

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 11 September 2012

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
THE PROSECUTOR *v.* FRANCIS KIRIMI MUTHAURA AND
UHURU MUIGAI KENYATTA**

Public with Public Annexes A and B

**Redacted Joint Defence Response to the "Prosecution's Submission of the
Updated Document Containing the Charges pursuant to Order ICC-01/09-02/11-
450"**

Source: Defence for Uhuru Muigai Kenyatta
Defence for Francis Kirimi Muthaura

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Ms. Fatou Bensouda, Prosecutor

Ms. Adesola Adeboyejo, Trial Attorney

Counsel for the Defence

Counsel for Francis Kirmi Muthaura

Karim A. A. Khan QC, Essa Faal,
Kennedy Ogetto & Shyamala Alagendra

Counsel for Uhuru Muigai Kenyatta

Steven Kay QC and Gillian Higgins

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented

Applicants

(Participation/Reparation)

The Office of Public Counsel for the Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia, Registrar

Deputy Registrar

Mr. Didier Daniel Preira, Deputy
Registrar

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Defence for Mr. Kenyatta and Ambassador Muthaura (the "Defence") submit its response to the Prosecution's Submission of the Updated Document Containing Charges.¹

II. PROCEDURAL HISTORY

2. On 23 January 2012, Pre-Trial Chamber II issued its "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute" (the "Confirmation Decision"), confirming the charges against Uhuru Muigai Kenyatta and Ambassador Francis Kirimi Muthaura and declining to confirm the charges against Major General Mohammed Hussein Ali.²
3. On 5 July 2012, Trial Chamber V (the "Chamber") issued its "Order for the Prosecution to file an updated document containing the charges", directing the Prosecution to file an Updated Document Containing the Charges (the "Updated DCC") following *inter se* liaison with the Defence teams for Mr. Kenyatta and Ambassador Muthaura.
4. On 6 August 2012, the Prosecution transmitted to the Defence its draft Updated DCC, and requested that any observations should be provided in a chart.
5. On 17 August 2012, the Defence transmitted its observations in a chart to the Prosecution. In this chart, the Defence provided substantial justifications for its observations, and, in an attempt to further expedite the consultation process, included an additional column which set out, where appropriate, proposals for alternative wording or action in relation to disputed passages within the

¹ ICC-01/09-02/11-468.

² ICC-01/09-02/11-382-Conf.

Updated DCC. The Defence provided supplemental observations to the Prosecution on 21 August.

6. On 21 August 2012, the Prosecution and Defence filed a joint submission requesting an extension of time to file the Updated DCC.³ The Chamber granted the request, allowing the Prosecution until 24 August 2012 to file the Updated DCC.⁴
7. On 22 August 2012, the Prosecution transmitted to the Defence its proposals on those sections of the Updated DCC in respect of which it considered resolution possible as between the parties. The Prosecution did not, however, set out the reasons for its objections to the Defence's observations. This version of the observation chart is annexed to this filing as Confidential Annex A.
8. Following a sequence of emails on 23 August 2012, the Defence agreed to the Prosecution filing the Updated DCC within the extended time period permitted by the Chamber which included observations from the parties, discussions in respect of which were still ongoing at that time. The Defence stated that it would respond to the Prosecution filing and provide any additional observations it deemed necessary for the Chamber in order to consider the matter on the merits.
9. On 24 August 2012, the Defence received notification of the "Prosecution's Submission of the Updated Document Containing the Charges pursuant to Order ICC-01/09-02/11-450", which contained the following annexes:⁵
 - a. an unredacted version of the Updated DCC;⁶

³ ICC-01/09-02/11-466.

⁴ ICC-01/09-02/11-467.

⁵ ICC-01/09-02/11-468.

⁶ ICC-01/09-02/11-468-Conf-AnxA.

- b. an unredacted version of a chart explaining the issues that remain in dispute between the parties, including the parties' submissions on each issue;⁷
 - c. a public redacted version of the Updated DCC;⁸
 - d. a public redacted version of the chart explaining the issues that remain in dispute;⁹ and
 - e. a redline version of the Updated DCC.¹⁰
10. The Chart filed with the Chamber included extensive Prosecution comments that had not previously been seen by the Defence, and in respect of which the Defence had no opportunity to respond during the course of the *inter se* communication.¹¹

III. PROCEDURAL SUBMISSIONS REGARDING APPROPRIATE FORUM

11. At the outset, the Defence disputes the frequent assertion by the Prosecution in the Updated DCC that Pre-Trial Chamber II did not address important factual issues in the Confirmation Decision. These assertions are set out clearly in the Consolidated Defence Version of the Updated DCC in Confidential Annex B.
12. Pursuant to Article 64(4) of the Statute, the Defence submits that, in the interests of fairness and expediency, it is appropriate for Pre-Trial Chamber II to clarify whether or not, and if so, to what extent, it addressed these particular factual issues in dispute between the parties, it being the Chamber before which they were initially considered and determined. The Defence submits that these disputed facts constitute preliminary issues within the meaning of Article 64(4).

⁷ ICC-01/09-02/11-468-Conf-AnxB.

⁸ ICC-01/09-02/11-468-AnxC.

⁹ ICC-01/09-02/11-468-AnxD (temporarily reclassified Confidential upon a request by the Defence under regulation 23bis(3) of the Regulations of the Court).

¹⁰ ICC-01/09-02/11-468-AnxE.

¹¹ A comparison between the original observations chart at Annex A and the Chart submitted by the Prosecution reveals a substantial number of detailed comments which added approximately 50 pages to the original chart.

13. Article 64(4) provides that:

“The Trial Chamber may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber or, if necessary, to another available judge of the Pre-Trial Division.”¹²

14. It is for Pre-Trial Chamber II to determine whether the Prosecution is correct in its assertion as to whether or not it addressed important factual issues in the Confirmation Decision, and to clarify the meaning of those factual findings, where unclear. The majority of the disputes between the parties concern the correct interpretation of facts determined by Pre-Trial Chamber II, which by virtue of its knowledge of the evidence and arguments submitted at confirmation, is best placed to rule on whether a given fact was denied or upheld in the Confirmation Decision.

IV. SUBMISSIONS ON THE UPDATED DCC

A. The Prosecution is Required to Specify Times, Locations, the Number of Victims and their Identities

15. The Defence submits that the Prosecution did not follow the Chamber’s order in formulating the Updated DCC to “clearly indicate facts and circumstances underlying the charges....in terms of times and locations and also, as far as possible, the precise numbers and identities of the victims and the means employed to commit the crimes.”¹³

¹² The Defence notes the jurisprudence of the Appeals Chamber which provides that “[I]f any power is conferred upon a court to make an order or issue a decision, the parties have an implicit right to move the Chamber to exercise it”, ICC-01/04-168 at para 20.

¹³ ICC-01/09-02/11-450 at para 9 (citing ICC-01/04-01/07-1547-tENG at para 31).

Specificity with Respect to Location and Time

16. The Chamber ordered the Prosecution to specify times and locations in the Updated DCC.¹⁴ In the Chart, the Defence has noted several areas where the Prosecution failed to adhere to the Chamber's order.¹⁵ The Defence has also noted another section of the Updated DCC that does not meet the level of specificity required by the Chamber's order.¹⁶ The Chamber will note the Defence observations in this regard in Confidential Annex B.
17. By way of example, the Defence submits that a location such as "Central Province" fails to satisfy the criteria required by the Chamber,¹⁷ as Central Province encompasses an area of over 13,000 km². Additionally, the Defence submits that a time frame of "early, mid and late January" does not attain the level of specificity required by the Chamber's order.¹⁸
18. The Defence understands that where a single footnote in the Updated DCC references a definite point in the Confirmation Decision which mentions a specific location and time, the criteria outlined by the Chamber are satisfied. Conversely, where in the Updated DCC the Prosecution refers to "key preparatory meetings", the Defence objects to the use of citations that state merely that an "[a]llegation [was] not addressed by [the] Pre-Trial Chamber". If the "key preparatory meetings" are not found within the Confirmation Decision, the Prosecution should be required to insert the time and location within the text and to cite specific pieces of evidence with reference to its evidence registration number ("ERN").

¹⁴ ICC-01/09-02/11-450 at para 9.

¹⁵ See ICC-01/09-02/11-468-AnxB-Conf at para 47, fn. 118 and 119; para 75, fn. 231; para 80, fn. 256; para 86, fn. 281; para 88, fn. 289; and para 89, fn. 295.

¹⁶ See ICC-01/09-02/11-468-AnxB-Conf at para 47, fn. 122; see also ICC-01/09-02/11-468-AnxA-Conf at para 53.

¹⁷ ICC-01/09-02/11-468-AnxA-Conf at para 47; see also ICC-01/09-02/11-468-AnxB-Conf at para. 47, fn. 122.

¹⁸ See ICC-01/09-02/11-468-AnxA-Conf at para 47, fns. 119-21; para 47, fns. 123-24; and para 51, fn. 136; see also ICC-01/09-02/11-468-AnxB-Conf at para 47, fn. 118 and 119.

19. In accordance with the Chamber's order, the Defence requests that the Chamber require the Prosecution to include the times and locations of all the alleged "key preparatory meetings" within the text and with ERN references in the Updated DCC.

Precise Numbers of the Victims

20. The Chamber ordered the Prosecution to indicate, "as far as possible, the precise numbers...of the victims."¹⁹ As Pre-Trial Chamber II limited its discussion to specific alleged acts of violence, and not every individual act, the Prosecution attempted to resort to the evidence provided to and used by Pre-Trial Chamber II for the Confirmation of Charges hearing.²⁰ The central piece of evidence used by Pre-Trial Chamber II for the Confirmation Decision to determine the number of deaths of perceived ODM supporters²¹ was the CIPEV list of reported death during the PEV.²²
21. For Nakuru, the list provides the name, age, date of death, ethnicity and cause in respect of those deaths that occurred throughout the entire PEV period.²³ For Naivasha, the list provides the name, sex, ethnicity, inquest number and cause of death for persons dying during the entire PEV period.²⁴ In addition to this list, the Prosecution also submitted hospital records from the Naivasha District Hospital.²⁵ This record contains the names, ages, sex, dates and causes of death for 42 of the 50 persons listed in the CIPEV list used by Pre-Trial Chamber II.

¹⁹ ICC-01/09-02/11-450 at para 9.

²⁰ See ICC-01/09-02/11-468-AnxA-Conf at fn. 41 (stating that "[t]he Pre-Trial Chamber relied on evidence demonstrating that a number of perceived ODM supports were killed in the attacks..."); see also fns. 65, 168 and 217.

²¹ Pre-Trial Chamber II defined a "perceived ODM supporter" at ICC-01/09-02/11-382-Conf at para 144.

²² See KEN-OTP-0041-0679 at 0679-90.

²³ KEN-OTP-0041-0679 at 0681-90 (noting that 25 persons were listed as "Unidentified Africans" with sex and age group).

²⁴ KEN-OTP-0041-0679 at 0679-81.

²⁵ KEN-OTP-0011-0658.

22. For Nakuru, Pre-Trial Chamber II decided that:

*"...the evidence before it reveals extensive violence in or around Nakuru in the period following the announcement of the results of the presidential election on 30 December 2007. The violence appears to have been brought about by actors on all sides of the political and ethnic divides. However, as clarified above, the events of relevance in the present case are only those relating to the attack by the Mungiki on the perceived ODM supporters between 24 and 27 January 2008. Consequently, any such items of evidence which relate to violent events outside the scope of the charges will not be considered by the Chamber."*²⁶

23. Using the data from the list relied upon by Pre-Trial Chamber II, and allegedly used by the Prosecution, 71 people died in Nakuru from 24 January 2008 to 27 January 2008,²⁷ not 112 as the Prosecution claims.²⁸ Furthermore, using the same list, 23 people died on 26 January 2008,²⁹ and not 48 as claimed by the Prosecution.³⁰ Even if the deaths from 26 and 27 January 2008 were combined, the total number of deaths in Nakuru was 34.³¹

24. In respect of Naivasha, the Defence notes that in the Updated DCC, the Prosecution is using inappropriately the information it provided for the Confirmation of Charges hearing. The Defence requested that the language used in paragraph 71 of the Updated DCC accurately reflects the timeframe decided by Pre-Trial Chamber II.³² When the correct time frame is used, the evidence submitted by the Prosecution excludes the deaths of at least four persons.³³ In accordance with the Chamber's order to indicate the number of

²⁶ ICC-01/09-02/11-382-Conf at para 117 (emphasis added).

²⁷ KEN-OTP-0041-0679 at 0681-90.

²⁸ ICC-01/09-02/11-468-AnxA-Conf at para 59; *see also* ICC-01/09-02/11-468-AnxB-Conf at para 59, fn. 171.

²⁹ KEN-OTP-0041-0679 at 0681-90.

³⁰ *See* ICC-01/09-02/11-468-AnxA-Conf at para 59; *see also* ICC-01/09-02/11-468-AnxB-Conf at para 59, fn. 168.

³¹ KEN-OTP-0041-0679 at 0681-90.

³² ICC-01/09-02/11-468-AnxB-Conf at para 71, fn. 217; *see also* ICC-01/09-02/11-382-Conf at para 133.

³³ *See* KEN-OTP-0011-0658 at 0660-61

compare with KEN-OTP-0041-0679 at 0679-81.

victims with precision in conformity with Pre-Trial Chamber II's decision, the Defence asserts that the number of deaths is no greater than 46.³⁴

25. The Prosecution claims that over 150 perceived ODM supporters were killed in Nakuru and Naivasha during the attacks.³⁵ Pointing to the numbers above, no more than 117 persons died during the temporal jurisdiction determined by Pre-Trial Chamber II. Additionally, Pre-Trial Chamber II stated that 43 people in Nakuru and 39 people in Naivasha died of Luo, Luhya or Kalenjin ethnicity (i.e. perceived ODM supporters).³⁶
26. The Defence observes that the Prosecution in counting those victims who should constitute the subject of the various crimes charged included individuals who were not perceived supporters of the ODM. It argued that excluding those individuals (non-perceived supporters of the ODM) would create an accountability gap. In so doing, the Prosecution seems to be disregarding its responsibility to bring only those charges that have been confirmed by Pre-Trial Chamber II. It did not confirm any alleged crimes committed against persons who were not perceived supporters of the ODM. As such, by including these categories of persons in the charges, the Prosecution not only inflated the figures, but also ventured outside the scope of the confirmation decision. The true figures of victims that ought to be the subject of the charges in this case must be limited only to the perceived supporters of the ODM as contained in paragraph 428 of the Confirmation Decision.
27. The Defence submits that if the Prosecution intends to cite and rely upon the list used by Pre-Trial Chamber II, it must do so faithfully, accurately and

³⁴ See KEN-OTP-0041-0679 at 0679-81 (noting that the total number of deaths is 50, [REDACTED]).

³⁵ ICC-01/09-02/11-468-AnxA-Conf at para 20; *see also* ICC-01/09-02/11-468-AnxB-Conf at para 20, fns. 41 and 42.

³⁶ ICC-01/09-02/11-382-Conf at paras 132 and 238.

according to the evidence it provided to Pre-Trial Chamber II.³⁷ Additionally, the Defence submits that the Prosecution must use the figures decided by Pre-Trial Chamber II when identifying the number of perceived ODM supporters that died in the relevant locations.

Precise Identities of the Victims

28. The Chamber ordered the Prosecution to list, “as far as possible, the precise... identities of the victims.”³⁸ Noting the Defence’s objections to the Prosecution’s imprecise language in the section above, the Defence submits that the Prosecution has the means to identify with precision those persons named in the CIPEV list provided by the Prosecution and used by Pre-Trial Chamber II to determine the number of perceived ODM supporters that died in Nakuru and Naivasha.³⁹
29. The Defence submits that the Prosecution has failed to identify, as far as possible, the precise identities of victims, other than those who died, in the Updated DCC.⁴⁰ Whether or not Pre-Trial Chamber II decided upon specific allegations, the Prosecution must still comply with the Chamber’s order, especially when dealing with data collected through hospital records. If such records exist in the evidence, the Prosecution should cite not only the Confirmation Decision, but also the respective ERN. If such evidence has been disclosed, but is currently redacted, it should be noted accordingly. If such evidence has not been disclosed, in order to comply with the Chamber’s order,

³⁷ If the Prosecution is in possession of undisclosed evidence which shows different detailed information, it should disclose such evidence and cite to it.

³⁸ ICC-01/09-02/11-450 at para 9.

³⁹ See KEN-OTP-0041-0679 at 0679-90.

⁴⁰ ICC-01/09-02/11-468-AnxA-Conf at paras. 20, 30, 31, 46, 57, 59, 60, 67 and 71; see also ICC-01/09-02/11-468-AnxB-Conf at para 20, fns. 41 and 42; para 30, fns. 64 and 65; para 30, fn. 67; para 31, fn. 72; para 31, fn. 76; para 46, fn. 115; para 46, fn. 116; para 57, fn. 161 and 162; para 59, fn. 168; para 59, fn. 171; para 59, fn. 172; para 60, fn. 174; para 60, fn. 175; para 67, fn. 203 and para 71, fn. 217.

the Prosecution should be required to disclose this information immediately and reference it in the Updated DCC.⁴¹

B. Forced Circumcision and Penile Amputation as Sexual Crimes

30. Pre-Trial Chamber II clearly decided that forced circumcision and penile amputation in Nakuru and Naivasha were not crimes of sexual violence.⁴² The Defence submits that the Prosecution has inappropriately refused to change sections of the Updated DCC to reflect the Confirmation Decision.⁴³
31. The Defence submits that, in conformity with the Confirmation Decision, any sentence inferring or associating forced circumcision and penile amputation with sexual crimes be removed or reformulated to reflect the determination of Pre-Trial Chamber II. Furthermore, the Defence submits that those paragraphs which discuss rape, penile amputation and forced circumcision be split into separate paragraphs. The Defence submits that the Prosecution's insistence in keeping the exact wording from the Amended DCC does not faithfully represent Pre-Trial Chamber II's characterisation of these alleged acts.

C. The Kenya Police Agencies were not Involved in the PEV in Nakuru and Naivasha

32. Pre-Trial Chamber II unequivocally decided that not only were the Kenya Police not involved in the attacks during the violence in Nakuru and Naivasha,⁴⁴ but that the evidence did not support the allegation that the Kenya

⁴¹ In accordance with the Chamber's order to the Prosecution to complete disclosure by 9 January 2013, the Defence accepts the fact that evidence might be disclosed in redacted form, if such redactions are warranted. The Defence notes that such redactions shall be lifted in due course in accordance with the Chamber's disclosure regime.

⁴² ICC-01/09-02/11-382-Conf at paras 265-66.

⁴³ ICC-01/09-02/11-468-AnxA-Conf at paras 31, 60 and 71; *see also* ICC-01/09-02/11-468-AnxB-Conf at para 31, fn. 76, para 60, fn. 174 and para 71, fn. 223.

⁴⁴ ICC-01/09-02/11-382-Conf at paras 224 and 379 (stating that "the Chamber has not found that the Kenya Police participated in the Mungiki attack in or around Nakuru and Naivasha...").

police or Kenya police agencies participated in crimes by way of inaction, in Nakuru and Naivasha.⁴⁵ The Prosecution has surreptitiously attempted to leave facets of this argument in the Updated DCC by referring to “unhindered passage” for Mungiki to Nakuru and Naivasha⁴⁶ and instructions to the police agencies of Kenya not to interfere with the attacks.⁴⁷

33. The Defence submits that the Chamber must confine the Prosecution to statements of facts regarding Nakuru and Naivasha that do not exceed the determinations of Pre-Trial Chamber II.
34. In accordance with the Confirmation Decision, the Defence requests the Chamber to order the Prosecution to remove inferences/references to the Kenya Police and Kenya police agencies’ involvement by way of inaction in the events in and around Nakuru and Naivasha.

D. Alleged Instructions by Muthaura to Kenya Police

35. The Prosecution insists on making broad allegations that Muthaura ordered the Kenya Police including through Major General Ali for the Kenya Police not to intervene in the attacks in Nakuru and Naivasha.⁴⁸ It argues that because Pre-Trial Chamber II made a finding that Muthaura in November 2007 (well before the PEV) allegedly instructed the police in Murang’a to release two allegedly arrested Mungiki, this forms a basis for the inclusion in the Updated DCC, that

⁴⁵ ICC-01/09-02/11-382-Conf at para 226 (stating that “the Chamber is of the view that the evidence presented in this regard does not allow for the conclusion that there existed an identifiable course of conduct within any of the police agencies active in Nakuru and Naivasha at the relevant time, amounting to participation, by way of inaction, in the attack carried out by the Mungiki.”). See also paragraphs 224 and 379.

⁴⁶ ICC-01/09-02/11-468-AnxA-Conf at paras 58; *see also* ICC-01/09-02/11-468-AnxB-Conf at para 58, fns. 158 and 159 and para 68, fn. 209.

⁴⁷ ICC-01/09-02/11-468-AnxB-Conf at para 21, fn. 45; para 34, fn. 81; para 68, fn. 210; para 76, fn. 236; para 78, fn. 246; para 86, fn. 283-284 and para 88(6), fn. 291.

⁴⁸ ICC-01/09-02/11-468-Conf-AnxA at paras 21, 34, 68, 78 and 86; *see also* ICC-01/09-02/11-468-Conf-AnxB at para 21, fn. 45; para 34, fn. 81; para 68, fn. 209; para 78, fn. 246 and para 86, fns. 283-284.

Muthaura instructed the Kenya Police, including through Major General Ali, for the Kenya Police not to intervene in the attacks in Nakuru and Naivasha.

36. First, the Prosecution never made any allegation in the amended DCC that Muthaura ordered any police officer besides Major General Ali for the police not to intervene in the attacks in Nakuru and Naivasha. Second, similar allegations were made in respect of Nairobi slums and the charges and allegations in this regard were rejected by Pre-Trial Chamber II. As at the time of the Confirmation hearing, the only allegations presented by the Prosecution with regards to alleged orders by Muthaura to any member of the Kenya Police were the alleged orders he gave to Major General Ali on 3 January 2008. This allegation was confirmed by Pre-Trial Chamber II.
37. As such, there is no basis for the Prosecution's allegation that Muthaura ordered the Kenya Police not to interfere with the Mungiki in the attacks in Nakuru and Naivasha. The allegation must be restricted to alleged instructions Muthaura gave to Major General Ali. To allow the Prosecution to allege that Muthaura gave instructions to unspecified elements in the Kenya Police would go beyond the scope of the Confirmation Decision. First, it would be a new allegation that was not subject to the confirmation process and second, it would be prejudicial to the Defence given its broad nature. On these grounds, the Prosecution allegation in this respect should be rejected.

E. Mungiki were not Ferried to Nakuru to Participate in the Violence

38. The Prosecution states that Pre-Trial Chamber II decided that Mungiki were ferried from outside Nakuru to participate in the violence.⁴⁹ Despite the fact that Pre-Trial Chamber II decided that the majority of the attackers in Nakuru

⁴⁹ ICC-01/09-02/11-468-AnxA-Conf at paras 42, 56 and 58; *see also* ICC-01/09-02/11-468-AnxB-Conf at para 42, fn. 109; para 56, fn. 153 and para 58, fns. 164 and 165. The Defence notes that in the submissions that were submitted to the Chamber, the Prosecution alleged that the Chamber only averred that the majority, not all, of the attackers were local.

were locals,⁵⁰ the Prosecution claims that the Defence misreads the Confirmation Decision when it disputes the Prosecution's allegation in the Updated DCC. The Defence asserts that the Prosecution's inclusion of this alleged fact in the Updated DCC misrepresents the findings in the Confirmation Decision.

39. In relation to Naivasha, Pre-Trial Chamber II stated that there were substantial grounds to believe that attackers were ferried in to participate in the attacks.⁵¹ The citations used in paragraph 42 of the Updated DCC supported a statement that attackers were ferried into Naivasha, not Nakuru.⁵² On two further occasions in the Updated DCC, the Prosecution states that attackers were ferried into Nakuru. In the first instance, the Prosecution cites to paragraph 163 of the Confirmation Decision.⁵³ In the second, the Prosecution states that the allegations were not addressed by Pre-Trial Chamber II.⁵⁴ The Defence submits that none of the sources referenced by the Prosecution supports its contention that a significant number of individuals were ferried in to Nakuru, such as to support the allegation as phrased in the Updated DCC.
40. Contrary to the Prosecution's assertion that Pre-Trial Chamber II's rejection must be explicit, the Defence submits that the implicit rejection of the allegation in question prevents its inclusion in the Updated DCC.⁵⁵ Pre-Trial Chamber II stated that:

“Although there are certain references in the evidence to the fact that some attackers arrived from elsewhere, the Chamber considers that, viewed as whole, the evidence establishes that the majority of the attackers in Nakuru were local Mungiki. However, the Chamber recalls its above consideration to the effect that this fact is not in itself

⁵⁰ ICC-01/09-02/11-382-Conf at para 163.

⁵¹ ICC-01/09-02/11-382-Conf at paras 148, 158, 160-61 and 390-95.

⁵² ICC-01/09-02/11-468-AnxA-Conf at para 42 (All references in this footnote refer to Mungiki being ferried into Naivasha).

⁵³ ICC-01/09-02/11-468-AnxA-Conf at para 56.

⁵⁴ ICC-01/09-02/11-468-AnxA-Conf at para 58.

⁵⁵ ICC-01/09-02/11-468-AnxB-Conf at para 58, fns. 158 and 159.

required for the overall determination of the organized and systematic nature of the attack.”⁵⁶

41. From the paragraph above, it is evident that Pre-Trial Chamber II decided that the evidence did not show that Mungiki were ferried into Nakuru, but that this factor did not affect the systematic nature of the attack. The Defence therefore submits that the Chamber require the Prosecution to remove all references to the allegation that Mungiki were ferried into Nakuru for the purpose of participating in the violence.

F. Kenyatta and Muthaura did not Facilitate or Hold Meetings

42. The Prosecution claims that Mr. Kenyatta and Ambassador Muthaura facilitated⁵⁷ and held “key preparatory meetings”.⁵⁸ Pre-Trial Chamber II decided that Mr. Kenyatta and Ambassador Muthaura only participated in meetings.
43. The language of the Confirmation Decision refers to Mr. Kenyatta and Ambassador Muthaura being present as participants in the meetings.⁵⁹ The only language which refers to the holding or facilitation of meetings came from Witness 4, who has since recanted the portion of his statement in which he stated that he was present at the meeting.⁶⁰
44. In light of the recent disclosure concerning the alleged meeting on 26 November 2007 at State House, Nairobi, the Defence submits that the Updated DCC must

⁵⁶ ICC-01/09-02/11-382-Conf at para 163 (noting that the internal footnote located after “elsewhere” cited only one reference which is a summary of a statement).

⁵⁷ ICC-01/09-02/11-468-AnxA-Conf at para 17; *see also* ICC-01/09-02/11-468-AnxB-Conf at para 17, fn. 35.

⁵⁸ ICC-01/09-02/11-468-AnxA-Conf at para 75, 86; *see also* ICC-01/09-02/11-468-AnxB-Conf at para 75, fn. 231, para 86, fn. 281.

⁵⁹ ICC-01/09-02/11-382-Conf at subtitle VII(A)(iii)(b) (Mr. Muthaura and Mr. Kenyatta’s participation in meetings with Mungiki members), para 311 (“were in attendance”), 333 (“was also present”), 336 (“presence” and “was in attendance”), 342 (“mentions the presence of”) and 344 (“were involved in”).

⁶⁰ KEN-OTP-0067-0604_R01 at 0607 at para 10.

be amended to reflect the fact that Witness 4's allegations regarding the sequence of events and the presence, words and actions of specific individuals at this meeting are no longer capable of supporting the determination of Pre-Trial Chamber II. Given Witness 4's revelation that, contrary to his previous evidence, he was not present at the meeting, the Chamber should reassess whether his evidence is capable of upholding allegations that the Accused participated or facilitated as alleged. In the absence of first-hand knowledge or reliable corroborative evidence regarding the Prosecution's allegations in relation to this meeting, the Defence submits that the Chamber must order the Prosecution to amend the Updated DCC accordingly.

45. The facts as decided by Pre-Trial Chamber II lead to only one logical conclusion: ⁶¹ Pre-Trial Chamber II implicitly accepted that there were substantial grounds to believe that Mr. Kenyatta and Ambassador Muthaura attended and participated in the alleged meetings, but that they did not facilitate or hold the meetings.

G. The Prosecution Must Remove all References of Violence in the "Nairobi Slums"

46. The Prosecution states that because Pre-Trial Chamber II did not address the allegation that the Kenya Police were involved, by way of inaction, in the violence occurring in the "Nairobi slums", it is allowed to retain the allegation in the Updated DCC.⁶² In adopting this position, the Prosecution misapplies a number of Pre-Trial Chamber II's previous decisions.
47. The Prosecution's assertion that the Kenya Police supported the Mungiki in the "Nairobi slums" by way of inaction contradicts statements made to Pre-Trial Chamber II as reflected in its "Decision on the Prosecutor's Application for

⁶¹ The facts as decided with the exclusion of the recent statement from Witness 4 that recanted significant portions of his testimony.

⁶² ICC-01/09-02/11-468-Conf-AnxA at para 78; *see also* ICC-01/09-02/11-468-Conf-AnxB at para 78, fn. 246.

Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali.”⁶³ This decision characterises the Prosecution’s theory as one in which the police actively participated in the Nairobi slums, namely in Kibera.⁶⁴ Pre-Trial Chamber II specifically limited the scope of the charges to events in and around Nakuru and Naivasha, therefore events in the “Nairobi slums” do not fall within the geographical jurisdiction of the case.⁶⁵

48. The Defence submits that this allegation falls outside the scope of the charges as confirmed by Pre-Trial Chamber II. The charges encompass allegations of events in and around Nakuru and Naivasha, not the “Nairobi slums”. Furthermore, this allegation contradicts previous assertions made by the Prosecution. For these reasons, the Defence submits that the Prosecution should be required to remove the reference to the “Nairobi slums” in paragraph 78 of the Updated DCC.⁶⁶

H. The Mungiki did not use Weapons or Uniforms Distributed by Ambassador Muthaura or Mr. Kenyatta during the Violence in Naivasha

49. The Prosecution claims that weapons and uniforms supplied by intermediaries of Ambassador Muthaura were used in the violence in Nakuru and Naivasha.⁶⁷ By retaining the references to Naivasha, the Prosecution has failed to adhere to an explicit ruling in the Confirmation Decision.⁶⁸
50. In paragraph 174 of the Confirmation Decision, Pre-Trial Chamber II was explicit in its finding that weapons and uniforms were not used by the Mungiki

⁶³ ICC-01/09-02/11-1, paras 30-31.

⁶⁴ ICC-01/09-02/11-01, paras 29-33.

⁶⁵ ICC-01/09-02/11-382-Conf, para 106.

⁶⁶ ICC-01/09-02/11-468-AnxA-Conf at para 78; *see also* ICC-01/09-02/11-AnxB-Conf at para 78, fn. 246.

⁶⁷ ICC-01/09-02/11-468-Conf-AnxA at paras 19, 23, 52, 53, 54, 62, 71, 75, 78, 82 and 88.

⁶⁸ ICC-01/09-02/11-382-Conf at para 174.

in the violence in Naivasha.⁶⁹ Pre-Trial Chamber II specifically cited Prosecution Witness 12 in support of its ruling that weapons were not distributed at State House.⁷⁰ Additionally, Pre-Trial Chamber II accepted as true the testimony of Lucas Katee Mwanza (Witness D12-25), who said that “the [six] gunshot deaths in Naivasha were attributable to the police.”⁷¹

51. In accordance with the explicit determination of Pre-Trial Chamber II, the Defence submits that all references and inferences to the supply of uniforms or weapons to the Mungiki by Ambassador Muthaura for use in the violence in and around Naivasha be removed from the Updated DCC.

V. RELIEF

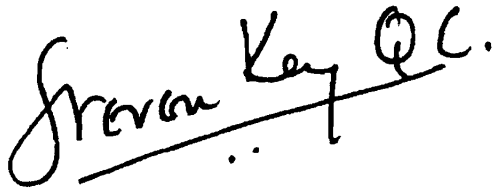
52. The Defence respectfully requests the Chamber to:
- a. Refer this matter to Pre-Trial Chamber II under Article 64(4); and
 - b. Order the Prosecution to amend the Updated DCC in accordance with the submissions set out herein and in Confidential Annex B.

⁶⁹ *Ibid.* (Finally, the Chamber clarifies that the use of weapons and uniforms is established by the evidence only in relation to the events in Nakuru. Conversely, the Chamber does not at this stage of the proceedings find sufficient evidence to substantiate the Prosecutor’s allegation that weapons and uniforms were used in Naivasha. Witness OTP-12 states clearly that weapons were not used, and Lucas Katee Mwanza (D12-25) testified that the gunshot deaths in Naivasha were attributable to the police. As for the uniforms, while Witness OTP-11 states that they were distributed to the attackers in Thika under the directions of Mr. Muthaura, *there is no evidence that uniforms were in fact used during the attack in Naivasha.* However, the Chamber reiterates that it does not consider its determination with respect to this fact to be of such significance as to undermine the overall conclusion with regard to the organized nature of the attack in Nakuru and Naivasha.) (internal citations omitted and emphasis added).

⁷⁰ *Ibid.* (citing KEN-OTP-0060-0365 at 0379).

⁷¹ *Ibid.* (citing ICC-01/09-02/11-T-8-ENG at page 81, lines 11-12).

Respectfully submitted,

.....
Steven Kay QC and Gillian Higgins
On behalf of Uhuru Muigai Kenyatta



.....
Karim A.A. Khan QC
On behalf of Francis K. Muthaura

Dated this 11th day of September 2012

At London, England