

## CHAPTER 6

### Reattributions: The Refusal to Arrest and Surrender African Heads of State

In October 2016, Burundi became the first country to commence the process of withdrawal from the Rome Statute of the ICC. This move was vindicating for those who felt that a rectification of the all-African focus of ICC cases was needed. But it also led to an international outcry by anti-impunity advocates. When the ICC's Office of the Prosecutor began to speak of launching a preliminary examination into the violence that occurred in Burundi the previous year, Burundian leaders accused the ICC of acting as an "instrument" to destabilize "poor [African] countries." Leaders also insisted that the ICC's preliminary examination could contribute to "potentially negative forces and their cronies" committing acts of violence. "Consequently," they noted later, "the government considers that maintaining Burundi as a party to the Rome Statute of the International Criminal Court cannot be justified."<sup>1</sup>

Following claims that the ICC's actions support a Western regime-change strategy, President Nkurunziza signed the withdrawal legislation on Tuesday, October 11, with overwhelming support from Burundi's lawmakers. Later that week his office submitted a letter of notification to the UN secretary-general, and according to the rules of Rome Statute withdrawal, they had to wait one year before the separation from ICC jurisdiction was formalized. Burundi has now withdrawn from the ICC, while in South Africa there has been an interim decision to stop the withdrawal process at the time of this writing.<sup>2</sup> Pan-Africanists committed to rethinking justice in terms of structural inequality and those who are engaged in reattributions of justice within and outside of African countries are celebrating this move as a welcome restorative action that responds to inequality in the international system.<sup>3</sup>

The context for the ICC's investigation included the deaths of four hundred people, followed by 168 more, in the capital in mid-April 2015, as well as the subsequent displacement of 310,000 Burundians following politically related violence when the president of the country attempted to amend the constitution and petition for a third term. Given the claims that it was the government's security forces that perpetrated these acts of violence, anti-impunity groups have supported the ICC's investigations and have insisted that the only way that such acts will stop is by holding accountable those who bear the greatest responsibility for those crimes. The chairman of Burundi's national coalition for the ICC voiced similar concerns and invoked "victims" when he said, "This vote is a terrible setback to a country that is facing a serious violent and political crisis. It comes at the very moment that thousands of Burundians thirst for fair, effective and independent criminal justice—as demonstrated by the families of victims that broke their silence and seized the ICC when their cries for justice were ignored by the national justice system."<sup>4</sup>

This was not a singular development. The next week, the South African parliament also submitted relevant paperwork to the UN, notifying them of their decision to withdraw from the Rome Treaty, followed by an announcement of Gambia's intentions to withdraw.<sup>5</sup> The Gambian minister charged, "Despite being called International Criminal Court, [it] is in fact an International Caucasian Court for the persecution and humiliation of people of colour, especially Africans."<sup>6</sup>

Similarly, a particular high-ranking South African government official complained to the media that "every person tried by the ICC has been African," while many other African leaders have echoed Kenyatta in claiming the ICC is "biased against Africans."<sup>7</sup> Interestingly, South African officials were very early supporters and trailblazers of judicial accountability for mass-atrocity crimes, which led to the conceptualization and building of the ICC. They were also the first to produce and implement legislation in Africa that allowed South Africa to incorporate the Rome Treaty into its constitution. However, South Africa's clash with the court and the subsequent pushback began when President al-Bashir of Sudan visited the country for a summit, and the South African government refused to arrest him. It insisted that all heads of state were entitled to immunity under customary international law (CIL).

A number of South African government officials reiterated the point that it does not want to carry out ICC arrest warrants because they are basically "calls for regime change." In response, anti-impunity activists declared South Africa's exercise of treaty withdrawal unconstitutional and enlisted passionate

responses to protest this action. Invoking the figure of Nelson Mandela, activists like William Pace, the head convener for the coalition for the ICC, declared, “With its history of injustice, South Africa under Nelson Mandela was a driving force behind the establishment of the ICC. Any withdrawal from the Rome Statute would reverse years of human rights progress. Opposition to the ICC has grown as it has implemented its role, mandated by 124 countries, to bring those most responsible for grave crimes—including high government officials—to justice.”<sup>8</sup> Pace then went on, “Victims across Africa have called for justice time and again, either through national judicial systems or, when they fail, through the ICC. The Zuma government is demonstrating a terrible disregard for victims and the powerless in South Africa, throughout Africa and the world.”<sup>9</sup> By invoking the figure of Nelson Mandela and the significance of the ICC for survivors, Pace aligned anti-impunity agendas with the heroic figure of Nelson Mandela while insisting that South Africa’s participation in the ICC was critical to the moral significance and priorities of the country.

Justice Richard Goldstone concurred:

I am concerned and disappointed at this regrettable action by the South African Government. The withdrawal is quite inconsistent with the provisions of the Rome Statute of the International Criminal Court Act, No. 27 of 2002 and hence unconstitutional and unlawful. . . . I am confident that a South African court will so rule. It is an act that is demeaning of our Parliament and of the people of South Africa. From a moral standpoint, it detracts from the inspiring legacy of the administration of President Nelson Mandela that so strongly supported the ICC and all of the mechanisms of international justice.<sup>10</sup>

Gambia was the third African country to announce its intention to withdraw from the Rome Statute. Its president, Yahya Jammeh, blamed the deaths of over five hundred Gambians (over a five-year period) on the “very dangerous, racist and inhuman behavior of deliberately causing boats carrying black Africans to sink.”<sup>11</sup> He called for an ICC investigation of the “manmade sinking” or intentional capsizing of boats carrying African migrants across the Mediterranean Sea to Europe. In an attempt to deflect the attribution of violence from Africans to agents of European nations, he suggested, “If it is not done deliberately, [then] how is it possible that each time a vessel is capsizing, there is the Italian navy to rescue only a few people.”<sup>12</sup>

Later, President Jammeh announced, “We have a right to call the ICC to investigate not only cases of Gambians but the case of thousands of African

young people who have died on the European coast under unusual circumstances.”<sup>13</sup> But these expressions were then followed by retractions from the new Gambian president and the South African parliament. In the fall of 2016, Jammeh was ousted from his twenty-two-year rule of the country, and in early 2017, he was replaced by former opposition leader President Adama Barrow, who subsequently overturned many of Jammeh’s policies, including the action to withdraw from the Rome Statute for the ICC.<sup>14</sup> In South Africa, the constitutional court revoked President Zuma’s withdrawal notice, finding it “unconstitutional and invalid,” and noting that the high court should not have pursued the action without parliamentary approval.<sup>15</sup>

Arguing on behalf of South Africa, South African scholar and former legal advisor Dire Tladi insisted that the ICC position on immunity ignores the International Court of Justice (ICJ) decision in *Arrest Warrant*, which holds that state officials may be prosecuted before international courts under certain circumstances.<sup>16</sup> According to Tladi, a more fundamental problem exists with the AU’s postulation that the immunity of state officials, whether personal or functional, under CIL means, in essence, immunity from the jurisdiction of courts of foreign states.<sup>17</sup> This immunity, he argues, is an extension of state immunity from the jurisdiction of other states based on the principle of sovereign equality of states.<sup>18</sup> Since international tribunals such as the ICC and the African Court are not foreign states, the rationale for immunity of states and their officials (i.e., the sovereign equality of states) does not apply.<sup>19</sup>

As a multilateral treaty, the Rome Statute, by definition, is understood as binding only those states that ratify it.<sup>20</sup> Accordingly, the Rome Statute is seen by various AU advocates as not being able to “impose obligations on third States without their consent.” Officials of nonmember states thus normally retain all of their immunities even in proceedings before the ICC.<sup>21</sup> In the al-Bashir case, however, the ICC has held that where the Security Council refers a situation in a nonmember state to the court, the entire Rome Statute—including its immunity provision—applies to the nonmember state and that its officials therefore have no immunity before the ICC.<sup>22</sup> Because of this ruling, the debate over whether the immunity provisions of the Rome Statute can be applied to nonmember states in cases before the ICC highlights a raging debate, because various AU officials insist that even if that interpretation is correct, many states, as well as the AU, have argued that Article 27 only lifts immunities before the ICC itself, and does not affect the immunities that such officials enjoy in domestic courts.<sup>23</sup> Under this interpretation, CIL immunities of state officials before domestic courts—recognized in the Rome Statute

itself—remain in place, preventing states from arresting al-Bashir, even if that arrest is on behalf of an international tribunal.<sup>24</sup> In response, Sudan began aggressively mobilizing AU member states to weaken support for the ICC in Africa. The AU called upon the UNSC to invoke Article 16 of the Rome Statute to defer the ICC proceedings against Bashir on the grounds that prosecuting the president could impede prospects for peace in the region.<sup>25</sup> But because of the Article 16 trigger that gives the council the power to make a referral, the UNSC sustained its position and failed to act on the AU's request to defer ICC proceedings.<sup>26</sup> As explained in the introduction, the AU directed all of its member states to withhold cooperation from the ICC in the arrest and surrender of al-Bashir.<sup>27</sup>

In contrast to the forms of reattribution taking place in the al-Bashir case, the rulings by ICC judges over immunities have reflected policy positions that Article 27 lifts immunities not only before the ICC, but also in any domestic proceedings on behalf of the court, because otherwise Article 27 would be rendered ineffective.<sup>28</sup> For that reason, Article 98 is seen by African states as not being implicated.<sup>29</sup> Moreover, even if Article 98 applied, Sudan is required to waive any immunity it has under the terms of the Security Council's referral, which requires the government of Sudan to cooperate with the court.<sup>30</sup> According to various ICC spokespersons, there is thus no impediment to the arrest of a sitting head of state such as al-Bashir in a national court, and all state parties are expected to cooperate with the ICC's arrest and surrender requests.<sup>31</sup> In refusing this position, a number of state representatives from mostly African countries, namely, Malawi, Chad, Kenya, Nigeria, Djibouti, the Democratic Republic of the Congo (DRC), Uganda, and South Africa, as well as Jordan, decided not to execute the ICC's arrest and surrender order of Mr. al-Bashir while he was in their territory. Chad did so three times, and Uganda twice. These countries then submitted to the ICC their reasons for their nonexecution of the arrest warrant, and in all six cases the ICC found that the countries failed to comply with the cooperation request issued by the court with respect to the arrest and surrender of al-Bashir, violating their obligation under the Rome Statute. With the exception of South Africa, the court referred all the other countries to the UNSC and the Assembly of States Parties (ASP) for noncompliance with the court's request.

At the thirteenth AU summit, African states agreed to seek an advisory opinion from the ICJ on the question of head of state immunity and the relationship between Articles 98 and 27, thereby seeking a decision on state entitlement to sovereign decision making. In spring 2018, the ICC invited in-

terested parties as well as the AU to make a submission on immunity. And, in July 2018, the African Group in the General Assembly, led by the chair, Ambassador Lazarus Ombai Amayo of Kenya, requested an advisory opinion of the ICJ on the “consequences of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and other senior officials. These issues are still underway.”<sup>32</sup> In keeping with ongoing disagreements over state entitlements to sovereignty and responsibility for international treaties, disagreements over executive actions reflect the most recent developments in the controversies that this book has been tracing. The response to the ICC’s indictment of sitting Sudanese president Omar al-Bashir and continuing efforts to secure an advisory opinion from the ICJ are examples of attributions of justice that follow a particular domain of logic that has a particular history and operates within complex affective justice assemblages.

The issues leading up to the withdrawal from the Rome Treaty go back to the 2010 summit of African heads of state when Malawian president Bingu wa Mutharika raised concerns about threats to state sovereignty in the context of the al-Bashir case. As he said, “To subject a sovereign head of state to a warrant of arrest is undermining African solidarity and African peace and security that we fought for so many years. . . . There is a general concern in Africa that the issuance of a warrant of arrest for . . . al-Bashir, a duly elected president, is a violation of the principles of sovereignty guaranteed under the United Nations and under the African Union Charter. Maybe there are other ways of addressing this problem.”<sup>33</sup>

Then there are the indictments of Uhuru Kenyatta and William Ruto of Kenya, detailed in chapter 4, making Kenyatta the first serving head of state to appear before the ICC. Add to the list the June 2011 issuing of arrest warrants for Muammar al-Qaddafi, then president of Libya, his son Saif al-Islam Qaddafi, and his brother-in-law Abdullah al-Sanussi for the commission of crimes against humanity.<sup>34</sup> At its July 2011 summit, the AU Assembly held that the arrest warrants seriously complicated efforts aimed at negotiating a political solution to the crisis in Libya, deciding “that Member States shall not cooperate in the execution of the arrest warrant” against Qaddafi.<sup>35</sup> At subsequent summits, assembly decisions have continued to call for solidarity among AU member states in their opposition to the proceedings launched against al-Bashir, and to call on the UNSC to defer the ICC’s prosecutions of al-Bashir, Kenyatta, and Ruto under Article 16 of the Rome Statute.<sup>36</sup>

This all led to what would be the first formal call at the October 2013 summit in Addis Ababa, by some AU member states, for all signatory African states to collectively withdraw their membership from the Rome Statute.<sup>37</sup> The assembly also formally decided, through a declaration of nonextradition, that “no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office.”<sup>38</sup> This was the first declaration by the AU to institutionalize opposition to ICC indictments of African leaders, and it would eventually be codified in the controversial Article 46A *bis* of the Malabo Protocol.<sup>39</sup> But first, the initial declaration was followed by the introduction of reforms to the Rome Statute, especially relating to Article 16 (proposed by South Africa) and Article 27 (by Kenya), one year later at the November 2014 ASP meeting. Kenya also proposed a number of other amendments—one to the preamble highlighting the recognition of regional bodies by the ICC and another to Article 63 on trial in the presence of the accused. But the most controversial was the proposal to amend Article 27, as a key aspect of the deteriorating relationship between the AU and the ICC concerns the applicability of the immunity provision under that article.

Many AU agents approach Article 27 of the ICC statute as a treaty whose rules should be applicable only to state parties. They argue that for nonstate parties, the rules of CIL relating to immunities should remain intact.<sup>40</sup> This position presents Article 27 of the ICC statute as an exception to the rules of CIL—a position that informed AU state decisions not to cooperate with the extradition of al-Bashir, the leader of a country, Sudan, that is not a party to the Rome Statute. This was illustrated by an Ethiopian diplomatic official who explained his irate feelings about the court’s hypocrisy: “Sudan is not a party to the Rome Statute. As a sitting president, Bashir enjoys immunity from prosecution on the basis of customary international law. There is no objective reason why as a nonparty to the treaty a judicial body should be able to still exercise jurisdiction and demand the extradition of another black man.”<sup>41</sup>

Both the place of politics and the relevance of blackness and inequality emerge time and time again, and they shape the feelings of indignation and the perception that African leaders are being unfairly targeted. Here, emotional climates are enforced through legal interpretation and the recognition of precedents operating within a field of unequal political practices. Among those practitioners engaged in international legal decision making, technocratic practices in international law, based on two primary sources.<sup>42</sup> The first is trea-

ties, and the second is Customary International Law (CIL). Treaties represent international law agreements that reflect “expressly accepted obligations” and mostly bind states that are parties to that treaty. In cases where treaty principles may legally bind states that are not party to particular treaties, it is usually under conditions where the key principles of the treaty are transformed into customary international law. By insisting on the legitimacy of law based on two measures—widespread and uniform practice, and engagement in that practice based on legal obligation—many of its anti-impunity practitioners deem CIL legally acceptable if a given set of norms gain uniform and widespread acceptance. Where various legal principles play key roles in establishing the basis for the legal legitimacy that states adopt, feeling regimes also shape the positions that state actors take.

As I have argued throughout this book, and what most scholarly work on Africa and the ICC dismisses, is the importance of understanding these formations in relation to perceptions of justice—including the deep-seated structures of feeling that emerge within complex assemblages and shape justice alignments. For not only do forms of affective justice take shape within various forms of international legality and through the emotional regimes that shape what is acceptable, but also, particular regimentations are reproduced within the international criminal law assemblage that include component parts within African domains. The examples in this final chapter, like the previous, highlight how alternative formulations of individual responses to structuring histories find their expressions in both legal and sociopolitical forms of action. The formation of these expressions, however, should not be assessed in relation to the production of fixed and temporally consistent identities. Rather, forms of affective justice, manifest in practices, such as treaty withdrawals, are acts that, while legally allowable, are shaped by emotional responses that people, as agents, also choose to embody, within particular conditions of the possible, as they take up particular causes. When these causes take the form of legal and extralegal questions, the result can be alienating for various camps searching for particular rules of order through which to orchestrate justice. This is because legal practices are not simply technical articulations of objective certainty; they are affective and are fueled by histories and assumptions about what one values and presumes, what they mean, and the best steps through which to achieve the goals of justice. Such an approach to technocratic law making highlights how legal practices involve life worlds in affective registers that actually constitute law.

One legal manifestation in the ongoing debate over whether African lead-



ers and heads of states should enjoy immunity has been the emergence of African states that were party to the Rome Statute lobbying for the amendment of Article 27 so that it expressly provides immunity to heads of state.<sup>43</sup> Given the profound sentiments of protest around not surrendering heads of state, African states have hoped that their contrary practice will develop into a regional custom. For law has both an instrumental and expressive function. When we go beyond the instrumental uses of treaty formation, implementation, and decision making, we can recognize that while contestations of treaty provisions have the potential to unravel the sacred bundle that is seen as emanating from Nuremberg and manifest in the form of the Rome Statute, claims of noncooperation and withdrawals not only contest the foundational principles on which the treaty was envisioned but also do something more profound. They provide the terrain on which social actors can articulate their concerns in relation to it. This domain is expressive and unfolds through what I refer to as reattribution—an affectively propelled site of refusal and redirection that is embodied and constitutes alliances through vivid emotional registers. The reattribution of legal frameworks and production of social, political, and legal alternatives provide the basis on which emotional expressions take place and new spaces of possibility are opened up. In this regard, many insist that international law is as dynamic as daily life and that African states have a right to engage in its formation. As chapter 5 recounts, from 2010 onward, AU mobilizations led to the expansion of the criminal jurisdiction of the African Court in order to shift the terms for the management of African violence, often articulated with the refrain, “African solutions for African problems.” And, in keeping with this sensibility, one of the most controversial attempts to manage African violence has involved the formation and inclusion of international criminal jurisdiction for an African court, not simply because it stands as a parallel court to the ICC but also because of Article 46A *bis*.

This provision for individual criminal responsibility in the Malabo Protocol advocates the maintenance of personal and functional immunities for heads of state. While it is true that personal immunity for heads of state and high-ranking officials in government does not apply before international criminal tribunals, it continues to apply before domestic courts, unless a waiver from the state concerned is obtained.<sup>44</sup> Advocates in the AU insist that personal immunity applies where domestic prosecutions are concerned. The AU has defended the need for the immunity provision from a doctrinal perspective on the grounds that immunities provided by international law apply

not only to proceedings in foreign domestic courts but also to international tribunals, and states cannot circumvent such obligations by establishing an international tribunal.<sup>45</sup> They point to a central concern that there is a conflict between Articles 27 and 98 of the Rome Statute in which African states have competing obligations. While Article 27 removes immunity, Article 98 establishes that the court cannot request that a state act inconsistently with its international obligations with respect to state or diplomatic immunity and must obtain cooperation for the waiver of the immunity. These officials insist that with respect to official immunities for President al-Bashir, CIL allows African states to opt to adhere to AU decisions as well as to decide not to comply with the arrest and surrender of the president of Sudan. This issue was far from resolved for the ICC's July 6 Pre-trial Chamber II decision that states that have ratified the Rome Statute, such as South Africa, and find President al-Bashir on their territory are required to arrest and surrender him to the ICC.<sup>46</sup> However, the International Law Commission has concluded that there are no exceptions to immunity *rationae materiae* for heads of state, heads of government, and ministers of foreign affairs.<sup>47</sup>

The discourses surrounding the immunity provision have arisen out of a concern for the integrity and capacity of an African leader to govern and, as such, an insistence that heads of state should be protected from prosecution while working to maintain peace and stability within their countries. This argument is seen as especially acute in the African region. For despite the delegitimation of political solutions by members of the anti-impunity movement, various AU advocates see the Malabo Protocol as a mechanism that allows for peace and justice sequencing, by which personal immunity is relevant only while a leader remains in power. Supporters insist that in allowing immunity to expire after a leader is out of office, African regional legal modalities can then provide uniquely impactful ways to manage violence on the African continent through the sequencing of peace and justice. Both sets of positions on the irrelevance of national capacity have been vigorously debated among the opponents of this anti-impunity movement—most significantly by those from African states.

It is also worth paying attention to the call by African states for a differentiated regional interpretation of the nonsurrender of incumbent heads of states to international tribunals and courts. They have mobilized to argue that the state practice of immunity for heads of state, foreign ministers, and other high-ranking officials is in keeping with principles in CIL that provide for personal and functional immunities for government officials, and there is no in-

ternational custom that sets out a contrary rule of surrendering incumbent heads of states. The practice of not surrendering heads of state may also reflect the development of a regional consensus on the rule of nonextradition, which, in keeping with the ICJ advisory opinion request, has become critical at the time of this writing.

The question of immunity, therefore, deals with issues concerning African states as legitimate domains for ensuring the protection of citizens. But it is also an attempt to retain some of the terms of an older order (immunity for heads of state) deemed inappropriate for a global order set on establishing new terms. The implication of Articles 27 and 98 as they apply to nonmembers of the ICC has been the subject of disagreement not only among scholars but among different chambers of the ICC. In a decision that was highly criticized by AU leaders and other prominent commentators, the ICC's Pre-trial Chamber I ruling on whether Malawi and Chad were noncompliant when they failed to arrest al-Bashir, found that "the principle in international law is that immunity of either former or sitting Heads of State cannot be invoked to oppose a prosecution by an international court. This is equally applicable to former or sitting Heads of States not Parties to the Statute whenever the Court may exercise jurisdiction."<sup>48</sup>

The ICC brought its next noncooperation case against the DRC, heard before Pre-trial Chamber II. Here the ICC took a different interpretive approach. The chamber recognized there might be instances where the personal immunity of a head of state of a nonstate party may justifiably be raised before the court and that "the solution provided for in the Statute to resolve such conflicts is found in Article 98(1) of the Statute."<sup>49</sup> It argued that in the case of al-Bashir, because the Security Council resolution imposed on Sudan the duty to cooperate, his immunity was waived, per the requirement of Article 98(1).<sup>50</sup>

In the next matter, against South Africa, Pre-trial Chamber II argued that the obligation of state parties to arrest and surrender individuals for whom an arrest warrant is issued by the ICC emanates from Article 27(2) of the statute and the referral of the situation by the Security Council.<sup>51</sup> The chamber argued that Article 27(2) does not only exclude the application of immunity in proceedings before the court, as South Africa and the AU contended. Rather, it referred to the arrest of such individuals.<sup>52</sup> The court found that where the Security Council refers a situation to the court, Article 27(2) would be equally applicable to nonstate parties. The court rejected the need for Sudan or the Security Council to waive al-Bashir's immunity, as provided under Article 98(1), since it was already removed by Article 27(2).<sup>53</sup>

What this debate demonstrates is how the ICC is articulating institutional assumptions about the power of the UN and—by extension—the ICC. Yet African state actors are pushing back by asserting claims for their sovereignty and making new regional declarations about the practice of immunity for heads of state and high-ranking leaders, in an attempt to set new terms for new justice formations that include economic sovereignty and claims to global membership. These various public positions reflect particular emotional sensibilities that are sustained by legality and its socialization practices.

In chapter 5, we saw how particular Pan-Africanist feeling regimes were deployed to shape the institutionalization of an African transitional justice agenda that included its own court to adjudicate crimes. This final chapter extends that conversation to explore how, with the ICC's refusal to amend various articles in relation to areas seen as contributing to structural inequalities, African leaders are reattributing the scope of international justice practices by shaping a new set of regional norms to better address the long history of violence in the region and provide new opportunities for justice. The proposed amendments to the ICC treaty were seen as setting the groundwork for African state parties to refrain from withdrawing from the ICC, but the failure to adopt those amendments has led to threats and now letters of intent—the first official step—to formally withdraw from the court or to refer the matter to the ICJ. Though Sierra Leone, Ivory Coast, Zambia, Nigeria, Malawi, Senegal, and Botswana were among the African states that countered the withdrawal notifications by pledging their continued support of the ICC, as we will see, acts of withdrawal, referrals to higher bodies, public statements, declarations, and refusals to comply with extraditions are expressions of particular political positions that have an impact on emotionally shaped alignments. Such alignments not only join particular state leaders that have articulated their rejection or disapproval of the ICC, but also constitute anti-impunity alliances through pledges of ICC support. What I am arguing here is that while the emotional states of leaders or negotiators is unknowable, we need to pay attention to the alignments involved in the political jockeying and strategies around withdrawals of support. This can help us understand how complex and controversial actions shape constituents whose emotional worlds are aligned with a position that is produced and socialized through particular emotional regimes. They are constituted not simply through ethnic, national, linguistic, and gender identities, but through embodied feelings about inequality and injustice that shape how international law is perceived and how justice is experienced affectively.

## Debating Justice: The ICC's 2013 Assembly of State Parties

In response to the AU's request, the ICC's Assembly of States Parties (a stakeholders' meeting convened annually by the president of the ICC and all states that have ratified the Rome Statute) convened a special November 2013 session titled *Indictment of Sitting Heads of State and Government and Its Consequences on Peace and Stability and Reconciliation*. At this meeting, state representatives, academics, and members of various civil society groups came together to debate the immunity question. Both the declaration of nonextradition and the proposal by African states to seek clarification on and amendments to Article 27, regarding the irrelevance of official capacity, came to a head at that Twelfth Session of the Assembly of States Parties to the Rome Statute.<sup>54</sup>

The ASP special session was moderated by the permanent representative of Jordan to the UN, Prince Ra'ad Zeid Al-Hussein, and panel speakers included AU legal counsel Djenaba Diarra, professors M. Cherif Bassiouni and Charles Jalloh, and the Kenyan attorney general, Professor Githu Muigai. Multiple sides of the debate were argued. Governments and members of civil society offered input, eventually resulting in the articulation of a range of positions. The then-acting legal counsel of the AU, Djenaba Diarra, welcomed the ASP's decision to hold the debate and to accommodate the AU request. She started with conviction, reminding those in the thousand-seat auditorium that "Africa was left alone to deal with the consequences of Rwanda."<sup>55</sup> This, she said, was why African states took such a prominent role in the establishment of the ICC and form the largest group in the membership.

In saying this, she made a profoundly self-assured statement that the AU has a commitment to peace, stability, justice, and good governance. She explained that the AU had moved from the principle of noninterference in a neighboring state to the principle of nonindifference—in other words, agreeing that a member state has the right to intervene in another member's state internal affairs (to respond to specific crimes, unconstitutional change of government, etc.). It was in that light that the AU had called for the universal ratification of the Rome Statute, she reminded everyone.

Diarra's central message was that the AU was concerned with some of the working methods of the ICC, namely the selective approaches to justice in the way it targets some locations of crimes, like Africa, and not others. Preliminary examinations were opened in Afghanistan, Korea, and other countries years ago, yet there has been no move to trial in those situations, while moves to trial in Africa have been swift. She ended by assuring the ASP that these

concerns were genuine and that in the interest of peace, stability, and reconciliation, Africa needed to trust the international community. As she noted, “Africa is worried; we need to be listened to, need to be trusted, in the interest of peace, stability, and reconciliation.”<sup>56</sup>

As Diarra ended her remarks, she then sat down with stern defiance and various constituencies in the audience whispered quietly. I sat in the audience next to a group of African statesmen who spoke among themselves in support of her call that Africa needed to be listened to. As I listened to them and watched them nod affirmatively and reflected on how empowered they seemed as they smiled. The emotions that they performed aligned with Diarra and her official AU position, which she articulated clearly and communicated with vehement passion. And yet, as I looked over to the section where I had sat earlier that day, I saw various members of civil society sigh and roll their eyes in what seemed to be disbelief. Their responses seemed skeptical of the AU’s motives. When I interviewed some later that day, they confirmed my rendering of their response to Diarra’s comments; with body language and frowns, they charged that “the AU was full of shit.”<sup>57</sup> This response articulated the domain of agreement or nuance that—with further conversations—clarified how emotional responses constitute international justice formations.

These two sets of actors—AU officials and various members of international civil society groups—represent two social alignments that are part of larger assemblages that have been at the heart of this book. Though complex and messy, these emotional responses align feelings about developments in international justice circuits whereby activists, state agents, donors, academics, and others articulate their relations to each other through emotional expressions of agreement, disagreement, or even neutrality. What is fascinating, however, is how such alignments are regulated through emotional regimes produced through people’s participation in particular emotional communities. The next presentation supported this.

Kenya’s attorney general, Githu Muigai, conveyed Kenya’s belief that the ICC is a court of last resort that should complement domestic and regional efforts, but its practice of indicting heads of state is actually doing the opposite:

We intended it to bring to trial those most responsible. The court was to promote justice and promote peace. We intended that the court in general, and the prosecutor in particular, should act in a professional fair manner—we did not expect that they would handle themselves at standards lower than those we expect to see at our level. This is not a license to behave irresponsibly—politically, socially, legally. Over the past five years, we have

cooperated fully with the court. This is a unique situation. The indictment of sitting heads of state is unprecedented and must be approached as such. Allowing for the indictment of sitting heads of state is a threat to the constitutional order and stability in a state—we are not talking of immunities to shield an individual, but immunity to allow a state to continue being a state.

Kenya is the lynchpin in the security of eastern Africa. It is not a country with which the international community should play Russian roulette. We stand with the international community in the fight against terror, against piracy, against drug trafficking, against human trafficking. Yet the sc [Security Council] declined to take seriously our request. Immunity for heads of state is well established and understood in other jurisdictions. We have created a problem within international jurisprudence by allowing double standards to take root.<sup>58</sup>

Muigai pointed to reports on violence unleashed in Gaza and in Sri Lanka, as well as the use of drones by the United States, asking if these situations did not constitute international criminal offenses. His rhetorical strategy garnered the support of those African statesmen and women who felt discriminated against by what they saw as the ICC's selectivity of cases that focus on Africa and not on other states, especially powerful ones. In a passionate utterance that emphasized discriminatory practices, he clarified that "they were not being pursued with the urgency they deserve."<sup>59</sup>

Through this claim, Muigai reflected on Kenya's role as one of the most important actors in maintaining peace and stability in Africa, and pointed to the prevalence of terrorism and piracy in the region. With a deeply animated and authoritative rhetorical style, he clarified that the ICC trials had a negative impact on Kenya's ability to address the consequences of the 2007–2008 postelection violence (as noted in chapter 4). He argued that immunities for sitting heads of state exist in many domestic jurisdictions, and that this should also apply at the international level.<sup>60</sup> At the end of the day, the ICC had the potential to negatively impact reconciliation and stability. As he clarified, "Reconciliation and healing are fundamental; the people must go back home and find a way of living together. When lawyers and judges and diplomats have gone home, the victims are the ones who must live with the consequences."

Muigai's invocation of the ICC's selectivity and the realization that the ICC had failed to produce reconciliation and stability, thereby failing those im-

pacted by violence, reflected an attempt to disavow the ICC's work. He did this through the rhetorical production of relations of inequality resulting from the ICC's selectivity practices. This clarification works through a pro-African strategic position that demands the application of fairness by ICC advocates. Those in the audience who were aligned with such concerns shared grumblings and support with Muigai.

Attuned to the frustrations of the Kenyan official, the next speaker, Cherif Bassiouni, a key scholar and architect of the Rome Statute, responded that the discussion about amending Article 27 is not about political issues but about rules. He stated emphatically,

Immunities for heads of state were removed within the Rome Statute framework; this was a conscious choice. There is nothing much to argue about that. You can argue as to the wisdom of that position, but it is a choice made by the drafters. And if, in hindsight, we consider this to have been an unwise decision then we would have to adjust the statute.

Article 27 of the Rome Statute does not reflect customary international law where head-of-state immunity is well established and generally accepted, so what prevails? With respect to ICC states parties, what the treaty says. But to nonstates parties, customary international law prevails. This means that the applicable standards for states parties are higher. How does this influence the policy consideration? Does this persuade states not to become states parties? The immunities afforded to heads of state under customary international law simply relate to the timing of prosecutions/indictments—legal proceedings can commence after an official has left office. . . . In Rome, the drafting committee submitted a package that could not be unraveled. There are a lot of imperfections. We needed to conclude in a five-week period. But, we can now reexamine, [and] reflect on corrections. This is the nature of the beast; the statute is complex. These things need to be revisited . . . in an institution that we all hope will be a long-lasting institution.<sup>61</sup>

Similarly, the next speaker, Charles Jalloh, professor of international law at Florida International University, reinforced the pragmatic position by reminding everyone that Article 27 reflects the manifestation of a “key conviction [that] has taken root in international criminal justice that insists that the law shall apply equally to all persons—the office of the person shall not lead to any form of immunity.” Through that entry point he reinforced the point that



Paragraph 1 of Article 27 of the Rome Statute provides that “official capacity of an individual will not be a factor for the purpose of establishing criminal responsibility. Nor will it be considered as a mitigating factor in sentencing. It denies a defense of ‘official capacity’ to several categories of officials: Head of State or government, members of government or parliament, elected representatives, and government officials.”<sup>62</sup>

Like Bassouni, Jalloh was not alone in his insistence on the norms, context, and spirit of the wording of Article 27. The ICJ also held that “an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.”<sup>63</sup> As such, many AU practitioners see state practice as confirming that the rules on personal immunities ensure that high-ranking officials and governments accused of international crimes should be prosecuted before international criminal tribunals.<sup>64</sup> This development has established the erosion of functional immunities and has contributed to the circulation of the discourse of ending impunity for the “most serious crimes of concern to the international community.” Such immunities are seen as being derived from diplomatic agreements and customary state practice, as well as treaties.<sup>65</sup>

Both of the law professors, one central to the Rome Statute’s drafting and the other an important African diasporic international criminal law scholar, spoke on the legal logic and importance of norms. Their alignments agreed with the goals of the irrelevance of official position and the goals and history that immunity represents. Standing behind a tradition of institutionalism to protect against generations of impunity and decades of violence without recourse, the academic call aligned emotional rationalities toward institutional change.

In a prerecorded message, Ambassador Rolf Fife, Norway’s minister of foreign affairs, started his comments by reflecting on the early days of the drafting of the Rome Statute. In the last days at Rome, with the final package on the table, there was a sense of universality; they were united in a general commonality of purpose, yet there was respect for diversity. Any new proposals at that point would have unraveled the package. The exercise had a truly cross-regional thrust. Close working relationships, and even friendships, had formed in what Fife called a Band of Brothers. “We had become a melting pot of legal cultures with input from all corners of the world.” He also described the willingness to listen and discuss the pros and cons of ideas as characteristic of the moment. He asserted that the ICC legal system was built around the idea of effectiveness, with a goal of removing cultures of impunity for

mass atrocities; restricting immunities for heads of state was part of that. He also noted that there was an understanding that the court would not exist in a vacuum and a discussion about how to integrate the court with the status quo—in other words, what the role of the UNSC in peace and security should be. Another core principle is that one is innocent until proven guilty. He reflected on whether the position of an individual also warrants respect and a recognition of the dignity of the post held. This is not to say, he clarified, that this must equal outright immunity, but should result in practical measures to recognize and take into account the dignity of the highest office in a particular state. Ultimately, justice and a functioning judicial institution are key for trust and predictability in a given society. With the spirit of that founding moment in mind, his closing message was that he hoped they would work toward such basic values.

Ambassador Fife's message aligned with the last two messages, where particular social norms and their recognition and incorporation in the spirit of the law were central. Overall, history, politics, and a deep commitment to the spirit of ending violence were all part of what would shape international criminal law. But this conviction had its limits with some members of the plenary and among some in the convention hall. Their emotional expressions and reactions coupled disappointment in the failure of the assumption that no one was beyond the law with a realization that this core principle did not reflect how international law was working in practice. This is so, they argued, because the very values of objectivity that were understood to accompany that commitment failed to guarantee fairness and the universal application of its principles.

The chairperson then opened the floor to commentators. In articulating disappointment and suggestions of race-based selectivity, the representative from Namibia repeated the dominant refrain: "Justice should not be based on selective application. Justice should apply to all continents, to all perpetrators, to all races and to all sexes. Any selective application ceases to be justice and is likely to undermine the objective of the international community in preserving international humanitarian law." He, like Kenya's attorney general, spoke of the similarity of current manifestations of international justice and the all-too-familiar history of colonial domination over African livelihoods.

Through these various remarks, we see attempts both to question what some saw as double standards and to rethink ICC legality through the prism of politics and histories. These comments reflect attempts to clarify international justice through alternate sensibilities. In that case, various AU spokespersons suggested that the future of accountability in Africa must include both legal

and political solutions. These arguments were made not just through the invocation of legal and political logic, absent affective armature; indeed, the affective appeal to histories of inequality or the need to protect survivors are central to the contours of international justice that continue to play out. Furthermore, as I discussed in chapter 3, while the anti-impunity movement fetishizes the victim as life to be protected, discussions about the immunity of sitting heads of state also evoke questions of biopolitics and bare life, especially in the context of state sovereignty.<sup>66</sup>

But there is certainly no consensus among African stakeholders, as shown by the opinion that “the AU was full of shit.” On the day in question, those affiliated with African civil society organizations chose to challenge the public assertions by African and non-African state officials by invoking the critical importance of the law in solving African problems. Several representatives of Kenyan organizations and governmental agencies delivered powerful public submissions. Njonjo Mue spoke on behalf of Kenyans for Peace with Truth and Justice, a coalition of Kenyan civil society organizations, and argued that immunity effectively means impunity, reminding everyone of the importance of international law for the weak—the victims of violence. George Morara, of the Kenyan Human Rights Commission, argued that survivors of the post-election violence in Kenya still support the ICC process, and cautioned that providing immunity to heads of state would contravene the very reason the court was created—to prosecute those who bear the greatest responsibility for the world’s gravest crimes. He also warned that providing sitting heads of state with immunity would create an incentive for them to hold onto power, threatening to entrench dictatorship and impunity.

George Kegoro of the International Commission of Jurists–Kenya warned against amendments to the Rome Statute and expressed concern that they could compromise the ICC and render it no longer worth having. Yet immediately following Kegoro’s appeal for the integrity of Article 27, Keriako Tobiko, Kenya’s director of public prosecutions, responded dismissively and with knowing authority. He reiterated Githu Muigai’s assertion that Kenya has, to date, cooperated with the ICC and will continue to do so. He stressed that the rhetoric that Kenya has disregarded international law and that it has failed to cooperate and take seriously its international obligations misrepresents the truth, disputing the claims of civil society representatives. Rather, he offered a plethora of examples of ongoing cooperation as well as evidence of Kenyan domestic efforts to put in place measures to prosecute those responsible for the postelection violence. Part of his message involved pointing to 1,200

domestic cases that have been taken to the Kenyan courts. But he ended by clarifying that complementarity should be a two-way street. Kenya has been cooperating with the ICC, but the Office of the Prosecutor has refused to cooperate with or furnish evidence to Kenyan authorities investigating postelection violence. Tobiko's defense of domestic adjudication was communicated through an emotional response to misrepresentations and inequalities in the international system.

Many individual states submitted comments that afternoon, drawing attention to the relationship between peace and justice, clarifying that the quest for justice cannot be allowed to jeopardize peace and security. There was a general consensus that something must be done to address the AU's concerns; however, many states also said that the integrity of the Rome Statute cannot be compromised, that the independence of the ICC as a judicial institution is paramount, and that Article 27 of the Rome Statute is an untouchable cornerstone of the ICC system. Some state agents reiterated that there is a need to find practical solutions to the problems facing the ICC, while others suggested that these solutions already exist within the law, particularly the Rome Statute and the rules of procedure and evidence. What this debate highlighted was the extent to which varying architects of the AU position were seen as contravening founding Rome Statute principles. But because Africans have become the sole subjects of the ICC, contravention is precisely what the AU intended. International lawmaking, public speeches, protest declarations, and public campaigns, as this book has detailed, provide the context within which shadows of the past manifest to articulate visions and aspirations for the future. They reflect the ordering principles of the past and the grammar of the present, and they clarify the terms on which particular forms of knowledge are seen. Invocations of past solidarity movements help to make legible various social imaginaries, as chapter 5 argued. The Africa that is imagined is indelibly shaped by a history fraught with struggle against an outside colonizer or unjust ideology. It is an Africa that is in crisis—the impunity of leadership, the failure to sustain institutions that can serve the poor. And through affects embodied and emotionalized through political responses, speeches, and social action, we see that the contemporary present cannot be separated from it. It follows that emotional responses to those political developments constitute alliances. They shape constituencies through the feeling rules that emerge in passionate utterances.

After this meeting, stakeholders aligned with Pan-Africanist positions emphasizing structural inequality continued to protest, while those who asserted the need for standards for anti-impunity insisted on the indefensibility of im-

munity. Such dueling narratives not only set the stage for regulating particular principles about the reach of the rule of law, but also were propelled through invocations of sympathy for survivors or protest against structural injustice. Critical events like these have led to requests for UNSC deferrals of cases under Article 16 and—because of their lack of progress—proposals for particular amendments to the Rome Statute.

### **Amendments as an Affective Practice**

Many arguments have been made regarding the systemic imbalance in international decision-making processes. Their inherent politics result in the unreliable application of the rule of law. P. S. Rao, a distinguished international lawyer from India, argues, “The decisions of the Security Council by design are manifestly political decisions. Accordingly, there is no guarantee that the decisions of the Security Council will reflect either the requirements of law or justice of the world at large. They are essentially reflective of the self-interests of its permanent members, as perceived by their governments, which may or may not coincide with the interests of the parties concerned. Decisions of the Security Council are often questioned for their selectivity and double standards.”<sup>67</sup>

Indeed, questions about which states are under the ICC’s jurisdiction and the processes of selectivity, as well as the role of the UNSC and its referral and deferral mechanism under Article 16 of the Rome Statute, have raised issues about the fairness of the international system. Under the United Nations Charter, the Security Council’s primary responsibility is to uphold international security and peace.<sup>68</sup> Composed of fifteen members, ten rotating and five permanent (the United Kingdom, China, France, the Russian Federation, and the United States), the Security Council is responsible for determining the existence of threats to peace and taking the appropriate action, be it diplomatic or military, to control the conflict.<sup>69</sup> In addition, under Article 24 of the UN Charter, the Security Council is responsible for representing all members of the United Nations to “ensure prompt and effective action,” while adhering to the purposes and principles of the UN and its charter.<sup>70</sup> Because of their key role in the establishment of the United Nations, the five permanent states on the UNSC can both vote and veto decisions.<sup>71</sup> They have been granted special overseeing, decision-making status on peace and security in global affairs. Because no African countries currently sit on the UNSC, African state representatives see themselves as lacking fair and equal representation in one of the most powerful international bodies.

On the other hand, the UN General Assembly has long been identified as the main “deliberative, policymaking and representative organ of the UN.” A total of 193 members make up the General Assembly, each of whom is allowed one vote on “designated important issues—such as recommendations on peace and security, the election of Security Council and Economic and Social Council members, and budgetary questions.”<sup>72</sup> It is essentially the assemblage of member states that “discusses and deliberates on policies, situations, and other international matters,” and all decisions related to important issues, such as peace and security, admission of new members, and budgetary matters require a two-thirds majority.<sup>73</sup> Decisions on other questions are decided by a general majority.<sup>74</sup>

Considering the systematic disadvantage that African nations face in UNSC decisions, being legally bound by a UNSC decision to a statute (in this case, the Rome Statute) that a country has not even ratified is not seen as acceptable.<sup>75</sup> As outlined, the case of President al-Bashir in Sudan has been cited as illustrating this seeming inequality, resulting in calls for the UNSC to also defer, under Article 16 of the Rome Statute, the ICC’s prosecutions against not just al-Bashir but Kenyatta and Ruto as well. When that was unsuccessful, South Africa, in a meeting on November 3–6, 2009, in Addis Ababa, decided to propose an amendment to the Rome Statute with respect to Article 16 to address situations where the UNSC was unable to decide on a deferral request. This is the original wording of Article 16:

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of twelve months after the Security Council, in a resolution adopted under the Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

South African officials proposed adding the following two revisions:

2. A State with jurisdiction over a situation before the Court may request the UN Security Council to defer the matter before the Court as provided for in (1) above.
3. Where the UN Security Council fails to decide on the request by the state concerned within six (6) months of receipt of the request, the requesting Party may request the UN General Assembly to assume the Security Council’s responsibility under paragraph 1 consistent with Resolution 377 (v) of the UN General Assembly.

Key to this proposed amendment is a larger set of issues related to the desire to address the power disparities of the UNSC through the call for reform. The power vested in the Security Council is controversial, as it allows countries to refer cases to the prosecutor concerning countries that have not submitted to the jurisdiction of the Rome Statute themselves. And coupled with the UNSC's referral for President Omar al-Bashir, a sitting head of state, in 2005 under Resolution 1593, South Africa, joined by a predominant number of African states that had ratified the treaty, felt it important to move to an amendment that asked the ASP to take action if the UNSC did not respond to a deferral request within six months of being notified of it. The request not only asks the ICC to reconfigure how the referral system works but also calls for the UN system to address a structural inequality problem. The unwillingness, thus failure, to address these claims has led to the creation of an African Working Group on ICC Amendments to discuss further reforms, which I attended over successive ASP meetings and informal gatherings.

During the various meetings of the Working Group on Amendments in 2014, Kenyan representatives introduced a proposal to amend Article 27 of the Rome Statute. The original article states:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, 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, nor shall it, in and of itself, constitute a ground for reduction of Sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

The first two paragraphs in Article 27 fulfill different functions.<sup>76</sup> 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 1 of Article 27 provides that official capacity of an individual will not be a factor in establishing criminal responsibility, nor will it be considered a mitigating factor in sentencing.<sup>77</sup> It denies a defense of official capacity to several categories of officials: head of state, member of government or parlia-

ment, elected representatives, and government officials. Article 27(1) concerns immunities *rationae materiae*, or functional immunities that attach to official acts. According to Gaeta, Article 27(1) “excludes the availability both of the international law doctrine of functional immunity for official acts and of national legislation sheltering State officials with immunity for official acts in the case of crimes within the jurisdiction of the ICC.”<sup>78</sup>

Functional immunities extend from the doctrine of state immunity, *par in parem non habet imperium* or “equal has no power over an equal,” under which no state can exercise jurisdiction over another. Functional immunities serve two purposes: (1) to prevent interference with state affairs through lawsuits, and (2) to protect state agents from individual liability for official state acts both at home and abroad.<sup>79</sup> Since this type of immunity attaches to the official act, serving state officials and former officials may rely on it with regard to official acts they performed while in office.<sup>80</sup> Such immunity does not, however, exist with regard to international crimes (e.g., genocide, war crimes, and crimes against humanity) on the grounds that such acts cannot be considered performance of official acts.

The ICJ held in its 1951 advisory opinion regarding the Genocide Convention that the principles underlying the convention, including the principle of irrelevance of official capacity, were a matter of state practice and CIL.<sup>81</sup> This view has subsequently been upheld in various domestic and international courts. In 1962, the Supreme Court of Israel held in *Eichmann v. Attorney-General of Israel* that Article 7 of the Nuremberg Charter and all of the Nuremberg principles “have formed part of customary international law since time immemorial.”<sup>82</sup> In 1998, the English House of Lords ruled on whether Augusto Pinochet could be extradited to Spain for acts of torture perpetrated while he was the head of state of Chile.<sup>83</sup> By a three-to-two majority, the House of Lords held that functional immunity cannot coexist with international crimes.<sup>84</sup> Wirth notes that this amounts to state practice in the UK, and also in Spain, Belgium, and France, which all requested Pinochet’s extradition.<sup>85</sup>

Paragraph 2 of Article 27 concerns immunities in CIL, and that protect heads of state and other senior officials by virtue of their particular office or status. Article 27(2) concerns immunities *rationae personae*, or personal 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.<sup>86</sup> These immunities are conferred on those with primary



responsibility for the conduct of the international relations of a state, and they are possessed only as long as the official is in office.<sup>87</sup> During that time, state officials are immune from prosecution for both official acts and 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.<sup>88</sup> 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.<sup>89</sup> Ultimately, Paragraph 2 amounts to a renunciation, by state parties to the Rome Statute, of the immunity of their own head of state to which they are entitled by virtue of *CIL* but have agreed to waive. 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 of Government, a member of a Government of parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this statute.”<sup>90</sup>

Kenya’s proposed amendment suggested adding a third paragraph as follows: “Notwithstanding paragraph 1 and 2 above, serving Heads of State, their deputies and anybody acting or is entitled to act as such may be exempt from prosecution during their current term of office. Such an exemption may be renewed by the Court under the same conditions.”<sup>91</sup> They later proposed to the ICC committee on amendments: “Notwithstanding paragraph 1 and 2 above, serving Heads of State, their deputies and anybody acting or [who] is entitled to act as such may be exempt from prosecution during their current term of office. Such an exemption may be renewed by the Court under the same conditions.”<sup>92</sup>

With regard to the proposed amendment, the Working Group Report, led by a Kenyan representative, stated, “The objective of [our] proposal was not to grant immunity to Heads of State, their deputies and persons acting or entitled to act as such, but only to ‘pause’ prosecutions during their term of office. It was therefore to be understood as a ‘comma’ rather than a ‘full stop.’” Several delegations expressed their appreciation for this clarification but had additional questions and comments with regard to the text of the proposal, notably concerning the meaning of the expressions “current term of office” and “anybody acting or [who] is entitled to act as [a head of state or their deputy].” Moreover, some delegations requested further clarification regarding the term “may” as it was not clear to them who would be entitled to make the

decision and on the basis of what criteria. Several delegations recalled that Article 27 was the cornerstone of the Rome Statute and that they were not willing to modify it. There was agreement that discussions need to continue after the thirteenth session of the assembly.<sup>93</sup>

Accordingly, AU stakeholders insisted that in real-world situations, the temporary granting of immunity to sitting heads of state is not antithetical to human rights, as many have argued.<sup>94</sup> The reality is that since no statute of limitations exists for war crimes and crimes against humanity, the eventual prosecution of those guilty of particular violations covered under the jurisdiction of the African Court is a reasonable prospect. They viewed the judicial process as part of a larger political process that needed to also involve peace negotiations and legal accountability sequencing as a strategy, as we saw in chapter 5, that could potentially protect more Africans from repression and violence than international prosecution could ever hope to achieve. As a result, a number of public declarations have shaped particular claims of the significance of African heads of state in some of the most volatile countries in the world, and that to delay investigations against them while they are in office would contribute to the necessary protection of people in the relevant region at risk. But articulating immunity as a pro-justice act involves employing particular sentiments of legitimate state entitlements, protectionism, and obligations of responsibility that are particular to the postcolonial state and its people.

Declarations that highlight these sentiments not only produce legally significant determinations, but, by signaling the aspirational direction of Pan-Africanist institutional practices, they establish certain emotional climates through which particular collective feelings are loosely established. Their protests reflect the recognition of a systemic imbalance in the international system that continues to drive international lawmaking in the contemporary period. As we will see, the assumption was that if the amendment strategy failed, an African Court that respects immunity for heads of state would be implemented, and discussions of treaty withdrawal from the ICC would follow. However, structural compatibility issues related to the ICC and the African Court remain at the time of this writing. For even though the ICC and the International Criminal Section of the African Court of Justice and Human Rights (ACJHR) will exercise overlapping subject-matter jurisdiction, the Malabo Protocol, which created the African Court, does not recognize the Rome Statute.<sup>95</sup> Due to the political climate prevailing during the making of the Malabo Protocol, substantive matters of cooperation with the ICC were

not considered. Instead, the African Court only considers cooperation and relationships of complementarity between the African Court and African national courts on the one hand, and regional bodies, known as Regional Economic Communities, on the other hand.<sup>96</sup> Similarly, at the time of its drafting and well after its coming into force, the ICC did not recognize regional judicial bodies such as the African Court. It only gives primacy to national states, and sees itself in complementary relationships with those states. Thus, the frameworks of the statutes that created both courts do not allow for flexible cooperation. Because survivors of violence deserve commitments to a global system that is effective and productive, the stakes are higher than ever before. The lack of a framework for cooperation between the two courts raises significant challenges for those involved. The Rome Statute's obligations require state parties to "ensure that there are procedures available under their national law for all of the forms of cooperation."<sup>97</sup> Accordingly, all state parties are required to carry out arrest warrants issued by the ICC should the suspect be in their territory, for example. Yet, as I have shown, the ICC has faced challenges with state parties refusing to execute these obligations. It is no surprise, then, that this has led to protests against the consequences of ICC strategies in the form of amendments, noncooperation, and even withdrawal.

The expansion of the criminal jurisdiction of the African Court that led to the crafting of *46A bis* is a further manifestation of the emotional regimes I have been examining throughout this book. As we will see, the claims of inequality and perceptions of selectivity that have prompted the proposed and controversial amendments to Article 27 of the Rome Statute, as well as the ICC withdrawal actions, are central to the relatively late introduction of an immunity provision to the Malabo Protocol, and the justice sentiments that accompany them. This reveals how affects contribute to social alignments that influence perceptions of justice, and how those perceptions shape the way that justice is achieved.

### **Innovating Immunity and Reshaping an African Regional Custom as a Form of Refusal**

Article *46A bis* of the Malabo Protocol is key to addressing the failure to accept the proposed amendments to the articles on extradition and irrelevance of official capacity in the Rome Statute, as described above, because it explicitly ensures immunity for heads of state. As it notes, "The Court shall uphold the immunities provided for under international law. In particular, no crimi-

nal proceedings shall be initiated or continued against a Head of State or Government during his/her term of office.” Thus, the ratification of the Malabo Protocol by fifteen states to bring it into force and the subsequent operationalization of the court would, as chapter 5 began detailing, open an alternative avenue for dispensing justice. The strategy involves identifying regional champions—such as Uganda, Kenya, and Ghana—seen as supportive of the African Court to drive the ratification enlistment of African states.<sup>98</sup> This is not simply a legal process.

This process involves securing strategic commitments and a belief in AU policy positions through rhetorical performances, ideological commitments, and strategic moves that align policy positions with legal actions as reattributive acts. For example, at a range of meetings held at different times over the two-year period when I observed various treaty-making negotiations, I documented various African stakeholders calling on “fellow Pan-Africanists who love freedom to take justice in their own hands.” Some passionately urged states to recognize that colonialism is long over. As one said, “We need to act against European courts that continue to target Africans and their leaders.” This linking of the possibility of justice to regional consolidation and treaty making engages a regional domain of African justice that also involves the invocation of vindicating sentiments through which justice is reattributed as spatialized and expressed as a form of Pan-African freedom.

The existence of such dynamics requires that we not dismiss such practices because of implied disappointments in the workings of the postcolonial African state. Rather, it demands further analysis of the way that refusals and redesignations are taking place in the contemporary period and of the crisis of the postcolonial state. In the case of the AU-supported immunity provision, protests around not surrendering African heads of state highlight the role of various political aspirations that are fundamentally tied to structures of inequality and propelled by particular feeling rules that align the brotherhood of the African statesman with histories of European imperial subjugation. For some of the architects of the AU-supported immunity provision, the Malabo Protocol’s Article 46A *bis* is not just about the will for impunity. It is an expression of the goal to establish a contrary regional custom around international treaty norms that have rendered immunity for heads of state irrelevant in some cases (for Africans) yet relevant in others (for Western and various Asian powers). Unlike the current trends in international treaty jurisprudence to make immunity obsolete, for some African stakeholders, like those discussed earlier in this chapter, CIL has long provided personal immu-

nities for heads of state, and African leaders responding to structural injustice insist that there is no reason why the current developments with the African Court Protocol should not be decided according to existing state practice in CIL. This was the South Africa's position when they refused to arrest President al-Bashir of Sudan.

As representatives of South Africa argued in one of the closed meetings that I attended, "We will not promote regime change by arresting and extraditing another sitting head of state." The reality, they insist, is that CIL provides immunity for heads of state and high-ranking senior state officials, and separate provisions have also been upheld that address treaties for the immunity of diplomatic agents, consular officials, representatives of states to international organizations, and state officials abroad on special missions. Similarly, the AU position is that regional customs are norms that develop from practices of states in particular regions of the world. In addition to the role of customary law in the application of personal immunity as a form of international state cooperation, there is a key threshold that for a regional custom to be established it must be continuously and uniformly executed.

The lead authority, the *Asylum Case* decided by the ICJ in 1950, highlights the issue, and many of those engaged in getting ICC or ICJ judges to consider the relevance of this claim point to that landmark case. With impassioned logic, various AU negotiators insisted that in the case between Peru and Colombia, the ICJ accepted that regional customs existed in international law, even if it rejected their relevance in that particular instance. The court stipulated that it relied on an alleged regional or local custom peculiar to Latin American states. Following the court's argument, they concluded that the state that alleges the existence of a custom must prove clearly that such a custom exists and that other states in that region, against which the contested custom is asserted, accept that custom.<sup>99</sup> They also insisted that under Article 98 of the Rome Statute, "The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity." Accordingly, states have a sovereign right to determine how to determine how to balance their state responsibility to treaty obligations while also considering their sovereign rights and protections.<sup>100</sup> As noted in the opening of the chapter, the AU Office of Legal Counsel saw their position regarding the amendment of Article 27 as justified and couched it in a legal form—that

of their recognition of Africa's development of a regional norm on immunity. Through resolute expressions and impassioned declarations offstage, a number of people supportive of the AU's position insisted to many of us that the AU's legal argument rests on the need for different regional customs, thus practices. They are seeking to develop a regional custom that carves out a limited exception from prosecution of a leader while holding office. This is a critical manifestation of African geographies of justice. It is a refusal to accept the emergence of a particular international legal norm and instead to articulate a regionally differentiated practice. It is what I have called reattribution.

Interestingly, this attempt to reshape the basis for African state practice runs counter to early positions held by many African states and Pan-Africanist national liberation movements of the 1940s–1970s, which refused to use international law for strategic purposes. Rather, African leaders of newly decolonized states in the early postcolonial period argued—often with great success—that general rules of CIL (as opposed to regional rules) were only relevant to Europe, or were Euro-American constructs typically generated behind their backs and foisted upon them without consideration of whether non-European actors had actually given their consent (expressly or tacitly). This argument was exceptionally powerful and far-reaching in international investment law, international human rights law, and (before long) international environmental law. But what is interesting here is that in the contemporary period, African stakeholders are claiming the tools of CIL to facilitate the establishment of new regional customs. Through the communication of these legal positions, which are often articulated with feelings of anger, the notion of differentiated African practices is being harnessed to institutionalize new contours of lawmaking using Pan-Africanist refusals.

However, although AU heads of state participated in the universal declaration of noncooperation with the extradition of President al-Bashir, behind closed doors there is actually no regional consensus on the rule of nonextradition and immunity. If the private debate is an indication of this, we could say that African regional alignments share the affective commitments to equality of states, but they are not aligned with how that should play out. The ethnographic interviews that we conducted in Nigeria, Kenya, and Ethiopia demonstrated this point. From Francophone to Anglophone to multilingual and multiethnic Africans, from the desert to the oil-rich regions, and from the predominantly Christian to the predominantly Muslim or animist, unified decision making has not been easy to achieve. African differences are vast, as are their varied positions on the nonsurrender of heads of state. Furthermore,

not all African stakeholders agree with the expansion of the jurisdiction of the African Court and the incorporation of Article 46A *bis*. Nor do they all agree with the call for AU noncooperation with the ICC.

One of the key disputes over the AU's immunity provision concerns whether the one that deals with personal immunity is in violation of CIL—one of two types of immunity in CIL.<sup>101</sup> This immunity attaches to the office or status of a very limited group of senior state officials and is conferred only as long as the official remains in office. The second type, functional immunity, attaches to official acts carried out on behalf of the state. It extends to a broader group of officials and covers them while in office and after they leave office. However, during heated debates between different stakeholders—members of African civil society, various international NGOs, academics, and state representatives—many have raised questions about whether this form of functional immunity covers those acts performed in an official capacity.

The legal questions have been innovative and contested, as have been public responses, through heated debates, that if African state leaders acted responsibly and protected their citizens, there would be no need for claims to immunity. In keeping with this trend in favor of the irrelevance of national capacity, over the past twenty years we have witnessed situations in which national courts have chosen not to apply functional immunity to officials accused of an international crime. Examples include cases against Qaddafi, former Chilean dictator Augusto Pinochet, and Charles Taylor.<sup>102</sup>

In May 2004, the Appeals Chamber of the Special Court of Sierra Leone rejected Charles Taylor's preliminary motion in which he claimed immunity. In doing so, the court emphasized its "truly international" legal status, despite the absence of chapter 7 powers, and found that it was an "international criminal court." It then went on to hold that because of its nature as an international criminal court, not a national court, the paragraph in its statute that denies immunity to officials is "not in conflict with any peremptory norm of general international law and its provisions must be given effect by this Court." The judges concluded that the "official position of the Applicant as an incumbent Head of State at the time when the criminal proceedings were initiated against him is not a bar to his prosecution by this Court."<sup>103</sup> The importance of the distinction between national and international courts for the immunity issue was derived from the ICJ's *Arrest Warrant* case (although the Special Court for Sierra Leone came to an opposite finding). By pronouncing authoritatively on the *Arrest Warrant* case, the ICJ determined whether Congo's minister of foreign affairs enjoyed immunity following Belgium's issuance

of an international arrest warrant for crimes committed in Congo.<sup>104</sup> The ICJ ultimately rejected Belgium's argument that there was an exception to immunity for incumbent officials in cases of alleged international crimes. In terms of legal rhetoric, the ICJ could not deduce such a rule from state practice (case law and national legislation), nor could it derive a position from the relevant rules contained in the legal instruments creating international tribunals; according to the court, the latter rules only applied to the specific international tribunals and could not lead to the conclusion that similar rules applied in prosecutions in national courts.

Various AU legal advisors have argued that it is important to see that immunity, though discussed through law, has its greatest relevance in its ability to speak to African realities. Some suggest that because tribal sentiment can lead to electoral violence, not giving heads of state immunity could have a critical impact on how and when one proceeds with judicial action in cases of mass atrocity violence where peace settlements are underway. As one southern African leader told me during my fieldwork, "Weak African states challenged by civil war or political strife need a framework throughout Africa to address how to deal with violence and leaders." And as another high-ranking AU interlocutor explained to a colleague and me during a research meeting:

We need to be innovative about the immunities issue. The debate is complex, but we need to be much more creative about violence in Africa. What this means is that we need to be active agents in the making of international law. The ICC emphasis has been on African leaders. Customary international law focuses on state practices in order to articulate norms. These opinions are binding. The way we deal with personal jurisdiction needs to be more creative. We need to think about reshaping international law in ways that look at the issues amongst African leaders. . . .

The innovation is that as a region, African states can play a critical role in generating new customs. African states can play a central role in the development of international norms and the creation of complex lawmaking relevant for African changing circumstances. . . . If we consider Africa's role in reshaping international law in ways that look at issues amongst leaders in relation to their ability to generate new customs that are relevant to Africa's uniquely different circumstances, then our approach to the Malabo Protocol, such as provisions like 46A *bis*, for example, requires that we think about personal immunity not in relation to [the] venue/national and international courts division but in relation to nature of the crime.



Why should venue be what is important in African regional contexts? Is it the venue that matters or is it the actual crime—the nature of international harm?

The insistence that the actual crime, not the venue, should be the basis for determining immunity is a point that international law scholar Sarah Nouwen has argued: international law should be the same, regardless of the kind of tribunal in which it is applied.<sup>105</sup> While functional immunity is clearly incompatible with the concept of individual responsibility for international crimes, and therefore of no avail to former officials charged with crimes against humanity and war crimes, it has been harder to prove the emergence of such a rule in *CIL* with respect to procedural immunity of serving officials. This is because personal immunity is founded on a different principle: granting immunity to certain officials because of the office they hold.<sup>106</sup> She concluded that despite this disregard for the type of crime, there have been several developments that the Special Court could have used as a foundation for finding such a rule, which could have denied former president Charles Taylor procedural immunity while at the same time advancing the emergence of the customary rule—immunity based on the type and severity of crimes.<sup>107</sup> The AU's former legal counsel has adopted this intellectual reasoning as a possible direction for its future lawmaking and speaks to the emotional commitments to legal innovation that are central to new possibilities in international relations.

As one of my AU interlocutors said, “Africa is tired of the dichotomy between national and international crimes,” mimicking that emotional exhaustion in his delivery. With the Malabo Protocol, Africans are saying that they are committed to the subject matter instead of the venue. The argument is that if immunity does not apply in national courts for some offenses, then it should not apply at all in international courts for those particular offenses. Instead, the AU legal counsel's argument, like Sarah Nouwen's, considers the nature of the crime a better route to pursue. This reattribution of legality through other modalities such as peace-justice sequencing and personal immunity for heads of state and high-ranking leaders highlights new possibilities for managing violence through the desire to apply the historical contexts that are relevant to Africa's realities. The AU's work to build alternate models for managing African violence on its terms has been relevant to the AU legal office's logic maintaining that peaceful international relations require a more temporary approach to peace through the institutionalization of personal immunity while a head of state is in office. These measures are seen by AU ad-

herents as reflecting “African solutions to African problems” and they speak to the socialization of particular cultural sensibilities and practices that are transforming the way that states address violence on the African landscape. In other words, the response to the immunity debate is not just about legal doctrine and actionable domains of law. The AU’s engagement can be seen in relation to a particular reading of Africa’s role in setting new international norms and, in so doing, attending to the forms of political inequality that are seen as deeply pervasive, thereby leading to regimes of inequality.

However, as I indicated above, not all AU actors agree with this perspective, and the incorporation of Article 46A *bis* has received extensive criticism from civil society groups and activists in Africa and around the globe, who similarly argue that such a provision would be a setback in the fight against impunity for international human rights abuses.<sup>108</sup> Some argue that the draft protocol is simply advancing the ideals of the ICC to ensure justice for international crimes peculiar to Africa.<sup>109</sup> Others insist that the draft protocol for the African Court includes a laundry list of crimes and is a project that is not feasible and cannot be effectively implemented.<sup>110</sup> Some scholars of international law, such as du Plessis, have insisted that the AU responses are simply examples of African fraternity; in other words, they represent Africa’s elite protecting their own in the midst of mass violence and lack of accountability.<sup>111</sup> And yet others argue that these concerns are purely strategic and serve to derail particular ICC indictments of African leaders.<sup>112</sup>

In May 2014, more than thirty civil society and international NGOs appealed to a meeting of African ministers of justice and attorneys general not to include Article 46A *bis* in its draft of the Malabo Protocol. Organizations including Human Rights Watch, the International Bar Association, the International Federation for Human Rights, Amnesty International, the South African Litigation Centre, the New York City Bar Association, and many others have released statements sharply criticizing the provision as retrogressive and inconsistent with ensuring that perpetrators are held to account.<sup>113</sup> Additional criticism has stemmed from the argument that the protocol contradicts Article 4(h) of the AU’s Constitutive Act, which 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.”<sup>114</sup>

Those engaged in such criticism argue that if Article 4(h) is strictly applied, the AU should be able to intervene despite declarations of immunity. Some have pointed to additional contradictions with specific articles, including Ar-

ticle 4(o), which obliges member states to respect the sanctity of human life and condemn and reject impunity. For example, they have suggested that the inconsistencies will make it difficult for the AU to be seen as procuring justice in its regional court—as shown through the victim/perpetrator construction in earlier chapters.<sup>115</sup> Some have argued that where immunity attaches to an officeholder, it can create an incentive for that person to remain in office to avoid prosecution. For Idayat Hassan, “Based on the antecedents and attitudes of some African leaders, we can expect immunity for heads of state and their officials to create an atmosphere of impunity for perpetrators of human right violations, thereby encouraging perpetrators to hold onto power for a long time to enjoy the immunity.”<sup>116</sup>

This disagreement with immunity for African heads of state may indeed encourage state leaders to stay in office. However, it is important that we see the Malabo Protocol’s heads of state immunity as what Ademola Abass calls a “protest treaty.”<sup>117</sup> In other words, 46A *bis* is not an objective legal doctrine but an emotionally relevant statement about inequality in global affairs. In this regard, Chidi Odinkalu distinguished immunity in relation to *de jure* and *de facto* immunity, in which states that have not submitted to the legal constraints of the Rome Treaty have *de facto* immunity—that is, immunity in fact. And those that have erected the Malabo Protocol have *de jure* immunity—that is, immunity in law.<sup>118</sup> Relatedly, and as this book has worked to show, law, formalized through treaties, is a form of expression that has force in particular contexts. But legal norms are not the only way to understand how particular practices are deemed legitimate. In reality, law is negotiated and disputed using legal reasoning in ways that structure what its products become. When we recognize how international law works in the absence of a statecraft and/or police force to compel action, it is important to understand the underlying emotional regimes that shape the nature of affective justice. Expressions of justice through conceptual or narrative reattributions or political protests are critical communicative forms by which law gains its power. To miss this is to misrecognize the place of affects in the life of the law.

As chapter 5 illustrated in relation to the making of the African Court, the debate over immunity and African heads of state is not simply a disagreement with the principle that no one should be beyond the law. It is fundamentally related to the problem of power and history and the emotional regimes that structure the acceptability of particular responses. In the case of the ICC arrest warrants for African leaders, this is seen as happening alongside the violence of economic plunder and structural inequalities that operate in Africa with-

out judicial hindrance. The existence of these perceptions of inequality make it all the more important to explore the making of new international regional mechanisms, not only in relation to their doctrinal formations but also in relation to the sociocultural sensibilities that shape and sustain them.

### **Treaty Withdrawal as Affective Alignments of Protest**

To understand the events that have led to treaty withdrawal as an emotionally affective practice requires that we detail the way that the above recent historical developments led to the contemporary forms of political protest that unfolded following the January 2016 summit.<sup>119</sup> At that time, the lack of progress with the amendments to the Rome Statute led various key African state actors to speak on behalf of states like Kenya, Burundi, Namibia, and South Africa requesting a withdrawal strategy. The AU tasked the Open-Ended Committee of African Ministers on the ICC, formed in 2015 by representatives from various regions of Africa, with the urgent development of a comprehensive strategy, including a collective withdrawal from the ICC. The committee was charged with communicating their strategy to AU member states that are also parties to the Rome Statute. They were also expected to submit their strategy to an extraordinary session of the executive council mandated to make decisions on the next steps.<sup>120</sup>

Once the committee was established, they considered proposals by the AU's Office of Legal Counsel as to what the withdrawal strategy might look like. The committee proposed multiple approaches, including the option of a collective withdrawal from the Rome Statute if particular reforms did not take place. In proposing the various approaches, the Open-Ended Committee outlined: (1) the need for continental and country-level ownership of international criminal justice through strengthening national judicial systems and working toward the ratification of the African Court; (2) the importance of engaging with the UNSC and clearly communicating that no referrals of particular situations on the African continent should be made without deference to AU Assembly; (3) the need for a robust strategy to enhance the ratification of the Malabo Protocol expanding the jurisdiction of the African Court of Justice and Human and Peoples' Rights to include international crimes; and (4) because of the slow pace of possible ICC reforms, the need for timelines for withdrawals. The ministerial committee insisted that the AUC should develop the comprehensive strategy as soon as possible. They emphasized the importance of soliciting input from various delegations and that a draft copy should

be submitted to the ambassadors for consideration at the June 2016 meeting. In the end, two successive meetings were scheduled with the UNSC, and both of the formal meetings were canceled. Instead, representatives met informally and discussed the possibility of articulating new strategies through which to produce more equitable results for African states.

Key to the AU strategy laid out by the Open-Ended Committee meetings was the delivery of justice in a fair and equitable manner that allows for the regionalization of international criminal law on the continent. Without that, state withdrawals were understood as being the only viable mode of rectifying the way that law was encapsulating the terms for justice. They spoke of the need to create viable political solutions to structural inequalities and work toward building African judicial institutions within Africa. Protests in the form of prioritizing the peace and security of the countries that these leaders guard, resisting extraditions, and presenting new legal and political alternatives are also critical to the concept of reattribution at the core of this book.

In the domain of international lawmaking negotiations, a treaty is an agreement entered into by actors (such as international organizations and sovereign states) who give consent to assume obligations among themselves. Because the creation of a treaty involves painstaking negotiation and reflects a compromise among states regarding mutual obligations, the assumption is that the ratification of such treaties by states represents their acceptance of being bound by not just conditions of the treaties but their restrictions on termination or withdrawal. Thus, state consent is seen as an overarching principle governing the design and operation of all treaty exit clauses.<sup>121</sup> In guiding these rules, the Vienna Convention on the Law of Treaties sets out the conditions under which state parties can unilaterally withdraw from treaties and under which treaty obligations can be suspended and terminated.

The Rome Treaty for the ICC provides for withdrawal. The withdrawal question raised by African member states falls on Article 127, which is open ended in its execution: “A State Party may, by written notification addressed to the Secretary General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date”—as seen with the Burundi withdrawal.<sup>122</sup> Central to the discussion of treaty withdrawal from the ICC by African states is the creation of a new notion of collective withdrawal as a way to demarcate their dissatisfaction with perceived inequality through selectivity.

Withdrawal from a treaty, according to Helfer, “can give a denouncing state additional voice, either by increasing its leverage to reshape the treaty to more

accurately reflect its interests or those of its domestic constituencies, or by establishing a rival legal norm or institution together with other like-minded states.<sup>123</sup> We saw such developments over the course of the twentieth century when the League of Nations began to collapse, precisely when a large number of states—from Costa Rica and Brazil (in 1925 and 1926, respectively) to Japan and Germany (both in 1933) and then a host of other states in the late 1930s—withdrawed from the organization. Such withdrawals were not necessarily coordinated, but they were also not coincidental or mutually indifferent. However, as a formal category of action, the notion of collective withdrawal has no formalized precedent. Rather, notions of “denunciation and withdrawal are . . . fundamentally unilateral acts.”<sup>124</sup> They are not understood as collective acts, though when done within a region by successive states, in political terms they are actually seen as indicators of regional dissatisfaction. In this regard, while states have banded together to propose different legal alternatives to the dominant regimes, they have done so unilaterally by invoking the notice procedures established in the various treaties they were denouncing.

Collective withdrawal “by a smaller number of treaty parties may indicate an attempt to shift from an old equilibrium that benefits some states and disadvantages others to a new equilibrium with different distributional consequences.”<sup>125</sup> States can sometimes band together to challenge international legal rules they perceive as unfair and objugate international institutions that enforce those rules. The collectiveness of the action has the potential to “radically reconfigure existing forms of international cooperation.”<sup>126</sup> This development raises questions about the norms that should shape international law and remains one of the most difficult of our time, thus the profound potential of such issues to create fissures and produce new alignments. While there are guidelines that establish treaty rules, customary rules are not static and provide an opening for social change. In this regard, once a general rule of *CIL* is established, continued *opinio juris* and state practice are necessary to preserve it.<sup>127</sup> Existing jurisprudence raises the uneasy question of whether state conduct that runs contrary to an existing rule, or reliance by states on a new principle, signifies the emergence of a new international norm, or whether it constitutes a breach of an existing rule—a strategy that describes one of the AU’s legal directions.<sup>128</sup>

Members of the International Law Association, which is seen as being authoritative in international legal determinations, acknowledges that contrary state practice to which other states acquiesce can lead to changes in *CIL*.<sup>129</sup> As a result, it is possible that withdrawals of AU states and attempts to end ICC

treaty obligations that do not follow conventional procedures set out in the Rome Statute, the Vienna Convention, and the broader customary law framework for ending treaty obligations could actually lead to a shift in those rules. This highlights the potential that such affective responses can have in changing norms. However, the prevailing thought in international law circles is that until conduct such as collective withdrawals and their associated acquiescence become sufficiently widespread to form a new rule, it will likely continue to be seen as a violation of existing international law or will need to be procured through individual state withdrawals.<sup>130</sup> And that is what has happened. State withdrawals from the Rome Statute for the ICC were part of a three-step strategy advanced by the African Union's ministerial group, established to report back to AU constituencies on Africa-ICC relations. The steps involved (1) reform of the Rome Statute, (2) reform of the UNSC referral system, and (3) ratification of both the Protocol on the Statute of the ACJHR and the Protocol on the Amendments on the Statute of the ACJHR by AU member states (the Malabo Protocol). They reflect AU attempts to promote equality in the international system and create new regional customs. Alongside these formations, concurrent withdrawals are also embodiments of political protest.

Such formations emerged from the AU's interest in being a shaper of international law rather than being shaped by it. In continuing this work, an important AU ministerial meeting in 2016 was concerned with African state party ICC withdrawals that resulted in a lack of consensus on the collective withdrawal of African states. Instead, individual states agreed to pursue withdrawal within a condensed time period, and one by one they began to submit their declarations of withdrawal to the UN secretary-general. First it was Burundi, then South Africa, then Gambia. In response, states such as Botswana and Senegal began to speak out against the withdrawal efforts. These acts of dissent were meant to ensure explicit recognition of the absence of consensus among African states. For it is well known among international law actors that "a small group of nations within a given region can threaten to object vocally to, and thereby derail, [its] attempts . . . to deviate from existing CIL rules."<sup>131</sup> What remains unclear is what fraction of states "need to explicitly object in order to prevent a new rule of CIL from forming," but ongoing legal commentaries about this matter suggest that "the fraction of nations that needs to object to bar the formation of a new CIL rule is significantly less than a majority, but greater than a handful."<sup>132</sup> These ambiguities have shaped the backdrop by which some AU states have sought to articulate their withdrawal strategy in relation to the possible and eventual formation of a new regional custom.

This chapter has considered the African Court's extension of its criminal jurisdiction and related forms of judicial action and protest in relation to the emotional and cultural sensibilities that sustain networks, shape practices, and transform attitudes around Africa's future. As we saw, AU representatives have responded to legal encapsulation through strategies that support African visions for a fair international system and new regional customs that, while contradictory and messy, shape alliances in critical ways. What we see is that bringing international law into African landscapes is about codifying various practices shaped in Europe and making them relevant to African lifeworlds. This importation of codified jurisprudence promoted through legal technocratic practices is not simply about the unimpassioned mimicry of European governance projects. It is also about intentional attempts to participate in biopolitical governance in the management of African lifeworlds while also refusing those forms of legality deemed not useful or irrelevant. Instead, it involves adapting and vernacularizing the law to put in place forms of legality that can be instrumentalized for African contexts in relation to very different histories and conditions of state formation. But with this comes emotionally-propelled innovations that respond in extreme ways to what is seen as structural injustice—such as Article 46A *bis*.

The introduction of Article 46A *bis* is an extraordinary act that reflects affective reattributive practices that are propelled through particular Pan-Africanist tropes and highlight African self-determination. Though they reflect core tenets of Europe's logics and traditions, these instrumentalizations of international law should also be seen through their relative forms of technocratic protest and the affective spaces that are opened up by some of the African elite, as no cultural practices are without tenets from other places. Justice making emerges out of rhizomatic formations, and through that messiness it reinscribes structural and emotional complexity.

With attention to the complex processes by which such projects are propelled, we have seen how issues that lie at the core problematic of the ICC and the formation of the African Court—struggles over inequality and selectivity—shape the emotional embodiments of affective justice that have propelled the formation of new institutions. To dismiss affective actions like reattributions, amendments, and withdrawals as irrelevant because they contravene international legality is to ignore the critical role of affective justice in the making and unmaking of international law.