Affective Justice

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CHAPTER 2

Founding Moments?

*Shaping Publics through Sentimental Narratives*

If affective embodiments and the working of reattribution reflect both subjective technocratic and political processes that shape and are shaped by various structuring fields of expression, then how do justice leaders, international lawyers, judges, bureaucrats, and members of various publics who are performing, observing, witnessing, and refusing legal encapsulation tap into prevailing emotional regimes and deploy sentiments that become institutionalized? And how do those emotional expressions become entrenched within institutions like the ICC, NGOs, and the African Union’s regional courts, such as the African Court? How are they transferred within constituent publics—from person to person, leader to constituency—and deployed to make new sociohistorical narratives feasible? And, as Sara Ahmed asks, how do emotions align subjects with each other and against others?1 This chapter explores the way that feelings of alliance and compassion are generated through political speeches and legal narratives that not only make various anti-impunity ICC and Pan-Africanist justice discourses real, but also constitute social alignments through which emotional regimes play out. I begin here with two brief examples to illustrate this process, and then delve more deeply to analyze the different contours of affect that both structure fields of expression and are conditioned by history and individual emotional responses. Taken together, they are transmitted through the production of feeling regimes, and through affective transference, a process felt bodily, their meanings travel and can become manifest through emotive practices.

In 1952 Jomo Kenyatta, the father of independent Kenya and of Uhuru Kenyatta, was arrested by the British colonial army following a state of emergency
declared by the British administrators of colonial Kenya. Kenyatta had been indicted the year before, together with five others known as the Kapenguria Six—Achieng’ Oneko, Bildad Kaggia, Fred Kubai, Kung’u Karumba, and Paul Ngei.\(^2\) By April 1953, all six were incarcerated for their membership in and organization of the Mau Mau freedom fighters. Kenyatta denied the accusations but was convicted of what many believe were “trumped-up charges.” He served six years as a political prisoner until 1960, when the demands for his release grew and native Kenyans gathered daily in the town square to protest the injustice. This mobilization succeeded, and Kenyatta was released. As the story goes, once released, Kenyatta led his people in petitioning for Kenya’s independence from British colonial rule. When the first Kenyan elections were finally held in May 1963, Jomo Kenyatta was elected prime minister of the Kenyan African National Union, and it was in that context that he and his advisors negotiated the terms for Kenyan independence on December 12, 1963.

Approximately fifty years later, Jomo Kenyatta’s son, Uhuru Kenyatta, became the president of the Republic of Kenya, and with his deputy presidential partner, William Ruto, established their landmark consolidation of two previously antagonistic political groups aligned along competing ethnic cleavages. This consolidation is related to the 2012 indictment of Uhuru Kenyatta and William Ruto by the ICC, which of course did not prevent them from winning the highest seats in government (a situation I explain in more detail in chapter 4). Their election campaign tapped into various emotional sensibilities related to anticolonial struggle and postcolonial Pan-Africanism in order to mobilize the sympathies of the Kenyan people. They did so by presenting the ICC’s indictment of Uhuru Kenyatta as a historical continuity of Jomo Kenyatta’s political struggle for independence against imperial rule. Kenyatta’s popularly hailed 2013 Heroes’ Day speech provides an example of postcolonial emotional regimes that celebrate the freedom fighter discourse deployed to cultivate emotional sympathies for Pan-African anticolonial struggles.

On October 20, 2013, Uhuru Kenyatta presided over his first Heroes’ Day (known as Mashujaa Day in Swahili), a national public holiday to collectively honor all those who contributed to the struggle for Kenya’s independence.\(^3\) That day, Kenyatta’s speech began with a characteristic unifying call to the ethnically divided nation and immediately highlighted the importance of celebrating the past. Upon establishing a sense of a shared political community that long struggled for independence from Europe, he went on to reinforce the aftereffects of colonialism and its impact on social and economic inequality. In an attempt to celebrate their independence journey, he highlighted the
material and psychological consequences of the colonial project and its impact on their Kenyan forefathers:

Fellow Kenyans, we are here to commemorate the sacrifice and heroism of many Kenyans whose vision and conviction won us freedom and sovereignty. Colonialism had stripped all Kenyans of their fundamental rights. They had no land, and were considered inferior in their own home. There was neither dignity nor freedom for Kenyans then. Our forefathers waged a struggle of conviction and principle, supported with no resources except the burning fire of humiliation and the indefeasible yearning for independence and respect.

They were brave and noble. Many took up armed struggle in the forests, as others formed and led movements for the civil agitation for independence. The colonial reaction was repressive and brutal. Heroes were killed and imprisoned, while the rest were stigmatized and hunted down like animals. The cost of the struggle was painful, because the settlers did not consider Africans equal human beings worthy of rights.\footnote{4}

Kenyatta’s narrative about the humiliation of Africans at the hands of colonial administrators and settlers, and the subsequent freedom struggles that ultimately led to Kenyan independence, set a particular emotional climate that formed the backdrop for his audience. He went on to describe how Africans suffered at the hands of colonialists and emerged victorious in their fight against those forces:

This day marks the official beginning of the worst phase of colonialism, and the most harrowing period of our struggle for independence. The brutality our independence heroes underwent from twentieth October 1952 until the attainment of self-government ten years later defies imagination. It is the reason that we have reverently emblazoned our national flag with the red of their sacred blood. That is why our constitution states that, we the People honor those who heroically struggled to bring freedom and justice to our land. In history, Mashujaa Day is a day written in blood by the hand of our heroes.\footnote{5}

After discussing the “brutality” that their “independence heroes” endured, Kenyatta went on to liken his judicial indictment by the ICC to his father’s indictment by the British colonial administration in Kenya, thereby connecting the brutality of the colonial past to contemporary international law. The audience—seasoned and acutely aware of Africa’s history of colo-
nial domination—was invited to share sentiments of horror about colonial injustice and make a symbolic connection to the other, current injustice: “Our forefathers rejected colonialism and imperial domination in their time. We must honor their legacy, and stay true to our heritage, by rejecting all forms of domination and manipulation in our time. Let us confront without flinching those external forces seeking to thwart our collective aspirations. They may be powerful and rich, but so were the colonialists. They may disrespect and even hate us; we have defeated their ilk before.”

When those who attended the event that day and others who watched it on television described their interpretation of the opening of the speech, time and time again they told us that Kenyatta’s references to external (read colonial) domination reflect colonial defiance at work. Their reaction reflects the way that popular feelings about Kenyan postcolonial futures are bound up in a particular form of rejection of colonial degradation. What we see is that these sentiments are made real as a result of particular a priori events that shape what the present and future become.

Through the use of partial invocations, Kenyatta succeeds in getting his audience to connect contemporary justice to selective histories of colonial sham trials. The logic is that the political histories of subordination that created Kenya as a colony were the same histories that led Uhuru Kenyatta to a subordinate place in the realm of international justice and politics. These historical logics highlighted the way that morally coherent causalities can be mobilized to produce moral sentiments that celebrate the fetishized victim-survivor. And through the deployment of certain linguistic tools, political speech acts and the sentiments that they conjure articulate partial concepts while still communicating full ideas. In other words, the existence of the violation is so commonly understood that it is unnecessary to spell out. Rather, the listener is made to call on his or her own sense of inequality in order to fill the gaps.

The forms of sentimental emotions involved in such postcolonial justice discourses represent what Russian philosopher Mikhail Bakhtin calls “dialogic” to refer to the ways that contemporary imaginaries are continually informed by past conceptions. This approach to the social retelling of relevant events in daily life can help us make sense of how emotive expressions about the colonial past, as temporally shaped manifestations of social reality, guide how feelings of injustice are understood and attributed through narrative strategies. In this particular example, emotional regimes shape emotional climates through passionate utterances and narratives about stigmatization. As social constructions, these collective feelings reflect individual perceptions.
but are actually manifestations of how discourses produce groups and how groups of people embody lived emotions. What we see is that through those experiences, they are positioned for the collective effects of the transference of those feelings to the social body. As a product of sociocollective emotions generated through social interactions, emotional climates reflect social norms that establish how people feel or ought to feel and constitute the affective terrain within which public emotions operate.8

The study of emotion presumes that such feelings are grounded in particular socio-moral orders expressed through responses that are deemed ordinary. For example, where stigma makes possible the terms for regulating what is acceptable in relation to what is abhorrent, the imagery and discursive concepts that are invoked produce the terms for shared collective sentiments. President Kenyatta’s reference to the ordinary aspirations in Kenyan dreams of freedom from “imperial domination” was juxtaposed with his suggestion that there were “external forces seeking to thwart [their] collective aspirations.” The political reality of colonial trials (often seen popularly as sham trials) and their parallel with Uhuru Kenyatta’s indictment by the ICC was conjured to produce a key moment of linkage. As he affirmed, “They may be powerful and rich, but so were the colonialists.” In this way, Kenyatta attributed the same colonial armature of subjugation to the ICC.9 This did not involve an explicit reference to the ICC. There was no need to name it. Rather, the point was sharpened with the profound declaration, “We have defeated their ilk before,” referring to external judicial bodies such as the ICC in which the colonial is tied to the international (read: European). Invoking the word ilk to refer to a type or kind of imperialist, Kenyatta symbolically equated the colonial subordination of black Africans under British imperialism to the known fact that, to date, the ICC has only indicted Africans. His conclusion: Kenya’s Mau Mau revolutionaries used constitutionalism to defeat their oppressors, and so will Kenya’s contemporary democratic vanguard.

By comparing his own ICC indictment to the arrest and political conviction of his father some fifty years earlier, Uhuru Kenyatta attempted to make personal meaning out of historical and contemporary realities through a cultural template of subordination and an emotional process known in psychoanalysis as transference.10 Transference represents the common ascription of one person’s emotion to another, or to an object. For Freud, it was connected to the process of projecting unresolved issues in one’s primary kinship relationships onto others. I use transference here to link intersubjective cultural fields to show how it is used in metacontexts such as crowds and large audiences.
Affective transference, as an intersubjective process fueled by emotional regimes, is not only employed by those protesting the presence of the ICC in Africa. We also see it in the rhetorical practices of those engaged in the anti-impunity rule of law movement, such as the members of the ICC’s Office of the Prosecutor (OTP). Key to this analysis is the understanding that once those narratives are articulated within their own component parts where they are seen as being socially legitimate, they have the power to mobilize sentiments that are shared by others and create new enmeshed alignments in that process.

In the ICC’s early days, the court gained popular traction as a symbol of protection for victims and as a means of ending impunity. The domain of state authority, which had (since the Peace of Westphalia in 1648) long dominated approaches to sovereignty, began to topple. Theories of a state’s responsibility to its citizens transformed with the emergence of a new moral order, which took shape with the emergence of the responsibility to protect, or R2P, doctrine, as explained in chapter 1.

Members of the OTP, such as Shamiso Mbizvo, remind us that the court was set up on behalf of the “international community to intervene when the nation-state fails.” As she suggested in a keynote speech at a conference on the ICC and Africa in The Hague in May 2014:

The final text of the Rome Statute of the International Criminal Court is the culmination of almost a hundred years of hard work, unyielding determination, and stubborn hope on the part of people all over the world, from many walks of life, who have all shared the vision of an independent, permanent International Criminal Court. The ICC exists to hear the voices of victims of the most atrocious crimes, when their cries fall on deaf ears. It is a Court that was set up to intervene on behalf of the most vulnerable, when their own governments fail to hold their abusers accountable.11

Mbizvo’s discussion of the existence of the ICC as a culmination of “almost a hundred years of hard work” in order to establish a mechanism to intervene on behalf of the “most vulnerable” suggests a historical continuity over a longer period of time than the mid-1990s, when international law was instrumentalized morally and politically. Like Kenyatta’s symbolic linkages, she described the contemporary ICC’s formation metaphorically as a one-hundred-year road to Rome culminating in the formation of the Rome Statute for the ICC. This is a sentimental narrative construction that tells a celebratory story about a long and sustained road to justice that often involves efforts
to end the impunity of a perpetrator and to rescue a victim through international legality. But when the ICC is examined dialogically, it becomes clear that even though the formation of the Rome Statute for the ICC was shaped by a range of very limited attempts to hold postwar leaders and commanders responsible for war crimes, there was also an absence or suspension of justice mechanisms in various colonies in the Global South.12

This chapter reveals the gaps in the production of particular founding narratives and their imbrication in legal and historical formulations. We see how emotions are deployed through sentimental rejections of the Rome Statute narrative to replace it, through affective transference, with new originary narratives that are used to attribute different meanings of justice. Kenyatta’s linguistic strategies highlight the emotional politics of social protest that are aestheticized through postcolonial imaginaries of injustice. Illustrating the effectiveness of the emotional architectures he built through his particular rhetorical practices, informants reported that these narratives were inspired by Africa’s colonial history and the subsequent objection that various Pan-Africanists have to Western dominance. The embodiment of such imaginaries generates a response to domination by rearticulating new histories that fold into the present.

Like Kenyatta’s dialogism framed in relation to continuous indictments by foreign bodies, Shamiso Mbizvo’s articulation of the histories that led to the formation of ICC justice is an example of a related set of emotional regimes underway. In this case it serves another set of politics. In both examples, the retelling of their public histories invented links of significance to present morally provocative sentiments around which to mobilize action. In these cases, the sentimental invocations pointed to many things—the perpetrator of violence to be held accountable, or the colonial perpetrators who were never held accountable, or the degradation and fortitude of those whose struggles for justice have been pivotal. All of the sentimental invocations stigmatized European colonial injustices to preclude particular readings of contemporary violence without attention to the roots of inequality. Ultimately, what we see in these examples is the transmission of sentiments of saving and protecting, as well as expressions of African redemption from injustice, for they are key to the way that references to particular types of violence work in liberal democratic speech making. The goal is to show how public speech making is critical to how affects are institutionalized in international rule of law assemblages and how political publics are produced in that process.
The Road to Rome

Today, the popular contemporary story of the birth of the Rome Statute and its judicial legitimacy is based on a particular history of the ICC that sets the beginning of the road to Rome in the early nineteenth century. That story, as told by various representatives of the ICC, often begins with the 1872 founding of the International Committee of the Red Cross, when a permanent court was proposed to respond to the crimes of the Franco-Prussian War. And if those narrative origins are not emphasized, the attempt of the 1919 Treaty of Versailles to try German war crimes of World War I or the 1948 Convention on the Prevention and Punishment of the Crime of Genocide are seen as key to the founding history of the court.

In this story, World War I is seen as contributing to the launching of the first global effort to use international and domestic criminal jurisdiction to address international crimes. Following the war, the Allied and Associated Powers (i.e., Great Britain, France, Russia, and the United States) convened the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties to inquire into culpable conduct by the Central Powers (i.e., Germany, Austria, Hungary, Bulgaria, and the Ottoman Empire). The commission was charged with considering the feasibility of asserting criminal jurisdiction over particular individuals, “however highly placed,” accused of committing breaches.13 Objectors to this approach, led by a predominantly American delegation, claimed that if heads of state and other state actors were held liable for collective actions, state sovereignty would be diminished.14 They also took issue with the reality that no precedent existed in law for such an approach.15

In 1919, the commission presented to the Paris Peace Conference its final report on which crimes should be prosecuted before an international high tribunal composed of representatives of the Allied Powers, or before national tribunals.16 The United States advanced four fundamental objections to this approach, among them that to prosecute a head of state outside of his national jurisdiction would violate the basic precepts and privileges of sovereignty.17 From here, the potential liability for German and Ottoman defendants proceeded down separate paths.

The Treaty of Versailles ended the war with Germany in 1919 and required it to accept full responsibility for causing the war, make territorial concessions, and pay reparations.18 It was Article 227 that proposed the establishment of an international tribunal composed of representatives from the United States, Great Britain, France, Italy, and Japan to try the former German emperor, Kai-
ser Wilhelm II.19 By the time the Versailles treaty had entered into force, the kaiser had fled to the Netherlands, which refused to extradite him for trial.20 Article 227 never came to fruition, and the Allies never enforced any other penal provisions of the treaty.21 In the end, only a few prosecutions took place in domestic courts in Germany, and those who were prosecuted received disproportionately low sentences or were acquitted.22

Following World War I, a number of policy makers and lawyers, often described as constituting the international community, took action to build institutions to settle international disputes. The League of Nations announced a commitment to safeguard the peace of nations without resorting to war and in 1920 recommended the creation of a permanent international criminal court.23 The proposal was rejected as premature; instead, the Permanent Court of International Justice, the precursor to the International Court of Justice, was established with civil jurisdiction over states.24 Following that narrative trajectory, the most critical period in the development of modern international criminal law (ICL) occurred in the period following World War II. Two international tribunals were established for adjudicating international crimes that occurred during the war: the International Military Tribunal for the Trial of German Major War Criminals (the Nuremberg Tribunal) and the International Military Tribunal for the Far East (the Tokyo Tribunal).

The Nuremberg Tribunal was established through the London Agreement of August 8, 1945, between the four victorious Allied Powers: France, the Soviet Union, the United Kingdom, and the United States.25 The tribunal convened from November 20, 1945, to October 1, 1946, during which time it heard the matters of twenty-one Nazi defendants.26 The Tokyo Tribunal was, by contrast, established by a special proclamation issued by the Supreme Allied Commander of the Far East, US General Douglas MacArthur, with the agreement of the Allied Powers.27 The Tokyo Tribunal convened from May 3, 1946, to November 12, 1948, and was heavily influenced by the United States, with prosecutions led by a single American chief of counsel chosen by MacArthur (with associate counsel from the Allied Powers).28 In addition to these two tribunals, hundreds of trials occurred before military and civilian tribunals in various locales in the zones of occupation of the victorious powers.29

Many scholars of international law argue that it is difficult to overstate the significance of the post–World War II period to the field of international criminal law. They insist that “these legal proceedings established many core principles of the field.”30 Indeed, the establishment of a mechanism in which high-ranking state officials could be held individually criminally responsi-
ble for international crimes created a set of discourses that were profoundly powerful.\textsuperscript{31} Many scholars have shown that the Nuremberg and Tokyo tribunals made explicit the commitment to holding various officials responsible for their orders to lower-ranking officers to facilitate or directly perpetrate violence. The argument that is often made is that by rejecting the basis for both state sovereignty and discarding principles of immunity through a movement that insists on the irrelevance of official capacity, this post–World War II movement certainly produced a few examples where those culpable for mass crimes were held criminally accountable.\textsuperscript{32} However, as is well documented in the literature, for every instance in which European sovereign heads of state were held responsible for violent mass crimes in Europe and South America, there were a plethora of other situations where this was not the case. While the Nuremberg example provides a mechanism for understanding particular instances of criminal liability of commanders, British or Dutch or Spanish imperial forces, for example, engaged in gross violations with impunity.\textsuperscript{33} Significant populations involved in self-determination or independence struggles in the Caribbean, Latin America, and Africa, and indigenous and First Nations peoples, were arrested, indicted, and subjected to violence. Yet, if we presume that “international” refers to a wide range of countries and populations, then the absence of the criminal prosecution of former colonial leaders in places like England or even France during twentieth-century independence struggles calls into question the often-told narratives about the trend toward criminal prosecutions.

The recent history that the OTP and many others within the field of international criminal justice call the road to Rome is one in which the immediate post–World War II period witnessed the United Nations emerging from its predecessor, the League of Nations. This was followed by the emergence of an international human rights regime that led to the drafting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights. The codification of ICL continued with the development of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the four Geneva Conventions of 1949.\textsuperscript{34} And in 1947, the UN General Assembly requested that the International Law Commission (ILC) study the possibility of establishing an international judicial body for crimes such as genocide, war crimes, and crimes against humanity.\textsuperscript{35} As the story is told, in the early 1950s the ILC was invited to assess the interest, thus the potential, for establishing a permanent international judicial institution. Codifying the
Nuremberg and Tokyo principles into a Draft Code of Offenses against the Peace and Security of Mankind would provide the subject matter jurisdiction for the proposed tribunal. But it did this with numerous stops and starts, dealing with pressure to abandon it during the Cold War and over various ideological and political disagreements over the type of crimes that would be under the subject matter jurisdiction of such an institution.

In the early 1990s, a range of parallel developments unfolded. The story told is that at the prompting of Trinidad and Tobago and with an emphasis on transnational crimes like drug trafficking and money laundering, the General Assembly once again prompted the ILC to draft a statute for a permanent international criminal court. This took shape alongside an initiative by Trinidad and Tobago to make a concerted effort to address various transnational crimes such as drug trafficking and money laundering. Also during this period, Resolution 780 was adopted on October 6, 1992, by the UNSC to establish a commission of experts to document violations of international law. In response to the commission’s recommendation, as well as to calls from a wide spectrum of international actors, on May 25, 1993, the UNSC unanimously adopted Resolution 827 to create the International Criminal Tribunal for Yugoslavia, an international tribunal to prosecute those responsible for crimes committed in the former Yugoslavia since 1991. The following year, the genocide in Rwanda led to the establishment of the International Criminal Tribunal for Rwanda.

Additional ad hoc tribunals were later established (out of the UNSC) to respond to crimes committed in Sierra Leone, East Timor, Lebanon, and Cambodia. The ILC completed a draft statute in 1994 that formed the basis for consideration by the Ad Hoc Committee on the Establishment of an International Criminal Court and then a Preparatory Committee on the Establishment of an International Criminal Court. And while this popular trajectory was seen by many in the growing rule of law movement as a positive development, the ILC’s project and the subsequent General Assembly deliberations led to the consolidation of the UN’s ICL assemblages, resulting in the formation of the ICC.

On July 17, 1998, 120 of the world’s states came together to complete the negotiation for the adopted text of the Rome Statute for the eventual establishment of the ICC. By 2002, the Rome Statute came into force and was celebrated with a profoundly historical century-old origin story. Yet even some of international criminal law’s juridical architects, such as Antonio Cassese and Cherif Bassouni, never accepted—empirically, legally, and normatively—the dominant road to Rome narrative, because they understood that up until 1993
such an institution was not enough to destabilize the modern legal concept of sovereignty. The story that is often left out of the road to Rome trajectory is the narrative that highlights the way that the moral responsibility to protect those victimized by violence led to the viability of the ad hoc tribunals and eventually the ICC. Also relevant is the reality that the early innovators who attended the conference in Rome and participated in the early negotiations that led to the eventual treaty often recognize each other as founding mothers and fathers of the statute, invoking familial relationships through which to establish propriety and recognize its originary prestige. From Nuremberg narratives to Tokyo to Rome to Kampala, these kinship descriptions of first, second, and third generations committed to ending impunity for victims and stopping perpetrators continue to pervade its discourses. Insistence that never again will the world allow impunity to soar without recourse remains at the heart of the anti-impunity movement. These sentiments are what make affective justice a critical domain for the study of the embodied feelings that propel justice making. This is very different from the linear story above and illustrates the process of reattribution at work in this example and throughout the book.

In Nuremberg and Tokyo, the reality of defeat in war led to the setting of the conditions for prosecutorial justice. As Mahmood Mamdani has helped to clarify, the hidden prerequisites for trial, in all these cases, were (1) a war, that was (2) won decisively by one side, and to which one might add (3) the historical institution of “unconditional surrender,” which includes the concession of sovereign power. By contrast, in the African situations that the ICC has taken up, very different conditions led to the court’s reach. The contemporary protection and invocation of justice for victims were related to the inability of African states to use decolonization to move toward new frontiers that would disrupt spheres of inequality, ethnic patronage, and poverty that prevailed in the post-1960 independence period.

**The Road from Rwanda, Not Nuremberg**

Violence in the former Yugoslavia and then Rwanda, Liberia, and Sierra Leone led to the formation of new judicial institutions that also contributed to a new set of discourses about the ICC. These further reinforced the emotional contours of international law. From Kenya to South Africa, Namibia to Mozambique, Zimbabwe to Algeria, independence negotiations from the late 1950s to the mid-1990s were brokered without attention to criminal prosecutions of former colonial powers. Even as various African leaders were stra-
tegically optimistic about the potential of using international justice in their newly independent states, they also knew that unless the roots of inequality were addressed, violence would remain a mode for managing law’s failures.

The postwar momentum to develop permanent ICL institutions resulted in the criminalization of certain forms of conduct, the establishment of particular types of jurisdiction, and the individualization of criminal responsibility in which particular members states and the UN, as stakeholders in criminal justice, became engaged in advocacy to use criminal justice to address mass atrocity violence. However, when various African advocates decried the timing of such forms of institutionalization, they often commiserated that when international criminal justice was needed to intervene in colonial and post-1990s periods, there were no judicial institutions available to them. The absence of international institutions to intervene in wide-scale violence in places like South Africa, for example, was seen by many of those concerned with the structural inequality of justice as reflecting the same architecture that produced the Treaty of Rome. From 1948 to 1990, apartheid in South Africa was an international crime without an international criminal court to prosecute it. However, after the UN General Assembly classified it as a crime against humanity in 1966, the Organisation of African Unity (OAU) attempted to lobby for the establishment of an international penal court in the 1970s to prosecute the crime. Initially, its stakeholders had hoped that they could establish a criminal chamber through the African Charter of Human Rights, but they abandoned this when the UN Security Council affirmed in 1984 that apartheid was a crime. This opened up the possibility of establishing in the late 1980s a UN international penal court in order to prosecute various apartheid crimes on the basis of universal jurisdiction. But the reality was that in order to pursue apartheid as a crime, national states had to enact legislation to prosecute individuals through universal jurisdiction.

When the Rome Statute crimes were negotiated, apartheid offenses were eventually dropped as a core standalone crime. Instead, apartheid was collapsed into crimes against humanity and subject to a post-2002 temporal jurisdiction. This meant that the period of brutal domination of South African or Kenyan natives was beyond the temporal reach of the court. Instead, the international rule of law movement took hold of post–civil rights judicial agendas propelled by various agents of change in the US, Europe, and Australia. And, as the story is often told, the late 1980s and early 1990s led to the establishment of new judicial institutions that dealt with a range of crimes in which criminal responsibility was narrowly tailored to the present and the future.
goals of ending impunity. The irony is that when African stakeholders needed prosecutorial justice against colonial domination, international law could not be mobilized to provide viable solutions because of the temporal framing. And although African state brokers participated to varying degrees during the Treaty of Rome negotiations, and even as the law was deployed to establish African independence and membership in the newly changing world order, they were well aware that there were limits to its use as a tool for justice against economic plunder in Africa.46

State actors that were actively engaged in the ICC’s success, such as England, the Netherlands, Spain, and Portugal, came to be seen by various African state actors as engaging in international lawmaking both as an instrument of historical subjugation and as a tool for social change. Kenyan history and memory of native subjugation provides a vivid example of this relationship. It shows that even as African states signed on to the Rome Statute in response to the demands of new democratic forms of constitutionalism, for a range of leaders and their publics in the Global South, post–Cold War democracy has an internal tension. Structural violence was written out of the ICC’s social history, which the narratives reflected. As discussed in chapter 1, African states were often persuaded to ratify the Rome Statute for the ICC by institutions like the World Bank, the International Monetary Fund, the European Union, and various NGOs funded by northern governments or philanthropists.47 Instead, the ICC emerged as a mechanism for protecting other types of “victims”—of African postcolonial violence—while the prosecution of northern perpetrators, such as those states that were at war in Iraq and Afghanistan, were for some in the North seen as unthinkable. This is because the violence in these contexts was either protected by particular state’s nonsubmission to the jurisdiction of the Rome Statute, like the United States, or because between 2002 and 2017 the crime of aggression was not yet operationalized and therefore not justiciable. And with the revision to the crime of aggression, states that were parties to the Rome Statute but did not want to submit to the amendment were able to register a reservation. The example is telling.

At the time of entry into force of the Rome Statute in 2002, Article 5(1) included the jurisdiction of the court over four crimes: (1) genocide; (2) crimes against humanity; (3) war crimes; and (4) aggression. However, Article 5(2) stated that the court will activate jurisdiction over the crime of aggression only after a definition of the crime and the conditions for such jurisdiction are established.48 The Kampala Review Conference in 2010 fulfilled this mandate, and over thirty state parties ratified the provisions for the amendment of the
original text to include the agreed-upon definition and conditions for jurisdiction. The sixteenth session of the Assembly of States Parties in December 2017 decided on the activation of the jurisdiction of the court over the crime of aggression, establishing it in Resolution ICC-ASP/16/Res.5 by consensus on December 14, 2017. However, the assembly’s resolution explicitly called for it to “enter into force for those States Parties that have accepted the amendments one year after the deposit of their instruments of ratification or acceptance and that in the case of a State referral or proprio motu investigation the Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national or on the territory of a State Party that has not ratified or accepted these amendments.” Many describe this ICC resolution as reflecting a compromised position between the majority of the state parties on one side and a small group of northern countries on the other (Britain, France, Canada, Japan, and Norway). According to our documentation of the negotiations, initially these countries had been calling for further clarity on how the amendments in Kampala would be interpreted. As the interpretation of the terms for the crime of aggression became clearer, they advocated for an opt-out alternative in which they could still remain as parties to the Rome Statute but register a reservation for the crime of aggression. The result was the brokering of the crime of aggression with limited jurisdiction in which the crime would only apply to those who ratified the Kampala agreement (thirty-five states at the time of this analysis), thus submitting to the subject matter jurisdiction under the crime of aggression.

Following the December 2017 Assembly of States Parties, the narrative that circulated among significant numbers of African state representatives was that, once again, northern countries had found a way to create exceptions to the universal application of justice. During the 2018 African Union Summit that I attended the following month, on the heels of the ICC’s Assembly of States Parties meeting, various narrative explanations and expressions of anger circulated about ICC states parties that had not ratified the Kampala amendment exercising what some have called de facto immunity. In other words, and except in the case of UNSC referrals, the stories that circulated clarified what they saw as the injustice: by not adopting the amendment and allowing for reservations, predominantly European and Asian states were seen as being able to shield themselves from the subject matter jurisdiction of the crime of aggression. The ability to opt in and opt out and apply the law at will prevailed in their angry discussions about the ICC pursuing only African cases—or, as I’ve heard many times, “the ICC being put in place to shield the West and pursue the rest.”
Given these feelings of structural inequality, documenting the persistence of these ironies makes it all the more important to examine how global power becomes manifest in particular international institutional forms and how structures of inequality are not only felt but expressed and circulate through particular narrative modes. We see this through the sentimental foundations of Kenyatta and others’ anti-ICC protest speech or the seductions of the OTP’s celebration of judicial possibility, and it explains how and why such feeling regimes circulate and are at times taken up uncritically, even as other critiques of the African postcolonial state project are launched. These complex affects that are embodied and manifest through particular emotional regimes matter because they influence the way people understand the rule of law in the contemporary period, and thus how people’s perceptions of law’s inequality (or promise) drive public engagement.

As I show here, these seductions do not work through preestablished sentimental formulations; rather, it is through affective transference that people deploy affects and consolidate them with narratives of power. Histories of law and its perceived legitimacy or illegitimacy are actively created within regimes of meaning and require work to sustain their seductions as rational. These narrative tropes are often sufficient, then, to provoke actionable results.

Feelings of anger, resentment, and the victory of the survivor are made real in such anti-impunity circles not through their exacting historical equivalents but through an emotional discourse of the “victim to be saved” that works to align like-minded participants. As one interlocutor following Mbizvo’s speech commented, “I may not have agreed with her rendition of the history, but she’s right. ‘Victims’ need us to carry the torch for our generation.” Or as another insisted, “For me, it didn’t matter whether I agreed with her; in some ways I didn’t because her rendition of ICC history seemed flawed. But her speech made me feel victorious all over—all over my body. We all wanted to be part of the movement that she described. We wanted to be counted.”

Similarly, in reflecting on Kenyatta’s speech in Nairobi, one attendee shared the following: “I’m not a supporter of Kenyatta, but when he gave that speech I felt something; there was something inside of me that tingled, that wanted to cry, that felt robbed and depressed. That feeling brought us together because we all shared that unfortunate [colonial] past.”

These comments suggest that the intensity of bodily feeling and its connection to particular sentiments perform sentimental work that can constitute groups, through what Émile Durkheim referred to as “collective efferves-
cence,” the simultaneous sharing of thoughts and actions that excite individuals and, in so doing, can lead to group unification. These processes are social but are also emotional and affective. The bodily sensations that people describe are connected to their feelings of shared agreement, their sense of victory or anger from historical conditions of dispossession, and are key to making sense of the emotional manifestations in the afterlife of the law. They call on us to ask hard questions that explain why significant numbers of leaders, academics, members of civil society, and policy makers who may have formerly supported the ICC’s potential have since advocated withdrawing from its jurisdiction and vice versa; why some (such as various members of civil society groups in African cities) who were suspicious of the ICC have joined the rule of law anti-impunity movement because they lost faith in their leaders. These shifts in emotional attachments are as elusive as they may be real, but they are key to understanding how shared emotional responses help form alliances—even if momentary.

Seeing law through the way that public utterances retell its history of relevance illuminates the connection between affects and political engagement and raises questions about what contemporary international criminal law really is, within what terrain it has operated, and what it can do given the political constraints within which it exists. Thus, a deeper reflection on the speeches delivered by Mbizvo and Kenyatta to their respective audiences can shed light on how people’s relationship to the law is tied to the emergence of contemporary socio-moral orders through which social formations are constituted and disaggregated and emotional climates regulated.

Moral orders operate within knowledge regimes that are propelled by the justice imaginaries that I go on to explore in this book. By discursively representing these figures as moral objects of compassion and retribution, some people engaged in what Thomas Laqueur has called “sympathetic passions,” which he describes as bridging compassion and action. These sympathetic passions or emotional calls for action shape the sentiments that its advocates deploy. As a way of defining justice through the production of emotional affinities, the imbrication of legal encapsulation on contemporary rule of law formations has led to particular justice imaginaries with affective valences and ordering logics. And yet, tracing assemblages of affects involves tracing affects in nonlinear ways—not from cause to effect but in relation to courses of events and their materialities, socialities, and aesthetics. This involves thinking about how a standing ovation at a public talk or a loud and unified roar in a crowd during a political speech crystallizes and solidify stories or
events. What we see is that certain historical lineages articulated through affective transference in public talks become feasible, thinkable, and acceptable because of the way justice is articulated. They set tones for emotional climates and shape existing fields of justice. Through these processes of public symbolic deployments and emotional community formation, we see how affective transference works—not through knowable emotion but through the constitution of emotional camps that are regimented in particular ways.

Legal encapsulation reinforces these discursive practices. As a product of technocratic knowledge applied to various campaigns for promoting justice, it is seen by those whose feeling regimes are constituted through the anti impunity movement as essential for protecting those victimized by violence and holding perpetrators accountable. The constructed figures—“the victim” and “the perpetrator”—are key component parts of anti-impunity assemblages as they provide the aesthetic icons through which technocratic legal practices can be instrumentalized.

Yet even with these component parts, attempts to counter prevailing justice narratives abound in the contemporary period. They emerge as narratives that contravene other stories and reflect struggles over the knowledge production through which necessary alignments take shape. This process of alignment is how reattribution gains its power. For, as a process of resignification, it is shaped by controversies around meaning making and contestations around the power to enforce those meanings. But as we shall see below, as affects that are operationalized with others, the process of social transference can be known not through actual experiences, but through the way that sociopolitical consciousness can be assessed by how subjects articulate justice feelings as echoing their past experiences. These descriptions set in motion potential futures while also tapping into past experiences of injustice.

Affective Transference and the Remaking of History

Shamisu Mbizvo’s audience included a room full of approximately seventy-five scholars of international law, human rights law, and the literature and anthropology of law, as well as a range of historians of Africa and the West who were committed to various ways of studying international law’s impact on and relationship to Africa. Immediately following her speech, she received a standing ovation, even from colleagues who remained skeptical about the court’s work. Uhuru Kenyatta’s speech was delivered to an outdoor assembly of thousands committed to new possibilities for justice through the coalition
parties. In both cases, the narratives about international law were framed in relation to different historical formations. For both speakers, the past was interwoven with the present to make the contemporary period meaningful.

Like Kenyatta’s narrative, Mbizvo’s retelling of the ICC’s past reflected morally coherent explanations concerning the making of the Rome Statute. The moral mission that led to the establishment of the contemporary rule of law movement was tied to its judicial inheritance—the protection of victims as the basis of its pursuit of judicial accountability. In both speeches, messages about interrelationships between the past and the present responded to various past events and made the present meaningful. Yet the viability of those attempts to link past and present is more about the speaker’s ability to use affective transference to communicate sentiments that are meaningful to others than they are about real modalities of interconnection or the ascription of stigma.

To critique international criminal institutions, Kenyatta identified an ongoing violation to foreground a stigma that demarcates what is or is not acceptable. He then forged a community of survivors by using language that invokes Kenyan citizens as beneficiaries of yesterday’s freedom fighters. From the opening, in which the “sacrifice and heroism of many Kenyans . . . won us freedom and sovereignty,” to his later invocations of “our forefather” in order to index kinship, we see attempts to constitute a community. Once senses of community were constructed, Kenyatta reconciled the substantively disjunctural historical narratives. He decentered the violence of the colonial project and brought it into relevance with the ICC’s African trials. By grounding his intervention in Kenya’s history of colonial violence and the popular perception of colonial sham trials, Kenyatta engaged in the transmission of feelings of resentment—from one person to another, from a leader to his constituency. Here transmission is possible through a colloquial knowledge about the colonial past and its related subjugation that is embodied in preexisting responses to loss, sham trials, and experiences of poverty. Suggestions about Africa’s place in an unequal past conjure sentiments that produce parallels with the contemporary world order where feelings of anger from past inequality prevail.

Affective transference is possible with the invocation to celebrate the survivors of that inequality. The reference to “their ilk” highlights how Kenyatta is, in turn, stigmatizing colonial institutions whose continuities contribute to feelings of anger at play. Transference was possible and effective because the histories of colonial violence and its related dispositions were decontext-
ualized from their earlier historical logic and recontextualized into contemporary realities. Through the realization of the relevance of the past to the present, members of the public gained an opportunity to constitute alliances with each other. The message was contingent on knowledge about colonialism, the relegation of colonial trials to sham trials, and African subordination, which were critical to the connections that audience members had to make. It was the decontextualization and recontextualization that characterized the magnetism of the emotional regimes being shaped, that oriented the way Kenyatta’s message was received. The achievement of transference allowed the sympathetic listener to create mutually linked freedom fighters and revolutionaries out of both Jomo and Uhuru Kenyatta.

Throughout Kenyatta’s speech, and in response to his passionate utterances, the audience applauded, and large numbers shouted for more. When he finished, their applause continued, almost uncontrollably. Affective transference happened through the rhetorical frenzies elicited in the speeches. Passing from person to person and group to group, the forms of collective effervescence created what Margaret Wetherell refers to as pulses of energetic relations. By engaging vociferously with the rhetorical link (“their ilk”) between Kenyatta’s fight against the ICC and the larger anti-imperial struggles over the past century, the audience that was there that day confirmed the effectiveness of the conjuncture of like-minded feeling expressions with performative displays of agreement.

Eight out of ten of the people we polled confirmed that they were Kenyatta-Ruto supporters. They described the moment as one where “the people spoke,” or where “Kenyatta and Kenya could be vindicated.” This was in keeping with the top-trending hashtag of 2012, #KenyaDecides. Said one woman to our question about the relevance of colonialism to this moment: “It’s true that colonial rule happened long ago but it is relevant today. My family would not be poor and without land if it weren’t for the British. Kenyatta can reverse that—Kenya Decides!”

Another agreed and insisted, “Kenyatta is not to be blamed. He defended his people. He was like Jesus. And like Jesus, he delivered.”

Through the deployment of certain linguistic tools, the political speech act and the sentiments that it conjured reflected people’s application of partial concepts while still communicating full ideas about heroism, retribution of colonial wrongs, and hopes of reconciliation. The violations present with the invocation of colonialism and the historical use of colonial law to oppress the Mau Mau fighters were so commonly understood that it was unnecessary for
Kenya to spell them out. Rather, the listener was made to call on his or her own sense of inequality in order to fill the gaps.

The use of the unsayable is powerful because as a rhetorical strategy in justice circles in Kenya around ICC issues, it operates within particular feeling regimes that shape alliances. What it enabled out of the experience of affirmations on that Hero’s Day was an embodied sense of “Tuko Pamoja”—meaning “we are together.” The sense of history shaping the present emerged from senses of displacement and deliverance. Accordingly, past subordination becomes a reflection of itself in the present. This is where the violence of the colonial past is effectively communicated through the embodiment of subjugation. And, as such, notions of justice are made real through the crafting of postcolonial narratives that the law is seen as being unable to deliver. Through spheres of resignification, representations of ICC justice as injustice and new histories are mobilized through public speeches, silences, selective memories, and referential musings.

As another attendee, Irene, told me in response to my question about that unspoken element in the speech: “It was what he didn’t say that made us all come together. Anyone who understood the connection was able to decide whose side they were on—the oppressor or the oppressed.”

When I asked her how she felt and whether she could still say that the pain of colonial oppression was embodied, she quickly responded by saying in a low and remorseful tone, “As long as people are displaced from their land, suffering knows no time.” By this, Irene was suggesting that the infraction still continues to be felt in the present and shapes people in particular ways. This demarcation of a shared feeling is a product of affects through which particular alliances with others are being formed. They are powerful not because their embodiments are knowable or certain. They are powerful because the feeling regimes within which they operate are constitutive passionate alliances that, in turn, shape social manifestations. The shaping of the social is therefore not about the truth of the feeling. Rather, it is about affective justice—that is, the way that the feeling of the moment is produced, embodied, communicated, and/or made to constitute particular relations.

Many of the responses we received from informants led them to construct a hero figure out of Uhuru Kenyatta. Not only did they speak of how Jomo Kenyatta—the father—sacrificed his life for his people, but they also linked it to how the son, Uhuru Kenyatta, mobilized forces to defend his people from displacement and violence. These claims were fueled through emotionally affective articulations—through an enthusiastic appreciation for the contribu-
tion of their leader and his social-familial lineage. Yet not all of those polled were traditional Kenyatta supporters. Instead, they were from a range of ethnic groups and political party affiliations. They nonetheless reported to us that they were taken by the transformative frenzy of the moment. Among those who voted for the opposing party, they still reported that they believed that it was important to rethink how we understand culpability. For many, collective culpability was the framework through which to attribute responsibility.

Time and time again, people spoke of the colonial other, the ICC, or other forces that were to blame for the postelection violence. Their language reflected feelings of oppression, disdain, subjugation, injustice, loss of land, and the importance of a deliverer to return their land to them. They acknowledged local corruption, Somali-Kenyan terrorism, and so on. And while many complained bitterly about Kenyan politicians and inherent corruption, others also articulated the problem of violence as being outside of the conditions of their making. One attendee responded to a question about culpability with the following insight: “No, I didn’t vote for Kenyatta... but I believe that he is a pawn in a larger game. ... The Kenyan mafia is relevant here. ... The game is also being controlled by the West; back then it was the British, now it’s Europe and America.”

In the context of the embodied impact of Kenyatta’s speech and the rhetorical frenzy that led to chants from the crowds, we see how feelings mediate one’s relationship to the past, the present, and the future. For example, narratives of subjugation and violence became embodied through the retelling of such histories of subjugation. In the retelling, the narratives passed from person to person, and through the creation of pulses of energetic relations, emotional alliances were formed that become socially relevant.63 And through the embodied experience of participating, of being there, of feeling anguish and being reminded of the histories that continue to propel Kenyan subjugation, people deployed emotional tools to make sense of particular messages and assess the way the message calls them be taken in—to be engaged bodily in experiences of public feeling. These public feelings have the ability to reinforce particular assemblages of socialization in which particular expressions, such as “We’ve defeated their ilk before,” become more acute.

Through the circulation of concepts (and slogans, as will be seen in chapter 4) that align with past narratives, invocations of togetherness—however fictive—highlight the way that morally coherent causalities can be mobilized to produce moral sentiments that do particular forms of momentary work. Protest speech or celebratory rhetoric demonstrates these dialogisms. As a
partial practice, protest speech is a powerful modality because it makes emotional transference possible in contexts that might be substantively different otherwise. Kenyatta’s disjunctural history provided the emotional fodder to align the public’s inventory of social feelings with their social alliances. This connection between particular types of violence and historical facts that are evidently disjunctural can produce new social truths by constituting “the real” dialogically through realignments of the social. This happens not because the audiences are uninformed but because of the power of available historical tropes and icons and their relevance to constituting the meaning of alliance and connection.

What the example of Kenyatta’s public speech shows us, therefore, is that substantively disjunct histories can be made real through the iconic construction of Jomo Kenyatta as hero and freedom fighter, and thus, through the articulation of the relevant continuities, Uhuru Kenyatta as inheritor of that iconic meaning. The production of the real, therefore, involves the deployment of histories that are ultimately sustained through subsequent networks of socialization. Those histories, as retold, become powerful because of the feeling regimes within which the iconic signs invoked operate in relation to particular nationalist founding tropes. The success of affective transference is possible precisely because icons, narrative tropes, and affective embodiments have the power to demand of publics an opportunity to become aligned with others in response to particular momentary and historical feelings. And though the feelings may be temporarily unstable, they tell us something about the assemblages and alignments at play and not necessarily actual sustained convictions over time. Once articulated, these discourses can be sustained through particular knowledge convictions, affective practices, and ongoing forms of biomediation that can shape the networks of socialization through which group alliances are produced and embodied and stories about group histories are told.

For her part, Mbizvo’s use of social transference allows her to establish ICL, the ICC, and its actors—the OTP—as the heroes and heroines of “victims” and survivors around the world. Utterances such as, “The ICC exists to hear the voices of victims of the most atrocious crimes, when their cries fall on deaf ears,” can be used to suggest that the judicialization of political issues can offer tangible solutions. As such, discourses that might normally operate in the unconscious through words such as victims or ending impunity can be formulated through a specified inventory of popular references that are more socially familiar than they are individually experienced. Themes of long his-
torical connections establish particular affective resonances and connect socially or institutionally to emotive templates. Accordingly, past subordination becomes a mechanism for articulating contemporary inequalities, but the past is always signaled dialogically. That is, it is seen as building on the present, thereby constituting a reflection of itself in the present.

Celebratory rhetoric also requires particular affective alliances to congeal. For this to happen, the roads of emotional causality must be presented as part of a dialogic continuum in which gaps in the social retelling of the past provide a space for indirect connections to be made between socially relevant developments. In Mbizo’s description of ICC’s one hundred years of development, for example, what we see is the profound imagery of the grand march to establish the permanent court as the ultimate evolutionary form of justice for all. A plethora of key ICC scholars—from Beth Van Schaack and Ronald Slye to Kathryn Sikkink, Cherif Bassioni, and Antonio Cassese, to name only a few—have popularized these narratives about international criminal prosecutions shaping new senses of justice for those victimized by violence. The related events, people, and the power relations that enable emotional sharing contribute to the establishment of the ordinary logic of law’s work. This use of sentimentality is emotionally pervasive in the literature. Who wouldn’t want to protect those victimized by violence?

Social Transference and the Institutionalization of Embodied Affects

What I have shown in this chapter is that substantively disjunct histories are often made real not through actual historical equivalences but through the symbolic construction of the “victim” fetish—be it a survivor of election violence or a persecuted anticolonial freedom fighter. This type of knowledge production involves the deployment of sentiments of compassion and responsibility around the protection of victims who are connected to the culmination of a one-hundred-year history of judicial strategies that are ultimately sustained through subsequent networks of socialization. It is also shown through the re-signification of the narrative of the “victim/survivor” of colonialism through which particular tropes of imperial justice are used to hold imperialists accountable. What we see in the study of the transference of these passionate utterances is how structurally dissimilar phenomena can be decontextualized and recontextualized to produce otherwise contested assemblages.

For the ICC’s OTP under Fatou Bensouda, this involves the encounter with new 1990s moral sentiments in which the promise of the ICC’s one-hundred-
found that the construction of international law’s moral legitimacy as a crucible for social change. The movement’s mantra that “no one is above the law” informs the OTP’s invocations of their work as being centrally about protecting victims. When understood in relation to affective transference, we see how hope for judicial legitimacy—meaning the instantiation of legal processes as viable and with the potential to achieve legal fairness, certainty, and predictability—can be breathed into new justice experiments.

For various African leaders and their publics, alternate notions of judicial justice involve articulating new vocabulary for analyzing the historical underpinnings of violence and the dialogic presence of the ancestors within. In the end, determining which justice mechanisms are appropriate is central to how new moral orders are being mobilized to inspire sentimental responses to injustice. Notions of justice are made real through the crafting of postcolonial narratives that the law is seen as being unable to deliver. Through spheres of resignification, representations of Hague justice as injustice and new histories are mobilized through public speeches, silences, selective memories, and referential musings. Their truths become manifest in sentimental attachments that accent the cadence of daily life. In the end, such attachments establish the moral logic that shapes the way that various publics achieve the feeling that justice has been served in the contemporary period.

In both cases, such passionate utterances are central to the social alliances that are formed—as in a celebration-day crowd or in the spaces, like The Hague, in which international justice actors engage in the production of affective justice. As we shall see in chapter 3, once the affective domains are narratively constituted through particular histories and sentimentalized in particular ways, a key component of their effectiveness involves the embodiment of their convictions as demonstrated in various justice campaigns. With the increasing relevance of a “victim” through processes of legal encapsulation, this embodiment of justice reflects affective justice and is critical for understanding the actual making of international justice through its place in the life of the law.