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Refiguring the perpetrator: culpability, history and international criminal law's impunity gap

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This article is about the ways that the notion of the African perpetrator and notions of 'culpability' are mediated through a distinct colonial–postcolonial continuum. These different assessments for assigning and comprehending guilt result in what I term an 'ICC impunity gap'. Epitomising this gap is the case against Kenya's William Ruto and the recently dropped case against Uhuru Kenyatta, whose indictments by the International Criminal Court (ICC) cohered with and confirmed the image in the international imagination of the perpetrator – an image of an African commander whose actions are in need of international judicial management. I consider the historical and juridical frames through which Kenyatta and Ruto were indicted and the resultant disjuncture in recognition by analysing the historic circumstances surrounding the violence that erupted following the 2007 presidential election alongside legal arguments made by the ICC about ways to determine culpability for mass atrocities. Though not new to legal anthropology, notions of legal time are scarcely interrogated in western jurisprudential circles, particularly with regard to differences in international law (which limits how notions of legal time are conceptualised). The goal is to make visible a particular 'gap' in the legal and popular senses of criminal responsibility, especially as it relates to the temporality and proximity of legal responsibility. By reflecting on temporal determinants for parsing guilt, I suggest that we consider the way that new modes of criminal liability shapes new narratives that determine the way that the perpetrator figure is constructed in international criminal law circles.

Keywords: impunity gap; culpability; the individualisation of criminal responsibility; international law; perpetrators; proximate violence; temporality; Uhuru Kenyatta; William Ruto; International Criminal Court; Kenya

To be sure, the notion of the perpetrator indicted by an international tribunal has – since the Nuremberg Tribunals and Adolf Eichmann in Jerusalem – propelled a particular international imaginary of those whose actions or inaction contributed to vast crimes against humanity, war crimes and crimes that shock the human conscience. These perpetrators – military leaders, co-conspirators, heads of state and warlords – embody a presence that is at large in various post-violence situations today. This article is concerned with the ways the African perpetrator – conceived of and indicted by international bodies such as the International Criminal Court (ICC) – and notions of 'culpability' are mediated through a distinct colonial–postcolonial

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continuum. In this context, entities such as the ICC base culpability for contemporary violence in a narrow, ahistorical time frame that adheres to notions of ‘command responsibility’ which places responsibility in the hands of those who gave the orders or encouraged the violence. Others take the long history of colonial and postcolonial injustices into account when assigning guilt for present-day actions. As important, there are still others, often those who experienced or lived through the violence themselves, who are more likely to hold accountable the proximate actors who inflicted the physical and emotional violence, including the police, the head of the police, the military and the foot soldiers.

These different assessments for assigning and comprehending guilt result in what I term the ‘international criminal law (ICL) impunity gap’. This ICL impunity gap is the gap between the assignments of guilt that draw their meaning from the individualisation of criminal responsibility distinguished from modes of liability for parsing guilt that go beyond the individual. Though the impunity gap has been invoked traditionally to refer to the gap in adjudication mechanisms between the international, regional, national and/or local mechanisms that shield some individual perpetrators from adjudication and enable the pursuit of adjudication for others, going beyond the individual analyses of guilt allows us to consider how and why collective and continuing crimes may trump new individualised conceptions of guilt in certain situations. Such examinations of the way that people parse guilt differently allow us to examine the differences that social time and legal time might offer; they likewise attend to the ways in which proximate actors are contradistinguished from commanders responsible for the actions of their subordinates and have implications for a substantial difference in how large portions of the Kenyan population are rethinking the popular international image of the perpetrator of crimes against humanity. For in the Kenyatta and Ruto cases under analysis, despite charges of culpability on the international stage, in 2013 a majority of the Kenyan people democratically elected them to be Kenya’s president and deputy president respectively. Both Kenyatta and Ruto remained in power, notwithstanding ICC indictments, and among various constituencies they took on a hero status which calls into question the gap between the international court and Kenya’s domestic imaginary.

In the remaining article I consider the historical and juridical frames through which Kenyatta and Ruto were indicted: specifically, I analyse the historic circumstances surrounding the violence that erupted following the 2007 presidential election alongside legal arguments made by the ICC about culpability. To clarify, a democratic election in 2002 deposed then-president, Daniel Moi, ending a 22-year dictatorship and resulted in the election of Mwai Kibaki (and not Uhuru Kenyatta Moi’s desired successor). In the 2007 elections, Kibaki was again declared the winner. This electoral result was contested by Kibaki’s opponent, Raila Odinga of the Orange Democratic Movement as well as Odinga’s supporters who accused Kibaki of electoral manipulation. Nevertheless, Kibaki was sworn-in immediately after the declaration of his electoral victory. The rushed nature of the ceremony held during night hours led to further suspicion, incitement and targeted regional and ethnic violence. The violence was first directed against various Kikuyus–Kibaki’s ethnic group—and then from the Luo and Kalejin ethnic groups. At stake in the ICC case against Kenyatta and Ruto was their alleged roles in the post-election violence following the election in which responsibility for the 2007–8 post-election violence was individualised and attributed to only a few constructed as key perpetrators. In this sense, the article shows that this logic of the African perpetrator figure is also contravened through a distinct colonial–postcolonial continuum in which affective relationships to perceived historical and ethnic injustices shape the way that people grapple with contemporary notions of individualised culpability.

Making sense of the perpetrator

Where all are guilty, no one is.¹

In his opening statement as one of the prosecutors of the Nuremberg Military Tribunal in November 1945, Justice Jackson stated: ‘... the idea that a state, any more than a corporation, commits crimes, is a fiction. *Crimes always are committed only by persons.* While it is quite proper to employ the fiction of responsibility of a state or corporation for the purpose of imposing a collective liability, it is quite intolerable to let such a legalism become the basis of personal immunity. This statement forms the cornerstone of modern-day international criminal justice. Article 25 of the Rome Statute of the ICC – developed over half a century after the Nuremberg Tribunal started its first case – solidifies this position, determining that the court shall have jurisdiction over natural persons. While historians of ICL often take Nuremberg as the starting point and trace the genealogy from there, the concept of individual criminal responsibility or culpability has long existed in national jurisdictions. Efforts to ascribe liability for collective crimes are a key feature of (international) criminal law. Liberal legalism (a key feature of Anglo-Saxon legal systems) dictates that individuals must be held accountable for their own crimes and not for those of others – it follows that the Western legal profession has a preference for direct, individual criminal responsibility. However, criminal trials (both domestically and internationally) have had to find ways to account for crimes that may have been collective in nature or have had collective elements.

On a national level, modes of liability such as aiding and abetting, conspiracy, etc., have long existed. However, due to the particular nature of international crimes, the tensions have been more pronounced. Prosecutors and judges have grappled with ways to establish the linkages between a particular accused’s actions (or failure to act) and a given set of acts. This tension in ICL – the matter of how to attribute individual guilt for collective crimes – remains among the most problematic issues of ICL. Yet, the figure of the perpetrator of violence in the international imagination represents the imagery of an individual actor and/or high-ranking leader who is mercilessly engaging in maiming and murdering thousands through their relentless commands. This figure is often described in human rights reports as an actor lacking feeling and brutally engaging in relentless prosecution. It often stands for a figure of violence, representing African politics to the world embedded in irrational violence. In this light, this perpetrator imagery is often seen as a figure of African tragedy and uncivilised violence, uncontrollable by reason and without respect for the sanctity of human life.

But the reality is that there is a gap between the individualisation of criminal responsibility and collective conceptions of guilt. Epitomising this gap is the ongoing case of Kenya’s William Ruto and the recently dropped case against Uhuru Kenyatta, whose indictments by the ICC cohere and cohered for some with the international image of the African perpetrator. For others it contradicted such depictions. Such international characterisations operate in ostensible contrast to in-country politics in which it is clear that conceptions of culpability are lived not as permanent, synchronic or diachronic temporalities but in what Achille Mbembe (2001) has referred to as embodying multiplicities and synchronicities in their presences and absences. Set against a backdrop in which Kenyatta and Ruto were cast legally as perpetrators notwithstanding an extensive history of colonial violence, this chapter makes visible a particular ‘impunity gap’ with regard to the office of the prosecutor’s alleged perpetrators and popular sense of responsibility. This gap is evident via the *longue durée* of colonial violence which operates simultaneously and in opposition to

the proximity of violence; such spaces lay bare the problem of legal time and the resulting implications for how culpability is imagined differently.

Culpability and the challenge of legal time

The cornerstone of criminal law – national or international – is culpability. Culpability refers to the degree to which one can be held responsible for a particular act or set of results. Measuring culpability then, can be said to be the prime objective of criminal justice. Rooted in American and European legal traditions, individual culpability treats individuals as autonomous agents able to either obey or violate the law, and to bear the consequences of a violation of the law. In 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*).² Elies van Sliedregt's work on individual criminal responsibility³ approaches individualism as a concept rooted in Western legal traditions, stemming from the understanding that a person is only culpable to the extent of his own free will or guilty mind (*mens rea*). Chrisje Brants, in her essay 'Guilty Landscapes' argues that individual guilt permeates Western legal culture, and that criminal law takes individual guilt as its sole domain, rather than concepts such as collective guilt (a peoples' guilt) or even metaphysical guilt (the notion that man is guilty simply by being, which Brants argues have been banished to the terrains of art and philosophy).⁴

The modern-day usage of individual criminal culpability can be considered an effort to pierce two traditional 'shields' from criminal culpability – the defence of superior orders and the principle of immunity for heads of state and senior state officials. While there is a tendency within international criminal legal scholarship to describe the development of ICL, and the modern-day international criminal justice system as merely another step in creating global law, a simple transplantation of domestic legal norms to the international level, the reality is more complex. Key proponents of ICL such as the late Cassese insist that 'international criminal law, to a great extent results from the gradual transposition on to the international level of rules and legal constructs proper to national criminal law or national proceedings'.⁵ The choice to reject collective responsibility was seen by Cassese as the central idea behind individualised liability decided in the *Tadic* decision, he argued that a 'defendant ought not to be punished for the acts of others'.⁶

The rejection of collective guilt in the international criminal legal system is both a matter of practicality in that it is not feasible to prosecute all who played a role, as well as a matter of principle and ideology with distinct historical roots.⁷ While prior to the twentieth century the response to collective guilt was collective punishment (i.e. military retaliation and war), after World War I the victorious allies addressed the matter of settling accounts with the 'aggressors' (Germany and the Ottoman Empire) in the Treaty of Versailles. While mention of criminal trials was made (a solution favoured by the British and to a lesser extent the American), the Treaty provided for criminal trials in national courts Brants writes, but little came of this. Instead, she argues that the Treaty of Versailles resulted in the collective punishment of the German people, creating economic malaise, poverty and hunger. For many, the agreement reached at Versailles represented 'the first *de facto* criminalization of a pariah state in international legal history'.⁸ Many historians and other scholars have reflected that these conditions after World War I created the ideal circumstances for the rise of the Nazi Party and World War II. And among some, the Versailles example of collective responsibility fell into disrepute, leading to the renunciation of state criminality and the invocation of a model of individual responsibility.⁹

Ultimately, through discussions amongst the victors of World War II on the way forward, a criminal procedure based in the Anglo-American tradition of fair trial, due process and, by extension, individual culpability, was favoured as the solution most likely to contribute to durable peace following the Nazi regime and the development of a legitimate regime in Germany.¹⁰

Justice Jackson, in his opening statement, employs similar reasoning. A famous quote from his opening statement reads: ‘That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason. Throughout his speech, Jackson makes the case that individual responsibility is the most reasonable and necessary approach. ‘This principle of personal liability is a necessary as well as logical one if international law is to render real help to the maintenance of peace.’ He then insists that ‘an international law which operates only on states can be enforced only by war because the most practicable method of coercing a state is warfare ... Only sanctions which reach individuals can peacefully and effectively be enforced.’¹¹ Thus, the Nuremberg solution is often taken to represent the ‘triumph of liberal legalism and individual responsibility over vengeful politics and collective guilt.’¹² To date, the Nuremberg precedent heavily influences ICL.

ICL is strongly influenced by humanitarian law and international efforts to regulate armed conflict. Even where, as is the case with the development of the legal definition of crimes against humanity, the contextual requirement that the crime took place during an armed conflict has been removed, international crimes by their nature require that the conduct took place systematically, was organised and occurred on a large scale. War crimes, for instance, as in Article 8 of the Rome Statute, fall within the jurisdiction of the ICC ‘in particular when committed as part of a plan or policy or as part of a large scale commission of such crimes’.¹³ Some, like Mark Drumbl, have argued that there is an element of collectivity in all international crimes. This collective element is the ‘essence’ of international crime.¹⁴ In this sense, there is an inherent conundrum present in ICL – the jurisdiction is triggered by collectivity, but once a court is seized of jurisdiction, individual perpetrators – ‘those most responsible’ – are to be prosecuted. In short, the conundrum ICL presents is that the very acts which are criminalised (war crimes, crimes against humanity, genocide, aggression) are least suitable to individualised accounts of blame or guilt.¹⁵

Ascribing the guilt of many to a few results in evidentiary challenges when attempting to link an accused to the crimes (and prove this beyond a reasonable doubt).¹⁶ Simpson has reflected that though putatively individualistic, ICL ‘cannot escape into individualism entirely’ and finds itself ‘perpetually drawn back to group responsibility and communal guilt’. However, this challenge of communal guilt is also tied to the forces of history that drive communal action’.¹⁷ Though not new to legal anthropology, the notion of legal time is scarcely interrogated in Western jurisprudential circles, particularly with regard to how notions of culpability are conceptualised.

Scholars of international law like Simpson and Brants have explored questions of liability as a way to understand criminal responsibility but they, among many scholars of critical international law, have hardly examined how notions of legal time are not only conceptualised in particular ways but serve to restrict the analytic space in which criminal law can operate. To examine legal time through its strict understandings and demarcations in criminal law is to reflect on other temporal modes – such as continuing crimes – for addressing collective crimes. Continuing crimes (such as colonialism or apartheid) present us with less stable questions of *perpetratorhood* and create multivalent legal dilemmas. These dilemmas

involve questions of jurisdiction, admissibility and evidence, and further the parameters of an ‘impunity gap’ through which the notion of Kenyatta and Ruto as perpetrators is imagined as viable or unacceptable.

Foundations for continuing crimes in the Kenyan postcolonial imagination

On 1 July 1895, the region that is now known as Kenya was declared to be a British-East African Protectorate.¹⁸ 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 labour 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. Land was not merely a means of economic production but was seen as a divinely inherited blessing that connected them to their ancestors. But as a result of the dispossession of Kenyans from their land, the Mau Mau struggle broke out in order to reclaim their land and promote equality in the region. The majority of the Mau Mau members were 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 the struggle.¹⁹ This struggle began as early as the late 1940s. It was most intense between 1952 and 1957 as its members intensified their mobilisation to establish the conditions for Kenyan independence in 1963. With Jomo Kenyatta, a former Mau Mau combatant,²⁰ as the new post-independence prime minister, there were great expectations that Kenyatta’s government would sufficiently address the land question through a new land redistribution policy. Hundreds of thousands of Africans – mainly Kikuyu – were either living 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 back to their ancestral lands. However, Kenyatta’s government instituted a land-reconsolidation policy that vexed many of the poor squatters, peasants and working classes.

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 took a loan from the British government in order to buy back land from the European settlers who chose to leave Kenya. 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. However, at independence, the majority of Africans were poor squatters, workers and peasant farmers with very little capital. This postindependence policy was seen by many as a blatant injustice because only those who worked closely with the British and earned an income had the necessary resources to buy land or secure bank loans. Thus the early forms of stratification gave an unfair advantage to those who were on the colonial government’s payroll during the Mau Mau struggle. But it also instilled feelings of injustice for many who felt that the terms for buying back land that was initially procured illegally were unjust.

Over time, the formation of landless squatters unravelled and took on an ethnic dimension, especially during the 24-year reign of Daniel arap Moi. Both Kikuyu squatters and those members of the Kikuyu who acquired land in the Rift Valley legally 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 contextualise the violence that erupted following the 30 December 2007 democratic deposal of President Daniel arap Moi, one must consider the events leading up 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 during election time.

Ethnic tensions ostensibly worsened when, amidst accusations of election rigging, competing parties – the Party of National Unity (PNU, led by sitting President Mwai Kibaki) and the Orange Democratic Movement (ODM, led by Raila Odinga) – both claimed electoral victory.²¹ When Kenya’s Electoral Commission announced that Mwai Kibaki was the winner of Kenya’s 2007 elections, a two-month period of violence broke out throughout Kenya, particularly in pro-Odinga areas: the slums of Nairobi, the Rift Valley (Eldoret) and Nyanza (Kisumu).²² In the end, rioting, excessive use of force (by police and security forces), burning, looting, sexual violence and murder left 1200 people dead and displaced thousands.²³ More than a year later, on 26 November 2009, the prosecutor for the ICC requested authorisation from Pre-Trial Chamber II to investigate Kenya’s 2007–2008 post-election violence. The Office of the Prosecutor 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 from 2007 to 2008.²⁴

On 15 December 2010, the Pre-Trial Chamber granted the relevant permission to indict Ruto and Kenyatta using the conception of superior responsibility. This legal frame involved the doctrine of hierarchical accountability wherein expectations of supervision pertain and a related liability for the failure to act were further established through the doctrine of ‘command responsibility’. In the case against Kenyatta, charges were based on his supposed command of murders committed in Naivasha on 27 and 28 January 2008, and in Nakuru on 24 and 27 January.²⁵ For Ruto, the demarcated period was from 1 to 4 January 2008, and involved violence allegedly committed in the greater Eldoret area.²⁶

Admittedly, the ICC’s temporal jurisdiction over the case was limited by Article 11 of the Rome Statute (*Jurisdiction ratione temporis*), which indicates that the ‘Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute’.²⁷ The ICC’s judges examined its temporal jurisdiction over potential cases against Ruto and Kenyatta when it granted the prosecutor permission to commence an investigation over 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. Expressly, 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 sitting president at the time, Mwai Kibaki). Following this logic, these activities correspondingly fomented the violence following the 2007 election. With regard to Kenyatta, the Prosecutor alleged that he organised meetings with various government leaders, the police and the leadership of the outlawed Mungiki sect; it was in those meetings that 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 organisation in Kenya and is notorious for its participation in the 2007 post-election violence. Kenyatta is said to have mobilised their support for the purposes of 'defending' Kikuyu interests, leading the ICC to consider him criminally responsible for the violence the Mungiki perpetrated.²⁸

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 should be admissible before the ICC.²⁹ The Kenyan government challenged this. Simultaneously, the African Union (AU), in partnership with the Kenyan National Dialogue and Reconciliation (KNDR) team, under the leadership of former UN Secretary General Kofi Annan, recommended that the government establish a national commission of inquiry to investigate the causes of the post-election violence.³⁰ Known as The Waki Commission, this Commission of Inquiry into Post-Election Violence (CIPEV) was established and 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.³¹ The Waki Report (October 2008)³² indicated that a meeting was held in the state-house to coordinate revenge on Luos and Kalenjins; it cited then-minister Uhuru Kenyatta as being criminally responsible for financing and mobilising electoral support through the Mungiki. Similarly, the Luos and Kalenjins purportedly mobilised their support to attack the Kikuyus (the ethnic group to which Kenyatta belonged). 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, amidst 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.³³ Parliamentarians from across the ODM (Raila Odinga) and 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 that involve legal accountability for the post-election violence. On 8 March 2011, the ICC issued a summons for the suspects to appear before the court.³⁴ The prosecutor named six persons (known as the Ocampo 6) suspected of bearing the greatest responsibility for crimes committed during Kenya's 2007 post-election 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 at the time of the post-election violence had been the commissioner of the Kenyan police; 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 industrialisation and a member of the National Assembly as well as the chairman of the ODM.³⁵ The opposing side included 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 presenter at the time of the post-election violence (respectively of the Meru and Kalenjin ethnic groups).³⁶

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 post-election violence. 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 on that case. 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 and only Kenyatta left in the second case. Though the mode of liability initially confirmed for Kenyatta/Muthaura was indirect co-perpetration, after the charges were dropped against Muthaura, the charge against Kenyatta was connected to him being 'individually responsible' for the violence in Naivasha on 27 and 28 January and in Nakuru on 24 and 27 January 2008.

The case against Ruto and Sang began in September 2013.³⁷ The case against Uhuru Kenyatta was continually adjourned and was finally dropped by the Office of the Prosecutor on 5 December 2014.³⁸ The Ruto and Sang case is beset with controversies and complexities. In a poll conducted by Ipsos Synnovate in February 2014, more Kenyans opposed the ICC process than ever before: 46% of the Kenyan population was opposed to ICC engagement, compared to 29% in 2013.³⁹ Interestingly, by fall of 2012 the once age-old competing parties/ethnic groups came together to create the Jubilee Party, led by indictees Ruto (formerly of the ODM party) and Kenyatta (formerly of the PNU party). Despite the ICC indictment, in March 2013 the Kenyan people supported the Jubilee Party and voted for Uhuru Kenyatta as President of the Republic of Kenya and William Ruto as Deputy President, quickly leading to a drastic shift in public opinion on the ICC engagement, with more than half of the population becoming increasingly dismayed with the ICC indictments.⁴⁰

While the question of who is responsible for violence committed against various victims has led to disagreements over the ICC indictments of perpetrators for crimes against humanity, especially those involving African sitting heads of states, longer histories of violence and questions of proximate violence have gained traction as the basis for the attribution of guilt. 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.⁴¹ Though supportive of the ICC concept, in principle, many victims also felt that instead of pursuing a lengthy ICC process in order to achieve compensation for violence and property loss, local and national mechanisms were preferable – even given the reality that in many ICC-situation countries many did not feel fully satisfied with the domestic measures taken.⁴²

In a 2013 survey that my research team and I conducted with victims of 2007–2008 post-election violence in Nairobi's low-income Kibera neighbourhood,⁴³ an overwhelming majority of Kibera residents insisted that criminal responsibility needs to be understood clearly through notions of collective guilt as clarified through the *Mungiki* phenomenon, the role of the police in post-election violence, and the way that the British colonial settlement of the Rift Valley led to the demise of both the Kikuyu and Kalejin ethnic traditional networks. Despite this perception on the ground, international criminal law prioritises command/superior responsibility rather than holding proximate perpetrators accountable; the expectation is that direct perpetrators will be held accountable 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 Kenya's national judiciaries; it is also attributable to the reality that international courts cannot situate crimes historically. Thus, as I will show, international legal processes have had the effect of producing images of African perpetrators that on the one hand are being met with unease. And on the other

hand are seen for some as the only alternative for ending impunity in postcolonial Kenya. This duality exists both because international law is not seen by large numbers of Kenyans in our study as being capable of addressing the imbrication of continuing crimes and because they see Kenya's postcolonial elite as being structurally culpable. This structural culpability calls for a temporal analysis of modes of legal liability and is connected to a colonial–postcolonial continuum for parsing guilt.

Command responsibility, legal time and the problem of continuing crimes

In the Rome Statute system, those most responsible for the commission of crimes over which the court has jurisdiction can, in accordance with Article 25 of the Rome Statute, be held individually responsible and liable for punishment. This criminal responsibility extends to individuals who commit such a crime jointly; those who order, solicit or induce the commission of a crime; persons who aid, abet or otherwise assist in the crime; and those who provide the means for the crime's commission.⁴⁴ Article 28 of the Rome Statute stipulates that a military commander or a person acting as a military commander with effective command and control over his forces shall be individually, criminally liable for the criminal conduct of his or her subordinates, provided he or she knew (or should have known) that the forces were committing or were about to commit such crimes. The article also concerns a commander who fails to take all necessary measures to prevent or suppress the commission of these crimes.⁴⁵

Accordingly, 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. Notwithstanding the stipulations for legal responsibility, many of the very victims on behalf of whom international judicial institutions seek to act 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. Many of my respondents insisted that focusing on 2007–2008 post-election violence failed to attend to deep-rooted historical and political issues. For example, Kiamu – a young Kenyan human rights advocate, maintains:

One of the biggest weaknesses of Kenyan criminal law, we do not have a scheme for compensating victims of crime and the idea that these people of the 2007 violence are the only victims of crime, they're not the only victims of crime, I'm also a victim of crime I lost ten teeth, I nearly died; the state isn't compensating me. The best the state will do if they find the guys who beat me they might even hang them but they'll never pay me a coin for the injuries I've suffered. We've had victims in this country since the colonial times so if you're going to address the system of victims of political violence in Kenya we do it holistically. We begin with the day the British landed here, the evictions that the settlers did – today the biggest land owners are settlers. All of these issues need to be addressed. We're not going to just come here and create a situation and it becomes an industry for everyone to make money and the reference point becomes 2007. My reference point is in the eighteenth century, and I think something needs to happen. If we're going to address the question of criminal politics of domination, exploitation and impoverishment and eviction then my reference point is not 2007 it goes much [further] back. And the ICC has no capacity to address that, so I'll not waste time on it.

Kiamu has a strong conviction about the limits of culpability in domestic and international criminal law; we also see a critique concerning the inability of law to adequately encompass

historical forms of violence. Despite these other conceptualisations 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.⁴⁶ Set against this vexed juridical backdrop, who should be held responsible for contemporary crimes of violence?

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 that exists over a long time rather than in more familiar crimes such as murder. A continuing or composite crime is one that necessarily occurs over an extended period, such as, for example, the crime of apartheid. Apartheid, unlike murder, does not occur in a single instant.⁴⁷ 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.⁴⁸ In contrast, when addressing regular crimes, such as murder, which 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.⁴⁹

Challenges with continuing crimes: the *Rainbow Warrior* case

The *Rainbow Warrior* is one of the most famous examples in the international case law concerning continuing violations. The case is important for the history of international tribunals recognising continuous crimes. In this case, two French agents were convicted by a New Zealand High Court for 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 measured France's liability not just 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.⁵⁰

British seizure of US slave ships

A handful of cases involving the British seizure of US ships illustrate that courts will rule on the absolute moral wrongness of historical practices – here, slavery – but that courts remain largely unwilling to impose criminal liability except for specific acts and only after the conduct is clearly understood to be against the law. In this case over a few decades the British authorities had seized numerous American ships and freed the slaves that belonged to American nationals who were aboard.⁵¹ The governments referred to the Mixed Arbitration Commission that had the task of determining whether, at the time each incident took place, slavery was 'contrary to the law of nations'. Umpire Bates held that the incidents during the 1830s to the 1840s, when the slave trade was considered lawful under the law of nations, amounted to a breach on the part of the British authorities.⁵² But the later incidents occurred when the slave trade had been 'prohibited by all civilized nations' and did not involve the responsibility of Great Britain.⁵³ Thus, the arbitration tribunal did not determine the timing of the wrongfulness of the acts – slavery was always wrong – but the (formal) illegality of the acts.

In *Prosecutor v. Musema*, the International Criminal Tribunal for Rwanda (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.⁵⁴ In this case as well as subsequent ICTR cases, such as *Prosecutor v. Nahimana* we see an example where the court allowed the introduction of evidence from outside the jurisdictional temporal window.⁵⁵ But this compares with *Prosecutor v. Barayagwiza*, in which the court interpreted its jurisdiction restrictively, holding that no facts pre-dating or post-dating 1994 could be used to support a count in the indictment.⁵⁶

Continuing and composite crimes force courts to address conduct that exists over longer time periods than other, more familiar, crimes such as murder. They create legal dilemmas not just for questions of jurisdiction but also around questions of evidence and admissibility. The cases identified here address the limits of legal time and represent compelling examples of how courts have attempted to wrestle with problems of strict temporality. In the ICC cases relating to post-election violence in contemporary Kenya, it is clear that a close reading of the ICC's charges allow us to reflect on the tension between specific instances of criminality (violence), on the one hand, and histories of inequalities and perceived injustices that have occurred over extended periods, on the other hand.

Cross-cultural differences in concepts of time abound in the social science literature. In *The Elementary Forms of the Religious Life*, Émile Durkheim noted that 'time' is socially constructed and the form it takes in each society reflects the activities and rhythms of the society's culture, reinforcing the regularity of those activities and rhythms.⁵⁷ E.E. Evans-Pritchard similarly asserted that, '[For the Nuer] time ha[ve] not the same value throughout the year ... The Nuer have no expression equivalent to "time" in our language, and they cannot, therefore, speak of time as though it were something actual, which passes, can be wasted, can be saved, and so forth.'⁵⁸ And Clifford Geertz, in 'Person, Time, and Conduct in Bali', sustained that a Balinese calendar 'is not used ... to measure the rate at which time passes ... [I]t is adapted to and used for distinguishing and classifying discrete, self-subsistent particles of time ... The cycles and super cycles are endless, unanchored, uncountable, and, as their internal order has no significance, without climax. They do not accumulate, they do not build, and they are not consumed. They do not tell you what time it is; they tell you what kind of time it is.'⁵⁹

Contemporary approaches such as David M. Engel's 'Law, Time, and Community',⁶⁰ also examine competing, cyclical or 'iterative' versus linear conceptions of time shared by residents of a rural American town. These different conceptions of time influence the community's responses to litigation and the law. Carol J. Greenhouse examines representations of time within American legal culture and social life. For Greenhouse the relationship between cultural conceptions of time – 'social time' – and the organisation and management of legal institutions' 'temporality and legality' are conceptually fused in the West. As such they produce the terms in which social life acquires meaning.⁶¹ This scholarship on temporality has established the role of time as socially constituted. Let us turn to the Kenyan example with John to demonstrate how temporality and legality played out in the conceptions of my informants. John – a known Kenyan journalist – insisted that in 2007–2008 neither Kenyatta nor Ruto were heads of state, so it is not clear why they, over others, would be seen as bearing the most responsibility.

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 stronghold. 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 post-election 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.⁶² The violence of 2007–2008 was, in many ways, seen as a response to the unwillingness of others to concede to the monopolisation of power by particular members of the elite once again. Yet, the media contributed to the production of the concept of the perpetrator by depicting the situation as ultimately being about the ethnic Kalenjin mobilising 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 otherized 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 monopolisation of power throughout Kenya. In Kiamu, John and Bornu's statements, we can begin to see that at the heart of the impunity gap is the difficulty in ascribing guilt to particular individuals; some feel that the ICC's focus on command responsibility not only overlooks the guilt of those who actually engaged in criminal conduct, but that, in the Kenyan cases, it also produces a framework in which the cases are argued in a way that overlooks the temporality of collective responsibility for age-old political problems.

Understanding the inter-ethnic consolidation of Ruto's United Republican Party (URP) with Kenyatta's Nation Alliance Party (TNA), which came together to produce the Jubilee Party and its victory, is central to grasping the emergence of an impunity gap in the Kenyan national imaginary. It is worth asking how would-be 'perpetrators' of Kenya's 2007 post-election violence, according to the ICC, could facilitate the consolidation of historically opposed ethnic groups, whose candidates then won Kenya's 2013 presidential elections.

On the 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 50-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 groups. 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 mobilisation of particular ethnic patronage networks to try to change the Kikuyu and/or Luo and Kalenjin monopolisation of power in postcolonial Kenya. It is the realisation 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. This sensibility of collective responsibility – instantiated through oath-taking, but later sedimented through patronage – informs the production of a popular national imaginary in which Ruto and Kenyatta are not widely seen as 'perpetrators' awaiting indictment of the ICC but as national heroes to be protected and celebrated.

My informant's answer to the related question of who should be held accountable instead highlights the extent to which collective responsibility is relevant. According to Ngugi, 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 shopkeepers 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.

Some of the Kenyans that we spoke with during fieldwork in Nairobi⁶³ alleged that Kenyatta and Ruto actually defended the powerless. From these interviews it became clear that the complexity of financing violence as a part of the co-perpetration of violence was not only central to parsing responsibility. Rather, the act of financing and arming fellow Kenyans was seen as a response to the call to protect the collective whole – the Kikuyu against Raila's supporters, the Luo, for example. Accordingly, what the OTP saw as Kenyatta's legal culpability was actually seen by 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 – was perceived to be taking critical steps to protect his community from ethnic-inspired violence and to ensure Kikuyu prominence/dominance in Kenyan politics.

Uhuru Kenyatta's rapid rise to power is seen as an indicator of the importance of the notion of collective responsibility, in which it is understood 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, Kenyatta's community saw him as protecting the collective, and thus they do not see him as culpable. The overt problem is that admitting to the existence of Kenyatta's participation and the role of others in actually financing the violence would be seen as a legal admission of guilt during the designated post-election period of violence. Instead, Kikuyus often make vague admissions by describing Kenyatta's actions as collectively appropriate. See 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'.⁶⁴ 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 Kikuyu elders mobilised forces to protect themselves in various places; hence the mobilisation of the Mungiki forces. Actions taken in the Ruto camp, and by extension the Kalenjins (and Kenyatta through his Kikuyu networks) in terms of mobilisation – i.e. financing and executing violent acts – were ultimately seen by participants as being in support of two principal players: Kibaki and Raila. The compromise related to this standoff eventually resulted in the creation of a new position, prime minister, as part of the power-sharing agreement in which historically opposed parties came together.⁶⁵ Thus, among a particular contingent, Kibaki and Raila were seen by many as the most invested parties in the post-election violence, and, therefore, though not seen as those engaged in proximate violence, when respondents were pressed to parse responsibility according to principles of international law, many argued that Kibaki and Raila should have been the ones seen as bearing the greatest responsibility and not Kenyatta and Ruto.

Proximity, intimacy and redirecting the culpability of the perpetrator

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

So, how do these guys end up at the ICC? If not through a process of 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, he narrowed it down too. 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 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 suggests 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. Also part of the story, and as my

informant explained, was that the police were part of this process. 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 mobilised 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, and not Kenyatta and Ruto, were the ones who were seen as being 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 leanings. 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 post-election 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 teargas 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 victims of violence are also conceptualising 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 neighbour, 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 figure of Kenyatta and Ruto that is being held responsible for those alleged perpetrators of violence in the police and security forces.

In response to our question about whether Kenyatta and Ruto should assume responsibility for the 2007–2008 post-election violence, the journalist Ngugi turns around the question and asks us:

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 Four items?⁶⁶ – it is absolute *bullshit*.

Here by referring to *Agenda Four* items 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 item was to

address ‘long-term issues and solutions’ and include items such as land reform, national unity, etc. The Agenda Four items were the last items agreed to in the Annan-brokered peace agreement. They had to do with further long-term peace-building concerns. But Ngugi’s point is that the issue is a lot more complex than simply ethnicity and land. The issues are also about the perceptions of narrative erasures – the production of false narratives that are seen as being part of the maintenance of state power. He suggests that the violence was not simply ‘routine’ ethnic violence, as it was often framed. He insists that the security forces – those in proximate relations to daily citizens – were actively involved, and people from 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 ops had gone completely amuck ... because even the security forces ... were divided along party and ethnic lines.

He emphasises 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 Munyaka, 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 Administration 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 here in Kisumu.

In this passage Ngugi counters what he sees 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 were underplayed. He insists, rather, that the state security machine played a major role in the violence and were in fact the largest perpetrators. He argues 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 the 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 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/political affiliation. Given the way the security forces are ‘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 overtake government – at all costs – or for the Kibaki government to maintain power within it.

Of the most pronounced redirections of culpability – from Ruto and Kenyatta to the police, security services or neighbours accused of stealing – was those accused of perpetrating the most intimate forms of violence: sexual violence ranging from rape to castration and sodomy. Proximity mattered in those contexts and notions of culpability were directly tied not to individual commanders who directed and enabled violence but to those who were themselves engaged in proximate violence.

Conclusion

Articulating guilt through narrow terms like superior responsibility limits the representational life of those deemed most responsible for violence. International criminal legal concepts of culpability rely not only on rational reasoning for clarifying the line of command, but they also depend on a particular production of the guilty perpetrator without whom violence would not be possible. Thus far we have seen that the different levels of perpetration – senior level and the execution level of proximate violence – are not separate but are interconnected. How one may attribute guilt, and by extension how the perpetrator of violence is conceived, becomes difficult when questions of historical collective responsibility are introduced. This is especially a challenge because international crimes normally involve a plurality of individuals acting within the framework of a common plan. In this context, the direct perpetrators or proximate actors who physically commit the criminal acts – typically occupying low-ranking positions – are set alongside those who orchestrate systematic commission and execution of violence. These notions of culpability and the related liability understood in legal circles are often argued in relation to strict temporal designations. And this is where the problem lies.

New international-law assertions of culpability are not enough to make sense of the deep roots of violence. There is an affective dimension, an emotional indignance about colonial injustices and their arbitrary power proximate actors that remains part of the post-colonial condition. But large numbers of the Kenyan public see the postcolonial complexities that have taken shape as being misdirected by the ICC indictments. Ultimately this has had implications for the construction of the African perpetrator as the Kenyan prime minister or the deputy president and the limits of the law in attributing histories of violence according to contemporary approaches to command responsibility.

The construction of international criminal law has involved the production of strict understandings and demarcations in time through which to attribute guilt. Rather than reflecting on historical developments or broader root causes, ICC jurisprudence has adopted a relatively strict view of temporality with the recognition that non-retroactivity or the principle of *nullum crimen sine lege* – no crime except what is proscribed by law – is one of the central principles of law. The criminalisation 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.

The impunity gap represents an abyss between legal presumptions of temporally relevant responsibility, and the growing grass-roots conception of who is actually criminally responsible for acts of violence – including historically relevant institutions such as colonial agents and discriminatory segregation politics. I have shown how – in relation to these historical realities – the impunity gap highlights a hierarchical/vertical disjuncture due to the limitations of attributing conduct from one person to the other – 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. What the ICL impunity gap reveals is the

difference between social and legal justice and the varying understandings of guilt and responsibility. It highlights the afterlife of a failure to balance power historically in postcolonial Kenya, set alongside the use of the law to rectify histories of dispossession manifest in acts of violence. We also see how fraught with meaning the assignment of culpability to one perpetrator really is – especially in contexts in which the state has failed to adequately address the needs of those victimised by violence.

Whether the disjuncture occurs because of a difference with attribution based on proximate violence, or because of the inability to reconcile contemporary violence in relation to guilt attributed within a strictly narrow temporal period in 2007–2008, the reality is that this impunity gap exists in the Kenyan political landscape because people recognise that legal time and the individualisation of criminal responsibility do not account for the deep histories that produced the conditions under which police violence, ethnic rivalries and land dispossession were made possible.⁶⁷ Rather, there is a realisation that inscriptions of power in colonial Kenya were central to the play of power in post-independence Kenya. And since independence, power has never been balanced or distributed beyond those ethnic groups – the Kikuyu and Kalenjins – that inherited power. Yet, the other reality is that in postcolonial Africa, the afterlife of imperialism, colonialism and the violence of dispossession persist deeply in the psychic life of social justice. And alongside 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.

The Kenyan cases being pursued by the ICC demonstrate an alternate conceptualisation of culpability. What they show us is that the impunity gap can actually be explained through affective sentiments of historical solidarity that suggest that not only do most Africans want to end violence, impunity and the abuses of the postcolonial elite, but they also want to reassert a new narrative imaginary about the political nature of contemporary violence in Kenya.

The new imaginary of collective crimes understood through a colonial–postcolonial continuum competes with the ICC perpetrator figure. It represents a new socio-cultural realisation tied to particular historical attachments that reflect the reality that we live in a world where meanings of justice extend beyond the law. What we see is that the colonial–postcolonial continuum is complexly interconnected. Senses of the continuity with the past and present are tied to an emotional afterlife that shapes the subordination of liberal legalism to the realities of postcoloniality. These notions of continuity show how people understand collective responsibility in relation to affective and historically influenced domains. These affective forms structure engagements with justice and reproduce forms of desire, freedom and ways of rejecting hegemony in daily life. In that process they produce an affective continuity in which agents struggle for the power to articulate meaning and produce relevance. Seen as thus, exploring the work of the temporal imagination in legal practice can be enriched through bringing it into dialogue with transnational fields of power, such as international law – historically situated subjects who imagine transformative possibilities in contemporary democracy. The Jubilee Party victory of 2013 demonstrates how social justice can exceed the juridical. On the one hand, the political elite was able to implement an UhuRuto promotional strategy and politicise ethnicity, leading to a merger and consolidation of the Jubilee Party and its deployment of a strategic narrative of colonial victimhood. On the other hand, we are seeing the emergence of a renewed sense of ethnic solidarity based on a different ‘moral imaginary’ within their

respective to the culpability for violence in postcolonial Africa. The contemporary period is characterised by a rupture with the past in which the imagination and the imaginary is constructed within a landscape of social practices and relations of power. Thus, when set alongside a broader temporal continuum, how one imagines culpability of a perpetrator involves the new negotiations between individual agency in the reading of colonial and postcolonial history in relation to globally defined fields of possibility in which social knowledge contributes to the production of new meanings of justice.

To understand the play of the imagination and the conditions of possibility through which legal logic is reconceptualised, the interrogation of the figure of the perpetrator calls for new theoretical models for explaining how through conceptions of continuing crimes new global imaginaries of conflict and violence are being deployed to address histories of protest against liberal legal forms and their institutions. They are being deployed to rethink continuing challenges of violence and their impact on proximate social worlds and are providing the vocabulary for managing the globalisation of the rule of law and the discourses of justice in terms that are contextually meaningful.

Ultimately, the competing discourses that are embedded in conceptions of culpability are actually reflective of a turn in the modernity of international justice and its reassertion as an ontological problem – that of the existence of temporal continuities that have traditionally been written out of modern legality. The insistence of temporal linkages through colonial–postcolonial continuums call on us to rethink how articulations of temporal jurisdiction presumed to be ‘natural’ and rational are just as shaped by ideologies of constructing rationality as they are by actual connections. With this insight, the attribution of the perpetrator figure is a question of how temporal continuity as an ontological question is negotiated in complex sites of international meaning making.

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37. On 23 January 2012, the Pre-Trial Chamber II decided to move cases against Ruto, Sang, Muthaura and Kenyatta to trial. Judges declined to confirm charges against Henry Kiprono Kosgey and Mohammed Hussein Ali. The recent decision to move the majority of the Kenyan cases to trial is bound to provide a window into another set of international juridical processes on the world stage and assessments on the extent to which the ICC has the potential to produce justice.
38. On 31 March 2014, Trial Chamber V(b) of the ICC adjourned the commencement date of the trial in the case against Uhuru Kenyatta to 7 October 2014. The purpose of the adjournment being to provide the government of Kenya with a further, time-limited opportunity to provide certain records, which the prosecution had previously requested on the basis that the records are relevant to a central allegation to the case. Press Release: 31/03/2014 Kenyatta case: 'Trial Adjourned until 7 October 2014', ICC-CPI-20140331-PR991, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr991.aspx (accessed 28 April 2014).
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 62. Home Guards were African village policemen who were working for the British colonial government in Kenya to quash the Mau Mau struggle. They had a reputation of being extremely vicious in their anti-Mau Mau campaigns.
 63. Concentrated ethnographic fieldwork and survey data collection for this project was funded by the National Science Foundation and conducted by the author and three researchers during May to December 2013 and then again in summer 2014. Surveys were disseminated in Kibera and Nashava, Kenya and focus groups were conducted in various sites throughout Western and Southern Kenya.
 64. Interview data collected in Nairobi during May to December 2013.
 65. A. Nicoll and J. Delaney, eds, 'Kenya's Election: Risk of Renewed Violence', *The International Institute for Strategic Studies* 19, no. 1 (2013): vii–ix.
 66. Following the violence over Kenya's disputed 2007 general elections the Kenyan Dialogue and Reconciliation forum was created to facilitate mediation among the various parties. As part of this process four agendas were identified as areas of focus for national dialogue and reconciliation. Agenda Four focused on long-term issues and solutions such as land reform, legal and institutional reform, unemployment and several more.
 67. The Truth, Justice, and Reconciliation Commission (TJRC) report tried to address these very questions, but the process was significantly delayed and marked with internal wrangling, which served to discredit the process significantly.