Affective Justice

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Notes

Acknowledgments


Preface

2 Commentary, The African Court and Its Geographies of Justice.
3 Hannah Appel, lecture commentary to author, UCLA, October 2016.
4 Appel, lecture commentary.
5 Cantero, “Specters of the Market.”
7 Asad, Formations of the Secular, 185.

Introduction. Formations, Dislocations, and Unravelings

1 ICC, Warrant of Arrest for Ali Kushayb (ICC-02/05-01/07-3).
2 ICC, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Al Bashir 9, ICC-02/05-01/09-1).
3 ICC, Assembly of States Parties, Resolution 5, “Activation of the Jurisdiction of the Court over the Crime of Aggression,” ICC-ASP/16/Res.5, December 14, 2017, https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res5-ENG.pdf. After receiving the milestone ratification from Palestine in June 2016, the Assembly of States Parties, in their sixteenth session, decided to activate the court’s jurisdiction over the crime of aggression as of July 17, 2018. It enters into force for those state parties that have accepted the amendments one year after the deposit of their instruments of ratification or acceptance. This is a historic activation that will enable the ICC to hold leaders individually criminally

4 Rome Statute, Preamble, para. 6.
5 Rome Statute, Arts. 28, 25(3)(d), and 33.
7 Arrest warrants were issued for the following individuals: Joseph Kony, Raska Lukiya, Okot Ochiambo, Dominic Ongwen, Vincent Otti, Thomas Lubanga Dyilo, Bosco Ntaganda, Ahmed Haroun, Ali Kushayb, Germain Katanga, Mathieu Ngudjolo Chui, Jean-Pierre Bemba Gombo, Omar al-Bashir, Callixte Mbarushimana, Muammar Gaddafi, Saif al-Islam Gaddafi, Abdullan al-Senussi, Laurent Gbagbo, Charles Blé Goudé, Simone Gbagbo, Abdel Rahim Hussein, Sylvestre Mudacumura, Walter Barasa, Narcisse Arido, Jean-Jacques Kagongo, Aimé Kilolo Musamba, and Fidèle Wandu. Summonses to appear were issued for Bahr Idriss Abu Garda, Abdallah Banda, Saleh Jerbo, Mohammed Ali, Uhuru Kenyatta, Henry Kosgey, Francis Muthaura, William Samoei Ruto, and Joshua Sang. As of March 2019, the following were on trial: Abdallah Banda, Bosco Ntaganda, and Dominic Ongwen. Thomas Luganga Dyilo and Germain Katanga were convicted and serving sentences of fourteen and twelve years, respectively. Mathieu Ngudjolo Chui, Jean-Pierre Bemba Gombo, Laurent Gbagbo, and Blé Goudé were acquitted. Charges were dismissed against Bahr Abu Garda, Callixte Mbarushimana, Mohammed Ali, Henry Kosgey, William Samoei Ruto, and Joshua Sang. Charges were withdrawn against Uhuru Kenyatta and Francis Muthaura. The case against Abdullah al-Senussi was declared inadmissible. Finally, proceedings against Raska Lukiya, Saleh Jerbo, and Muammar Gaddafi were terminated due to the death of the individuals.
8 Regarding countries outside of Africa, as of 2016, the ICC’s Office of the Prosecutor was conducting eight preliminary examinations, including an assessment of information about alleged war crimes by UK nationals during the conflict in Iraq from 2003 to 2008; the violence committed in Ukraine since February 20, 2014; an investigation in Afghanistan, in which they have indicated there is reasonable basis to believe that war crimes and crimes against humanity were and continue to be committed there; an examination of violence and alleged crimes in the occupied Palestinian territory since June 13, 2014; and monitoring of national
prosecutions of crimes in Colombia. However, for the first thirteen years of its existence, all of the ICC cases involved Africans. This has shaped the charges that the ICC is engaged in the selective targeting of Africans. For updates on the investigations, see International Criminal Court (https://www.icc-cpi.int/).

On April 12, 2019, the ICC judges’ refusal to permit the prosecutor of the ICC to open an investigation into US crimes in Afghanistan underscore the feeling that there are double standards in international law. See International Criminal Court (https://www.icc-cpi.int/).

Kimani, “Pursuit of Justice or Western Plot?”


Note that a Kenyan court held that Kenya is under international obligation to arrest al-Bashir whenever he visits Kenya. Some scholars argue that he has immunity and that Act 98(1) of the Rome Statute protects him. This is a counterargument by Dapo Akande that the Security Council referral suspends his immunity. See Akande, “The Legal Nature of Security Council Referrals to the ICC”; Akande, “The Bashir Indictment”; Akande, “The Jurisdiction of the International Criminal Court over Nationals of Non-Parties.” See also Jalloh, Akande, and Du Plessis, “Assessing the African Union Concerns about Article 16,” 8.

Kimani, “Pursuit of Justice or Western Plot?”

As stated by Colonel General Omar Zein Abedeen of Sudan’s Transitional Council. See public speech, Associated Press, April 12, 2019.

Derrida, Specters of Marx; Rawls, Theory of Justice; Rawls, Political Liberalism; Rawls, The Law of Peoples; Derrida, “Force of Law.”

Locke, Two Treatises of Civil Government; Locke, The Works of John Locke; Russell, Marriage and Morals; Russell, An Inquiry into Meaning and Truth; Russell, The Problems of Philosophy; Wittgenstein, Philosophical Investigations; Malcolm, Ludwig Wittgenstein; Frege, Black, and Geach, Translations from the Philosophical Writings of Gottlob Frege; Frege, Logical Investigations.

The AU decided to merge the currently functional African Court of Human and Peoples’ Rights, which was established in 2004, and the African Court of Justice, which was envisioned in the Constitutive Act of the African Union but not established, in 2008. This was mostly due to concern over the cost required to maintain two continental judicial bodies. Before the Merger Protocol came into force, African states agreed to revise the composition of the court once again with the aim of expanding the subject matter jurisdiction of the proposed court. In 2014, the AU adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (ACJHR). In addition to human rights (jurisdiction currently being exercised by the African Court on Human and Peoples’ Rights) and general affairs (jurisdiction essentially to be exercised by the African Court of Justice), the newly proposed court would also have jurisdiction over international crimes. The amended protocol has yet to be ratified by any African state. See Werle and Vormbaum, _The African Criminal Court._

Deleuze and Guattari, “The Geology of Morals,” in _A Thousand Plateaus._

De Landa, _A New Philosophy of Society._

De Landa, _A New Philosophy of Society._

Deleuze and Guattari, _A Thousand Plateaus._

Bourdieu, _Outline of a Theory of Practice._

Eltringham, “When We Walk Out.”

Kersten, _Justice in Conflict._

Fraser, _Scales of Justice_; Valverde, _Chronotopes of Law._ See also Jonas Bens, “Gerechtigkeitsgefühle und die Legitimität des Internationalen Strafgerichtshofs in Norduganda,” _Gerechtigkeitsgefühle: Zur affektiven und emotionalen Legitimität von Normen_, January 2017, transcript; Latour, _Reassembling the Social._

Deleuze and Guattari, _A Thousand Plateaus_, 8.


See Shaw, _Colonial Inscriptions._


41 Ross, *Mixed Emotions*.


49 Foucault, *The History of Sexuality*, 140.


51 Foucault, *The History of Sexuality*.

52 Schuller, *The Biopolitics of Feeling*.

53 Harding, *The Book of Jerry Falwell*.
Clarke, “Refiguring the Perpetrator.”


Leys, *The Turn to Affect*.


The Silencing the Guns campaign represents the AU’s efforts to address violence in Africa before 2020.


Foucault, *Archaeology of Knowledge*; Foucault, *Discipline and Punish*.

See also Berg Ulla and Ramos-Zayas, “Racializing Affect”; and Berlant, *Compasion*.


The ICC had already passed a decision of noncooperation against Malawi six months earlier because the country failed to arrest and surrender al-Bashir when he was attending a summit of the Common Market for Eastern and Southern Africa in the capital city, Lilongwe. See International Criminal Court, “Situation in Darfur, Sudan,” Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-139-Corr.


70 United Nations, “Declaratory Statement by the Republic of South Africa on the Decision to Withdraw from the Rome Statute.” In law, a declaratory statement is known as a letter of notification.


74 Hamilton, “Case Admissibility at the International Criminal Court,” 306–308.


78 See Simpson, “The Sentimental Life of International Law”; also see Ross, Mixed Emotions.


80 Mbembe and Dubois, Critique of Black Reason, at 32.

81 Mbembe and Dubois, Critique of Black Reason, at 32.

82 Mbembe and Dubois, Critique of Black Reason.

83 For earlier work on discourse and its operationalization, see also Goffman, Frame Analysis; or Luhmann, Social Systems.

84 Cooper, Africa in the World.

85 Thanks to Erin Baines, private communication, June 2017, for her further clarification of the key point here.

86 Brants, “Guilty Landscapes.”

88 See also scholarly discussions about the judicialization of politics in Comaroff and Comaroff, Law and Disorder in the Postcolony; Randeria, “De-politicization of Democracy and Judicialization of Politics”; Blichner and Molander, “Mapping Juridification”; Eckert et al., Law against the State.

89 African Union meeting notes on file with author.

90 Yoweri Museveni, interview with author.


92 Mamdani, When Victims Become Killers.

93 Hannah Appel, lecture commentary, UCLA, October 2016.

94 Massumi, The Autonomy of Affect, 90.

95 Mazzarella, “Affect,” 299.

96 See Verges, De la stratégie judiciaire.

97 Sikink, The Justice Cascade.

98 An emerging body of literature on the sociology of emotions has unpacked how the microcreation of sense making through emotion becomes shared and ultimately institutionalized; see Colombetti, The Feeling Body; Bandes, The Passions of Law; Bandes and Blumenthal, “Emotion and Law”; and Popovski, “Emotions and International Law.”

99 Li, “What Is Land?”

100 Political crimes are compared with crimes that are considered the root causes of violence. They are seen as enabling violence, but do not directly address the crimes that are central to Africa’s economic resource wars and illegal economies; instead, they manifest as the political actions that produce violence.

101 Legum, Pan-Africanism, 14–15.

102 Legum, Pan-Africanism, 14–15.

103 Legum, Pan-Africanism.

104 Constable, Our Word Is Our Bond, 11; Richland, “Jurisdiction.”

105 Mbembe and Dubois, Critique of Black Reason.


107 Fischer, Emergent Forms of Life and the Anthropological Voice; Haraway, Modest_Witness@Second_Millennium.FemaleMan®_Meets_OncoMouse; Mascio, The Nuclear Borderlands; Cazdyn, The Already Dead; Rajan, Lively Capital.

108 Dominic Ongwen’s case provides an excellent example of how one can be both a victim (he was abducted as a child) and a perpetrator (he allegedly climbed the ranks of the LRA to be Joseph Kony’s second in command) and the role of understandings and temporality in the construction of the perpetrator.
Chapter 1. Genealogies of Anti-Impunity

1 Bärbel Bohley was known to have said, “We wanted justice and got the rule of law.” She was strongly criticized for saying that, as the governing sentiment about the (West German) rule of law was that while it was oriented toward justice, the rules of the law had to be respected because achieving legality was more important than bending the law in order to secure justice. As quoted in “Bärbel Bohley,” The Economist, September 23, 2010, http://www.economist.com/node/17090837; and in German, original quote, “Wir wollten Gerechtigkeit und bekamen den Rechtsstaat”; Claus Christian Malzahn, “Sie wollte Gerechtigkeit und bekam den Rechtsstaat,” Welt, September 11, 2010, https://www.welt.de/politik/deutschland/article9566915/Sie-wollte-Gerechtigkeit-und-bekam-den-Rechtsstaat.html.


3 William Pace, Assembly of States Parties Address, November 2013.


5 Kendall and Nouwen, “Representational Practices at the International Criminal Court.”

6 Uhuru Kenyatta, ICC Status Conference, February 5, 2014, The Hague, Netherlands. Note also that the name Mungiki (mũngĩkĩ) referred to in the Kikuyu language means “a united people.” In the 1980s, it emerged as a secretive religious cult group and eventually took on characteristics closer to a gang-like secretive society. It is now banned.

7 Waddell and Clark, Courting Conflict?, 11.

8 Baxi, “What May the ‘Third World’ Expect from International Law?”

9 Franceschet, “The Rule of Law, Inequality, and the International Criminal Court.”

10 Meister, After Evil.

11 Clarke, Fictions of Justice.

12 Clarke, Fictions of Justice.

13 Sikkink, The Justice Cascade, 11.

14 Engle, Miller, and Davis, Anti-Impunity and the Human Rights Agenda.


16 Teitel, “Transitional Justice Genealogy.”


20 N’Diaye, “Not a Miracle after All.”

22 From independence to the present, France has intervened in African countries using military force in over thirty situations. It has military bases in Djibouti, Senegal, Gabon, Mayotte, and Réunion, and army deployments in Somalia, the Ivory Coast, Chad, the Central African Republic, and Malia.


24 Rodrik, “Goodbye Washington Consensus, Hello Washington Confusion?”


26 Krever, “The Legal Turn in Late Development Theory.”

27 Chalfin, Neoliberal Frontiers; Ferguson, Global Shadows; Comaroff and Comaroff, Millennial Capitalism and the Culture of Neoliberalism.


29 Santos, “The World Bank’s Uses of the ‘Rule of Law’ Promise.”

30 Krever, “The Legal Turn in Late Development Theory.”

31 Kaufmann, Kraay, and Mastruzzi, “The Worldwide Governance Indicators.”


33 Safarty, “Regulating through Numbers”; also see Kendall, “Donors’ Justice.”

34 Davis, Kingsbury, and Engle Merry, “Introduction.”

35 Serban, “Rule of Law Indicators as a Political Technology of Power in Romania.”

36 Such as the MacArthur Foundation, the Open Society Foundations, Bill and Melinda Gates Foundation, and Ford Foundation. See also Oomen, “Donor-Driven Justice and Its Discontents”; and Parsons et al., Developing Indicators to Measure the Rule of Law.

37 Teitel, “Transitional Justice Genealogy.”


41 “Background: The Road to Reconciliation.”


43 “Background: The Road to Reconciliation.”

44 Smith et al., “Special Report”; “Background: The Road to Reconciliation.”

45 “What Place for Forgiveness after Genocide?,” Forgiveness Project, July 18, 2016.
46 “What Place for Forgiveness after Genocide?”
47 “What Place for Forgiveness after Genocide?”
48 “After the Rupture: Understanding Transitional Justice and Reconciliation,”
-reconciliation, paras. 7–8.
49 “Background: The Road to Reconciliation.
50 “After the Rupture,” para. 9; Ensalako, “Truth Commission for Chile and El
Salvador.”
51 González and Varney, Truth Seeking.
52 González and Varney, Truth Seeking.
53 Clarke, Fictions of Justice.
54 Kofi Annan, “The Secretary-General Address to the United Nations General
Assembly,” United Nations Meeting Coverage and Press Releases, September 20,
1999.
55 Koulen, “The Responsibility to Protect.”
56 ICISS, The Responsibility to Protect, 18.
57 ICISS, The Responsibility to Protect, 10.
58 Kioko, “The Right of Intervention under the African Union’s Constitutive Act.”
59 African Union, Constitutive Act of the African Union, Article 4, para. (h), 7,
Comments.”
61 Stahn, “Notes and Comments”; Focarelli, “The Responsibility to Protect Doctrine
and Humanitarian Intervention”; Schimmel, “The Moral Case for Restorative
Justice.”
62 See Feldman and Ticktin, In the Name of Humanity; Fassin and Pandolfi, Contemporary States of Emergency; Fassin, Humanitarian Reason; Redfield, Life in
Crisis.
63 Etymology: impunity, mid-sixteenth century, from Latin impunitas, from impunis
“unpunished,” from in- “not” + poena “penalty” or punire “punish.”
64 The relevant part of the recommendation stated, “In these circumstances, the
Commission desire to state expressly that in the hierarchy of persons in authority,
there is no reason why rank, however exalted, should in any circumstances protect
the holder of it from responsibility when that responsibility has been established
before a properly constituted tribunal. This extends even to the case of heads of
States . . . even if, in some countries, a sovereign is exempt from being prosecuted
in a national court of his own country the position from an international point of
view is quite different.” Commission on the Responsibility of the Authors of the
War and on Enforcement of Penalties, “Report Presented to the Preliminary Peace
Conference, 29 March 1919,” reprinted in American Journal of International Law 14
%20of%20IMT%201945.pdf.


Jackson, “The Besieged Strongholds of the Mind.”


The ICTY declared, “Individuals are personally responsible, whatever their official position, even if they are heads of State or government ministers: Article 7(2) of the Statute and article 6(2) of the Statute of the International Criminal Tribunal for Rwanda . . . are indisputably declaratory of customary international law.”


Crawford, The International Law Commission’s Articles on State Responsibility.


The only suggestion came from Garcia Labajo of Spain, who said that he had reservations about Article 24. He stated that for Para. 2 of Article 24, it might be better to say, for example, “jurisdiction in relation to acts for which that person is responsible.” This was not considered, and the articles were passed.

Schabas, The International Criminal Court, 446; Rome Statute, Article 27, Irrelevance of Official Capacity: “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.”

79 Teitel, *Transitional Justice*.
82 Green, “The Last Man at Nuremberg.”
83 Ben Ferencz, interview with author, 2014.
84 Rome Statute, Preamble, 1.
85 See also Constable, *Just Silences*.
86 Teitel, *Transitional Justice*.
89 Warrant of Arrest for Omar Hassan Ahmad Al Bashir; Baldo, “Sudan.”
90 Murungi, “10 Years of the International Criminal Court.”
92 Baldo, “Sudan.”
95 See United Nations–African Union Hybrid Operation in Darfur.
98 See African Union, “Communique of 547th Meeting of the Peace and Security Council,” para. 22(ii)(a); also “Agreement on the Resolution for the Conflict in the Republic of South Sudan.”
101 Papenfuss, “Interview with Luis Moreno-Ocampo.”
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102 Papenfuss, “Interview with Luis Moreno-Ocampo.”
104 Jennings, “Cosmopolitan Subjects.”
105 Jennings, “Cosmopolitan Subjects;” 6–7. See also the Tadic Decision “Judgment,”
Tadić (IT-94-1-A), Appeals Chamber, July 15, 1995, ¶86.
106 Focarelli, “The Responsibility to Protect Doctrine and Humanitarian
Intervention.”
107 International Criminal Court, “Rules of Procedure and Evidence,” Rule 85(b), 31,
108 Schabas, An Introduction to the International Criminal Court.
109 The Rome Statute of the International Criminal Court, Articles 75 and 79. Article
75 establishes that the court “may order reparations against a convicted per-
son specifying appropriate reparations to, or in respect of, victims, including
restitution, compensation and rehabilitation.” Article 79 establishes the TFV “for
the benefit of victims of crimes within the jurisdiction of the Court, and the
families of such victims.”
110 War Crimes Research Office and Judge Sang-Hyun Song, Victim Participation
before the International Criminal Court.
111 “Kenyans Set Benchmarks for Implementation of Jubilee Manifesto,” Ipsos Syno-
vate, July 13, 2013.
112 Trust Fund for Victims, “Mobilising Resources and Supporting the Most Vul-
nerable Victims through Ear-Marked Funding,” Programme Progress Report,
115 ICC Trial Chamber V, Decision on Victims’ Participation and Representation,
October 3, 2012.

Chapter 2. Founding Moments?

2 The Kapenguria Six, a group of political activists in Kenya, were all members
of the Mau Mau society. In 1953 they were arrested and convicted of conspiracy
against the colonial government and of pressuring locals into pledging alliance to
the Mau Mau. They were later released, as elections for an independent govern-
ment took place, in which Kenyatta won the majority vote. Both the colonial gov-
ernment and the Mau Mau activists competed to gain people’s support through
relentless propaganda. See “The Case That Immortalised Kenya’s ‘Kapenguria
Six,’” East African, July 1, 2017, https://www.theeastafrican.co.ke/magazine/Case
-that-immortalised-Kenya-Kapenguria-Six-/434746-3995106-s8sxn5z/index.html;
for more on the propaganda war, see Osborne, “The Rooting Out of Mau Mau.”
3 Previously known as Kenyatta Day, celebrated to commemorate the detention of the Kapenguria Six. However, following the establishment of the new Kenyan Constitution in August 2010, Kenyatta Day was renamed Mashujaa Day.


5 See “Mashujaa Day Speech by Uhuru Kenyatta.”

6 See “Mashujaa Day Speech by Uhuru Kenyatta.”

7 Bakhtin, The Dialogic Imagination, especially “Forms of Time and the Chronotope in the Novel: Notes toward a Historical Poetics.”


9 Interestingly, despite Kenyatta’s attempt to highlight the wealth and power of the West, Kenyatta’s own family’s wealth and power is ironic as it is seen by the Office of the Prosecutor as an impediment to its investigations, as Kenyatta was seen as using his financial and political resources to influence witnesses and the political and legal process.

10 See Freud, The Ego and the Id.

11 Clarke, Knottnerus, and de Volder, Africa and the ICC.


18 Schabas, An Introduction to the International Criminal Court, 3.


20 Schabas, An Introduction to the International Criminal Court.

21 Schabas, An Introduction to the International Criminal Court, 4.

22 Schabas, An Introduction to the International Criminal Court, 4.


24 Cassese, “From Nuremberg to Rome.”

25 Schabas, An Introduction to the International Criminal Court, 5–6.


35 Schabas, An Introduction to the International Criminal Court, 8–9; Cassese, “From Nuremberg to Rome,” 9–10.
36 Schabas, An Introduction to the International Criminal Court, 9.
38 Franklin, “Prevention and Suppression of Transnational Organized Crime.”
39 UN Doc. sc Res. 780, October 6, 1992.
40 UN Doc. sc Res. 827, May 25, 1993.
41 Schabas, An Introduction to the International Criminal Court, 12; Cassese, “From Nuremberg to Rome,” 14.
43 The clearest location of Mahmood Mamdani’s argument that it was necessary to produce Nuremberg and the model it created for transitional justice is in his “The Logic of Nuremberg.” The point about the Nuremberg model is clarified more substantively in Mamdani, “Beyond Nuremberg.”
46 Grovogui, *Beyond Eurocentricism and Anarchy.*


48 See Article 5 of the Rome Statute of the ICC, 3.

49 The states that have so far ratified this jurisdiction are overwhelmingly countries in the developing world, with a striking absence of all five UNSC permanent-member states: China, France, the Russian Federation, the United Kingdom, and the United States. See “Status of Ratification and Implementation of the Kampala Amendments on the Crime of Aggression,” Update No. 28, as of December 8, 2017, https://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/.


51 “Activation of the Jurisdiction of the Court over the Crime of Aggression,” Resolution ICC-ASP/16/Res.5, para. 2.

52 See Annex 2 of the report, ICC-ASP/16/24, 15.

53 The states that have ratified this are Liechtenstein, Samoa, Trinidad and Tobago, Luxembourg, Estonia, Germany, Botswana, Cyprus, Slovenia, Andorra, Uruguay, Belgium, Croatia, Slovakia, Austria, Latvia, Spain, San Marino, Georgia, Malta, Costa Rica, Czech Republic, Switzerland, Lithuania, Finland, the former Yugoslav Republic of Macedonia, El Salvador, Iceland, the State of Palestine, the Netherlands, Chile, Portugal, Argentina, and Panama. On December 6, 2017, Panama deposited its instrument of ratification of the Kampala amendments, becoming the thirty-fifth state to ratify the amendments.

54 Odinkalu, “International Criminal Justice, Peace and Reconciliation in Africa.”

55 “Report on the Facilitation on the Activation of the Jurisdiction of the International Criminal Court.”

56 On file with author: prevalent narrative collected in fieldwork interviews.

57 Wetherall, *Affect and Emotion,* 142.


59 Laqueur, “Bodies, Details, and the Humanitarian Narrative.”

60 For more on the politics of resentment, see also Hogget, Wilkinson, and Beedell, “Fairness and the Politics of Resentment”; and Engels, “The Politics of Resentment and the Tyranny of the Minority.”

61 Clarke and Goodale, *Mirrors of Justice.*


63 Wetherall, *Affect and Emotion.*

Chapter 3. Biomediation and the #BringBackOurGirls Campaign

1. See Matfess, *Women and the War on Boko Haram*; see also Walker, “Eat the Heart of the Infidel”; and “The Popular Discourses of Salafi Radicalism and Salafi Counter-Radicalism in Nigeria.”


5. President Goodluck Jonathan was a Christian southerner and was president in 2014 when the Chibok girls were kidnapped. The popular discourse is that he was interested in resolving this crisis because the disorder in the northeast bolstered his political prospects in the next presidential election to be seen as a political success.


As of December 30, 2017, one hundred girls remained captive since their abduction in May 2014. The way Nigeria’s leadership under President Goodluck handled the Chibok girls’ kidnapping should be compared with the more recent (February 19, 2018) kidnapping by Boko Haram of schoolgirls in Dapchi, Yobe State, which was addressed almost immediately by the next Nigerian president, Muhammadu Buhari. The release of the girls in these regions was negotiated and they were freed a month later.

9. Ross, *Mixed Emotions*. See also publications on victimhood, human rights, and humanitarianism, such as Allen, “Martyr Bodies in the Media”; McLagan, “Principles, Publicity, and Politics”; see also Khoja-Moolji, “Becoming an ’Intimate Publics,” on hashtag feminism as it relates to #BringBackOurGirls, exploring the politics of saving Muslim women. See also Abu-Lughod, *Do Muslim Women Need Saving?*; Hirschkind and Mahmood, “Feminism, the Taliban, and Politics of Counter-Insurgency”; and Chouliaraki, *The Spectatorship of Suffering* and the literature on posthumanitarianism concerning how social media changes the affective landscape of humanitarian mobilization and erases the need for suffering.
Barad, *Meeting the Universe Halfway*; Haraway, *When Species Meet*.


These campaigns are not only funded by multimillion-dollar donor organizations, such as the Bill and Melinda Gates Foundation, the MacArthur Foundation, Open Society, and the Ford Foundation, they also reveal how particular forms of activism have carried over to the business of advocacy.


Kony 2012: Invisible Children. The image can be found on the main page of their website.


Obiageli Ezekwesili is a chartered accountant and was the federal minister of solid materials and, later, federal minister of education under Olusegun Obasanjo, the president of Nigeria from 1999 to 2007.

Barthes, “Shock-Photos.”


This was the US branding for disadvantaged students that was advanced by President George W. Bush’s educational platform. The message prioritized literacy for all children through ensuring that all children’s educational needs would be
addressed through the new plan. It was legislated through the US Congress’s No Child Left Behind Act of 2001 (NCLB).


29 Mia Farrow (@MiaFarrow), Twitter, May 5, 2014, 12:37 p.m., https://twitter.com/MiaFarrow/status/4640204814023836.

30 Iman Abdulmajid (@The_Real_IMAN), Twitter, May 7, 2014, 10:05 a.m., https://twitter.com/The_Real_IMAN/status/464088568426356480.


32 Gina Carano (@ginacarano), Twitter, May 7, 2014, 8:29 p.m., https://twitter.com/ginacarano/status/46424579085694240.


41 Mary J. Blige (@maryblige), Twitter, May 7, 2014, 10:46 a.m., https://twitter.com/maryblige/status/464098955093999618.


49 See Ariana Hernandez Reguant’s argument about racism and American anthropology, unpublished paper.

50 Williams, *Stains on My Name, War in My Veins*.

51 Mamdani, *When Victims Become Killers*; Cooper, *Africa in the World*.

52 For a historical view on inequality in Nigeria, see Diejomaoh and Bienen, *Inequality and Development in Nigeria*. Also, for a discussion of contemporary structural inequality, see Ariyo and Olaniyan, “Structural Transformation and Inequality.”


54 Nicolson, *The Administration of Nigeria*.

55 Mbembe, *On the Postcolony*; see also Mbembe, “Provisional Notes on the Postcolony.”

56 In relation to the question of legitimate victims, see also Ticktin, “The Gendered Human of Humanitarianism”; Ticktin, “How Biology Travels”; and Fassin, “Humanitarianism as a Politics of Life.”

57 Augé, *Non-Places*.

**Chapter 4. From “Perpetrator” to Hero**

1 De Rivera and Páez, “Emotional Climate, Human Security, and Cultures of Peace.”

2 This message was formally articulated in Uhuru Kenyatta’s official announcement that introduced the Jubilee Coalition in February 2013, where he set the tone for the message that our fate is in our hands, promoted by the Jubilee campaign. See also Agathangelou and Killian, *Time, Temporality and Violence in International Relations*.

3 See also Vladimir Petrović’s book on juridical and historical time, *The Emergence of Historical Forensic Expertise*; Bevernage, “Time, Presence, and Historical
Injustice”; Bevernage, History, Memory, and State-Sponsored Violence; and Stauffer, “Speaking Truth to Reconciliation.”


7 Sikkink, The Justice Cascade.

8 Hart, “The Aims of the Criminal Law.”

9 Similarly, the law literature describing the choice to reject the collectivization of guilt often suggests that holding a few accountable allows the rest to be cleansed, rid of guilt, and free to move beyond the period of violence. Scholars such as Madoka Futamura, for instance, wrote that avoiding the collectivization of guilt has “the effect of endorsing the transformation of the nation by freeing it from the burden of collective guilt while detaching those responsible for war crimes from the society concerned and eliminating their political influence.” See Futamura, “Individual and Collective Guilt.” Writing on the Tokyo Tribunal, the Nuremberg IMT’s less famous counterpart, she reflects, “Consciously or unconsciously, the Japanese displaced the burden of their war guilt and responsibility onto the shoulders of the defendants at the Tribunal.” This position was further explored by Mark Drumbl, who argued, “Absolving the many might be more conducive to the grand project of social healing. Such absolution may have currency . . . in the process of peace. . . . Implicating too many individuals might threaten peace and, as such, the fiction of collective innocence could serve important political purposes.” See Drumbl, Atrocity, Punishment, and International Law, 41.

10 On emotions, see Ahmed, The Promise of Happiness.


16 In the midst of Liberia and Sierra Leone’s war, the president of Nigeria, Olusegun Obasanjo, gave Charles Taylor asylum in the southern state of Calabar, Nigeria, in exchange for brokering a peace deal in Liberia and an agreement to put an end to the raging war. However, while in exile Taylor was accused of breaking the agreement by continuing to engage in Liberian politics. In January 2006, when President Ellen Johnson Sirleaf took office in Liberia, she made the extradition request for Taylor. President Obasanjo agreed to release Taylor into Liberia’s
custody. Taylor fled and was recaptured and repatriated to Liberia. He was then taken to Sierra Leone and turned over to the Special Court for Sierra Leone. In the end, his trial was administered in the first ICC building in The Hague, where in April 2012 he was convicted of eleven charges of aiding and abetting war crimes.


18 ICC Pre-trial Chamber II, “Situation in the Republic of Kenya, Decision on the Prosecutor’s Appeal against the Decision on the Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute.”


20 Kagwanja and Southall, “Introduction.”

21 See Waki, Report of the Commission of Inquiry into Post-Election Violence. In the Kikuyu language, Mungiki (mũngĩkĩ) means “a united people.” It was first a secretive religious cult group and is now a banned gang-like secret organization.

22 The first defeat was in 2009 when the government failed to obtain enough support in Parliament to pass the relevant laws to set up the tribunal.

23 See also Brown, “International Criminal Justice and Electoral Violence”; Sriram and Brown, “Kenya in the Shadow of the ICC”; Kendall, “ ‘UhuRuto’ and Other Leviathans”; and Höhn, “New Start or False Start?”


25 Mueller, “Kenya and the International Criminal Court (ICC).”


27 Charged pursuant to articles 7(l)(a), 7(l)(d), 7(l)(h), and 25(3)(a) of the Rome Statute.

28 Charged pursuant to articles 7(l)(a), 7(l)(d), 7(l)(g), 7(l)(k), 7(l)(h), and 25(3)(a) of the Rome Statute.

29 Cheeseman, “The Kenyan Elections of 2007.”


31 Human Rights Watch, “High Stakes”; see also Kagwanja and Southall, “Introduction.”

32 Interview 0037, by Kamari Clarke, July 18, 2013.

33 On January 23, 2012, the Pre-trial Chamber II decided to move cases against Ruto, Sang, Muthaura, and Kenyatta to trial (see The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11-859, 16-08-2013; The Prosecutor v. Uhuru Muigai Kenyatta, ICC-PIDS-KEN-02-010/14-2014). Judges declined to confirm charges against Henry Kiprono Kosgey and Mohammed Hussein
The charges against Francis Muthaura were dropped before being brought to trial. The decision to move the majority of the Kenyan cases to trial is bound to provide a window into another set of international juridical processes on the world stage and assessments on the extent to which the ICC has the potential to produce justice.

34 Dworkin, *Law's Empire*.


36 Rome Statute of the International Criminal Court, Article 11.


38 Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, para. 107.

39 *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-859. The prosecutor did seek permission to amend the charges against Ruto and Sang to include events on December 30 and 31, 2007, but the judges deemed this request inadmissible at the time it was made, as it was after the confirmation of charges hearing and no postponement was requested in order to amend the charges. For the ICC’s narrowing of the relevant time period for Ruto, see Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, para. 349.


41 See Rome Statute, Article 61(7). The ICC sua sponte undertook the decision to narrow the charges by time period.

42 Request for Authorization of an Investigation Pursuant to Article 15, ICC-01/09, para. 55–56.

43 Rome Statute of the International Criminal Court, Article 7(2)(h).

44 Rome Statute of the International Criminal Court, Article 7(1)(a).

45 See also Nissel, “Continuing Crimes in the Rome Statute.”

46 See Case Concerning the Difference between New Zealand and France Concern-


48 ictr Case No. ictr-99-52-T, P103 (ictr Trial Chamber, December 3, 2003).

49 ictr Case No. ictr-97-19-ar72 (ictr Appeals Chamber, September 12, 2000).

50 Eltringham, Accounting for Horror; and Wilson, Incitement on Trial.

51 See Mamdani, When Victims Become Killers.

52 Engel, “Law, Time, and Community.”

53 Uhuru Kenyatta, speech, February 2013, announcing the launch of the Jubilee Coalition.

54 Uhuru Kenyatta, speech, February 2013.

55 Uhuru Kenyatta, speech, February 2013.

56 Uhuru Kenyatta, speech, February 2013.

57 Ogot, Zamani, 249.

58 Oathing rituals among the Mau Mau involved a campaign in which members of the Gikuyu masses took oaths to show their support of particular social decisions or conditions. The oaths involved the alignment of particular beliefs understood as ideological and expressed through solemn commitments in songs and at rallies—all for the expression of those alliances.

59 Kinyatti, History of Resistance in Kenya, 144–150. The question of ethnicity in the Mau Mau struggle is one of the most controversial in the historiography. The debate revolves around whether the struggle was of a nationalist nature or was only a Kikuyu affair. For details of this debate, see Kinyatti, “Mau Mau”; and Atieno-Odhiambo, “The Production of History in Kenya.”

60 It is worth noting here that Kenyatta denied involvement with the Mau Mau during the Kapenguria trial.

61 Home Guards were African village policemen who were working for the British colonial government in Kenya to quash the Mau Mau struggle. They had a reputation for being extremely vicious in their anti-Mau Mau campaigns.

62 Interview data collected in Nairobi, on file with author.


64 Robins, “‘To Live as Other Kenyans Do.’”

65 Field notes/data collection on file with author.

66 See Nissel, “Continuing Crimes in the Rome Statute.”

67 Ngugi, interview with author in Nairobi. Note that following the violence over Kenya’s disputed 2007 general elections, the Kenyan Dialogue and Reconciliation Forum was created to facilitated mediation among the various parties. As part of this process, four agendas were identified as areas of focus for national dialogue and reconciliation. Agenda 4 focused on long-term issues and solutions such as land reform, legal and institutional reform, unemployment, and several more. See the National Accord and Reconciliation Act 2008 signed in Nairobi, Kenya, on February 1, 2008.
NOTES TO CHAPTERS 4–5

68 Ngugi, interview with author.
69 Ngugi, interview with author.
70 The Truth, Justice and Reconciliation Commission of Kenya report tried
to address these very questions, but the process was significantly delayed
and marked with internal wrangling, which served to discredit the process
significantly.

Chapter 5. Reattribution through the Making of an African Criminal Court

2 “50th Anniversary Solemn Declaration.”
3 “50th Anniversary Solemn Declaration.”
4 Nkosazana Dlamini Zuma, “Silencing Guns in Africa: Building a Roadmap to a
au.int/en/newsevents/20140429.
5 “African Union Agenda 2063: A Shared Strategic Framework for Inclusive
www.au.int/web/sites/default/files/newsevents/workingdocuments/29732-wd-27_
o8_agenda_2063_background_note_en_0.pdf; “From the Organisation of African
Unity (OAU) to the African Union (AU): The 50-Year Path towards African
-partnership.org/en/stay-informed/news/organisation-african-unity-oau-african-
-union-au-50-year-path-towards-african.
6 United Nations Economic Commission for Africa, “Youth and Children’s Forum:
Theme: African Renaissance/Africa We Want to See 2063,” Addis Ababa, Ethio-
pia, April 2013, https://au.int/sites/default/files/newsevents/conceptnotes/29076-
-cn-concept_note_auc-eca_20may_0.pdf.
7 African Union Commission, “Agenda 2063: The Africa We Want,” June 2014,
Issuu, 68–69, https://issuu.com/assobgavi/docs/au_agenda_2063_-_draft_june_
2014.
8 Gordon, Ghostly Matters.
9 For more on this, see Pahuja, Decolonising International Law; Ferguson, Global
Shadows; Grovogui, Beyond Eurocentricism and Anarchy.
10 See Hobsbawm and Ranger, The Invention of Tradition; and Anderson, Imagined
Communities.
12 Thabo Mbeki and Mahmood Mamdani, “Courts Can’t End Civil Wars,” Opinion,
courts-cant-end-civil-wars.html.
13 See Murithi, “The African Union and the International Criminal Court”; Akha-
v-an, “Are International Criminal Tribunals a Disincentive to Peace?”; Branch,
“Uganda’s Civil War and the Politics of ICC Intervention”; Eisikovits, “Peace ver-
sus Justice in Transitional Settings,” 717.
See, for example, Mallinder, “Beyond the Courts?”; Mnookin, “Rethinking the Tension between Peace and Justice,” 145; Olsen, Payne, and Reiter, “The Justice Balance.”


Connal Parsley, “Global Spectatorship: The Power of Appearance and the Construction of Authority,” Contemporary Trends Speaker Series (Carleton University, Ottawa, Canada, March 17, 2016).

See also Kai, *Pouvoir et Poursuite*.

See the “I am African, I am the African Union” branding campaign highlighted at *African Union Newsletter*, May 25, 2012: https://au.int/ar/newsevents/26526/launch-au-branding-campaign-%E2%80%9Ci-am-african-i-am-african-union%E2%80%9D.


Legum, *Pan-Africanism*.


Mwanasali, “From the Organization of African Unity to the African Union,” 205.

African Union, “OAU Charter.”


Constitutive Act, Article 9.

“From the Organisation of African Unity (OAU) to the African Union (AU).”

Ferguson, *Global Shadows*. 

NOTES TO CHAPTER 5  293
31 Dlamini, “Towards a Regional Protection of Human Rights in Africa.”


35 In January 1981, an OAU Council of Ministers adopted a preliminary draft of an African charter in Banjul, the Gambia, that had been written in 1979 by a committee of experts headed by Keba Mbaye. The charter was adopted at the OAU Assembly Summit held in June in Nairobi, Kenya (see Dlamini, “Towards a Regional Protection of Human Rights in Africa,” 193, citing Kannyo, “Human Rights in Africa,” 20) and came into force in 1986. The African Commission, the institution established under the charter to interpret, protect, and promote human rights in Africa, was established in November 1987 (African Charter, Article 45). In 1998, a protocol to the charter was adopted that created the African Court of Human and Peoples’ Rights (ACHPR). That protocol entered into force on January 25, 2005, and currently twenty-seven of fifty-four possible states are party to it (see Dlamini, “Towards a Regional Protection of Human Rights in Africa,” 7–8). The ACHPR sits in Arusha, Tanzania, and may hear applications relating to human rights violations brought before it by the AUC as well as African intergovernmental organizations and member states, but the path to adjudicating international crimes has taken much longer (see Dlamini, “Towards a Regional Protection of Human Rights in Africa,” 8).


37 See Abass, “The Proposed International Criminal Jurisdiction for the African Court,” citing UN GA Res 2202 A (XXI), December 16, 1966; Article 5 of the Apartheid Convention, see note 14 above.

41 Constitutive Act, Articles 10–13.
43 See AU, “Decisions,” Fourteenth Ordinary Session of the AU Assembly; see also “Decision on the Theme, Date and Venue of the Sixteenth Ordinary Session of the Assembly of the African Union.”
44 See AU, “Decisions,” Fourteenth Ordinary Session of the AU Assembly; see also “Decision on the Theme, Date and Venue of the Sixteenth Ordinary Session of the Assembly of the African Union.”
45 On the structure and status of AGA, see Mukundi, “Consolidating the African Governance Architecture.”
46 Mukundi, “Consolidating the African Governance Architecture.”
47 Mukundi, “Consolidating the African Governance Architecture.”
48 “The AGA’s policy approach rests on three principal pillars: the existence of necessary norms, the institutions that house them and the processes through which they are implemented” (Mukundi, “Consolidating the African Governance Architecture,” para. 7–19). With links between peace, security, and democracy, AGA is envisioned as complementary to the PSC and the associated institutions that support its work, together with the REC, jointly constituting the African Union’s Peace and Security Architecture (APSA). On APSA, see generally Powell, “The African Union’s Emerging Peace and Security Regime.” Through APSA, the assembly works closely with the PSC, a fifteen-member body elected on a regional basis, which serves as the AU’s standing decision-making organ responsible for the maintenance of continental peace and security (AU, “PSC,” http://www.peaceau.org). According to the outlined structure, the AU’s PSC is supported by a number of associated units: the commission, a Panel of the Wise, a Continental Early Warning System, an African Standby Force, and a Special Fund (Protocol Relating to the Establishment of the Peace and Security Council). Since starting
work in 2004, the PSC has addressed a variety of issues on the African continent, such as armed conflicts (e.g., Somalia and Sudan), unconstitutional changes of government (though the PSC position on these—and the role of popular uprisings in particular—has yet to be solidified), peace building, and issues such as terrorism and the illicit trade in small arms and light weapons (Williams, “The Peace and Security Council of the African Union”).


For a case for humanitarian intervention in Darfur, noting that legal (judicial) responses have limits and their role should be contextualized, see Smith, “Moral Hazard and Humanitarian Law”; on responses to the Darfur conflict and the role of the AU, see Musila, “New Posture and Old Rhetoric?,” 15–17. See also Grono, “Briefing,” 621–631; on humanitarian intervention, see Udombana, “Still Playing Dice with Lives”; and Kuwali, “The End of Humanitarian Intervention.”


See African Union, “Communique of 547th Meeting of the Peace and Security Council”; see also “Agreement on the Resolution for the Conflict in the Republic of South Sudan.”

PSC, “Communiqué of the PSC 207th Meeting of the Peace and Security Council at the Level of Heads of State and Government.”


Kuperman, “A Model Humanitarian Intervention?”


See Kuperman, “A Model Humanitarian Intervention?,” 110. Kuperman argues
that evidence that Qaddafi avoided targeting civilians comes from HRW’s report on the city of Misurata, which showed that of the 949 people wounded there in the rebellion’s initial seven weeks, only thirty were women or children, meaning that Qaddafi’s forces focused narrowly on combatants. During that same period, only 257 people were killed among the city’s population of 400,000—a fraction less than 0.0006—providing additional proof that the government avoided using force indiscriminately. Moreover, Qaddafi did not perpetrate a “bloodbath” in any of the cities that his forces recaptured from rebels prior to NATO intervention—including Ajdabiya, Bani Walid, Brega, Ras Lanuf, Zawiya, and much of Misurata—so there was virtually no risk of such an outcome if he had been permitted to recapture the last rebel stronghold of Benghazi.

63 Kuperman argues that NATO attacked Libyan forces indiscriminately, including some in retreat and others in Qaddafi’s hometown of Sirte, where they posed no threat to civilians. Moreover, NATO continued to aid the rebels even when they repeatedly rejected government cease-fire offers that could have ended the violence and spared civilians. Such military assistance included weapons, training, and covert deployment of hundreds of troops from Qatar, eventually enabling the rebels to capture and summarily execute Qaddafi and seize power in October 2011.

64 Kuperman, “A Model Humanitarian Intervention?”
65 See International Criminal Court, “Situation in Libya.”
66 Moomkin, “Rethinking the Tension between Peace and Justice.”
67 Moomkin, “Rethinking the Tension between Peace and Justice.”
68 Kuperman, “A Model Humanitarian Intervention?”
70 Akuffo, “The Politics of Interregional Cooperation.”
71 Akuffo, “The Politics of Interregional Cooperation.”
72 African Union, Constitutive Act of the African Union.
75 Akuffo, “The Politics of Interregional Cooperation,” 120.
77 See Nouwen, Complementarity in the Line of Fire; also see Abbas, “The Proposed International Criminal Jurisdiction for the African Court”; Udombana, “Can These Dry Bones Live?” 1.
African Union, *Report of the African Union High-Level Panel on Darfur (AUPD).*


Musila, “New Posture and Old Rhetoric?”


Protocol of the ACJ, note 7 above, Article 60 (requiring fifteen ratifications to enter into force). A list of countries that have signed or ratified/acceded to the Protocol of the Court of Justice of the African Union, as of June 15, 2017, is at https://au.int/sites/default/files/treaties/7784-sl-protocol_of_the_court_of_justice_of_the_african_union_1.pdf.

Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, see note 1 above, Article 3(1).


AU Assembly, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court, annex Article 6 (replacing Article 16). Note that as of May 2018, only eleven countries have signed the protocol and none have ratified it.

See also Deya, “Worth the Wait.”

Jalloh, Clarke, and Nmehielle, “Introduction.”


AU Assembly, “Decision on the Application by the International Criminal Court Prosecutor for the Indictment for the President of the Republic of Sudan.”


103 The PALU draft of the amended criminal jurisdiction was considered at validation workshops attended by legal counsel attached to AU organs and institutions, as well as representatives from some RECs (see Marc, Verjee, and Mogaka, The Challenge of Stability and Security in West Africa). In July 2010, the second draft of the protocol was prepared following that meeting with AU Office of the Legal Counsel. The AU OLC organized internal review meetings in Midrand, South Africa, in November 2010, where piracy and aggression were reinstated and the subject matter jurisdiction of the proposed court expanded to include transnational crimes (November 2010 [Midrand Draft] Protocol, document on file with author).

104 On January 19–20, the AU OLC organized a review meeting of African experts and Chief Security Officer actors of the Midrand Draft Protocol, held in Nairobi, Kenya. This meeting was organized by PALU in collaboration with Open University of Tanzania and Open Society Initiative of East Africa. In October and November 2011, AU OLC then organized two meetings of government legal experts in Addis Ababa to assess the Midrand Draft of the protocol. This was followed by a May 2012 AU summit meeting of the justice ministers and attorneys general, in Addis Ababa (see “Report of the Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters on the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights”). Following this, the executive council reviewed and endorsed the report of the Meeting of Ministers of Justice/Attorneys General (“Decision of the Executive Council Adopted during Its Twenty-First Ordinary Session”).


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107 See Clarke, *Fictions of Justice.*


110 Countries that have signed the protocol: Kenya, Benin, Chad, Congo, Ghana, Guinea-Bissau, Guinea, Sierra Leone, São Tomé and Principe, and Mauritania.

111 These are the African Commission on Human and People's Rights (Banjul Commission), the African Committee of Experts on the Rights and Welfare of the Child, the African Union Advisory Board on Corruption, the African Union Commission on International Law, the Peace and Security Council, the Courts of the Regional Economic Communities, the African Standby Force, and the African Capacity for the Immediate Response to Crises.


114 In relation to affects argued as both internalities and externalities, see Navaro, *The Make-Believe Space.*


Chapter 6. Reattributing the Irrelevance of the Official Capacity Movement


3 Burundi's withdrawal will not affect the country's existing obligations in relation to ongoing proceedings or investigations, and it will not come into effect until after a one-year waiting period has elapsed and the subsequent notification of withdrawal is registered with UN treaty office.


5 Just one week after that, on October 25, 2016, Gambia announced its intent to withdraw as well. This was reversed in February 2017 when the country, under new leadership, decided to cancel its withdrawal from the ICC.


NOTES TO CHAPTER 6


9 "Mandela Legacy on the Line as South Africa Moves to Leave ICC.”

10 “Mandela Legacy on the Line as South Africa Moves to Leave ICC.”


12 "Gambia urges U.N. Inquiry into ‘Deliberate’ Migrant Shipwrecks.”


21 ICC, “Situation in Darfur, Sudan: In the Case of The Prosecutor v. Omar Hassan Ahmad Al-Bashir,” Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al-Bashir’s Arrest and Surrender to the Court, April 9, 2014, at para. 26; ICC, “Situation in Darfur, Sudan: In the Case of The Prosecutor v. Omar Hassan Al-Bashir,” Case No. ICC-02/05/01/09, decision under Arti-
Article 87(7) of the Rome Statute on noncompliance by South Africa with the request by the court for the arrest and surrender of Omar Al-Bashir, July 6, 2017, para. 82; Akande, “The Legal Nature of Security Council Referrals to the ICC,” 339.

22 ICC, “Situation in Darfur, Sudan: In the Case of The Prosecutor v. Omar Hassan Al-Bashir,” Case No. ICC-02/05-01/09, decision under article 87(7) of the Rome Statute on the noncompliance by Jordan with the request by the court for the arrest and surrender of Omar Al-Bashir, December 11, 2017, para. 37–38; ICC, “Situation in Darfur, Sudan: In the Case of The Prosecutor v. Omar Hassan Ahmad Al-Bashir,” decision under Article 87(7) of the Rome Statute on the noncompliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, para. 85–86; see also Akande, “The Legal Nature of Security Council Referrals to the ICC,” 340.


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29 ICC Decision on Jordan’s Noncompliance, at para. 33, 39.
30 ICC Decision on the DRC’s Cooperation, at para. 29; ICC Decision on South Africa’s Noncompliance, at para. 87–89.
31 ICC, Warrant of Arrest for Omar Hassan Ahmad Al Bashir.
39 The word bis comes from old Latin and means “repeat” and “twice” in Old High German. It is applied to various modern protocol standards to indicate the second version of the protocol.
41 Hobbs, in notes on file with author.
42 While Article 38 of the Statute of the International Court of Justice (and before it Article 38 of the Statute of the Permanent Court of International Justice) lists international treaties and CIL as the two most significant “sources of international law,” it also goes on to list two other sources, “general principles of law recognized by civilized nations” and “judicial decisions and the teachings of the most highly qualified publicists of the various nations.” Many international lawyers have since sought to add UN resolutions, both Security Council and General Assembly resolutions, to that list of “soft law,” jus cogens norms, obligations erga omnes, and a litany of other modes of international legality, each with varying claims to formal validity and substantive coherence.
Decisions on Bashir’s Immunity: Will the ICJ Get Another Immunity Case?, “EJIL Talk!”, February 8, 2012, https://www.ejiltalk.org/2012/02/page/2/, who states that “what the AU wants is an opinion [from the ICJ] that would clarify the immunity (or otherwise) of State officials from prosecution by the ICC and from enforcement action taken by States acting at the request of the ICC.”

46 ICC, “Situation in Darfur, Sudan: In the Case of The Prosecutor v. Omar Hassan Ahmad Al-Bashir.


48 ICC-02/05-01/09-139, “Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests,” para. 36.


50 ICC-02/05-01/09-195, para. 29.

51 ICC-02/05-01/09-302, “Decision under Article 87(7) of the Rome Statute on the Noncompliance by South Africa with the Request by the Court,” para. 91–93.

52 ICC-02/05-01/09-302, para. 74.

53 ICC-02/05-01/09-302, para. 93.


64 Du Plessis, The International Criminal Court That Africa Wants, 77.


66 See also Foucault, Discipline and Punish; Agamben, Homo Sacer; Agamben, State of Exception; and Foucault, The History of Sexuality.

67 Rao, “The Concept of International Community in International Law,” 102;


75 The International Criminal Court can assume jurisdiction if a case is referred to it by the UNSC, per Article 13 of the Rome Statute.

76 Schabas, The International Criminal Court, 446.


78 Gaeta, “Official Capacity and Immunities.”

79 Akande, “International Law Immunities and the International Criminal Court,” 413.

80 Akande, “International Law Immunities and the International Criminal Court,” 413.


84 See R v. Bow Street Metropolitan Stipendiary Magistrate; see also Wirth, “Immunities, Related Problems, and Article 98 of the Rome Statute,” 434.


89  Akande, “International Law Immunities and the International Criminal Court,”
410.
90  See Article 27, para. 2, p. 8 of the Vienna Convention on Diplomatic Relations.
91  “Report of the Working Group on Amendment of the Assembly of States Parties
of the International Criminal Court,” ICC-ASP/13/31, 16.
92  Secretariat of the Assembly of States Parties, Compilation of proposals to amend
94  Secretariat of the Assembly of States Parties, Compilation of proposals to amend
95  See Preamble of African Union Protocol on Amendments to the Protocol on the
Statute of the African Court of Justice and Human Rights, June 27, 2014.
96  Amended ACJHR Statute, Article 46(H).
97  Rome Statute, Article 86.
98  Conclusions of the Meeting of the Open Ended Committee of Ministers of For-
eign Affairs on the International Criminal Court at the Level of Permanent Rep-
resentatives, fieldwork notes on file with author.
99  International Court of Justice, Asylum Case (Colombia/Peru), 266.
100 Tladi, “Interpretation and International Law in South African Courts.”
101 For further discussion, see Adjovi, “Immunities in International Criminal
Law”; Imoedemhe, “Unpacking the Tension between the African Union and the
International Criminal Court”; Du Plessis, *Shambolic, Shameful and Symbolic*;
Abraham, “Africa’s Evolving Continental Court Structures”; Igwe, “The ICC’s
Favourite Customer.”
Immunities,” 975, 983–989. See also the Ghaddafi case, Arrêt no. 1414 (2001),
125 ILR, 456 (France: Cour de Cassation); Castro case (Spain: Audiencia Nacio-
nal, 1999), cited in Cassese, *International Criminal Law*, 320n24; Re Sharon and
Yaron, 42 ILM (2003) 596 (Belgium: Cour de Cassation); R v. Bow Street Sti-
pendiary Magistrate and Others, Ex Parte Pinochet (No. 3), [1999] 2 All E.R. 97,
126–127, 149, 179, 189 (UK House of Lords, per Lords Goff, Hope, Millett, and
Phillips).
103 Special Court for Sierra Leone, “Decision on Immunity from jurisdiction,”
worldcourts.com/scsl/eng/decisions/2004.05.31_Prosecutor_v_Taylor.pdf.
105 Nouwen, “The Special Court for Sierra Leone and the Immunity of Taylor,” 668.
106 Nouwen, “The Special Court for Sierra Leone and the Immunity of Taylor,” 668.
107 Nouwen, “The Special Court for Sierra Leone and the Immunity of Taylor,” 668.
108 See Kujenga Amani, “Article 46A bis: Implications for Peace, Justice, and Rec-
forums.ssrc.org/kujenga-amani/2014/10/21/article-46a-bis-implications-for
109 For example, the international crime of unconstitutional change of government.
110 In January 2012, during the Nineteenth African Union Summit, over thirty civil
society organizations from close to twenty African countries wrote to the African member states of the ICC and urged them to renew their support for the ICC’s efforts to combat grave international crimes.


116 Amani, “Article 46A bis.”

117 Abass, “Prosecuting International Crimes in Africa.”

118 Odinkalu, “International Criminal Justice, Peace and Reconciliation in Africa.”

119 Assembly of the Union, Twenty-Sixth Ordinary Session, Assembly/AU/Dec.590 (XXVI), 3.


127 *Opinio juris* is the second element (along with state practice) in international law that is necessary to establish a legally binding custom.
Epilogue. Toward an Anthropology of International Justice

1 Thomas Spijkerboer, “The International Refugee Regime” (lecture, Carleton University, Ottawa, December 2017).
2 Foucault, The Order of Things.
3 Grovogui, “To the Orphaned, Dispossessed, and Illegitimate Children.”