

## CHAPTER 4

### From “Perpetrator” to Hero

#### *Renarrating Culpability through Reattribution*

Where all are guilty, no one is.

—HANNAH ARENDT, *Responsibility and Judgment*

If the #Kony2012 and #BringBackOurGirls campaigns contributed to the popularization of a particular figure of the African “perpetrator” to be held accountable and the figure of the “victim” to be saved, in neighboring Kenya a campaign with the opposite ideological angst emerged through the figures of Uhuru Kenyatta and William Ruto. Despite being indicted by the ICC and deemed by those in the anti-impunity movement to be perpetrators of Kenya’s 2007–2008 electoral violence, these men were resignified and reframed in relation to modes of responsibility that raised the importance of articulating Kenya’s violence in the context of the country’s history. This treatment of historical context and the role of temporality in attributing culpability are in direct contrast to the approach of international justice campaigns, though equally manipulative. Through the deployment of Kenyatta and Ruto as brave leaders attempting to settle age-old disputes, the two came together as presidential and deputy presidential contenders for the Kenyan federal elections. Their campaign, with its highly produced and compelling message, merged two unlikely collaborators through the rebranding of Kenyan nationalist narratives using sentimental articulations that worked against the growing legal encapsulation trend.

The slick UhuRuto 2013 campaign, introducing the newly merged political party, the Jubilee Coalition, celebrated a new story of national unity by critiquing Europe’s ongoing interference in Africa. As symbolic figures of the



4.1 UhuRuto political campaign poster.

new postcolonial Africa, Kenyatta and Ruto were made to represent a different story through the Swahili slogan “Tuko Pamoja” (We are together) and with the top-trending hashtag #kenyadecides. Adamant about not letting the West interfere, its message responded to President Obama’s warnings—shown nightly on Kenyan news stations—that Kenyans should not elect ICC indictees as the country’s leaders. But the refrain prevailed: Kenyans had a right to decide for themselves who their leaders would be.

Through the merger of the names of both leaders, the campaign spearheaded the symbolic unification of historically competing voting blocs to support two leaders now rebranded as figures who would defend against external forces. The resignified image from perpetrator to African freedom fighter was effective (as suggested in chapter 2) because of what Joseph de Rivera refers to as particular historical emotional sensibilities and contemporary emotional climates.<sup>1</sup> As social domains that produce emotional cultural sensibilities, they engage in the socialization of practices and attitudes and create acceptable meanings out of particular political contexts. In this light, #kenyadecides went viral and was the highest trending hashtag of Kenya’s 2013 election period.

Tuko Pamoja was deployed as a cultural symbol of unity between two historically competing parties. It was translated into forty-two tribal languages and signaled the diversity of the governing coalition and the coming together of historically fractured political groups. Invocations of Tuko Pamoja on the campaign trail—through speeches, utterances, and salutations—led to the mobilization of grassroots constituencies who prayed and anointed their leaders in defense of what they portrayed as the persecution of Africa’s leaders by the ICC. The party’s new colors—yellow, red, and black—drew from both Uhuru’s National Alliance (TNA) party (red and white) and Ruto’s United Republican Party (yellow and black) and was characterized by two hands together with the slogan “Our fate is in our hands.”

The Jubilee Coalition’s campaign tapped into pro-Kenyan desires for post-colonial justice and succeeded in turning the electoral conversation away from the ICC trials and toward the need for a new agenda for change that addressed the historical roots of inequality in Kenya. This message highlighted the violence of the colonial past and the importance of reckoning with Kenya’s contemporary struggles through a sense of the *longue durée* of violence that produces structural inequalities.<sup>2</sup> Thus, in contrast to the ICC’s focus on individualized criminal responsibility and strict notions of legal time, this narrative draws on emotional reactions to historical and ongoing inequality and appropriates the discourse of reattribution to reassign blame.<sup>3</sup> But this narrativization could not unfold without the major support of a mediation strategy.

In 2012, Kenyatta hired a British public relations firm (located in the former colonial center) to conduct the relevant strategic market research to understand what they needed to do to win the election. The National Alliance adopted the dove as their symbol and “I Believe” as their slogan. He then hired another UK-based company, BTP Advisers, with a network in European, African, and emerging markets, to develop a campaign that would pull in support and offer a more youthful and dynamic image of the candidates. According to their website, BTP staff see themselves as creating and executing “political and profile-raising campaigns for individuals, candidates, organisations and companies to change hearts, minds and laws and deliver upset and unexpected victories.” This company harnessed key sentiments already central to the lives of Kenyans to achieve their main objective.<sup>4</sup> As their website explains, “Our full-time team of consultants, embedded on the ground with the campaign, helped to develop a set of messages that turned Kenyatta’s image around. By exposing the weak and flawed nature of the ICC case against him, we made the election a choice about whether Kenyans would decide their own future

or have it dictated to them by others. We demonstrated that only Kenyatta understood the concerns of ordinary Kenyans and would defend Kenyan values.”<sup>5</sup> Mark Pursey, one of the BTP advisers who led the campaign, outlined that his media strategy involved excessive monitoring of social media and information gathering on their opponent, with the goal of improving Uhuru’s image while presenting the ICC process as the machinations of the Western powers.<sup>6</sup>

The campaign message highlighted Uhuru’s call to foreign powers to stop interfering with Kenya’s internal affairs. This trope, familiar in its form and content, alongside the merger of two traditionally opposed parties, produced a winning package. With input from Kenyatta’s defense attorney, the well-known international lawyer Stephen Kay, extensive and detailed commentaries, op-ed pieces, consistent strategic responses to inquiries, and active creation of a positive public-relations message BTP masterminded the Jubilee Coalition campaign to redirect the impact of the ICC’s indictments. Central to this was their reorienting of the way that the general public understood issues of criminal culpability—especially the collective nature of culpability—as it relates to who was actually responsible for Kenya’s postelection violence. And it worked. Despite the charges of Ruto and Kenyatta’s culpability on the international stage, in 2013 a majority of the Kenyan people democratically elected Kenyatta and Ruto to be Kenya’s president and deputy president. This democratic election followed the reign of President Mwai Kibaki (2002–2013), who succeeded Daniel Moi’s (1978–2002) twenty-four-year dictatorship. The message that the ICC process is deeply political and reproduces older patterns of European colonialism in African affairs, while ignoring Europe’s responsibility for its part in Kenya’s contemporary violence, continues to resonate and circulate throughout the Kenyan press.

This approach involved contemporary forms of mediation deployed affectively to ignite hearts and minds with the injustices of Europe’s violent past and to set new terms for how issues of culpability were understood. But when we deconstruct the hero symbol that the campaign highlights, we see that part of what hastens the transformation of Kenyatta and Ruto from “perpetrator” to “hero” is made possible by clever branding, alliances and complicity with transnational capital, the importance of Kenya-Western trade relations, and the cunning of the untold story of the Kenyan mafia. Indeed, there are few heroes in this story—particularly from the perspective of people who have lived through and survived violence inflicted on them by various African leaders. In talking with ordinary people, even as they complained of the injustices

of the African state, we also saw how the reattribution of the individualized “perpetrator” figure by the ICC often led to feelings that international justice has also failed them. Time and time again we witnessed people then dealing with those feelings by shifting the parameters of culpability—a process that I have referred to as reattribution. In this case, reattribution takes the form of reclassifying the basis for culpability through temporality.

As we have seen, the figure of the African “perpetrator” to be held accountable for mass violence committed within a legally limited period of time, or in the context of legal time, has emerged as both a bold symbol of anti-impunity and a key force for social resistance. This chapter builds on a discussion I began in previous chapters about the rhetorical resignification of the figure of the “perpetrator” but looks specifically at counterattributions of culpability in relation to law’s temporality. As my research showed, various African leaders use this strategy to deflect blame, protest ICC indictments, and win elections, and African stakeholders, including survivors, also use it to harness such strategies as well. The act of reattribution highlights a genuine ambivalence about international justice prosecutions for mass violence. When the relevance of structural inequalities—and thus the culpability for violence that implicates colonial settlers and authorities or proximate actors—is ignored, the ICC’s perpetrator figure functions as a mode of erasure rather than an example of prosecutorial justice cascades, as scholars such as Kathryn Sikkink may suggest.<sup>7</sup> This case, thus, shows how particular sentimental responses to the ICC perpetrator figure and the relevance of legal time have inspired counter-ICC sentiments that are shaping new ways to measure justice in the contemporary period. This happens through the rethinking of culpability.

Culpability is the cornerstone of criminal law and refers to the degree to which one can be held responsible for a particular act or set of results. Rooted in American and European legal traditions, individual culpability treats individuals as autonomous agents who are able to either obey or violate the law, and to bear the consequences of a violation of the law. In the Anglo-Saxon legal tradition known as the liberal justice model, culpability requires the existence of a criminal act (*actus reus*) coupled with the intentional commission of such an act (*mens rea*).<sup>8</sup> As I explained in the introduction, notions of individual culpability introduced to international law in Nuremberg and revived in the 1990s with the International Criminal Tribunal for Yugoslavia, the International Criminal Tribunal for Rwanda (ICTR), and later the ICC, remain a cornerstone of international criminal law today. However, collec-

tive violence—as a key feature of international criminal law—has meant that prosecutors in international criminal trials have had to find ways to ascribe liability for collective crimes to high-ranking leaders. They have grappled with ways to establish the linkages between particular actions (or failure to act) of the accused and a given set of acts.

This issue of how to attribute individual guilt for collective crimes has proven difficult in international criminal law circles and among the constituencies and publics expected to internalize such principles. The difficulties have been centered around liberal legalism and the challenges with advocating for direct, individual criminal responsibility—the principle that individuals must be held accountable for their own crimes and not for those of others.<sup>9</sup> In these contexts, legal agents such as the ICC’s judges and prosecutor also maintain a threshold of July 1, 2002, for the ICC’s temporal jurisdiction over contemporary violence. This narrow temporal sense of admissible time places responsibility for violence in the hands of those who gave the orders, encouraged violence, or did not prevent it. However, others take the long history of colonial and postcolonial injustices into account when assigning guilt for present-day actions. Some of those who experienced or lived through the violence were more likely to hold responsible the proximate actors who inflicted the physical and emotional violence—the police, the head of police, the military, and the foot soldiers—rather than a leader deemed responsible for the actions of his subordinates.

Through this disjuncture we can look for openings to understand how affects and emotional alliances are used to narrativize culpability for the collective violence in 2007–2008. I begin by mapping the circumstances surrounding the violence that erupted following Kenya’s 2007 presidential election alongside legal arguments made by the ICC about the leaders’ culpability. We then see how the resulting sentimental defiance of those indictments by some Kenyan constituencies takes the form of reattribution, in which culpability for mass violence is redirected through historical and experiential senses of collective culpability. These seemingly different approaches contextualize the temporal and juridical frames through which Kenyatta and Ruto were indicted and the forms of popular refusals that are experienced differently that led to their support and election. Ultimately, these figures are invested emotionally with meanings that map onto either compressed juridical temporalities (the indicted perpetrator) or longer historical narratives (the anticolonial hero), but neither results in feelings of justice being served. For if we see these various anti-ICC sentiments as regulatory responses that buttress

feelings against histories of Western domination rather than as ephemeral emotions, then it is what these anti-ICC sentiments do within international rule of law assemblages that is critical for making sense of how the ICC is understood as an extension of European colonialism.<sup>10</sup>

What is relevant is that the history of technocratic imposition of colonial laws in Africa and their related violence exists alongside Africans' bitterness about the role of their African leaders in furthering such problems. For while people's perception of African leaders' abuse of power and the prevalent feelings about corruption and violence with impunity continue to shape the complexities of African landscapes, both the anticolonial and the anti-impunity discourses circulate as social goods that serve to reinforce particular social norms. In so doing, they provide the template for particular behaviors and set new domains for the regulatory ideas around which justice inspires new ideals. Both groups of sentiments are emancipatory in different ways and are shaped by the feeling regimes at play.

### **Individual Criminal Responsibility and the Case against Kenyatta and Ruto**

Adherents to the principle of individual criminal responsibility perform particular sentiments that support the idea that certain types of liability (such as aiding and abetting and conspiracy) can be reconfigured into new modes of responsibility and within strict conceptualizations of temporality. Such reconfigured forms of international legality rely on affective responses to certain narratives, such as the "victim to be saved" or the "perpetrator to be held legally responsible," and are sustained by legal provisions in the Rome Statute. Article 28, in particular, stipulates that a military commander or a person acting as a military commander with effective command and control over their forces shall be individually, criminally liable for the criminal conduct of their subordinates, provided they knew (or should have known) that the forces were committing or were about to commit such crimes.

Article 28 also concerns a commander who fails to take all necessary measures to prevent or suppress the commission of these crimes. The material elements of the crimes must occur within the temporal jurisdiction of the court (from July 1, 2002, onward) and be committed with knowledge and intent. Such a doctrine of hierarchical criminal or command responsibility—established by The Hague Conventions (IV) and (X) of 1907 and first applied during the Leipzig War Crimes Trials after World War I, and then later at Nuremberg—involves the reassignment of the guilt of thousands who committed violent

acts to a single chief commander and a few top aides.<sup>11</sup> It highlights a relatively recent development of command responsibility outside of military command structures.

The Nuremberg solution of individualizing criminal responsibility for collective crimes was a moral intervention that was seen to reflect what Gerry Simpson calls the “triumph of liberal legalism and individual responsibility over vengeful politics and collective guilt.”<sup>12</sup> This precedent of individual responsibility was heavily influenced by the formation of late twentieth- and early twenty-first-century international criminal law. Yet the challenge is that individualism, as a concept rooted in Western legal traditions, stems from the understanding that a person is only culpable to the extent of their own free will or guilty mind (*mens rea*). Individual guilt permeates Western legal cultural traditions over concepts such as collective guilt (a people’s guilt or historical/structural guilt) or even metaphysical guilt (the notion that a person is guilty simply by existing). It represents what Antonio Cassese has described as the central idea behind individualized liability—a core feature of liberal legality: no one should be held accountable for criminal offenses that were perpetrated by other persons.<sup>13</sup> And though this point was further affirmed with the decision of the International Criminal Tribunal for Yugoslavia Appeals Chamber, which held in the *Tadić* case (written by Judge Cassese) that “the basic assumption must be that in international law, as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*).”<sup>14</sup> This conception forms one of the key foundations of international criminal law. Thus, Cassese and a range of other innovators contributed to the popularization of a contrary formulation that was propelled by the notion of attribution. The move to attribution through the individualization of criminal responsibility has actually been seen by many in the Global South as contradicting the foundational principle that no one should be held accountable for the acts of others, because many see the process of attribution as insufficient in addressing issues concerning collective liability for violence. This disagreement not only shows some of the pitfalls of ascribing agency based on military structures to actions among civilians, but also the way in which international criminal law has developed through the authority of (nonbinding) case law between tribunals. We see the precedents applied in the Rwandan genocide trials of civilian command responsibility as well as the Charles Taylor case.<sup>15</sup>

In 2006, an extradition request was issued for the former Liberian pres-



ident, Charles Taylor, to be extradited from Nigeria to the Special Court for Sierra Leone. This set a precedent for international law norms for a sitting president. Taylor was charged for crimes against humanity and war crimes committed during Sierra Leone's civil war between 1991 and 2002 by another institution that preceded the ICC, the Special Court for Sierra Leone. He was not charged because he was seen as committing those crimes himself; instead, the charges assumed that as a commander he should have prevented such violence (he had command responsibility) or that he was complicit through modes of joint criminal enterprise.<sup>16</sup> These legal developments related to command responsibility are normalized through precedent, but as we will see, they may not map well onto how affected communities understand the causes of violence.

With the individualization of criminal responsibility firmly established as a form of legality for procuring justice for those victimized by violence, the notion of the representative perpetrator indicted by an international tribunal has—since the Nuremberg Tribunal and Adolf Eichmann's trial in Jerusalem—propelled a particular international imaginary of those whose actions (or inaction) contributed to mass crimes that shocked the human conscience. These perpetrators—represented as military leaders, coconspirators, heads of state, and warlords—embodied an individualized presence to be held accountable in various postviolence situations today. At stake in the ICC case against Kenyatta and Ruto were their alleged roles in postelection violence.

On November 26, 2009, the prosecutor for the ICC requested authorization from Pre-trial Chamber II to investigate violence following Kenya's 2007–2008 elections. The Office of the Prosecutor (OTP) argued that it had reasonable grounds to believe that “crimes of murder, rape and other forms of sexual violence, deportation or forcible transfer of population and other inhumane acts” had been committed in Kenya during 2007–2008.<sup>17</sup>

On December 15, 2010, the Pre-trial Chamber granted the relevant permission to indict Ruto, Kenyatta, and others using the conception of superior responsibility. This legal frame involved the doctrine of hierarchical accountability, wherein expectations of supervision pertain to a related liability for the failure to act and were, therefore, further established through the doctrine of command responsibility.

Citing the gravity of the acts of violence and the absence of national proceedings, the prosecutor argued that the cases originating from the investigation of violence during 2007 and 2008 involving the culpability of various high-ranking Kenyan leaders should be admissible before the ICC.<sup>18</sup> The Ken-

yan government challenged this. Simultaneously, the African Union, in partnership with the Kenyan National Dialogue and Reconciliation team, under the leadership of former UN secretary-general Kofi Annan, recommended that the government establish the Commission of Inquiry into Post-Election Violence.<sup>19</sup> Known as the Waki Commission, it recommended that a special tribunal for Kenya be set up within a given time frame to investigate and prosecute suspected perpetrators of crimes committed during the crisis period.<sup>20</sup> In October 2008, the report indicated that a meeting was held in the state house to coordinate revenge on members of the Luo and Kalenjin ethnic groups; it cited the then-minister, Uhuru Kenyatta, as being criminally responsible for financing and mobilizing electoral support through the Mungiki.<sup>21</sup> Similarly, the Luos and Kalenjins purportedly mobilized their support to attack the Kikuyus (the ethnic group Kenyatta belongs to). The African Union-sponsored Waki Commission recommended that if the Kenyan government failed to set up a tribunal to investigate and adjudicate the cases, then the ICC should take over.

In early 2009, amid increased ethnic party tensions, Kenyan parliamentarians tried to bring forward a bill to establish a special tribunal. In the end, it received limited support and was defeated on two different occasions.<sup>22</sup> Parliamentarians from across the Orange Democratic Movement (ODM, led by Raila Odinga) and the Party of National Unity (PNU, Kenyatta and Kibaki's party) united to defeat it under the slogan "Don't be vague; let's go to The Hague." The public statements made by various ODM and PNU politicians revealed their interest in seeking legal accountability for the other party. The prevailing argument was that no special tribunal in Kenya could be trusted to deal independently and impartially with issues of legal accountability for postelection violence.<sup>23</sup>

On March 8, 2011, the ICC issued summons for the suspects to appear before the court.<sup>24</sup> The prosecutor named six persons (known as the Ocampo 6) suspected of bearing the greatest responsibility for crimes committed during Kenya's 2007 postelection period. The six were divided into two sets of cases representing two historically opposed factions divided along ethnic lines. On one side was Major General Mohammed Hussein Ali, a Somali Kenyan who had been the commissioner of the Kenyan police during the postelection violence; Uhuru Kenyatta (Kikuyu), then the deputy prime minister and minister for finance, as well as the chairman of President Kibaki's PNU; and Henry Kiprono Kosgey (Kalenjin in ethnicity), former minister for industrialization and a member of the National Assembly as well as the chairman of the

ODM.<sup>25</sup> The opposing side included three political agents representing predominant people aligned with the Meru and Kalenjin ethnic group: Francis Kirimi Muthaura, the head of public service, cabinet secretary, and chairman of the National Security Advisory Committee; William Ruto, the minister for higher education, science and technology, and ODM member of the National Assembly for Eldoret North; and Joshua Arap Sang, the head of operations at the Kalenjin-language radio station KASS FM and a radio host at the time of the postelection violence.<sup>26</sup>

Ruto was charged with (1) “Murder constituting a crime against humanity,” (2) “Deportation or forcible transfer of population constituting a crime against humanity,” and (3) “Persecution as a crime against humanity.”<sup>27</sup> For his part, Kenyatta was charged with (1) “Murder constituting a crime against humanity,” (2) “Deportation or forcible transfer of population constituting a crime against humanity,” (3) “Rape and other forms of sexual violence constituting a crime against humanity,” (4) “Other inhumane acts constituting a crime against humanity,” and (5) “Persecution as a crime against humanity.”<sup>28</sup>

Ruto was alleged to have held a series of meetings in which he distributed money and arms with the goal of commissioning the crimes of murder and displacement of supporters of the PNU (led by Mwai Kibaki, sitting president at the time). Following this, these activities correspondingly fomented the violence following the 2007 election. Ethnic tensions ostensibly worsened when, amid accusations of election rigging, competing parties—the PNU and the ODM—both claimed electoral victory.<sup>29</sup> When Kenya’s Electoral Commission announced that Mwai Kibaki was the winner of Kenya’s 2007 elections, violence broke out throughout Kenya—particularly in pro-Odinga areas: the slums of Nairobi, the Rift Valley (Eldoret), and Nyanza (Kisumu)—lasting two months.<sup>30</sup> In the end, rioting, excessive use of force (by police and security forces), burning, looting, sexual violence, and murder left 1,200 people dead and displaced thousands.<sup>31</sup>

The prosecutor alleged that Kenyatta organized meetings with various government leaders, the police, and the leadership of the outlawed Mungiki sect, in which he supposedly provided funding, uniforms, and weapons to various pro-PNU youth to carry out their attacks. The Mungiki, whose name means “a united people” in the Kenya Kikuyu language, is known as a mafia-oriented organization and is notorious for its participation in the 2007 postelection violence. Kenyatta is said to have mobilized their support for the purposes of defending Kikuyu interests, leading the ICC to consider him criminally responsible for the violence the Mungiki perpetrated.<sup>32</sup>

In January 2012, the Pre-trial Chamber judges confirmed the charges of crimes against humanity against only four of the six indictees for Kenya's 2007–2008 postelection violence.<sup>33</sup> The chamber did not find that the evidence against Mr. Kosgey met the necessary evidentiary threshold, so the charges against him were not confirmed. In Mr. Ali's case, the judges did not find that the evidence provided substantial grounds to believe that the National Police participated in the attacks in Naivasha and Nakuru, so the charges against him were also dropped, leaving Ruto and Sang versus the prosecutor. By summer 2013, due to various setbacks in the prosecution's evidence, such as the loss of key witnesses for the Muthaura case, the charges against him were dropped, leaving only three indictees overall, with only Kenyatta left in the second case. Though the mode of liability initially confirmed for Kenyatta/Muthaura was indirect coperpetration, after the charges were dropped against Muthaura, the charge against Kenyatta was connected to his being individually responsible for the violence in Naivasha on January 27 and 28 and in Nakuru on January 24 and 27 of 2008. By May 2016, all charges were dropped against all Kenyan indictees because of lack of evidence to convict.

### The Limits of Legal Time

When time is juridified, it becomes a matter of concern for law. Operating within the limits of legal time, the ICC cannot see retrospectively beyond its own coming into force in 2002. It is compressed and dehistoricized, bounded by temporal jurisdiction—such as the start date of the ICC's founding statute or the temporal scope of the punishable offense. It also has a substructure in time based on the perceived supremacy of the legislative, constitutional or treaty doctrine. This substructure brings to life the basis on which original intent of legal documents can be determined in time and establishes the basis on which looking backward is permissible. This substructure shapes the basis for the type of legal reasoning through which fundamental values are established.<sup>34</sup> In this case, the Rome Statute for the ICC set out substantive laws and procedural rules through which to address violence. It ascribes guilt based on a particular period within the temporal jurisdiction of the court and highlights questions of responsibility in individualist terms. The ICC examined its temporal jurisdiction over potential cases against Ruto and Kenyatta when it granted the prosecutor permission to commence an investigation of the situation; these considerations are also apparent in the temporal scope of the asserted crimes in relation to the evidence provided to cover the entire time

period included in the prosecutor's initial charges.<sup>35</sup> In the end, the ICC's temporal jurisdiction over the Kenyatta and Ruto cases was legally limited by Article 11 of the Rome Statute (*jurisdiction ratione temporis*), which provides that the "Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute."<sup>36</sup>

The Prosecutor submits that, since the Republic of Kenya ratified the Rome Statute on 15 March 2005 and, pursuant to article 126(1), the Statute entered into force for that State on 1 June 2005, the crimes allegedly committed fall within the Court's temporal jurisdiction. . . . The Chamber concurs with the Prosecutor that the crimes allegedly committed after 1 June 2005, as they appear from the available information, fall within the jurisdiction *ratione temporis* of the Court.<sup>37</sup>

Each of the charges asserted by the prosecutor against Ruto and Kenyatta covered the period from on or about December 31, 2007, to January 31, 2008. However, the ICC narrowed the scope of those charges, finding that the prosecutor had provided sufficient evidence to support the charges only for specific dates. Specifically, in the case of Kenyatta, the ICC held, "Regardless of the broader temporal parameters of the charges, the events of relevance in the present case are exclusively those for which the Prosecutor alleges the individual criminal responsibility of the Suspects, i.e. those that form part of the attack by the Mungiki on the ODM supporters between 24 and 28 January 2008."<sup>38</sup> Eventually, in the case against Ruto, the demarcated period was January 1–4, 2008, and involved violence allegedly committed in the greater Eldoret area.<sup>39</sup> For Kenyatta, the charges were based on his supposed command of murders committed in Naivasha on January 27 and 28, 2008, and in Nakuru on January 24 and 27.<sup>40</sup>

Two aspects of the ICC's decision to narrow the time are worth noting. The ICC decision was based not on a lack of temporal jurisdiction but on the prosecutor's failure to present sufficient evidence to cover the entire time period included in the initial charges. Second, the articles of the Rome Statute that require the ICC to confirm the asserted charges do not expressly require that the ICC parse the time period in days, months, or any other temporal measure, or to otherwise confirm that the time period is sufficiently confined.<sup>41</sup>

The temporal scope of the charges against Ruto and Kenyatta is especially narrow when compared to the scale of the violence that triggered the prosecutor's investigation. As described in the prosecutor's November 26, 2009, Request for Authorization of an Investigation Pursuant to Article 15:

The scale of the post-election violence resulted in a reported 1,133 to 1,220 killings of civilians, more than nine hundred documented acts of rape and other forms of sexual violence, with many more unreported, the internal displacement of 350,000 persons, and 3,561 reported acts causing serious injury. In addition, the social and economic structures of the local communities were largely affected by the widespread looting and wanton destruction of residential and commercial areas. Crimes have been committed in six out of eight Kenyan regions, and particularly in the country's most populated areas, including the capital city of Nairobi, the Rift Valley, and the Nyanza and Western provinces.<sup>42</sup>

In many cases, the multiple crimes had been organized and planned within the context of a widespread and systematic attack against selected segments of the Kenyan civilian population. Groups, and persons belonging to these groups, were stigmatized and deliberately targeted on the basis of distinctive ethnic features and/or presumed political affiliations. Typically, the perpetrators attacked, killed, and displaced members of minority ethnicities in those areas.

One of the most challenging examples of how courts wrestle with problems of strict temporality can be seen through attempts to address continuing and composite crimes, as they force courts to address conduct over a long time rather than in more singular crimes such as murder. A continuing or composite crime is one that necessarily occurs over an extended period, such as apartheid. Unlike murder, apartheid does not occur in a single instant.<sup>43</sup> It involves legal policies, state action, social control, and prolonged practices of exclusion and separation. Continuing and composite crimes also include specific, discrete acts that, by definition, must occur over a longer time frame. For example, the Rome Statute outlaws murder as a crime against humanity. By definition, to be a crime against humanity, the act of murder must occur as part of a widespread or systematic attack against a civilian population.<sup>44</sup> In contrast, when addressing regular crimes such as murder that occur in a discrete temporal instant, courts rarely if ever address the importance of temporal limits. However, with continuing and composite crimes, courts must regularly address the temporal scope of the conduct being prosecuted.<sup>45</sup>

The *Rainbow Warrior* case, one of the most famous examples in international case law concerning continuing violations, set a precedent in shaping how continuing violations are understood. The case is important for the history of international tribunals recognizing continuous crimes. In this case,

two French agents were convicted by a New Zealand high court of assisting in the sinking of the *Rainbow Warrior*, a Greenpeace ship docked off the coast of New Zealand (which was going to protest French nuclear testing in the Pacific Ocean). France refrained from detaining the two agents and returned them to Hao, a French Pacific island, in violation of its agreement with New Zealand. In determining France's culpability for refusing to detain the agents, an international arbitration tribunal did not measure France's liability from the moment the agents were removed. Rather, the misconduct was deemed continuous and ongoing, and it included each day the agents remained outside of New Zealand's control.<sup>46</sup>

Continuing and composite crimes force courts to address conduct that continues over longer time periods than simpler crimes such as murder. They create legal dilemmas, not just for questions of jurisdiction but also around questions of evidence and admissibility. In *Prosecutor v. Musema*, the ICTR allowed the prosecutor to present pre-1994 evidence in order to establish the mens rea needed for genocide. Thus, the ICTR jurisprudence allowed pre-1994 evidence of intent but "not of conduct."<sup>47</sup> In this case as well as subsequent ICTR cases, we see an example where the court allowed the introduction of evidence from outside the jurisdictional temporal window.<sup>48</sup> But this contrasts with *Prosecutor v. Jean-Bosco Barayagwiza*, in which the court interpreted its jurisdiction restrictively, holding that no facts predating or postdating 1994 could be used to support a count in the indictment.<sup>49</sup> This case resulted in the conviction of a former Rwandan journalist for incitement to commit genocide as a crime against humanity.<sup>50</sup> It led to the court's attempt to focus on conduct—direct and public incitement—leading to a conviction rather than considering pre-1994 conditions of colonial and postcolonial subordination that fostered the development of extremist Hutu ideologies.<sup>51</sup>

In the last two cases we see inconsistencies in how the ICTR dealt with measures for intent, but what is interesting is that conduct remained within the remit of the court's narrowly prescribed jurisdictional window. The historical and current cases identified here address the limits of legal time and represent compelling examples of how courts wrestled with problems of strict temporality. In the ICC cases relating to postelection violence in contemporary Kenya, a close reading of the ICC's charges reveals the tension between specific instances of criminality (violence) on the one hand, and histories of inequalities and injustices that have occurred over extended periods on the other hand. With this dynamic at play, what we see is how anti-impunity affects are used to shape notions of culpability through the application of legal

time and how other senses of responsibility are expressed through the reattribution of such measures of culpability.<sup>52</sup>

### **The Longue Durée of Structural Violence: Recontextualizing Culpability**

In February 2013, Uhuru Kenyatta announced the launching of the Jubilee Coalition with a speech that established the landmark creation of TNA—the political party that was taken over by Uhuru Kenyatta and rebranded to create an alliance of various democratic forces. With a discourse of togetherness, Kenyatta began by highlighting the challenges and opportunities the Kenyan nation was facing. The former had to do with the cycles of violence that caused death and destruction to Kenyans following the ebbs and flows of each election cycle—the most serious being the 2007–2008 violence in which over 1,300 Kenyans died and more than 300,000 were displaced. Central to this violence is the question of land. Shifting the core problems to pre-2002 structural violence, Kenyatta’s narrative began with the displacement inherent in the British colonial disenfranchisement of Kenyan natives. As Kenyatta explained:

You all know that when the colonial government established itself in Kenya it created three categories of land ownership. First was the land taken by the colonial government for its own use, which was called Crown Land, second was the land given to settlers as private land, and lastly what remained was assigned to Africans as Native Reserves. Back in 1954 under the Swynnerton Plan some Native Reserves saw a process of adjudication, consolidation, and registration that gave titles to Africans. At independence our Government inherited Crown Land and renamed it Government land, today this accounts for 13 percent of the country’s total land mass. Native Reserves became trust land vested in local county councils.

Even after independence the settlers kept their land under private title, or sold it to Africans on a “willing buyer, willing seller” basis. And today private land is something bought and sold like any other commodity. . . . Private land accounts for 20 percent of our country. Land in those Reserves that were not adjudicated and given back to Africans is now called Community Land under the new Constitution and is to be managed by the National Land Commission. This category of land presently accounts for about two-thirds, 67 percent of the total land in Kenya.<sup>53</sup>

The speech was full of campaign promises that outlined a range of opportunities tied to the land question and ensuring that the nation would re-



cover from violence. “Our nation must heal. Our people must come together, with the realization that—as difficult as it may seem—we need each other. The solution should be obvious to all; we must learn to live with one another, trust one another, to respect one another as Kenyans, love one another.”<sup>54</sup>

Later he clarified how this might happen by proposing to provide economic opportunities so that people could procure land viable for agriculture: “As a government, we will provide wider economic opportunities so that people, especially in rural areas, do not feel that the only way they can make a living is tilling ever-smaller parcels of land using a jembe and a panga. We aim to reverse the process of fragmentation and instead institute a process of re-consolidation that will create viable land holdings. While our policies will be deliberate, the process of reconsolidation will be voluntary and driven by the availability of better opportunities across the country.”<sup>55</sup>

From the discussion of government land to private land to community land, he articulated a plan for how his government might help citizens own the land on which they live: “The new Constitution recognizes that there is a problem but it does not provide a solution. My Government will be committed to finally giving the Land Answer. . . . My Government will be committed to giving people the title to their own land. . . . Kenyans deserve to have that process completed. . . . We will do this not just in rural areas but also in urban areas where informal settlements abound.”<sup>56</sup>

The history to which Kenyatta referred takes us to July 1, 1895, when the region that is now known as Kenya was declared a British-East African Protectorate.<sup>57</sup> British colonialism in Kenya produced a situation of uneven land distribution and a related problem of elite patronage. The colonial government forcefully evicted Africans from their ancestral lands and relocated them onto what became known as the Native Reserves. The confiscated lands were referred to as the White Highlands and represented some of the most fertile regions of Kenya. The British colonial administration imposed laws that also forced Kenyans to labor on European farms with poor social services. They imposed taxation laws, instituted racial segregation, restricted movement through the *kipande* identification system, and curtailed basic freedoms.

Despite their displacement, land and ritual oath-taking continued to be important for the unification of various Kenyan social groups.<sup>58</sup> Land was not merely a means of economic production but was seen as a divinely inherited blessing that connected them to their ancestors. In response to dispossession, the Mau Mau struggled to reclaim their land and promote equality in the re-

gion. The struggle began as early as the late 1940s, though it was most intense between 1952 and 1957, as the Mau Mau intensified their mobilization to establish the conditions for Kenyan independence. With a majority of members from the Kikuyu, Embu, and Meru communities, other Kenyans from various groups—such as the Akamba, Maasai, Abaluhya, Abagusii, and Luo, as well as various Kenyan Indian trade unionists—also participated in what became a movement.<sup>59</sup> With Jomo Kenyatta as a symbolic member, significant social pressure for self-determination led to Kenyan independence in 1963, with Kenyatta as the first president.<sup>60</sup>

Independence came with great expectations around the rectification of past colonial injustices. Kenyatta's government was expected to address land inequalities through a new land redistribution policy. Hundreds of thousands of Africans—mainly Kikuyu—were living either as squatters on European farms in the Rift Valley or in relatively unproductive Native Reserves away from their ancestral lands. Many hoped that Kenyatta's government would resettle them in their ancestral lands. However, instead it instituted a land reconsolidation policy that vexed many of the poor squatters, peasants, and workers. Kenyatta eventually developed a series of strategies for the continual investment of European interests in Kenya while also brokering a deal for the transfer of land to native Kenyans. In order to implement this plan, he borrowed money from the British government to buy back land from European settlers. Instead of overhauling the agrarian inequalities that were established during the colonial period and redistributing land among the majority of Africans who were either landless or land poor, Kenyatta's government introduced the infamous land policy known as “willing buyer, willing seller,” which required Africans to buy back their land.

Many saw this postindependence policy as unjust because the majority of Africans were poor squatters, workers, and peasant farmers with very little capital at that time. The popular assumption was that only those who worked closely with the British and earned an income were able to accumulate the necessary resources to buy land or secure bank loans. Thus the early forms of stratification were seen as producing unfair advantages for those who were on the colonial government's payroll during the Mau Mau struggle.

The policy also caused feelings of injustice in many who felt that the terms for buying back land that was initially procured illegally were unfair. According to many of the Mau Mau veterans that we spoke with in Kenya in 2013, this inequality reflected how they understood justice as being about recovering

land that had been stolen from them, not holding an individual perpetrator accountable. “Ultimately we have not received any form of justice because the main purpose of our struggle was land and freedom and we have not gotten land. And we are going to demand this land and even if we die our children will continue to demand for this land until justice is done and we have been given what is rightfully ours which is each and every freedom fighter to get the piece of land he fought for in this country.”

According to many, issues of culpability must go back to much earlier periods:

We fought against the British colonizers in order to get our land, and at independence the colonizers all left Kenya and went back to their own country. But now the huge plots of land they owned were taken over by black European, black colonizers and now our struggle today is against these black Europeans, these black colonizers who continue to horde huge plots of land in this country and we will continue to fight and struggle until we get back this land from these black Europeans who own a majority of land in this country.

“Black Europeans” or “colonizers” refers to the home guards—those black Kenyans seen as working closely with the colonial powers, who then took over the bureaucratic governance of the country once the colonizers left.<sup>61</sup> Others in the group we interviewed agreed. One woman, attributing blame specifically to the home guards, added, “They stole our land, they stole our cattle, they stole our chickens, they stole everything that we had and that’s why since then we have lived in abject poverty. And it is these home guards, these black Europeans who were working on behalf of the colonial government, of course being overseen by their white supervisors, it is they who have put us in all this mess for the decades we have lived in this country from that period of time from this Mau Mau struggle.”

Over time, the emergence of landless squatters unraveled and took on an ethnic dimension, especially during the twenty-four-year reign of Daniel arap Moi. Both Kikuyu squatters and those who acquired land legally in the Rift Valley were seen as foreigners who needed to be forcefully evicted. The reality that various members of the Kikuyu elites—who eventually became known as the Mount Kenya Mafias—had acquired immense wealth and power in Kenya’s postcolonial period only made matters worse for those deemed to be foreigners in the Rift Valley. To contextualize the violence that erupted following the December 30, 2007, elections, one must consider the events leading to

the elections, which seemingly reveal a nation fractured along ethnic-tribal lines, especially the way that a discourse of evicting the foreigners became a rallying cry for Rift Valley politicians at election time.

Thus, understanding the interethnic consolidation of Ruto's United Republican Party with Kenyatta's TNA, which came together to produce the Jubilee Party and its victory, is central to grasping how accused "perpetrators" of Kenya's 2007 postelection violence, according to the ICC, could facilitate the consolidation of historically opposed ethnic groups, whose candidates then won Kenya's 2013 presidential elections. On one hand, the histories of land dispossession during and following British colonialism produced the conditions through which Kenyatta and Ruto's Jubilee Coalition could be perceived as settling a more than fifty-year-old history of injustice. On the other hand, since Kenya gained independence, political and economic power in government has circulated among the Kikuyu and Kalenjin elite to the exclusion of other ethnic groups, such as the Kamba, Maasai, and Borana, and religious groups, such as Muslims. The recognition of these two realities suggests that the violence actually attests to the way that histories of dispossession became sedimented along various patronage lines. Thus, the attacks against the Kikuyus represented the mobilization of particular ethnic patronage networks to try to change the Kikuyu and/or Luo and Kalenjin monopolization of power in postcolonial Kenya. It is the realization of the deep-seated complexities of culpability playing out through a sense of communal responsibility to protect that has contributed to the recognition of the centrality of proximity and patronage.

The sensibility of collective responsibility—instantiated through oath-taking, but later sedimented through patronage—thus informs the production of a popular national imaginary in which Ruto and Kenyatta are not widely seen as "perpetrators" awaiting ICC indictment but as national heroes to be protected and celebrated. My informants' answers to the question of who should be held accountable for the violence instead highlights the extent to which collective responsibility is relevant. According to Ngogi, a local Kenyan activist,

The financing of that violence involved the entire Kikuyu diaspora as well as [the] domestic population. People from southeast London to Texas were holding meetings and sending cash to support the cause. They were planning meetings all over this city. There w[as] supposed to be at one point a huge incident in Umoja and Eastlands where especially Luos were going to be flushed out of the houses that they allegedly occupied. Kikuyu shop-

keepers in Umoja raised a lot of cash and it just so happened that the peace deal came before they were able to carry out the plan.

Here we see not only the complexity of Kenyatta and Ruto possibly financing violence as part of its coperpetration, but a duality where the act of financing the arming of others was seen as a response to the call to protect the collective whole—the Kikuyu against Raila’s supporters, the Luo, and others.

Accordingly, what the OTP saw as Kenyatta’s legal culpability was actually seen by various members of the Kikuyu elders as a necessary act of communal responsibility in which he—as well as others in Kenya and throughout the diaspora—were perceived as taking critical steps to protect his community from ethnic-inspired violence and to ensure Kikuyu prominence and dominance in Kenyan politics.

Further, Uhuru Kenyatta’s rapid rise to power may indicate the importance of the notion of collective responsibility, meaning that Kenyatta was obligated to contribute to the financing of the violence in order to protect his community against other ethnic forces set on displacing them from their land. With this rationale, the sentiment that Kenyatta is a “freedom fighter” and not a “perpetrator” supports a celebratory popular image of him as protecting the collective and not culpable for violence.

Furthermore, admitting to Kenyatta’s participation and the role of others in actually financing the violence would be seen as a legal admission of collective guilt during the designated postelection period. Instead, Kikuyus vaguely described Kenyatta’s actions as collectively appropriate. Statements such as, “Uhuru stepped in because Mwai Kibaki was asleep.” Or “Kibaki was too weak, Mwai Kibaki was useless,” and “Uhuru is our hero because he took responsibility when it really mattered.”<sup>62</sup> These claims—with their legal implications—speak to the affective sentiments of solidarity and alliance through which contemporary Kenyans are asserting a new narrative about political violence in their country.

According to interview participants, because of reprisal violence on the part of Luos against any ethnic group they felt had supported the Kibaki victory, the Kikuyus, in coordination with their elders, were seen as having mobilized forces to protect themselves in various places; hence the mobilization of the Mungiki forces. Actions taken in the Ruto camp, and by extension the Kalenjins (and Kenyatta through his Kikuyu networks), in terms of mobilization—that is, financing and executing violent acts—were ultimately seen by participants as supporting two principle players: Kibaki and Odinga. The compromise re-

lated to this standoff eventually resulted in the creation of a new position, deputy president, as part of the power-sharing agreement in which historically opposed parties came together.<sup>63</sup> Thus, many people saw Kibaki and Odinga as the ones who were most invested in the postelection violence; therefore, though they were not seen as engaging in proximate violence, when respondents were pressed to parse responsibility according to principles of international law, many argued that Kibaki and Odinga should be seen as bearing the greatest responsibility, not Kenyatta and Ruto. When the ICC narrative is overlaid onto Kenyan national politics, we see how what appears in one framework as individual criminal accountability can be reframed as communal responsibility based on a different conceptualization of culpability. Looking after the interests of a people in a complex set of attacks and reprisals cannot be resolved simply through a decontextualized attribution of criminality. It reveals an important paradox—an ambivalence in the data concerning who is held accountable (Kibaki and Odinga rather than Uhuru and Ruto), or whether looking beyond legal accountability may be an attractive way of settling the political foundations of the conflict, which are manifestations of deep-seated responses to structural injustice. This paradox leads to mutual erasures. The first is a legal time erasure that renders insignificant the *longue durée* of structural violence that continues to be experienced and articulated through daily practice. The second is an experiential-historical time erasure that displaces the encapsulation generated by legal time and instead produces in relation to it the terms through which historical conceptualizations of collective responsibility are experienced and lived. I take up the latter below.

### **Proximity and the Redirecting of Culpability**

Our ethnographic research in Kenya showed that the very survivors of violence that international judicial institutions seek to protect protest the designations of criminal responsibility strictly in relation to individual responsibility, especially when there is an understanding that longer histories of imperial land disenfranchisement created (and were not products of) such forms of contemporary violence. According to a report by the International Center for Transitional Justice, though victims understood that in ICC judicial contexts greater responsibility is borne by those who gave orders that led to violent outbreaks, more than half of those who responded to the question “Who should be prosecuted?” identified direct perpetrators or “foot soldiers” of violence as being directly responsible.<sup>64</sup> Though supportive of the ICC con-

cept in principle, many of those in Kenya classified as “victims” also felt that local and national mechanisms were preferable to pursuing a lengthy ICC process in order to achieve compensation for violence and property loss.<sup>65</sup>

In a 2013 survey that we conducted with survivors of 2007–2008 post-election violence in Nairobi’s low-income Kibera neighborhood, an overwhelming majority of residents insisted that criminal responsibility needs to be understood clearly through notions of collective guilt, the role of the police in postelection violence, and the way that the British colonial settlement of the Rift Valley led to the demise of both the Kikuyu and Kalenjin ethnic traditional networks. Thus, individualized criminal responsibility and an expanded perception of time were important. Despite this perception on the ground, international criminal law prioritizes command and superior responsibility rather than holding proximate perpetrators accountable; the expectation is that direct perpetrators will be dealt with under domestic criminal law. Accordingly, for some, the law falls short. This is not only because perpetrators of proximate violence are not being prosecuted in the national context but also because international courts cannot situate crimes historically.

Many of my respondents insisted that focusing temporally on the narrow 2007–2008 postelection violence period as way to measure culpability fails to attend to deep-rooted historical and political issues. Recall that Kiamu, a young Kenyan human rights advocate quoted in chapter 1, maintains, “We’ve had victims in this country since the colonial times, so if you’re going to address the system of victims of political violence in Kenya we do it holistically. We begin with the day the British landed here, the evictions that the settlers did—today the biggest land owners are settlers. . . . My reference point is in the eighteenth century. . . . The ICC has no capacity to address that, so I’ll not waste time on it.

Here we see not only a strong conviction about the limits of individual culpability as a framework in international criminal law but also a critique concerning the inability of legal time to adequately encompass historical forms of violence. Despite these other conceptualizations of guilt, it is unlikely that the ICC will permit itself to consider activities that occurred prior to its temporal jurisdiction, thereby violating basic principles of legality.<sup>66</sup> Set against this vexed juridical backdrop, who should be held responsible for contemporary crimes of violence?

Despite the articulation of culpability by the ICC and deep-seated sentiments that supported historical hostilities against warring ethnic groups and parties, public discourses surrounding ICC activity shifted the terms of engagement about justice, increasingly narrating its measure through the *longue*

durée. John, a well-known Kenyan journalist, insisted that in 2007–2008 neither Kenyatta nor Ruto were heads of state, so it is not clear why they would be seen as bearing more responsibility than others.

Neither of them were running for president. I don't think there was [responsibility] if you look at the violence and protest in ODM strongholds. I think you would see "No Raila, No Peace," not "No Ruto, No Peace," and especially in Kalenjin strongholds. So how on earth do you then begin to design these cases against the two of them? I think that it is possible to finger Uhuru Kenyatta for postelection violence in Naivasha and Nakuru; I think that it is possible. It is much more difficult to [connect him] to the North Rift.

By referring to the slogan, "No Raila, No Peace," John was explaining that those who supported Raila were fighting for his presidency and not for Ruto's (who was in the ODM leadership). After the election results and the announcement that Kibaki had won again, it became clear that Raila, through his ODM supporters, mostly from the Luo ethnic group in the ODM strongholds (like Kibera), refused to accept a situation in which Raila was not going to be in power. Much of this was connected to the problem of the concentration of power among a few families and ethnic groups. From the time Jomo Kenyatta took office from the colonial Home Guards in 1963 to the last election, power was seen as remaining within a very tightly sealed vacuum in which the Kikuyu and the Kalenjin constituted a small community that governed all others and shielded their political and economic elite from accountability to the people and to the law.

The violence of 2007–2008 was, in many ways, seen as a response to the unwillingness of others to concede to the monopolization of power by particular members of the elite once again, which carried over from the transfer of independence. Yet many blamed the media for contributing to the production of the concept that a perpetrator could be responsible for postelection violence by depicting the situation as ultimately being about the ethnic Kalenjin mobilizing against the Kikuyu. As Bornu, a Kenyan political analyst, explained:

Some say the Kalenjin rose up as a community, though it's not true at all! If you just go back to reports of the violence, the violence was up and down the railway line. There was looting and violence in Mombasa, there were Kikuyu and Kisii evictions in Maasai Land; there was no violence in Central Highlands but Nairobi and going all the way to the border! So the



idea that the Kalenjin were some . . . atavistic, blood thirsty Others just served to demonize them. . . . The ignorance about the Kalenjin was mind-blowing. I mean the Kalenjin were organized so effectively. . . . But when you talk to people in Nakuru or Kikuyus who had family or whatever in Nakuru, there was a point at which the Kalenjin were invading and there was just utter fear. [Because of their fear, people didn't] know what kind of monster [was] coming to attack [them]. But the reality was that the violence was across the board and along party lines and also along a very anti-Kikuyu level. Then you'd have to provoke the question of why is everybody standing up, rising up against the Kikuyu? What is going on? But the Kalenjin were very insistent that that violence was spontaneous, and were very insistent that any form of planning or organization happened after the announcement of the election results, not before.

Bornu's statement highlights that there was not only a sense that the violence was perpetrated across the board by many actors—police, local people, outside forces, militia, gangs—but also that it was inspired by deep-seated histories of disenfranchisement and the monopolization of power throughout Kenya. The ICC's focus on command responsibility not only overlooks the guilt of those who actually engaged in criminal conduct, but in the Kenyan cases it also overlooked the temporality of collective responsibility for age-old political problems. In Kiamu, John, and Bornu's statements, we can begin to see that at the heart of the sentiments being articulated are reattributions of culpability in which guilt for crimes of mass violence is understood in relation to sentimental passions about ethnicity, land, and historical injustices. Culpability is reinscribed onto other bodies, other motives, other actors; the individualization of those acts is delegitimized in favor of addressing such violence through the political settlement of long-standing inequality.

When we asked Marcus, a villager from Kibera, whether he thought Kenyatta was most responsible, he, like many, responded by insisting that many Kenyans believed that Prosecutor Moreno Ocampo was interested in prosecuting those on the Waki Commission's list because the OTP was outsourcing a significant number of its investigations to NGOs and others whom many discredited as being incompetent and far from thorough. As Marcus elaborated:

So, how do these guys end up at the ICC? If not through a process of a kind of political roulette, how does he end up there? That is completely arbitrary; you have twenty people or twenty-plus people fingered for the violence by Waki. . . . I think a lot of people will be asking questions about why

isn't so-and-so and why isn't so-and-so on the list, but I don't know by what logic somebody like John Michuki could have escaped. He was internal security minister, the one who directly banned any type of street demonstrations. He was very much involved at the National Security, NSAC, and on top of that Michuki had said on multiple occasions he was directly ordering the police to shoot to kill Mungiki. But if you are not going to touch Mungiki, I don't know how then you are going to deal with reprisal violence in the north. The other person who should be at the ICC, I mean one would think, would be Maina Njenga [the head of the Mungiki] himself.

By referring to the perception that the OTP accepted the names outlined in the Waki Commission report, Marcus was suggesting that the logic was political and, in some cases, arbitrary. He continued, "If you are talking about the criteria for these kinds of charges to warrant a case at the ICC, I think one of the things that Luis Moreno-Ocampo has been at pains to show is that there was a structured violence, that there was an organization with a hierarchy and so on. It is called Mungiki and his head is Miana Njenga. In many ways one can then begin to understand that there is something legitimate about the angle of Uhuru Kenyatta and William Ruto."

Yet despite this concession about the plausibility of guilt, a range of actors, such as the police chief, members of the police force, and Mungiki gangs were also seen as contributors to violence but were actually dropped from the list. And, as my informant explained, the police were part of this process, too.

The existence of the police also raises questions about why the ICC's prosecution did not pursue the head of the Kenyan police force. Here the presumption was that the violence should not be attributed to one or two commanders. The planning for the violence was said to precede the elections and was mobilized as part of the defense of the Kikuyu. The reality is that there is not only a sense that the violence was perpetrated across the board by many actors—police, local people, outside forces, militia, gangs—but also that the violence was inspired by deep-seated histories of disenfranchisement in which various persons saw themselves as carrying out their obligations to protect their community. But despite the recognition of the responsibility to protect, the point, ultimately, is that they, not Kenyatta and Ruto, were the ones engaged in inflicting proximate violence. Here Marcus maps out the forms of proximate violence relevant to the Mungiki phenomenon:

There are a number of men that were targeted because of their ethnic leanings, and the link between those ethnic groups to certain political lean-

ings. And because of that they were attacked in certain sex-selective ways. You know having their penises amputated, or having them sodomized, and because then when you think about them from the political reasons why it happened, then they qualify as gender crimes. . . . Sexual and gender-based crimes postelection have been downplayed. They're taken as serious crimes related to the election violence. The police have been implicated and other security agents that some victims have described in detail, that it is for sure the people that raped them were security agents that had been deployed to that area or to those places during the period of the chaos.

So, for instance, in Kibera a number of victims have described the attire that the men that raped them were in, and for some of them they describe it in detail; they talk about the way the tear gas canisters were dangling and making noises. Those are some of the noises they remember. So we were concerned that our own security agents have been implicated and that the government has not done anything.

As we see, the realities of intimate violence—rape, castration, sodomy—remain part of the ways that those victimized by violence are also conceptualizing guilt. Those responsible for violence against their bodies are those who actually committed the crimes: the man who raped, the boy next door who killed his neighbor, and the foot soldiers of the security forces who maimed. Yet the problem for many is that because of the ICC indictment, it is the Kenyan government, through the figures of Kenyatta and Ruto, that is being held responsible for those alleged perpetrations of violence, instead of the police and security forces.

In response to our question about whether Kenyatta and Ruto should assume responsibility for the 2007–2008 postelection violence, the journalist Ngugi asks,

Responsibility for what? Some of the worst violence happened in Western Kenya and, yes, it is often mentioned that Kisumu [is] burning, but it's actually not considered a media epicenter of the violence. And in both cases [they] let the state security forces off the hook. In Kakamega, Bungoma, in Kitale, the vast majority of people that were killed were killed by police bullets usually found in [their] back; they were running away. If you omit that, then all the violence becomes is a long-held ethnic dispute. You know all the rhetoric that influenced—is it called Agenda 4 items?—it is absolute bullshit.<sup>67</sup>

Here Ngugi is referring to part of the national dialogue and reconciliation efforts that took place after the 2007–2008 violence. Four agendas were proposed to address the way forward for Kenya. The fourth and final agenda was to address “long-term issues and solutions” and included points such as land reform, national unity, and so on that have to do with further long-term peace-building concerns. The Agenda 4 items were the last ones agreed to in the Annan-brokered peace agreement. But Ngugi’s point is that the issue is a lot more complex than simply ethnicity and land. It is also about the perceptions of narrative erasures and false narratives that are seen as being part of the maintenance of state power. He goes on to suggest that the violence was not simply routine ethnic violence, as it was often framed. He insists that the security forces—those in proximate relation to daily citizens—were actively involved, and people from the Western region were being targeted. “I spent a lot of time, January and part of February, in the North Rift, in places like Kiptere, just around Eldoret town in the outskirts of Eldoret. I was scooping spent cartridges, G3 cartridges. I mean the cops had gone completely amuck . . . because even the security forces . . . were divided along party and ethnic lines.”<sup>68</sup>

He emphasizes how ethnically segmented the divisions became:

If you went to the police station in Eldoret town—I remember the first time I went there on a Sunday and a policeman comes striding out. I am coming into the compound and she is coming out, and she is loudly announcing, “This is an ODM zone, so understand where you’re coming.” I needed security to go into a place called Muniyaka, which was a Kikuyu settlement, and she told me, “Eh, listen, my friend, this not the place, and now you have to make special arrangements. You are not going to find people here that are going to go in there.” The cops, General Service Unit, Administrative Police, and so on who were shooting up the place in Kiptere and so on were imported, and it was very specific because they were Kenyan police and—again according to locals, again another narrative that’s never discussed—Ugandans. But if you went to Moi referral hospitals and you found anyone who was working at Moi referral hospital in January–February 2008, [they say] there was an invasion by Administrative Police-looking types of the hospital at one point, and they said these people could not speak Kiswahili. That is one of the stories you will also hear in Kisumu.<sup>69</sup>

In this passage, Ngugi counters what he saw as false narratives—or massive omissions of facts—in which the proximate role of the police, the security

forces, and the use of foreign forces like the Ugandans was underplayed. He insisted, rather, that the state security machine played a major role in the violence and was in fact the largest perpetrator. He argued that when you remove these major players from the story, the violence begins to look like a long-standing ethnic dispute. It involved a range of actors engaged in intimate killing whose affiliations were conveniently segmented along ethnicity and party alliances; but some of the worst forms of violence involved police and security forces from nearby states who were imported to perpetrate violence. The implications debunk Kenyatta and Ruto's criminal responsibility for the perpetration of violence by suggesting that Kibaki had requested assistance from Museveni, who responded by sending security forces from Uganda to parts of the Rift Valley and western Kenya. The report that the "police-looking types" did not speak Kiswahili was taken as further evidence that they were not Kenyan and had been imported. He also seems to suggest that even Kenyan security forces were stationed in different areas, or at least imported into certain hot spots like Eldoret, based on ethnicity and political affiliation. Given the way the security forces were "divided along party and ethnic lines," the Kibaki government was calculating in its deployment of the forces. Thus, Ngugi suggests that there was more at play than different ethnic communities fighting each other.

The key point is that the violence was based on much more than ethnic patronage. It was about the fight to take over government—at all costs—or for the Kibaki government to maintain governmental power and the embodied affects that fueled those struggles. The most pronounced redirections of culpability—from Ruto and Kenyatta to the police, security services, or neighbors accused of stealing—were for the most intimate forms of violence: sexual violence ranging from rape to castration and sodomy. This is one way of assigning guilt to perpetrators of violence through interpretations of proximity, not command responsibility. Another, as we have seen, is through expanded notions of time that reflect the attribution of sentiments about the colonial past and the way the ICC has come to occupy these historical structures of power and exploitation in the eyes of those involved.

### **Whose Perpetrator, Whose History? Emotional Regimes and the Politics of Attribution**

While chapter 3 emphasizes a notion of justice directly tied to advocacy that insists on the immediacy of social action (the temporality of the now), this chapter highlights particular notions of time that not only order the way that legal justice is rendered (legal time), but also make viable the possibilities for

understanding culpability in longer temporal periods. These sense-making processes are dialogic, as we saw with the acts of affective transference in chapter 2, and enable people to consider a range of measures for determining culpability. Senses of justice can also be shaped by particular articulations of guilt and innocence that are understood through expectations of patronage, ethnicity, and land inequality. But more importantly, they are propelled through emotional climates, though shared differently and at times constructed and even engaged duplicitously, that produce collective experiences in relation to hegemonic signs. These signs may be historical or contemporary; they may motivate those irate responses that appear to represent anger, or joy, or sadness—all experienced differently perhaps—but what is key is that they are part of an emotional climate that shapes a given experience. It is this experience that contributes to affective community formation and cross-cuts race, gender, nationality, and so on, even as it exists in tension with it. Thus, dissatisfaction about inequality constitutes the way that particular emotional climates are experienced. These feelings punctuate the way that claims and counterclaims are made.

Through reattribution, those engaged in various pro-Pan-African formations deploy particular judgments and narratives in order to undermine the post-2002 linear determinants of legality by which particular foot soldiers, not political leaders, are deemed culpable for violence. Those attributions also have their own institutional and social histories through which regimes form and then are deployed to propel particular narratives for particular purposes. Through claims of guilt or heroism, people attribute culpability. And through this process the figure of the individual “perpetrator” can transform into the figure of the freedom fighter—as seen with Uhuru Kenyatta. For what we see is that these iconic symbols are articulated through particular cultural and emotional lenses that shape judgments, capacities, and moral expressions. As embodied thought, sentiments that shape the meaning of these symbols animate cognition in ways that make interpretation meaningful according to various sociocultural rules. Here various constituencies see the postcolonial condition in contemporary Kenya as fundamentally related to the West and its colonial past. In their attribution of guilt through the *longue durée* of colonial violence, these Kenyan responses to the ICC’s legal designations reflect how definitions of violence and culpability are sentimentally and socially charged and rely on particular conceptions of time as they relate to justice. And through nationalist sentiments and ethnic sensibilities, notions of responsibility are communicated through speech acts, ritual practices, voting

behavior, popular campaign icons, and so forth. Ultimately, this is important because perceptions of legal time and histories of colonial and postcolonial degradation can shape ethical horizons for Western legality even as they shape the terrain by which others protest those determinations.

According to one former African head of state who had been in office during the negotiations of Liberian president Charles Taylor's extradition request and who witnessed the subsequent ICC indictments of African leaders, "If I had known then what I know now about extradition and these European courts, I would never have allowed my country to sign on to the ICC [Rome Statute]. Signing on has enabled these extraditions. It's almost like allowing them to take us to the ship, once again." When I asked this leader to explain more about the slave ship metaphor and the idea of external forces controlling African bodies, he likened it to other types of extractions, like "the unfair pilfering of resources, age-old treaties that can't be changed. . . . [They] look like colonialism once again."

The leader's invocation of unknowing consent was echoed in other responses I gleaned from leaders engaged in extradition discussions. On one level, the figure of the African body being extradited to Europe conjures significant responses from those in the West aware of the politics of racialization and its impact on the global order. The imagery of the slave ship speaks to the history of the removal of the black body from Africa and evokes African and European collaborations in historical removals and control of black bodies, as happened during the transatlantic slave trade, as well as the imperial control of Africans through European colonialism. From international legal actors condoning slavery and then later prohibiting it long after its destruction of African societies, to the subsequent colonization of African social, political, and economic life, to the contemporary control of global economic and political institutions, feelings of structural injustice are continually frustrated by new forms of extraction, such as resource extraction, economic extraction, and the general history of external control of Africa's interior. They are part of the dehumanization of African bodies. In addition to the history of the stratification of human value and the sentimental responses to it, the dynamics at play are tied to the existence of an ambiguous set of political exclusions that are in tension with aspirational possibilities of equality through international legality. For the claims of geographic and political selectivity—the idea that some forms of violence are legally actionable by international criminal law instruments and some are not—incite a prevalent emotional response that is also tied to how we understand the place of history and time in shaping questions of culpability.

Though not new to legal anthropology, the notion of legal time is scarcely interrogated in Western jurisprudential circles, particularly with regard to differences in international law (which limits how notions of legal time are conceptualized) and criminal law (which focuses on strict understandings and demarcations in time, rather than reflecting on historical developments or broader root causes). Continuing crimes (such as colonialism or apartheid) lend themselves to less stable assertions about who is a “perpetrator” and create multivalent legal dilemmas. Such questions of jurisdiction, admissibility, and evidence further complicate the parameters by which reattribution responds to encapsulations of justice. Thus it is important to clarify ethnographically what the realm of the social can tell us about contemporary social processes around which notions of time are understood and responses to it registered.

Attributing guilt through strict understandings and demarcations of time is critical to anti-impunity formations in international criminal law. Rather than reflecting on historical developments or broader root causes, ICC jurisprudence has adopted a relatively strict view of temporality with the recognition that nonretroactivity or the principle of *nullum crimen sine lege*—no crime except what is proscribed by law—is one of the central tenets of law. The criminalization of acts occurring over long periods of time is seen as potentially threatening this principle because it is hard to define what precisely is being punished and when exactly the conduct becomes criminal. But this is where the problem lies, for the legal presumptions of temporally relevant responsibility and the growing grassroots conception of who, over what period of time, is actually criminally responsible for acts of violence highlight a hierarchical or vertical disjuncture. This is due to the limitations of attributing the conduct of one person to another—distinguishing between foot soldiers and “those most responsible”—and the problem of legal time as it relates to strict applications of the temporality of violence.

I am not suggesting that those who are responsible for mass violence should not be held accountable for their role in wrongdoing. What I am highlighting here, however, is that competing attributions of culpability reveal substantive differences between social and legal justice in shaping varying understandings of guilt as affective formulations of culpability. They highlight the afterlife of the disappointment with the failure to balance power historically in postcolonial Kenya, set alongside the articulated failure of the law to rectify histories of human dispossession from their ancestral land. We also see how fraught with meaning the assignment of culpability is—especially in con-



texts in which postcolonial states have failed to adequately address the needs of those victimized by violence.

In the Kenyan political landscape, the individualization of criminal responsibility does not account for the deep histories that produced the conditions under which police violence, ethnic rivalries, and land dispossession were made possible.<sup>70</sup> Rather, there is a realization that the inscriptions of power in colonial Kenya were central to the play of power in postindependence Kenya. And since independence, power has never been balanced or distributed beyond those ethnic groups—the Kikuyu and Kalenjin—who inherited control of statecraft. In postcolonial Africa, the afterlife of imperialism, colonialism, and the violence of dispossession persist deeply in the psychic life of social justice. Alongside historically constituted ethnic divisions there is also an awareness of the ways that imperial injustices remain part of the postcolonial reality—a continuity of structures of economic, legal, and political power. And while the image of the African perpetrator as warlord and killer has been constructed through the law to produce a narrative of the merciless mercenary, the African head of state as perpetrator has been subject to another moral imaginary that represents a new shift in the consolidation of panethnic alliances.

The Kenyan cases pursued by the ICC demonstrate this point and capture the affectivities already in place that the PR firm BTP Advisers used so effectively in their campaign. What they show us is that the attribution of culpability of an African leader to a particular historical moment can actually be explained through affective sentiments of solidarity; not only do Africans want to end violence, impunity, and the abuses of the postcolonial elite, but they also want to reassert a new narrative about the political nature of contemporary violence in Kenya. The Jubilee Coalition victory of 2013 demonstrates how social justice can exceed the legal-political and how an individual's internal feelings manifest in group sentiments about justice and culpability. On one hand, the Uhuru-Ruto Kenyan campaign team was able to implement a publicity strategy that nationalized ethnicity, leading to a merger and consolidation of the Jubilee Coalition and its deployment of a strategic narrative of victimhood. On the other hand, it led to the emergence of a different moral imaginary in which the emotional regime of nationalism galvanized new social domains for supporting the Uhuru-Ruto party. This process highlights the importance of understanding how notions of culpability, circumscribed through temporal frameworks, shape the basis upon which justice is understood and, therefore, on which other alliances are formed.

## Justice Corrupted?

Articulating culpability through terms like “superior responsibility” limits the representational life of those deemed most responsible for violence. As I have been arguing, international criminal legal concepts of culpability rely not only on rational reasoning for clarifying the line of command; they depend on a particular production of the guilty “perpetrator” without whom violence would not be possible. But these assertions of culpability and their temporal reconfigurations are not enough to make sense of the deep roots of violence. There is an affective dimension to justice—an emotional connection to it in relation to various time horizons that remain part of the postcolonial condition and which is sustained by the socialization of particular practices and attitudes. These realities highlight the complexities of different understandings of justice—redistribution (dealing with land and structural injustice) versus anti-impunity—articulated through criminal accountability. Their competing claims raise questions related to how justice can be about individual culpability as well as larger forms of structural injustice. Through highlighting processes of reattribution, we can see that some determinations of historical inequality are understood as corruptions of justice, while other feelings of injustice produce new legal innovations to end impunity. Where mainstream constructions of liberal democratic social orders presume the existence of fairness and freedom as the norm, expressions of disappointment point to the problem that without redistributive politics as the basis for justice, a legal order that fails to address inequality can be seen as a corruption of justice.

Similarly, discursive strategies that deploy Pan-African signs of justice through the mythic domain of the freedom fighter, for example, also have the ability to erase acts of violence that evade accountability. In postcolonial African contexts, like that which we witnessed during Kenya’s 2007–2008 violence, acts of physical violence were deployed by the very peacekeepers and police and enabled by the very leaders that are expected to protect the people. When those controversies unfold, they often manifest various forms of protest speech that openly contest certain discourses about justice and displace old emotional norms. Those sentimentalized speech acts operate alongside power relationships.

Rather than recognizing the role of the structuring order and its dual fiction as an objective tool, designations of “justice corrupted” depend on the classification of corruption as atypical, as an aberration. But to claim that the failure of justice is an anomaly is to continue to fetishize justice as a veil that

hides other relations. Legal time is an example of the fetish of justice; the temporality of the law hides the basis upon which social inequality can be understood. It narrowly circumscribes the possibilities for what justice is and can be and highlights how particular forms of temporality can contribute to the exclusion of other temporal worlds, even as it presumes to be liberatory and justice producing. In other words, the very legal framework that designates culpability temporally can be a tool for exclusion, and justice is legible only within that which is legal. Those formulations that fall outside of liberalist temporal constructions of culpability are rendered unintelligible, thus untenable. The resulting exclusions contribute to the production of fissures in the social order.

Liberal legalist frameworks emerge through particular ways of organizing subjects and then erasing the processes by which such formations take shape. It is accompanied by a belief in the objectivity of the frameworks that serve the law, but these frameworks produce objectivity out of subjectivity. Often, those engaged in this process do not necessarily recognize the constructed temporalities that shape judicial order; they disavow them, instead, because they signal subjectivity. However, if we recognize that the pursuit of justice is fundamentally about domains of inequality, then we can see how feelings about it are mobilized differently yet produce similar results. As we have seen, these developments are differentiated through reattribution, which in some cases leads to refusals of legally circumscribed justice encapsulations, as well as feelings that justice, as the domain for distributive possibilities, has been corrupted. The invocation of corruption may emerge conveniently as a discourse for evading culpability. Or it may be shaped by other time horizons that people identify as the source of the infractions that led to mass violence. Legal time and the *longue durée* of structural inequality provide the frameworks through which people assess the social order and how justice operates within it.

Ultimately, notions of the culpability of the “perpetrator” or the righteousness of the Pan-African “hero” are made real through the fiction that justice corrupted is an anomaly. On either side of the perceptions of such notions of justice, people engage in reframing law’s temporality in order to shift the modalities through which culpability is understood. These processes are at the center of the emotional work of international justice, and it is in the fissures of perceived injustice that legal temporalities are actually made visible. It is these struggles over meaning making and the power to shape and define justice that I go on to explore in chapter 5 through the examination of Pan-African institutions as further examples of reattributions of justice.