

PART I



COMPONENT PARTS OF THE INTERNATIONAL CRIMINAL LAW ASSEMBLAGE

CHAPTER 1

Genealogies of Anti-Impunity

Encapsulating Victims and Perpetrators

I cannot and will not forget the innocent Kenyans who are no longer alive to tell their story. I will not forget those who did live to tell their stories of survival—and who have waited too long for justice. These survivors are crying out for more justice, not less. I will continue to fight for the justice they deserve.

—FATOU BENSOUDA, prosecutor for the International Criminal Court

The words above, articulated by the prosecutor for the ICC, were part of Fatou Bensouda's closing remarks at a press conference on the opening of the trial of William Ruto and Joshua Arap Sang. With determination to address injustice against those victimized by Kenya's 2007–2008 electoral violence, her words index how the rule of law, in this case the Rome Statute for the ICC, has become a proxy for the defense of those victimized by violence. But do all political actors invest confidence in the law as a primary mechanism for justice? Consider Bärbel Bohley, a prominent East German opposition activist who famously observed, "We wanted justice, and we got the rule of law," in critique of the contemporary conflation of justice with law.¹ Consider William Ruto, the deputy president of Kenya, who during his pretrial hearing for crimes against humanity attempted to broaden the bid for justice by expanding the terms of victimhood. In a conciliatory, reflexive, and assertive tone, he argued that there were two types of "victims" following Kenya's postelection violence, casting himself within one category. According to Ruto, there were "the post-election violence victims, whose lives and property were destroyed and deserve justice and truth; and another set of victims which I belong to, victims of a syndicate of falsehood and a conspiracy of lies choreographed by

networks that are obviously against truth and justice.”² Ultimately, he claimed, he was a victim of structural violence at the hands of the ICC.

Some people received Ruto’s remarks sympathetically and affirmed his plight. To others, his claims were laughable and defiled the very idea of suffering. The executive director of the NGO Coalition for the ICC responded to Ruto’s invocation of victimhood by insisting, “States should not be distracted by the efforts of certain leaders to portray themselves as victims when the Court guarantees fair trial rights. The Assembly should stay focused on strengthening the Court’s work and impact so that the actual victims of ICC crimes receive redress.”³ A year earlier, then–deputy prosecutor Bensouda had responded to a similar sentiment in which members of the African elite claimed the ICC had victimized them:

What offends me most when I hear criticisms about the so-called African bias is how quick we are to focus on the words and propaganda of a few powerful, influential individuals and to forget about the millions of anonymous people that suffer from these crimes . . . because all the victims are African victims. Indeed, the greatest affront to victims of these brutal and unimaginable crimes . . . women and young girls raped, families brutalised, robbed of everything, entire communities terrorised and shattered . . . is to see those powerful individuals responsible for their sufferings trying to portray themselves as the victims of a pro-western, anti-African court.⁴

The language Bensouda uses reflects a *juridified* notion of justice in which agents of the court equate justice with legal accountability and claim moral responsibility as its motivation.⁵ In this case, the narrative construction of justice as law invokes the mission of protecting survivors against powerful “perpetrators” of violence who have engaged in the exemption from punishment for too long.

The ICC’s legal mission presumes that in order to protect those victimized by violence, justice must be understood as the objective manifestation of law. Bensouda’s remarks also privilege contemporary definitions of suffering. For her, survivors of “brutal and unimaginable crimes” occupy a category of persons whom the law must protect. The sacred space of victimhood must not be open to expansion. But Ruto’s remarks, however controversial in context, do open up space for noticing how the notion of the “victim” in Kenya’s postelection context has become popularized to refer specifically to those subjected to violent physical attacks on the body. While ideas about structural, political, and economic violence once had a place in progressive politics on the African continent, Ruto’s remarks cast in relief the narrowing of definitional spaces

within which judicial processes are playing out. This delimitation of who is a “victim” and what constitutes victimhood has been accomplished through the popularization of a victim-protection discourse and is not unrelated to the rise of the construction of the perpetrator, to which I return later in this chapter and in the subsequent chapters.

It is presumed today that to utter the words “victims want justice” is to assume that victims want adjudication. We can see this illustrated at a February 2014 status conference in the ICC case against Uhuru Kenyatta, now president of Kenya. Fergal Gaynor, the victims’ case representative, told the following story about the survivors he represents:

I referred earlier to a woman I met who was gang-raped by Mungiki attackers and then doused in paraffin and set alight. She was lucky to be rescued. Nine months later she gave birth to a little boy. His biological father is a Mungiki rapist. The woman explained all of this to her husband—who, as you will recall, was himself hacked repeatedly by the Mungiki and left for dead that same day. He understood his wife’s hellish predicament. And today they are raising together that little boy. Conceived through rape he is being raised in love. What does he [the husband] want—taking into account the horrors that he and his wife were subjected to? His answer is justice. With justice, he told me, “There can be reconciliation.” But if there is no justice he won’t be able to find it in his heart to forgive.⁶

Gaynor concluded with the following: “For there to be *true* reconciliation there must be truth. For there to be truth, there must be evidence—all the evidence that is necessary to uncover the truth. For there to be evidence, there must be state cooperation and for that, the accused must give the order. . . . Justice ultimately is truth. It is the whole truth in all its measures. It is the rejection of those who try to create obstacles for reaching those truths. . . . They say in Kiswahili, ‘Haki huinua taifa.’ In English, ‘Justice elevates a nation.’”

In this passage Gaynor connects the notion of true reconciliation with justice, which is fundamentally achieved through legal measures. The implication is that one may uncover the truth of violence only through juridical deliberations. This concept of justice, he argues, will produce the conditions for an elevated nation. This reduces justice to legal justice or legal accountability as the precondition for reconciliation. The language of legal encapsulation underlies this veneer of justice as law, erasing the political and economic realities of violence by judicializing them. The impacts of this reduction are especially notable in cases where poverty has contributed significantly to the conditions

for and vulnerabilities to violence, such as in Kenya, the Democratic Republic of the Congo, and the Central African Republic—all countries where the ICC has intervened.⁷ Gaynor's rhetorical strategies appeal to the listener's sorrow and sense of righteous indignation when faced with innocent civilians whose personal lives have been destroyed by violence.

The form of sentimentality that we see in Gaynor and Bensouda's speeches has its roots in the humanitarian ethos of giving, holding accountable, protecting, and saving. Seemingly benign and benevolent, the judicialization of justice has been used to justify and enable mechanisms that safeguard the property of elites and protect foreign investments. Even as practices of affective justice are aligned with particular assemblages that include emotional regimes and technocratic legal knowledge, the exercise of power includes the state security apparatus, which has also been shaped by biopolitical mechanisms, including external state intervention, military action, economic assistance, and health aid.⁸ Neocolonial systems of dependency, in turn, reinforce Western legal approaches, creating a feedback loop of assemblages that guarantee particular forms of control and contestation. Through the coupling of emotional incitement and material intervention, the individualization of criminal responsibility in relation to the defense of a certain kind of "victim" has become central to discourses of justice in the contemporary period. Holding a figurehead such as William Ruto responsible for mass crimes under his watch (and possibly at his behest) is one example of this discourse in action. Legal encapsulation can be brought to bear on explanations of how displacement functions and why it is not easily measured as an outcome of justice but comes into view with attention to emotional affect. Through these displacements others are also refusing hegemonic justice forms of legality and engaging in counterprocesses that, while they involve the application of the same legal doctrines, are reconceptualized and propelled through a spirit of refusal. This happens through narratives that are personally or publicly communicated and that become aligned institutionally with specific emotional communities, such as those that ICC prosecutor Bensouda constituted through anti-impunity organizing. As such, the particular figures that emerge are narrativized in particular emotional registers. In this case, Bensouda's liberalist legal discourse emerges through particular ways of organizing subjects and then erasing the conditions of their making. Yet those engaged in the instrumentalization and dissemination of this discourse do not necessarily recognize how their speech acts depend on affect. Indeed, on the contrary, liberal legality requires a belief in its predictability and objectivity as well as

the power to exercise its principles. In theory, feelings are disavowed and disappeared because they signal subjectivity. However, if we recognize that, in practice, emotions respond to particular types of social experiences, then we can see how particular sentimentalized feelings can be mobilized to place emotion in the service of a differentiated objective.

Let us turn to another example to highlight the contested and divergent nature of the victimhood discourse. In this case, Kiamu is a survivor of the effects of postelection violence in Kenya. He claims the category of victimhood in terms that question the ability of the ICC to secure a reparative form of justice:

One of the biggest weaknesses of Kenyan criminal law is that we do not have a scheme for compensating victims of crime and the idea that these people of the 2007 violence are the only victims of crime. They're not the only victims of crime. I'm also a victim of crime. I lost ten teeth—I nearly died; the state isn't compensating me. The best the state will do if they find the guys who beat me, they might even hang them, but they'll never pay me a coin for the injuries I've suffered. We've had victims in this country since the colonial times, so if you're going to address the system of victims of political violence in Kenya we do it holistically. We begin with the day the British landed here, the evictions that the settlers did—today the biggest landowners are settlers. All of these issues need to be addressed.

Here we see not only a strong conviction about the limits of culpability in domestic and international criminal law, but also a critique concerning the inability of international law to adequately protect or compensate those victimized by violence.⁹ Kiamu claims the status of a victim not only by talking about his social category but also by invoking narratives of loss, suffering, and the pain of erasure. In doing so, his narrative establishes and reproduces particular rhetorical structures that invoke the listener's sympathy and have the potential to secure emotional affinities. Kiamu does this while also problematizing the legal encapsulation of "victims."

Today, some of those victimized by violence are popularly understood to be individuals we have a responsibility to protect. And various people engaged in the production of sentiment about victimhood often invoke justice in relation to narrowly tailored legal processes. As this narrative becomes normalized, law is increasingly seen as the proper domain for vetting sociopolitical issues. The figures of both the "victim" and the "perpetrator" are central to the production of an emotional domain of action around which the rule of law, hu-

man rights law, and humanitarianism have come into being alongside larger biopolitical processes.¹⁰ Thus, what is important is not so much that those figures have emerged, but that the law can only rescue someone who has already been victimized *ex post facto*—after the fact. This makes it impossible to presume that legality can end suffering in and of itself. Rather, this chapter shows how law’s biopolitical techniques contribute to the technocratic management of violence through its emotive and aspirational force. Seen as such, what international legal invocations of the victim to be saved do, as I have shown elsewhere, is to produce imaginative hauntings of a “victim,” like a specter or a ghost.¹¹ The figure of a victimized body has both a presence and absence that structures international justice projects in particular ways. As such, the idea of an individual “victim” has been, in turn, reduced to someone who suffered physical violence perpetrated against their individual body. Structural forms of victimhood caused by deep and persistent conditions of economic or political disenfranchisement fade from the new justice discourse. This development reflects a new international order in which the desire to manage violence and the need to mobilize extrastate support for the defense of particular survivors have become part of a critical narrative triangulation—victims, justice, law—that is deployed through affective justice.

In an attempt to understand how the biopolitics of justice has gained influence in the definition and protection of survivors as well as the articulation of action against “perpetrators” of violence, this chapter explores the ways in which legal encapsulation has taken shape and has regimented particular emotional expressions of justice. In this regard, the language of justice as law has been deliberately crafted over time. As the language of individualism rose in significance, the focus on the individual criminal responsibility of state commanders became central. And alongside that narrative circulation is also the relevance of historical, colonial, and postcolonial developments in African landscapes in which global domains of structural inequality have become manifest in a range of sentimentalized justice practices.

A significant part of European involvement in Africa over the past few centuries was founded on and structured by the interrelationship of settler colonialism and the emergence of capitalism. When the management of African violence is understood in relation to the workings of white supremacy, patriarchy, and particular legal logics, we see how the twenty-first-century emergence of justice as law sentiments is not unrelated to the structural inequalities within which postcolonial Africa’s violence is unfolding. From the postindependence failures of African state experiments in the 1960s through

the 1990s, African dependencies on International Monetary Fund (IMF) and World Bank projects contributed to states becoming increasingly economically and politically vulnerable to neocolonial forms of extraction and control. By the early twenty-first century, a highly orchestrated and carefully designed international campaign of human rights law, humanitarian law, and international criminal law emerged with Africa as its focus. Postconflict African states became experimental sites for a new generation of technocratic knowledge—including legal scholars and practitioners (mostly from North America, Europe, and Australia), who amassed armies of interns and graduates eager to deploy the tools of legal education while launching and advancing international careers.¹² These actors alongside freshly minted legal professionals in Africa and other parts of the Global South (all of whom I later describe through the figure of “the international community”) participated in the development of international legal practice and scholarship and collaborated with—at times were led by—northern technocrats committed to using law, such as domestic and international prosecutions, to rectify violence.

In *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*, Kathryn Sikkink argued that the enactment of international and domestic judicial prosecutions across the globe constitutes a new trend in world politics. It signals a turn toward holding state officials criminally accountable for human rights violations. By examining how prosecutorial justice is establishing a new basis for morality, she charts a trajectory of increasing demand for individual prosecutions and argues that they reflect a radical change toward social insistence on accountability through prosecution. This development reflects what she calls *justice cascades*. From the Nuremberg tribunals and Tokyo trials, to the prosecutions of Pinochet and Milosevic through ad hoc tribunals, to the coming into force of the ICC, Sikkink argues that a new norm that centers individual accountability has spread across the world. She favors an explanation that focuses on the accumulated impact of a growing body of advocates across the world who have embraced this framework for justice. Thus, justice cascades as a metaphor for the emergence of legal encapsulation in the contemporary period reflect the shift in the transformation of the legitimacy of the norm of holding high-ranking leaders accountable for various international human rights crimes. As she argues, “Norms are intersubjective, that is, they are held by groups of people. But norms start as ideas held by a handful of individuals. These individuals try to turn their favored ideas into norms. . . . When these norm entrepreneurs succeed, norms spread rapidly, leading to a norms cascade.”¹³

While it is empirically true that we have seen an increase in the number of

judicial mechanisms in the contemporary period, there are in fact many ways to account for their rise. To suggest that a widespread and enthusiastic acceptance of new justice norms is the primary factor is to miss the significance of the consolidation of technocratic knowledge, affects, and emotional regimes in shaping the terms by which affective justice has emerged to constitute international rule of law assemblages. For Sikkink, the expansion of demands for accountability and the spread of new norms are being applied equally across the board, but I argue that these realities continue to be asymmetrical because they are infinitely varied and temporally explosive. They are shaped and guarded by persistent structural inequalities between the Global North and Global South. As the ICC indictment statistics show, and as we have already seen some of their critics argue, prosecutorial justice is practiced differentially according to geography, with postcolonial regions—characterized by deep underlying economic difficulties and evacuated institutions—deemed more in need of international judicial intervention.

Furthermore, to presume that the rise and spread of criminal trials is indicative of new forms of justice patterns that are cascading and producing new norms is to misrepresent the actual rise and spread of the rule of law mechanisms that various stakeholders are deploying. What I aim to show is that the judicialization of politics and the manifestation of what Sikkink refers to as justice cascades are not arbitrary or objective. Nor are they reflections of the natural progression of prosecutorial justice in the contemporary period, as Sikkink suggests. Their contemporary manifestation structures the possibilities around which legality functions and is a result of various processes of delimitation. The justice outcomes highlight the limits of legality in politically shaped conditions of turmoil. In an attempt to demonstrate how forms of technocratic power circulate and combine with particular emotional regimes to constitute affective justice, it is important to understand how contestations over notions of justice respond to various forms of displacements by anti-impunity activists that lead to reattributions of justice. As central promoters of legal accountability in the name of survivors, anti-impunity discourses are often divorced from the actual biopolitics of the rule of law movement. However, the separation of political-economic and legal processes from affects and regulatory regimes of power misses the way that histories of plunder and corruption are deeply bound up in histories of inequality and institutional destabilization in the African postcolony. This disconnect also misses the way that articulations of the rule of law have become naturalized and how the particularities of African postcolonial contexts are deeply tied to Western imaginaries.

ies that situate African populations or leaders as lacking order, susceptible to violence, or simply evading justice.

Similar gaps are evident in the prominent counterarguments related to political and legal issues raised in the contributions of political scientists Kathryn Sikkink and Beth Simmons in *The Future of Human Rights*, where they argue that there is no evidence that the dominant approach to justice underway in criminal tribunals actually displaces other ways of thinking about justice. However, when we demonstrate how such forms of legal justice represent the encapsulation of justice through the figure of the victim, we see how this displacement functions as an erasure of other justice mobilizations. Thus, quantifying the trial as a measure of justice cannot be easily measured as an outcome; instead, what comes into view is what other justice modalities come into play.

This chapter seeks to explore a key component part of affective justice—the deployment of international law’s technocratic power and its embeddedness in particular structures of emotion. It seeks to show how a particular hegemonic rule of law discourse of justice and individual criminal responsibility has, through an assemblage of component parts, narrowed the category of “victim” in particular ways. This narrowing has resulted in a substantive disjuncture in which a new (post-1999) conception of justice is being propelled through particular emotional regimes aligned with the emergence of neoliberal forms of economic and political governance. International rule of law formations combined with the emergence of transitional justice as a concept and gave rise to an NGO-led movement of anti-impunity that centers the court as the site of justice. By reifying the act of holding perpetrators accountable for mass violence, the anti-impunity movement has introduced and defended a logic by which structural inequality is addressed through judicialization. The emotional push-back from various Pan-Africanists is invigorated by questions about what this says about the politics and geographies of violence.

To understand how this has come about, we must pay attention to the ways in which emotional regimes have been deployed in the post-Cold War era. In this moment, the reorganization of sovereignty, democracy, and various neoliberal forms of economic expansionism with the defense of the victim at its base is not accidental. This construction represents a particular alliance between economics, politics, morality, and the law, which reflects the link between affective sentiments and liberal legality. With these developments, the passionate, sentimental mobilization of what I call anti-impunity demands has been key to the establishment of new norms in support of criminal pros-

ecutions as the solution to mass atrocity violence. The affects that augment these justice forms have come to be seen as legally necessary, and, following Karen Engle, they are central to the perceived relevance of criminal prosecutions as appropriate mechanisms for holding “perpetrators” accountable for violence in the twenty-first century.¹⁴

When we foreground the deeply political and historical nature of violence in Africa and point to the importance of recognizing that Africa’s contemporary violence is deeply embedded in its histories of destabilization and plunder—a process that continues even today, in subtle form but nonetheless damaging—we see that the story about prosecutorial justice takes on different forms of relevance. Instead, a particular discourse of ending the impunity of African leaders has emerged as the triumphant call of the twenty-first century without regard to the conditions of inequality and the histories of inhumanity and structural violence that pervaded black life prior to and during colonialism and well after it. This discourse is symptomatic of a deep-rooted problem in the African postcolony; as we shall see, the structural conditions of inequality—what Thabo Mbeki and Mahmood Mamdani have referred to as the political nature of African violence—are rendered secondary.¹⁵ This marginalization has contributed to the legal encapsulation of the victim and the perpetrator—developments that are not seen as solutions by everyone, including some of the “victims” that trials are meant to help. And, as I show, what we see is how the black body or the discourse related to the African woman or child to be saved becomes part of the way that both the imaginary and its related sensorium are playing out in new internationalist biopolitical regimes.

Neoliberalism, the Washington Consensus, and the Rule of Law

The history of the contemporary state form with its new international justice mechanisms, like the history of the African state, is a modern experiment. The origins of contemporary transitional justice can be located in World War I and then traced through the Cold War.¹⁶ This phase saw the emergence of the December 11, 1946, UN General Assembly, which affirmed the principles of international law recognized by the charter of the Nuremberg Tribunal, as well as the December 10, 1948, UN General Assembly, which adopted the Universal Declaration of Human Rights.¹⁷ Many scholars have characterized the post-Cold War period as a phase of accelerated democratization in which new democracies flourished after the collapse of repressive leaders.¹⁸ This period saw the application of the universal exercise of international law through the ex-

tradition of Chilean ex-dictator Augusto Pinochet, arrested in London after being indicted by Spanish lawyer Baltasar Garçon. Through this narrative, legal scholars like Ruti G. Teitel, among others, have identified a third phase—post-1990s—characterized by heightened political instability and violence and the subsequent increase in international peace strategies that feature pressure to institutionalize criminal prosecutions. The progression of these three phases has resulted in prosecutorial justice as the new norm.

And where the state experiment in the Global North led to the establishment of democratic institutions, the establishment of states in Africa followed not only colonial forms of governance that were fundamentally extraction oriented, but forms of governance with diminishing institutional capacities. Independent African states retained colonial boundaries and began to establish their institutions in keeping with these archetypes for the new postcolonial experiments. But there were challenges that primarily had to do with the production of national and homogenous unity in the midst of heterogeneous sovereignties and competitions over governance.

From Africa to Latin America and from East Asia to South Asia, the former colonies tried various governance experiments following independence. By the 1960s, newly postcolonial African states began to struggle to establish new democratic models that reflected new constitutions. Even as constitutional democracies were being birthed in Africa, Western states were transitioning to the market economy as the basis for state governance. Even as new African independent states attempted to establish social market principles carried over and adapted from imperial governments, former colonizers were embracing neoliberal economic reforms involving deregulation and the reduction of state influence, the elimination of price controls, and the diminishing of trade barriers in favor of market freedom.

Neoliberal reform had profound consequences as African states, with their nascent institutions, were pulled into the international economy and compelled to negotiate terms of extraction and compensation with their former colonial powers. As imperial forms of colonial protectionism were withdrawn, many African states experienced chaos even as economic extraction persisted in new forms. The shift to independence signaled a precarious period for postcolonial states, in which they were “exposed, weakened, and stripped of their monopolies on violence.”¹⁹ One result was a vulnerability to attacks from dissident groups from within nation-states and regions. When conflicts in Africa erupted after the end of the Cold War, there was no remaining imperative for Western powers to intervene in defense of Western interests.²⁰ In the

absence of century-old institutions of colonial power, new domains of power emerged through, at times, the exercise of brutal force. Extreme forms of violence manifested in brutal dictatorships, such as former president Hissène Habré's regime in Chad. This had the effect of widening gaps between the state and various constituent communities, and further weakening the governance systems that were in place.

The recent histories of the Democratic Republic of the Congo, Somalia, Liberia, Kenya, Nigeria, Mali, Sierra Leone, and Congo-Brazzaville all fit this trajectory. Each has a history of authoritarian dictatorships, rebel groups, and various international companies and governments deeply embroiled in controlling land and or extracting resources. This dangerous interplay has deep roots. During the scramble for Africa, Western powers dictated mineral and resource extraction. Over time, the colonization process led to the creation, institutionalization, and exacerbation of various ethnic or religious tensions that persist today. Colonization, the conditions of decolonization, and the reassertion of neocolonization form the bedrock of instability and mass violence that has given rise to most of the contemporary cases being taken up by the ICC.²¹

Given this history, it is no surprise that the contemporary period (1980s to the present) has been rife with the eruption of challenges over governance. Electoral disputes in Kenya, Ivory Coast, and Sudan, for example, led to mass violence. Accordingly, the rule of law has emerged as the barometer for the measure of progress in Africa, without regard for the deeper work of rebuilding the social, political, economic, and legal institutions decimated by generations of extraction and exploitation. There is now a persistent impasse between what is legible to rule of law mechanisms, which individualize mass atrocity violence, and the more complex and far-reaching explanations and solutions that acknowledge the tumultuous impact that Western powers have had in Africa.

Over the past twenty years, Africa has suffered ten civil wars directly related to struggles over land redistribution and mineral extraction. These conflicts have caused widespread destruction and untold numbers of killings and rapes, ultimately leading to the militarization of everyday life. This violence is traceable to colonial legacies and the ways in which postindependence states attempted to control their capital cities and rural regions—with minimal success in the latter—through military takeovers and the autocratic suppression of opposition movements and democratic constitutionalism. In what is known as *Françafrique*, France is seen as being in a neocolonial rela-

tionship with its former African colonies. In Anglophone Africa, we see the deployment of British and American military interventions that seek to shape the management of African political stability and economic growth, the most dramatic of which was the use of military operatives to accomplish successive coups throughout Africa in the 1960s, '70s, '80s, and '90s.²² In Nigeria, for example, the discovery of oil in 1966 (just ten years after independence) led to decades of struggle over control of petroleum wealth. This contributed to the formation of a highly centralized federal body and minimal long-term development of state institutions. Uneven distribution of power between federal and regional/local governments led to the development and maintenance of patronage politics that saw the political sphere as the central site of social advancement. This led to the autocratic tightening of political power and a series of military coups as the primary mechanism through which political competitors could agitate for power.

By the 1980s, a new international liberal economic order arose to advocate for deregulation, privatization, and the enhancement of private-sector development. In 1981 the World Bank published what became known as the “Berg Report” (named after author Elliot Berg) on accelerated growth in sub-Saharan Africa.²³ Among the key recommendations were market-oriented policies and reductions in government expenditures. These recommendations were soon reflected in World Bank and IMF lending practices; loans were granted in exchange for commitments to market-stimulating reforms (structural adjustment policies).

In 1989, English economist John Williamson coined the term *Washington Consensus* to refer to a strongly market-based approach to development. It highlights ten relatively specific economic policy prescriptions considered central to the standard reforms for the economic and political crises in the Global South. This framework was promoted by the IMF, the US Treasury Department, and the World Bank. Its prescriptions dictated policy approaches to macroeconomic stabilization, economic opening with respect to both trade and investment, and the expansion of market forces within the domestic economy. Themes such as “stabilize, privatize, and liberalize” became the mantra of a generation of Western consultants who came of age traveling to meet with political leaders in southern countries to offer economic development advice.²⁴ These technocrats inspired a wave of reforms in Latin America and sub-Saharan Africa that fundamentally transformed the policy landscape in these regions toward privatization, deregulation, and trade liberalization.²⁵ The market-driven reforms proved to be ill suited to deal with

public health emergencies, poverty, and social inequality that were in fact exacerbated during this period.²⁶ This resulted in a cycle of underdevelopment in which the poor grew poorer and the only avenues for profit were extractive industries such as oil, mining, or plantation agriculture—industries that are characterized by violent and exploitative labor conditions. Meanwhile, state institutions ranging from the police and military to schools and hospitals were underfunded, with workers generally under- or even unpaid.

Given these conditions, it is not surprising that contests for political control (i.e., access to wealth) have triggered electoral violence in many post-colonial states, and that in some cases intra- and interstate rebel groups have emerged to vie for political influence and the control of extraction industries. In the midst of political strife, international organizations have generally brokered structural changes that ultimately benefit Western states and corporations in negotiating and sustaining agreements that continue to funnel most of Africa's extracted wealth out of the continent.

In short, neoliberal policies failed to result in economic development and actually did the opposite, exacerbating inequality.²⁷ In evaluating the failures of the dictates to stabilize, privatize, and liberalize, the World Bank turned its focus from African states to institutions. What resulted was the merger of mainstream development theory with the ideology of the rule of law. Those technical experts engaged in development praxis recognized that economic growth also required the institutional transformation of property rights, legal institutions, and the judiciary. They worked through Western-rooted international institutions such as the World Bank to articulate a new rule of law discourse in which good governance meant a new set of policy strategies aimed at securing economic growth not so much through market efficiency crafted by structural adjustment as through the consolidation of democracy, the upholding of human rights, and the reduction of corruption.²⁸ In fact, the 2004 World Bank rule of law definition, which was part of the unveiling of its twenty-first-century development policies, centered the need for legal predictability and property rights protection as requirements for good governance.²⁹ The assumption was that if neoliberal policies had failed, it was because of the absence of a secure institutional environment, rather than flaws in the policies themselves.

The law and legal institutions—component parts of international rule of law assemblages—were central to this new discourse, which signaled that transparent legislation, fair laws, predictable enforcement, and accountable governments would be essential to maintain order, promote private-sector

growth, fight poverty, and achieve legitimacy.³⁰ The ultimate strategic goal was to ensure predictable market conditions. The challenge was to measure governance and commitment through the development of predictive indicators. The World Bank developed a Worldwide Governance Indicators ranking system in which it categorized countries in relation to six aspects of good governance: voice and accountability, political stability and absence of violence, government effectiveness, rule of law, regulatory quality, and control of corruption.³¹ The World Justice Project's Rule of Law Index is said to measure how the rule of law is experienced in daily life in a cross section of households. Based on data collected from over 100,000 households and 2,400 expert surveys in ninety-nine countries worldwide, it highlights forty-seven indicators that are said to index the following themes: constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, and civil and criminal justice.³² It also produces data for analyzing various challenges, regional strengths, and best and worst practices.

These indicators were used by foreign-aid donor agencies to allocate funding according to various predictions of compliance.³³ As Sally Merry and others have described, "An indicator is a named, rank-ordered representation of past or projected performance by different units that uses numerical data to simplify a more complex social phenomenon, drawing on scientific expertise and methodology. The representation is capable of being used to compare particular units of analysis (such as countries or persons), and to evaluate their performance by reference to one or more standards."³⁴ Indicators are said to produce systems of knowledge in which various phenomena are ordered, even as particular claims are asserted according to legal, moral, and scientific measures.³⁵ Indicators have thus become part of the new democracy of the twenty-first century. They purport to measure compliance as well as predict volatility, risk, and economic viability.

The shift to the rule of law, and the associated support for its principles, institutions, and measurable indicators, opened up space for the UNSC to operationalize the notion of international justice through the establishment of various ad hoc tribunals and, subsequently, the ICC. In addition to serving as a measure for various state conditions and a predictor of a range of outcomes (including state stability, fragility, and the probability of violence), the new rule of law indicators mattered greatly in postcolonial Africa because they played a critical role in the renewal of IMF and World Bank loans, as well as in ensuring the ongoing support of international donors.³⁶ It is not only that

historic patterns of structural inequality are illegible to these judicial frameworks, but also that they are used, via the mechanism of indicators, to justify the perpetuation of neocolonial dependency and disparity at the institutional level.

The Limits of Transitional Justice: The Transition from Forgiveness to Legal Accountability

Even as international institutions were reconfiguring economic neoliberalism and associated pro-democracy institutions, they were also articulating new humanitarian principles embedded in various UN resolutions and international treaties. This new discourse reconfigured the reach of law and located the individual at the center of foreign affairs. The figure of the individual was cast in two key roles: the high-level “perpetrator” criminally responsible for mass atrocities, and the “victim” to be saved from the perpetrator’s violence. This rule of law discourse centered on the individualization of criminal responsibility became known as *transitional justice*, which can be defined as a form of justice that is associated with political change and, in particular, can serve as a legal response to the violence of repressive regimes. It is a post facto measure used to enable postviolence transitions to peace once conflicts are over. It advocates for justice strategies to redress mass violence, especially when it is state sponsored or connected to armed conflict aimed at overthrowing government regimes.³⁷ The tools of transitional justice were developed through the spread of truth commissions, the formation of quasi-judicial mechanisms that document past abuses through truth telling, all with the goal of achieving a political transition.³⁸ The South African Truth and Reconciliation Commission (TRC) was among the first to popularize the potential of transitional justice.

In the aftermath of widespread systematic violence in South Africa, emotional discourses of forgiveness were everywhere in the public sphere, and people were being compelled to display bodily suffering by performing forgiveness. In 1995, following the toppling of South Africa’s apartheid regime, the new government established the TRC to document “the truth” about the past violence of the ruling apartheid government and repair the consequences of race-based exclusions that structured South African life. The objective was to lead the nation through a collective transition from the wounding and anger under apartheid to forgiveness and restoration. It was assumed that those who were able to forgive were ultimately better off than those who were not

able to do so.³⁹ Chaired by Archbishop Desmond Tutu, the TRC centered themes of individual guilt, forgiveness, and reconciliation, rather than on institutional change and reparations, deploying a religiously infused logic built not only on a moral basis but also on a deeply emotional one. As noted by the former minister of justice, Dullah Omar, the commission was “a necessary exercise to enable South Africans to come to terms with their past on a morally accepted basis and to advance the cause of reconciliation.”⁴⁰ Apartheid had oppressed generations of South Africans and led to the escalation of conflict, resulting in violence and human rights abuses. No section of society escaped these abuses. As a response to the far-reaching consequences of apartheid, the TRC forums required moral and emotional performances of a necessary forgiveness in order to usher in social buy-in to a postapartheid landscape.⁴¹

Albie Sachs, a former African National Congress activist, explained that the TRC’s open hearings were central to its effectiveness: “To me, the most important part of the truth commission was not the report, it was the seeing on television of the tears, the laments, the stories, the acknowledgements.”⁴² This utterance highlights the way that emotional displays related to experiences of violence are central to the conversion of those experiences of violence into new states of reconciliation.

Bishop Tutu took the opportunity to preach that forgiveness should inhabit the spaces opened up by truth telling. As he has uttered passionately, time and time again, the wounds of hatred and anger created by the apartheid system must not overtake society. He said, “There was no place for retaliation in the new society that emerged after independence.”⁴³ Describing the TRC as an “incubation chamber for national healing, reconciliation and forgiveness,” he insisted, “When I talk of forgiveness I mean the belief that you can come out the other side a better person. A better person than the one being consumed by anger and hatred. . . . If you can find it in yourself to forgive then you are no longer chained to the perpetrator. You can move on, and you can even help the perpetrator to become a better person too.”⁴⁴ Many of the stories told at the TRC reflected a progression from truth to forgiveness. Though affectively embodied and reflecting the angst and pain of subordination, they also emerged in the context of sentimental forgiveness strategies that conferred legitimacy on new forms of South African governance. These strategies were also deployed to attempt a postviolence transition in the aftermath of the Rwandan genocide (April to July 1994) and were articulated in keeping with predominant regimes of expression and feeling.

The period following the Rwandan genocide saw the deployment of pas-

sionate discourses that centered the practice of saving victims and holding perpetrators accountable at the core of justice. For example, the musician and peace activist Jean Paul Samputu spoke about how God had shown him the way and that he was surprised that people found it hard to forgive Christians (because of the church's moral and political culpability during the genocide). He stressed that, for him, "forgiveness had nothing to do with the perpetrator but rather meant a release from the bondage of hatred."⁴⁵ Samputu reminded his constituencies that "it was human-beings who did this—the world should learn from Rwanda. . . . We live in a world where the culture of revenge reigns, forgiveness should be our permanent attitude."⁴⁶

A woman on the same podium added that sometimes being a Christian can complicate forgiveness because of the undue pressure on Christians to forgive others. But in clarifying different forms of forgiveness, she drew a distinction between psychological forgiveness (promoting improved health and well-being) and Christian forgiveness, which she described as being "based on the fact that God has forgiven me." Then, after a short silence she reflected, "That's quite overwhelming for me. If God can forgive me, who am I not to forgive others?"⁴⁷

What became clear was that forgiveness also required the acknowledgment that a "perpetrator" had committed an offense. And while some victimized by the brutalities of the apartheid regime did offer forgiveness, the overall "perpetrators" of such violence did not generally acknowledge their wrongdoing.⁴⁸ The forgiveness projects that were generated through transitional justice projects provided a wealth of testimonies in which ordinary citizens shared their experiences in dealing with forgiveness, always structuring them in relation to particular emotional structures of expectation. But the figure of the "perpetrator" remained elusive. The "oppressor role" was glossed as the apartheid system writ large, white racism, histories of inequality, and President de Klerk as a symbol of a racist minority, but with no particular person or people from whom to extract accountability. For example, during a South African TRC hearing, one witness, a teenage daughter of one of those victimized by apartheid's violence, described the incident in which her relatives were murdered: "The police ambushed their car, killed them in the most gruesome manner, set their car alight." When asked whether she would be able to forgive the people who did this to her family, she answered, "We would like to forgive, but we would just like to know who to forgive."⁴⁹

The absence of an individualized "perpetrator" was seen as a weakness of the South African TRC. Critics argued that, as a quasi-judicial mechanism

with no adjudicatory power, the TRC placed a burden on the forgiveness of survivors rather than holding the “perpetrators” accountable and offering recourse for what was seen as some of the worst kinds of structural and physical violence.⁵⁰ The International Center for Transitional Justice (ICTJ) was established in light of this critique. The development of the ICTJ signaled a key shift in the advancement and transformation of justice strategies in the last decades of the twentieth century. As advocates in a right-to-truth movement, survivors of violence began demanding investigations into human rights violations to unearth information about the fate of survivors as well as identification of “perpetrators” of violence.⁵¹ Citizens demanded that their leaders and government institutions had a responsibility to locate them and facilitate trials to adjudicate wrongdoing. This movement shaped a new consciousness about people’s right to rectify atrocity through legal remedies.⁵² New legislation was crafted in response to this assertion of rights. In cases of international crimes (crimes against humanity, genocide, and certain crimes of war), formal amnesties as seen in South Africa or Rwanda would no longer be seen as a legitimate political solution to mass violence.

This paradigm shift from forgiveness to legal accountability laid the foundation for the institutionalization of the anti-impunity movement that proposed legal trials and convictions as tools for change. International tribunals that hosted multiple trials of named “perpetrators” became the testing grounds for determining whether the deployment of criminal justice in post-war contexts could be used to advance political transitions. As a vehicle for those victimized by violence to reconcile past harms, it led to the emergence of the emotionally infused category of the “victim” of violence as a problem to be addressed in legal as well as moral terms. However, it was the moral register that had become critically relevant for African states following the Rwandan genocide, the long history of antiapartheid struggle in South Africa, and Liberia and Sierra Leone’s civil wars, in relation to which international intervention was late, marginal, and ineffective. In that regard, much of my earlier research on the making of the ICC documented that African state diplomats signed on to the Rome Statute with the expectation that judicial mechanisms should ensure that the “international community” would never again stand by and watch genocidal violence on the African continent.⁵³

The notion of the “international community” is itself an important site of discourse that merges humanitarianism with foreign policy making and international criminal law mechanisms that are sustained by a responsibility to protect discourse.

**“We Wanted Justice, and We Got the Rule of Law”:
The Core Responsibility of the “International Community”**

In September 1999 in The Hague, Netherlands, on the centennial of the first international peace conference, Kofi Annan, then secretary-general of the United Nations, delivered a critical speech in which he challenged states to address “two equally compelling interests” at once.⁵⁴ Titled “The Effectiveness of the International Rule of Law in Maintaining International Peace and Security,” Annan’s speech called first for the production of an effective response to human rights abuses. The second interest was concerned with the development of a mechanism through which states could act with universal legitimacy.⁵⁵ Galvanized by this challenge and the movement it represented, the Canadian government established the International Commission on Intervention and State Sovereignty to reconcile the relationship between state sovereignty and the responsibility of the international community to act in the face of “mass violations of humanitarian norms.”⁵⁶ It published a report in December 2001 titled “The Responsibility to Protect,” which introduced a critical doctrine for the development of key principles of legality related to the protection of survivors.⁵⁷

Following the 2001 failure of the international community to act to prevent or stop the Rwandan genocide, the African Union reinforced the idea that the international community had a responsibility to protect populations in crisis situations.⁵⁸ Article 4 of the AU’s constitutive act asserts “the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity.”⁵⁹ Some four years later, the UN General Assembly produced a declaration called “Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.” This declaration articulated a universal set of guidelines for survivors. Also by 2005, the AU had adopted the Ezulwini Consensus, which provided African states with an African regional tool to address mass atrocities.

A foundational pillar of these declarations was the right to protect, the idea that states have a responsibility to protect populations from gross human rights violations including crimes against humanity, war crimes, genocide, and ethnic cleansing. Where states fall short or in fact perpetrate crimes, then the international community has a responsibility to step in to assist or usurp states in fulfilling this primary responsibility to protect a population.

If a state fails to protect its citizens from the four crimes of concern, and if it has failed to maintain peaceful measures, the international community has a responsibility to intervene using the most effective and appropriate means, ranging from coercive measures to economic sanctions, with military intervention as a last resort.⁶⁰

The discourse of a right to protect is not simply a moral architecture constructed in the contemporary period. The notion of an obligation to protect those victimized by violence was driven by a force of law deployed across sovereign borders through international institutions afforded expanded jurisdictional reach. This expansion of activity reflected a fundamental shift from the regulated affairs of the state to the expansion of global governance mechanisms known to operate from the north to the south, particularly in Africa and Latin America. This geospatial dynamic reflects the continuity of economic dependencies and a persistent need to manage political compliance through legal means. The establishment of new ad hoc tribunals, international treaties, decrees, and charters promoted the legal frameworks that made this possible. The notion of the individual to be protected joined with new international humanitarian and judicial mechanisms that provided the vocabulary for popularizing radically new and fundamentally transformative formations.⁶¹ Key to the development of these mechanisms was a deeply retributive justice system focused on punishing the guilty, but with minimal powers to confer reparation and restoration for the survivors.

As the second decade of the twenty-first century progresses, the plight of survivors in postviolence conflict situations remains within the realm of retributive justice approaches, such as criminal tribunals but has been institutionalized in only particular places, such as the Global South, and not other places. International discourses about victims of violence were critical in establishing a profoundly astute justice discourse. The formation of judicial mechanisms to protect “victims” was only part of the story. In shifting from development priorities to judicial measures, not only were the sites for adjudication deeply selective, but the popular definition of justice became narrower and far more restrictive and, with it, who counts as a “victim” deserving of that justice, and the discourses surrounding it, were articulated through the dialectical pinning of an individual “perpetrator” whose impunity was to be stopped at all cost. And yet, the complication is that in the African region, a differentiated form of international justice was developed through the African Union Commission and related bodies. The rise of a new hegemonic anti-impunity justice trend requires that we consider these emergent formations

and the pro-accountability discourses that sought to override African culturalist forms of justice differentiation through an emotively moral individualization of criminal responsibility that insisted on a justice stance that required criminal trials as the optimal approach to ending impunity.

The Emergence of International Criminal Justice and Its Differentiated Formations

In an age characterized by neoliberal precarity and a post-1968 disenchantment with the potential of radical politics, notions of saving victims and ending impunity have become predominant throughout the Global North. Increasingly, campaigns to project these ideas globally are reflected in the discourses and actions of citizens in the Global South and connected diasporas. From Palestine to Mali, and from the Philippines to Chile, anti-impunity activists are engaged in missions to save those victimized by political violence.⁶²

The rise of various national and international concerns about how to manage violence has led to the development of solutions forged within a paradigm of global security and protectionism. Some of the solutions have prioritized the essential role of anti-impunity, insisting on the radical dismissal of the immunity of heads of state, a core principle that has long pervaded international customary law. Known as the exemption from punishment or freedom from the injurious consequences of an action, the notion of impunity galvanized a movement intent on eradicating the differential and unequal application of justice.⁶³ Activists insisted that no one is above the law. Stamping out the exceptionalism of leaders whose actions contribute to mass atrocities, international criminal law took shape as a viable mode of justice that renders official authority irrelevant in the eyes of the law. This core value of anti-impunity that is enshrined in the Rome Statute dates back to the World War I era. In March 1919, in the war's aftermath, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties recommended the formation of a high tribunal. Built into its architecture was the rejection of immunity for all—including leaders and governmental heads of state.⁶⁴

With a commitment to ending impunity, this contemporary movement is driven by the foundational ICC dictum that no one is above the law. This has contributed to the individualization of criminal responsibility through which a vociferous anti-impunity movement has taken shape. After World War II, the Nuremberg and Tokyo international tribunals built their case law around the Charter of the International Military Tribunal. Under Article 7, the charter stated, "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as

freeing them from responsibility or mitigating punishment.”⁶⁵ A subsequent decision by the tribunal in a Nuremberg case reaffirmed this principle in an October 1946 judgment; it noted that “the principle of International Law, which under certain circumstances protects the representative of a State, cannot be applied to acts which are condemned as criminal by International Law.”⁶⁶ This was echoed by the International Military Tribunal sitting in Tokyo. In 1950, the UN General Assembly adopted the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal. Principle 3 of this document states, “The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.”

A further example of this early judicial development that I highlight as an example of technocratic knowledge is illustrated by the words of Robert Jackson, a leading American lawyer, judge, and writer of the twentieth century who served as a US Supreme Court justice from 1941 until 1954. During 1945–1946 he was the architect of the international trial process and then the chief prosecutor of the surviving Nazi leaders at Nuremberg, Germany. In the absence of precedent for legal individual criminal prosecution in European states, he, among other analysts, invoked emotionally charged moral grounds for pursuing legal accountability for victims of Nazi mass atrocities.⁶⁷ As part of his opening statement at the Nuremberg trials, he articulated a goal of achieving justice for survivors by punishing those who bear greatest responsibility for crimes against the peace:

The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.⁶⁸

Here the opening is focused on the condemnation and punishment of those whose actions led to mass violence and required that other nations intervene and sacrifice their citizens in the interest of humanity. To further buttress the moral force of his emotional plea, he locates the neutrality of allied nations as victorious but resulting in mass injury. He highlights the significance of legal action as subjecting captive enemies to the judgment of the law, clear-eyed and devoid of retaliatory impulses. The invocation of sacrifice and

moral duty is clearly articulated throughout his opening, which utilizes emotionally charged expressions of feeling and conviction. Later in his statement, in reflecting on the collective responsibility of the German people, Jackson indicates, “A second paralyzing force involves a mental conflict involving moral values; before which we Americans stand a bit baffled. We have long been taught, and still believe, that might does not make right. And yet we see that all we hold to be morally right is in jeopardy wherever it does not also possess physical might.”⁶⁹ The call for a moral impetus to “confront evil” that echoes in his statement resounded throughout the second half of the twentieth century. Its relevance was foregrounded at the commemoration of the seventieth anniversary of the Nuremberg trials on September 29, 2016, during which then US Attorney General Loretta Lynch declared,

Certainly the onslaught of evidence of man’s inhumanity to man can leave one dispirited and discouraged. But we cannot—and we should not—give in to despair, because the legacy of Nuremberg is that when we are called to confront the evil that walks this earth, we turn to the law. When we need to mete out justice to those who have reaped the whirlwind and revel in the chaos resulting therefrom, we turn to the law. And through the law we give voice to those shattered souls who seek redress, and we provide a reckoning to those who trade in fear and trembling. Let us never forget that within these walls, evil was held to account and humanity prevailed.⁷⁰

Feelings of fear and impassioned responses that result in bodily trembling are both affective responses to perceived injustice materialized through sentimentalizations to justify the introduction of legal rituals as remedies. However, there is an irony in the attempt to individualize criminal responsibility as well as render insignificant the official capacity of those who acted in the interest of evil: it can result in the obscuring or erasure of the structural underpinnings of institutional violence. We see this materialized in later tribunals that insisted on official capacity as irrelevant, including the International Criminal Tribunal for Yugoslavia (ICTY) and, later, the International Criminal Tribunal for Rwanda (ICTR).

Article 7(2) of the ICTY statute stated that “the official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.”⁷¹ The ICTY asserted that Article 7(2) was declaratory of customary international law. In its Article 6(2), ICTR replicated the sentence, as did the Statute of the Special Court for Sierra Leone.⁷²

Innovations that came with the establishment of new and budding international legal institutions presented challenges to the legitimacy of the ICTY. These challenges required that its champions constantly affirm the nature of justice under construction and the moral basis on which it operates. For example, ICTY registrar John Hocking, in discussing the function of the tribunal, clarified the domain of justice as not simply the creation of individuals, but instead as a moral force represented in the shared conscience of humanity:

Of course, the principal function of the Tribunal is judicial, as indeed it is of the special courts in the region. . . . The Tribunal views the continuation of its work by national jurisdictions as a central element of its legacy and it remains committed to transferring its experiences and knowledge to the domestic justice systems in the former Yugoslavia. . . . In parting, allow me to leave you with the words of Aleksandr Solzhenitsyn: *Justice is conscience, not a personal conscience but the conscience of the whole of humanity. Those who clearly recognise the voice of their own conscience usually recognise also the voice of justice.*⁷³

Time and again, the moral force of the work of hybrid courts was articulated as representing the will of the collective whole. This narrativization of society as speaking through the work of international courts was further adumbrated by the tones of voice and the body language of legal actors as they solemnly recounted the horrors of violence. The emotive pleas that surrounded public testimonies are not incidental. They follow particular regimes of expression that are structured by law's logic and the larger political frameworks that propel its interest. The forms of defiance that are often performed in public speeches take their cue from principles of law that have been historically crafted.

As unpacked above, the movement toward anti-impunity is based on the principle of the irrelevance of official capacity with origins in the Nuremberg and Tokyo tribunals and the subsequent work of the International Law Commission that was directed to work on a statute to establish a permanent court.⁷⁴ Yet, though the Nuremberg tribunal operated on the principle of irrelevance of national capacity, the draft statute for the ICC did not contain this principle. After the first draft of the Rome Statute was released, a preparatory committee of state representatives formed to discuss it. At a committee meeting in February 1997, the concept of the irrelevance of the official position was approved and consolidated in the draft statute. The suggested article read:

IRRELEVANCE OF OFFICIAL POSITION

This Statute shall be applied to all persons without any discrimination whatsoever: official capacity, either as Head of State or Government, or as a member of a Government or parliament, or as an elected representative, or as a government official, shall in no case exempt a person from his criminal responsibility under this Statute, nor shall it [per se] constitute a ground for reduction of the sentence.

Any immunities or special procedural rules attached to the official capacity of a person, whether under national or international law, may not be relied upon to prevent the Court from exercising its jurisdiction in relation to that person.⁷⁵

This recommendation was added to Article 24 of the Draft Rome Statute. At its second meeting on June 16, 1998, the Committee of the Whole decided to refer to the Working Group on General Principles of Criminal Law, among which was Article 24—Irrelevance of official capacity, paragraph 2. However, its wording was not altered.⁷⁶ The committee then approved the articles as they appeared in the document, and the Rome Statute was approved on July 17, 1998, with the immunity provision dismissed.

Upon signing the Rome Statute, one-third of UN member states had to ratify it in order to establish a permanent court. Over the course of the next few years, neither the preparatory commissions nor the Assembly of States Parties addressed issues of immunity until various African states presented an amendment. At the assembly's twelfth session, the Article 27 passage concerning the irrelevance of the official position of the “perpetrator” was considered.

The first two paragraphs in Article 27 have different functions.⁷⁷ Paragraph 1 denies a defense of official capacity. It concerns functional immunity and is derived from texts in the Nuremberg Charter, the Genocide Convention, and the statutes of the ad hoc tribunals. In contrast, Paragraph 2 outlines that no exception exists for “core crimes” under personal immunity. Paragraph 2 of Article 27 concerns immunities that exist by virtue of customary international law, and that protect heads of state and other senior officials by virtue of their particular office or status. Immunity *rationae personae*, or personal immunities, describe those immunities that attach to an office or status. This type of immunity is limited to only a small group of senior state officials, especially heads of state, heads of government, foreign ministers, diplomats, and other officials on special mission in foreign states. It is conferred on those with primary responsibility for the conduct of the international relations of a state, and it is possessed only as long as the official is in office. State officials

to whom this type of immunity applies are immune from prosecution for official acts as well as those carried out in their private capacity, whether the act in question was committed while the official was in office or before his or her entry into office. Such immunities stem from the recognition that state affairs are hindered by judicial interference from foreign governments, and the view that immunities are necessary for the maintenance of peaceful cooperation and coexistence among states.

Ultimately, Paragraph 2 amounts to a renunciation, by state parties to the Rome Statute, of the immunity of their own heads of state to which they are entitled by virtue of customary international law. It concerns personal immunity and is without precedent in international criminal law instruments. It outlines that the statute applies “equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this statute.”⁷⁸

With this key development underway, international criminal law as a technical legal strategy for addressing mass atrocity violence took shape. But what is important to note is that these legal developments could not take root without particular emotional assertions about the form of morally driven interventions articulated as being on behalf of “victims/survivors” and “perpetrators” at play. Through the mobilization of members of political and civil society, international and nongovernmental organizations, and social movement activists, the ICC has been advocating for national judicial solutions to mass violence. These developments, with their moral and juridical foci, have moved from a focus on the sovereignty of states and state protections to the protection of individual persons, groups of peoples, and membership in a network of treaty obligations.⁷⁹

This anti-impunity movement emerged against a backdrop in which state actors were seen by their publics as exercising impunity at will. As in the twentieth century, members of the movement responded to widespread human rights abuses—rape and torture, for example—by demanding that institutional mechanisms be deployed to hold leaders legally accountable for criminal actions. This call to end impunity was a call to ensure that no leader would be above the law. And thereby grew the rule of law movement to put in place a legal infrastructure to support legal accountability. However, anti-impunity movement organizers encountered an inherent problem in that despite the institutionalization of the ICC, as described in chapter 6, it lacked

institutional enforcement powers. As such, the ICC's anti-impunity principles become effective through the amplification of its affective and emotional practices engaged by NGO advocates, such as the Coalition for the International Criminal Court (CICC).

In communicating the anti-impunity principles at the core of the CICC's mission, NGOs evoked feelings of empathy in response to human suffering through technologically savvy pro-justice campaigns that featured the image of the victimized African body. For example, in 2016, the CICC launched an ongoing campaign in support of the ICC called *United by Common Bonds*. The website features "ways to get involved," including sharing content on social media, a way to donate to the campaign, videos, and information about the court and the issues it addresses. Sophisticated design and carefully chosen colors seemingly aim to compel visitors to join the fight for justice. With the goal of underlining what they call "the global nature of the Court's mandate and mission," messaging on the site highlights the "continuing desire to see it deliver justice to victims in all parts of the world."⁸⁰

Through the work of civil society and NGOs like Amnesty International, African Legal Aid, the CICC, the Coalition for the African Court, and Human Rights Watch, to name a few, competing notions of justice are being propelled by demands for immediate forms of judicial accountability in order to insist upon forms of liberal legality that are legible to other missions. But, as we will see, to assess the impact of these demands we need to look well beyond their mission statements or Twitter characters. Their power is tied to their work within the complex assemblages of anti-impunity formations, and their effects are felt through the impact of legal encapsulation, through which similarly constituted emotional constituencies are formed. This formation can be measured through the way that groups of people deploy figures of those victimized by violence as the key domains by which anti-impunity sentiments are expressed and by which moral subjects and bodies politic are shaped through history and power. And when combined with a particular examination of legalistic products such as indictments, which are seen by some as representing constricted international justice apparatuses, structuring devices such as space and time come into precise focus.

Various NGOs engaged in articulating their work through anti-impunity sentiments have established regional offices both at home and abroad and are working to universalize this discourse, drawing linkages among victims everywhere and presenting a universal legal remedy. As projected by the images in the backdrop of the CICC homepage, the global justice movement

is discursively built upon images of the most vulnerable: black and brown women, elders, and children. This contemporary imagery and the discourses invoked in international law circles can be traced in large part to the influential worldview of Ben Ferencz, the former investigator of Nazi war crimes for the Nuremberg trials who himself fled persecution as a small child and identifies himself as motivated by affiliation with the victim population. Popularly billed as “the only living prosecutor from the war-crime trials that followed the Holocaust,” his “victim”-oriented, pro-judicial-accountability stance has contributed to the mobilization of an assemblage of justice NGOs, such as what was then the Lawyers’ Committee for Human Rights (now Human Rights Watch) as well as Amnesty International and the CICC.⁸¹ Ferencz’s collaborators worked with governments and built citizen support for a 1998 Rome conference for the formation of the International Criminal Court, which led to the signing of the Treaty of Rome. This occasion marked the institutionalization of a movement for which the narrative of anti-impunity—that no one is above the law—and the importance of the duty to prosecute reached far and wide. This narrative was propelled by many who suffered abuses at the hands of violent government regimes and became influential advocates of international criminal justice, including Thomas Buergenthal and Juan Mendez in Argentina, or African civil society workers like Netsanet Belay, the Africa director for research and advocacy at Amnesty International, who previously spent over two years in an Ethiopian prison as a prisoner of conscience. These activists working through the law or with large NGOs or human rights institutes engaged in affective justice strategies that shaped the rise of a duty to prosecute during the 1980s and ’90s. This shaped the moral authority and power associated with appeals from those victimized by violence at the hands of their governments.

As discussed in the book’s introduction, the radical impacts of the duty to prosecute that became popularized at the Nuremberg trials led to the reclassification of criminal culpability in the post-1990s treaty construction period and the assignment of guilt to individual leaders, especially African leaders. Central to the notion of anti-impunity for those indicted for mass atrocities was a form of reattribution of guilt articulated through an emotionally charged dictum, uttered publicly and privately in both formal and informal contexts, that no one is above the law. Also known as the “irrelevance of one’s governmental capacity,” this dictum is often articulated with absolutist declarations that everyone—from powerful state leaders to impoverished members of rebel groups—must be held accountable equally to the standards of

prosecutorial justice. In the post-Nuremberg era, advocates refined and disseminated passionate convictions that the rule of law cannot be questioned or overturned, and they deployed a related justice narrative that “you’re either with us or against us” to condemn any public critique. Ferencz himself engaged in political negotiations and strategic lobbying at the Rome conference for the establishment of the court. In his public speeches and private conversations throughout the development of the NGO anti-impunity movement, he and many others contributed to the iconic continuities that linked the ICC to a post-Nuremberg social imaginary. To accomplish this, Ferencz was known to draw on his moral authority not only by claiming to have seen the results of Nazi violence against victims, but by narrating how he played a central role in holding some of its commanders judicially responsible for crimes. As he recalled in an article for the popular magazine *The Atlantic*,

I saw crematoria still going, the bodies starved, lying . . . dying, on the ground. I’ve seen the horrors of war more than can be adequately described. . . . The capacity to destroy life on earth has grown incredibly in the course of my lifetime, which increases the need to set up a mechanism to try to prevent that from happening. . . . There are perpetrators of crimes, and there are victims of crimes. They are ready to fight and die for their ideals; they cannot have a fair judgment. You need a third party—a court—in order to determine the facts.⁸²

Ferencz’s worldview assumes that the solution to mass violence is a third-party institution, namely an international court that is autonomous and has the power to determine the facts of horrific violence. Here, justice is understood as being exercisable through legal methods and through the call to action to “protect victims wherever they are.”⁸³ A call to action is a particular, regimented strategy. It reconfigures the spatial authority of international justice, in which citizens who are victimized by mass violence are within the reach of the objective redemption that international justice renders possible. This has engendered a popular discourse that supports the reformulation of the contemporary sovereignty principle through a movement that claims moral responsibility beyond borders.

By insisting that international publics have a moral responsibility to protect victims everywhere, the component parts of affective justice are highlighted through advocates’ use of this narrative. For example, introducing particular sentiments of saving alongside the moral responsibility to act, anti-impunity advocates established the building blocks to produce a legal solution

out of a twentieth-century sociopolitical process. It is this legal solution, sentimentalized through saving and holding accountable, that liberal legality represents. Supplemented by a linear narrative of activism from Nuremberg to Rome, Ferencz communicated a universalist and color-blind mission shaped by the Rome Statute's preamble: that all peoples are united by common bonds that could be shattered at any time by violence, and that millions of children, women, and men have been "victims of unimaginable atrocities that deeply shock the conscience of humanity."⁸⁴

As a key icon of international justice, over the past fifteen years Ferencz (and his family, including his son, Don Ferencz) has been called on to open and close key ICC events and to speak at receptions. He also delivered the Office of the Prosecutor's closing argument for the ICC's first trial, that of Thomas Lubanga, with a statement that included invocations of "ending impunity" through the legal pursuit of individuals responsible for what is often articulated as the worst crimes against humanity. This emotional enactment of justice through the enfolded of those victimized by violence into the core justification for international legal action reflects legal encapsulation in its most hegemonic form. This domain of biopolitical technocratic practice is most vividly seen in the anti-impunity movement and manifest in the use of international law to save the "victim" from "perpetrator" impunity.⁸⁵ While legal encapsulation was once a response to the blatant and brute power of worldwide state practices and violence with impunity by their leaders, today the assemblage has shifted its entanglements and produced a highly vocal and institutionalized response to state violence. Within this structuring field, then, affects are felt bodily and are knowable when they converge with particular feeling expressions.

From Technocratic Knowledge to Postcolonial Emotional Regimes

With the combined expressive and instrumental impetus behind Africa's participation in the Rome Statute system, as well as the adoption of a range of other international treaties, African state agents inserted themselves and mobilized to build new institutions. These included the signing of international law treaties and the erecting of international crime and investigation divisions that wedded domestic state action with the expansion of human rights and international criminal law institutions, shifting the focus from states and state protections to the protection of persons and peoples.⁸⁶ In doing this, emotional expressions of justice were articulated through anti-impunity activists' reinforcement of regimes of suffering and protection. In other words, though

protections for minorities and those from the Global South were differential and uneven, discourses invoking the responsibility to protect citizens from violence and the rights of survivors were seen as a means to support the increasing responsibility of state actors to protect citizens.

Since the early 1990s, African sites of violence have continued to provide the spaces and subjects for new policies to address violence, seek truth and justice, and enable reconciliation in fractured societies. As evidenced by the implementation of international criminal tribunals such as the Special Court for Sierra Leone in Freetown, Sierra Leone, to the ICTR in Arusha, Tanzania, to the Extraordinary African Chambers in Dakar, Senegal, to the Hybrid Court for South Sudan, it is clear that the emergence of the rule of law has not only involved African actors, but has also left deep imprints throughout the continent. However, the justice approaches did not emerge only as a result of the rise of legal accountability mechanisms or the cascading of criminal prosecutions. African Union–driven approaches to anti-impunity in African contexts have also been shaped by disappointments that led to alternate possibilities through which new policy frameworks touted as reflecting African traditions were institutionalized. One such domain of invention driven by particular emotive histories was the development of the Transitional Justice Policy Framework, shaped by a group of elder statespeople who were a part of the African Union’s establishment of a group of a small number of high profile African leaders named the Panel of the Wise. This group of recognized leaders approached the management of violence with the assumption that peace and justice are inter-related and that those engaged in justice work should be sensitive about the timing of indictments, especially where peace talks are underway.

By the late 1990s and early 2000s, the euphoria following the end of apartheid in South Africa and the promise to rectify the international community’s failure to intervene in the genocidal violence in Rwanda gave many the feeling that the ICC could provide redemption for histories of violence. Many African state negotiators and political actors participated earnestly and enthusiastically, offering technocratic cooperation and public advocacy to help establish and ratify the Rome Statute of the ICC. They were committed to the rule of law’s potential as a protective device for the future. For stakeholders in several engaged African countries, the transformative potential of law was less about the symbolism of international justice that Nuremburg represented for so many anti-impunity ICC advocates in the Global North than about the hope that international legal justice might finally offer a possibility for deterring future violence in Africa, a continent that has long suffered violent plunder

from external and internal agents. Motivated by this vision, African governmental representatives participated earnestly in the adoption of a movement that equated legal accountability with justice. In turn, the ICC's predominantly European and North American staff worked in concert with African civil society, and under the expectations of primarily Western donors, to cement the ICC as the key modality for constraining the arbitrary abuse of power where states are deemed unwilling and unable to do so. However, the ICC's framework is structurally limited. It does not have universal jurisdiction and can act only in those states that have signed and ratified the Rome Statute. This means that at the time the ICC was unable to pursue perpetrators of violence in places like Iraq, Afghanistan, the United States, and Syria. This had implications for the appearance of ICC justice and made the court vulnerable to accusations of inequality, racism, and selectivity in favor of African countries.

In response, the Panel of the Wise contributed to the formal development of an African Transitional Justice Policy Framework that foregrounded what are seen as shared African values on democratic governance, human rights, peace and security, and rule of law. In this formulation of African values, strengthening the rule of law is just one component of a larger transitional justice modality for addressing impunity and armed violence in Africa. Central to the emergence of an African justice discourse is the production of an affectively claimed African geography that is Pan-African in scope and expression, and that seeks to differentiate international justice through a sense of African shared values. Such values presume that African justice requires an understanding of the contexts and deep histories within which such violence has unfolded. Cultural and political considerations can be factored into justice solutions alongside a range of other priorities, such as various issues concerning national cohesion, socioeconomic rights, African solidarity and cohesion, and transformative development.⁸⁷ The case of South Sudan's Commission of Inquiry and the subsequent establishment of the Hybrid Court for South Sudan are examples of this approach and of the role of sequencing in allowing peace talks to play out. The strategy is said to involve the invocation of a Pan-Africanist logic that is differentiated from dominant assemblages of anti-impunity and rule of law.⁸⁸

Contrary to the ICC prosecutor's choice to request an arrest warrant against Sudanese President Omar al-Bashir on March 4, 2009, the Sudanese government, the AU, the Arab League, and the Organisation of Islamic Cooperation objected on the grounds that such an action by the ICC was destabilizing for peace talks, which were to be revived in Doha, Qatar.⁸⁹ Several African and

Arab members of the UNSC, supported by permanent members China and Russia, proposed a resolution to renew the United Nations–African Union Mission in Darfur, the joint AU-UN peacekeeping mission formally approved by UNSC Resolution 1769 on July 31, 2007, to bring stability to the war-torn Darfur region of Sudan while peace talks on a final settlement continued.⁹⁰ Using Pan-Africanist language to invoke the need for an African approach, the AU called on the UNSC to invoke Article 16 of the Rome Statute to defer the processes initiated against Bashir on the grounds that a prosecution of the president could impede the prospects for peace in the region.⁹¹

To contain the broad backlash against the ICC in Africa, the AU established the High-Level Panel on Darfur in March 2009, headed by Thabo Mbeki, with a mandate to recommend approaches for reconciling the demands of peace, justice, and reconciliation.⁹² The report, released in October 2009, recommended balancing these demands by establishing a hybrid court composed of Sudanese and non-Sudanese judges and legal experts, introducing legislation to remove immunities for state actors suspected of crimes in Darfur, and forming a “Trust, Justice and Reconciliation Commission.”⁹³

In May 2011, the Doha Document for Peace in Darfur (DDPD) was finalized at the All Darfur Stakeholders Conference.⁹⁴ The government of Sudan and the Liberation and Justice Movement then signed a protocol agreement on July 14, 2011, committing themselves to the document, which established the framework for the comprehensive peace process in Darfur. The DDPD was the culmination of two and a half years of negotiations, dialogue, and consultations with the major parties to the Darfur conflict, including all relevant stakeholders and international partners. The UN-AU Mission in Darfur lent technical expertise to the process and continues to support the dissemination of the DDPD as well as to urge nonsignatory movements to sign on.⁹⁵ Many argue that the establishment of the DDPD and the threat of prosecution have led to serious delays in the overall implementation of the accord and the lack of a permanent ceasefire.⁹⁶

As one AU negotiator, whom I will call Abdul, shared with me, “The issue is complex and the threat of prosecution and the creation of an international judicial solution is part of the problem. We have tried to insist on an African approach, a staggered approach that is politically savvy, in order to achieve peace first and justice later.” By emphasizing the sequencing of peace and justice as an “African approach,” Abdul attempted to attribute to Africanness not only an interest in prioritizing peace and the end of violence first but also a commitment to judicial justice at the appropriate time. This sequencing has led to the establishment of the Hybrid Court for South Sudan as an African

approach that is attentive to establishing peace, addressing political injustice, and investigating and prosecuting individuals bearing the most responsibility for violations of international law and applicable South Sudanese law committed from December 15, 2013, through the end of the transitional period.

Though the court is not yet functional, it is controversial, and there are many who object to criminal prosecutions as a way to address deep-seated historical and political projects. Yet, in keeping with legal technocratic formations as a component part of the international criminal legal assemblage under examination, under the August 2015 agreement, the AU Commission established it as an extension of the sequencing directives outlined in the report from the UN Panel of Experts on South Sudan (otherwise referred to as a Commission of Inquiry).⁹⁷ Part of this AU commission of inquiry approach is an affective articulation of justice for South Sudan that is being described as an African-led and African-owned process. As such, discourses abound that highlight particular imaginaries, such as African geographies of justice, through which various AU actors participate in the reattribution of justice.⁹⁸

In contrast, the emergence of an anti-impunity movement most significantly active in European states has involved ensuring that powerful leaders responsible for mass atrocity violence do not use peace talks or quasi-judicial mechanisms (including the law of immunity) as a shield. Also relevant to the component parts of such technocratic legal tools is the role of the United States in offering diplomatic pressure and millions of dollars in funding.⁹⁹

Assemblages of Justice Feelings: Saving the "Victim," Stopping the "Perpetrator"

The component parts of advancing anti-impunity discourses through the ICC are also relevant to the way that emotionally propelled justice discourses are being fueled. Building on the principle that no one is above the law, the new justice formations have involved particular checks on national power. Luis Moreno-Ocampo, the first ICC prosecutor, has commented on the importance and roles of courts: "People have to understand, before the ICC, the way to control crimes was to negotiate."¹⁰⁰ Now that the ICC exists, he explained, "some people were thinking the ICC could be like a new threat for force negotiations; one that could be taken away. This is not the ICC. The ICC is a judicial system."¹⁰¹ Moreno-Ocampo has also sought to clarify a misconception concerning the role of the ICC in peace processes. "It's not us affecting the peace process. The criminals are affecting the peace process, because what they like to do is to use the negotiations to protect themselves."¹⁰²

A number of key figures in the creation and development of technocratic legal theories in the International Criminal Law School also moved international law jurisprudence beyond earlier twentieth-century principles of state sovereignty.¹⁰³ One such figure was Antonio Cassese, who, as president of the ICTY and one of the architects of the doctrine of the criminal responsibility of the offender, documented what he saw as a fundamental moment of rupture in international law. In *International Criminal Law*, he argued for the expansion of criminal responsibility of an offender. To do this, he expanded the term “culpable negligence” (*culpa gravis*) to include unconscious negligence, to move international criminal law to the objective responsibility of an offender for strict liability. However, this also resulted in making individuals and not states sole legal subjects of criminal law. This, he argued, provided a sufficient legal basis for an interpretation of international criminal law that would not disregard the legal concept of state sovereignty.¹⁰⁴

Cassese and other figures such as Judge Theodor Meron and Professor Cherif Bassiouni idealized international criminal law as capable of replacing state sovereignty. Cassese had been a critical figure in the creation of the ICTY and author of the Tadić decision that established the basis for individual criminal jurisdiction.¹⁰⁵ And Bassiouni was central in shaping the individualization of criminal responsibility. Known as the father of the ICC, he championed the driving of the ICC process forward. For Bassiouni, the “absence of the individual in international law” was an unfortunate development in the history of law. With precedents such as the Tadić decision, international law recognized individual criminal jurisdiction and shaped the formation of a corpus of international criminal law that combined human rights and humanitarian law with criminal law. With the already established moral force under which the notion of the individual “perpetrator” was rendered a subject of the law, and the shift to individuals as a core concern, the idea of the “victim” to be protected also emerged with a vengeance.

The international victims’ rights movement took shape with great moral force. It was based on a parallel humanitarian regime guided by the law of war.¹⁰⁶ Like laws of acceptable justifications to engage in war that incorporated dimensions of democratization and political and social transformation, the law of war emerged alongside the legal protection of the “victim.” The pressures of laissez-faire globalization affected the ways in which state sovereignty and state borders were being reconfigured. They also had implications for how domestic laws were reformulated through the incorporation of inter-

national treaties, and how national laws were reworked with the introduction of bilateral agreements and new regional conventions and formations.

Institutionalizing Compensatory Possibilities for “Victims” as Performative Acts

At the Nuremberg and Tokyo tribunals, as well as the ad hoc tribunals for the former Yugoslavia and Rwanda, the interests of survivors were to a large extent overlooked; their role was generally restricted to that of witnesses. However, as a result of the shift of the new governance architecture, there has been a growing movement, supported by a range of NGOs as well as some states, to recognize the role of international justice in providing not only retributive justice but also restorative justice by permitting survivors to participate in proceedings and receive reparations for the harms they have suffered.

In 1985, the UN General Assembly first adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (the Victims’ Declaration), which revolutionized the ordinary usage of the term *victim*. This declaration has been the cornerstone of legal rights for “victims” under international law. It established victims’ rights in the criminal-justice process, including the right to access justice, to be treated with basic respect and dignity, to protection and assistance, and to reparation. The restorative dimension came further into play in 1991, when a compensation system for victims of war was created. In the aftermath of the Gulf War, the UN Security Council set up a commission to deal with the requests for compensation stemming from the occupation of Kuwait.

The Victims’ Declaration contributed to laying the foundation for negotiations during ICC Preparatory Committee discussions about how *victim* should be defined. Interestingly, after extensive debates about whether legal entities could be included in the definition of the term, a compromise was reached in the Rules of Procedure and Evidence to establish that it may include organizations or institutions.¹⁰⁷ Despite this, the definition popularized by the ICC and the NGO Coalition for the ICC represents the consolidation of the notions of “victims,” justice, and law. During the negotiations on the statute, emphasis was placed on ensuring that the core values of the court—to promote greater peace and security through accountability for crimes, as well as the rights and the dignity of the “victims”—would be respected.¹⁰⁸ This issue was crucial, given the clear recognition by states that the ICC should be not only retributive but also restorative.

In keeping with the rule of law momentum, the Rome Statute provides for the possibility of granting reparations to victims. In the negotiations that led to its formation, two principal institutions were conceptualized: the International Criminal Court and the Trust Fund for Victims (TFV). These two institutions were propelled by a ten-year campaign called “A Universal Court with Global Support.” Through its goals of state enlistment through ratification and implementation of the Rome Statute, the signing of cooperation agreements and enhancement, and the recruitment of top ICC staff, the long-term campaign involved ongoing advocacy, networking, strategy building, lobbying, and the use of language that reproduced particular affective commitments to “victims everywhere” as the basis of their work. It was against this backdrop that the TFV was established in September 2002 by the Assembly of States Parties to complement the reparations functions of the court. Its mission was to provide advocacy and mechanisms for mobilizing physical, material, or psychological resources for individuals victimized by violence. Today the TFV is administered by the Registry but is independent from the ICC and is supervised by a board of directors. Articles 75 and 79 of the Rome Statute lay the foundation for this restorative, victim-centered element.¹⁰⁹

The TFV, supported through court-ordered forfeitures and fines as well as voluntary contributions by states, has a two-pronged mandate. The first aspect is the provision of general assistance to survivors or communities of survivors in ICC situation countries. The second mandate involves the management and implementation of reparations for survivors. In a novel phenomenon in international criminal proceedings, Article 68(3) of the Rome Statute grants that victims of crimes under the jurisdiction of the court may also make their views and concerns heard during a trial. Accordingly, the Office of Public Counsel for Victims was established in 2005. As of July 2010, the office had represented approximately two thousand victims and filed approximately three hundred submissions in various proceedings before the court. The office has also assisted thirty external legal representatives in all situations and cases, and provided close to six hundred legal advisors to them.

The Victims’ Rights Working Group was created in 1997 under the auspices of the NGO Coalition for the ICC in order to work with various survivors’ representatives to help them participate in the proceedings or to inform them of judicial developments as they relate to their case. The Victims Participation and Reparations Section of the ICC’s registry conducts regular assessments and evaluations of its work, and sees itself as committed to a reflective learning process as its staff implements the court’s mandate in situation countries. The

mission is communicated in a prevailing discourse of defending survivors and ending impunity through the rule of law. The centrality of survivors in the trust fund's work is enabled through the mobilization of ICC judicial proceedings.

Despite initial presumptions that the formation of the TFV signaled a revolutionary turn toward centering the oppressed, various stakeholders on the ground have come to rigorously debate whether international criminal trials should be subordinated to other justice-producing mechanisms available on the African continent, as I touched on in the introduction. Their arguments are broad and reflect concerns about the viability of the ICC and its ability to achieve justice, especially if driven by retributive motivations. While the ICC is essentially a punitive institution, the drafters of the Rome Statute and a significant civil-society lobby attempted to include elements of restorative justice that focus on social repair and reconciliation.¹¹⁰ Yet various victims of violence, once enthusiastic about ICC adjudication, are also ambivalent about the extent to which the ICC is able to achieve the sort of justice real survivors imagine for themselves and their communities.¹¹¹ Two large questions emerge: (1) How are we to define whom the court is working for? (2) Has it been able to deliver on the expectations of justice for survivors?¹¹²

The inclusion of those victimized by violence as a key component of international trials has become one of the main organizing principles underlying the development of twenty-first-century international criminal justice. The limitations and tensions in practice have also become apparent. Accommodating the participation of survivors of extreme forms of physical, sexual, and psychological violence through the structure of trial proceedings and as beneficiaries of reparations through the TFV were heralded as significant achievements. Yet survivors' applications to participate in trials have at times been so voluminous that those involved in data management and registration systems have struggled to cope with the bureaucratic burden. And though the court's promise has been articulated in the name of survivors, many survivors of violence complain of the lack of proportionality between its institutional force and its ability to produce substantive and tangible reparation for those in ongoing need. While on one hand the discourse of victimhood has produced emotional sympathies, on the other hand the identification of certain violations has set the terms by which sympathetic protective action can take place, often limiting the possibilities to certain prescribed channels and outcomes.

Judge Christine van den Wyngaert of the ICC has described the lengthy and cumbersome process of survivor registration at the ICC as a terrain for contending with the aspirations of survivor inclusion and the difficulties of

necessary exclusion.¹¹³ She concluded that the “number of victims is becoming overwhelming. . . . The Court may soon reach the point where this individual case-by-case approach becomes unsustainable. It may well have to consider replacing individual applications with collective applications.”¹¹⁴ Judges have, since the start of ICC trials, been grappling with a way to balance considerations of restorative justice for survivors with expeditious and fair retributive justice. Indeed, a ruling by the judges of Trial Chamber V has led to the overhauling of survivors’ participation and representation in the case against Uhuru Kenyatta, and is an example of the need for rethinking the ICC’s restorative mandate.¹¹⁵

Despite the rhetoric, the nature in practice of retribution-driven judicial proceedings may at times deliver undesirable or even incomprehensible results where survivors are concerned. Due to a recharacterization of charges, or a change in the temporal scope of cases, it is possible that, from one day to the next, survivors may find themselves ineligible even for participation, let alone reparations. Organs of the ICC working with survivors or the legal representatives of survivors must deal with the challenges of communicating changing judicial decisions about who is considered a “victim” or whose changing status has caused new forms of exclusion. Competing demands continue to highlight the challenges as they relate to maintaining the equilibrium between the restorative mandate and the retributive criminal justice mandate of the ICC.

What we see from this tracing, in which the emergence of the anti-impunity movement led to a particular conception of individualized “victim” and “perpetrator,” is that the increasing judicialization of postconflict transitions actually delimits the potential for deep and pervasive societal reparation. By analyzing the nature of violence being adjudicated in the first place, and linking it to historical processes that have organized subjects in particular ways, we see that the rise of prosecutorial justice has been part of a larger, complex set of histories tied to deeply felt attachments in the Global North to core ideas about society, law, the economy, the individual, and freedom. These attachments have been deployed strategically in the Global South and have been central to the development of a moral impetus around which the rule of law’s anti-impunity movement has gained its force, ultimately shifting the justice terrain to a popularly articulated individualization of criminal responsibility. Ultimately, this move to individuating criminal responsibility in the name of “the victim” is also tied to the circulation of an aesthetic that is built on the moral fortitude of saving predominantly black and female bodies.

These aesthetics undergird international justice through a biopolitics of sentimentality in which it is not just an individual universal subject that is invoked in the international psychic but rather a raced, sexed figure that occupies the moral imagination.

As discussed in the introduction, the ordering of liberal legality is also built on an aesthetics of the “perpetrator” to be held accountable. This perpetrator figure, individualized and gendered as mostly male, provides the international imaginary with a sensory depiction within which notions of justice are nested. How did these black and brown bodies come to be seen as the prototypical “victim” and “perpetrator” in international rule of law circuits? As we shall see in the chapters that follow, the technologies of legal power that unfolded alongside the institutionalization of liberal legality did so through a moral call to individualize responsibility for violence that in most cases has its roots in histories of colonial plunder and structural inequality, economic restructuring, and the consequent absence of institutional alternatives in fledgling African postcolonies. These formations point to a moral aesthetics of the “victim” and the “perpetrator” whose sensory depictions appear illegible to liberal legality but are felt among those who identify with its racialized and nationalized aesthetics.

Making Sense of Liberal Legality and Its Sensory Depictions

In the international adjudication of mass atrocity crimes, liberal legalism substitutes collective responsibility for mass crimes with the individualization of criminal responsibility. We see this most clearly in the cases involving ICC indictments of African leaders—black, male, middle aged, powerful. These indictments of individuals being held criminally responsible are not simply to be read as unraced perpetrators. They present black and brown bodies whose presence involves the transmission of sensory impressions about race but whose imagery is often said to represent that violence. The public responses by defiant African leaders about the ICC as racist—as we saw in the introduction—is a statement about racialized embodiments and the emergent feelings that have followed related to its histories of injustice.

Despite its disavowal of subjective affects, the reality is that justice, expressed through liberal legality, relies on emotional affectivities in order to be established as seemingly legitimate. The central dilemma is the dialectic between the work of emotion and the way that emotional inscriptions play out through racial and gendered politics. Because of the incommensurabili-

ties related to the exercise of international criminal justice, the reality of these justice formations is not adequately explained by Sikkink's "justice cascade," which imagines organic and widespread calls for prosecutorial justice as the drivers of its manifestation. Rather, as I have begun to show, the technocratic production of legal justice alongside emotive discourses and the regimes that propel them have combined to produce the tools through which law regulates possibility, and those possibilities in international justice domains are propelled through affective expressions. Thus, articulations of justice do not spread evenly across geographies of time and space. More often they reaffirm sites of inequality, in turn giving rise to novel contestations that mobilize new forms of emotional and conceptual expression.

What is the relevance of examining affective justice in these spaces of structural inequality? In these spaces we see the manifestation of biopolitical legality. This involves considering how the emergence of the African state was always a project of material extraction, economic opportunism, and political and legal impositions but also a project that reinforced particular aesthetic imaginaries for particular purposes. In chapter 2 I begin to take a closer look at the way that technocratic knowledge puts in place the conditions of possibility in which emotional expressions are regimented and fueled. As I will go on to show, sociocultural norms unfold through specific ways of talking, signaling, expressing reaction, or producing practices that enable new priorities to develop. Feelings about and perceptions of justice manifest moral codes that are expressed through particular emotional performances. Certain rhetorical strategies, such as affective transference, are used both to champion international justice formations, like the ICC, and to critique them. In the process, subjectivities and communities of affects arise and impact the work of affective justice.