



Original: **English**

No.: **ICC-01/09-02/11**

Date: **7 January 2013**

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding Judge
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 Redacted Annex B

**Public Redacted Version of the Prosecution's Final Updated Document
Containing the Charges**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Fatou Bensouda
Adesola Adeboyejo

Counsel for Francis Kirimi Muthaura

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

Counsel for Uhuru Muigai Kenyatta

Steven Kay QC and Gillian Higgins

Legal Representatives of Victims

Fergal Gaynor

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Other

Pursuant to Article 61(3)(a) of the Rome Statute, the Prosecutor of the International Criminal Court charges:

FRANCIS KIRIMI MUTHAURA AND

UHURU MUIGAI KENYATTA

with **CRIMES AGAINST HUMANITY**, set forth below:

I. THE PERSONS CHARGED

A. Francis Kirimi MUTHAURA

1. Francis Kirimi MUTHAURA (MUTHAURA) was born on 20 October 1946 in Mariene, Meru, Central District, Eastern Province in the Republic of Kenya (Kenya).¹ He is of Meru ethnicity and married with three children.²
2. MUTHAURA attended secondary school in Eastern Province, and completed his University education at the University of Nairobi.³
3. MUTHAURA began his career in the civil service under President Moi's regime, and was subsequently promoted to various high profile diplomatic positions.⁴
4. In 2003, MUTHAURA was appointed head of the Public Service and Secretary to the Cabinet in Kenya.⁵ In this capacity, he sat at the apex of the civil service all public servants reported to him.⁶ At all times relevant to the crimes charged, MUTHAURA served as the Chairman of the National Security and Advisory Committee ("NSAC").⁷

B. Uhuru Muigai KENYATTA

¹ Allegations not addressed by Pre-Trial Chamber.

² Allegations not addressed by Pre-Trial Chamber.

³ Allegations not addressed by Pre-Trial Chamber.

⁴ Allegations not addressed by Pre-Trial Chamber.

⁵ Allegations not addressed by Pre-Trial Chamber.

⁶ Allegation not addressed by Pre-Trial Chamber.

⁷ Allegations not addressed by Pre-Trial Chamber.

5. Uhuru Muigai KENYATTA (KENYATTA) was born on 26 October 1961 in Nairobi, in Kenya.⁸ He is the son of Kenya's first President, Jomo Kenyatta.⁹ He is married with three children.¹⁰ He is of Kikuyu ethnicity.¹¹
6. He was educated in Kenya and the United States.¹²
7. He began his political career in 1992, when he joined the Kenya African National Union ("KANU").¹³ He was elected KANU National Vice Chairman in March 2001.¹⁴ In January 2005, he was elected KANU National Chairman.¹⁵
8. In December 2006 and June 2007, respectively, following his loss of the KANU Chairmanship and a subsequent court challenge, he was reinstated as the party's leader and Chairman by two Kenya High Court decisions.¹⁶
9. From January to April 2008, before the grand coalition political agreement between the Party of National Unity ("PNU") and the Orange Democratic Movement ("ODM"), KENYATTA served as the Minister for Local Government.¹⁷ Between April 2008 and January 2009, he held the positions of Deputy Prime Minister and Minister for Trade as a PNU representative in the grand coalition Cabinet.¹⁸
10. From January 2009 until the present, he has served as Deputy Prime Minister.¹⁹

II. STATEMENT OF FACTS

⁸ Allegations not addressed by Pre-Trial Chamber.

⁹ Allegations not addressed by Pre-Trial Chamber.

¹⁰ Allegations not addressed by Pre-Trial Chamber.

¹¹ Allegation not addressed by Pre-Trial Chamber.

¹² Allegations not addressed by Pre-Trial Chamber.

¹³ This is one of the parties in the PNU coalition of parties.

¹⁴ Allegation not addressed by Pre-Trial Chamber.

¹⁵ Allegations not addressed by Pre-Trial Chamber.

¹⁶ Allegations not addressed by Pre-Trial Chamber.

¹⁷ Allegations not addressed by Pre-Trial Chamber.

¹⁸ Allegations not addressed by Pre-Trial Chamber.

¹⁹ Allegations not addressed by Pre-Trial Chamber.

Background

11. The Rift Valley is one of Kenya's eight provinces.²⁰ In December 2007 through January 2008, the Rift Valley was the epicentre of violence following the 2007 general election (commonly referred to as the "PEV").²¹ Compared with other provinces, the Rift Valley suffered the greatest number of victims, including over 700 deaths,²² the largest share of injuries, and approximately 400,000 forcibly displaced persons.²³
12. In December 2007, Kenya held presidential and parliamentary elections.²⁴ On 30 December 2007, the Electoral Commission of Kenya ("ECK") declared the incumbent, President Mwai Kibaki, presidential candidate for the PNU, as the winner of the presidential election.²⁵ The announcement triggered one of the most violent periods in Kenya's history.²⁶ The circumstances of President Kibaki's victory were immediately contested by ODM party members.²⁷
13. Following the announcement of the election results, a network of perpetrators consisting of ODM supporters executed attacks against perceived PNU supporters in the Uasin Gishu and Nandi Districts, which are known to be densely populated by the Kikuyu, Kamba and Kisii who are perceived to be PNU supporters.²⁸
14. In response to the attacks by the ODM supporters, MUTHAURA and KENYATTA, as the Principal Perpetrators, in conjunction with Mungiki leaders and other prominent PNU supporters, agreed to pursue an organisational policy to keep the PNU in power through every means necessary, including through retaliatory attacks against perceived ODM supporters in and around Naivasha

²⁰ Allegations not addressed by Pre-Trial Chamber.

²¹ Allegations not addressed by Pre-Trial Chamber.

²² Allegations not addressed by Pre-Trial Chamber.

²³ Allegations not addressed by Pre-Trial Chamber.

²⁴ Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 26 January 2012, ICC-01/09-02/11-382-Red ("Confirmation Decision"), para 117.

²⁵ Confirmation Decision, paras 117, 143.

²⁶ Allegation not addressed by Pre-Trial Chamber.

²⁷ Confirmation Decision, para 143.

²⁸ Allegations not addressed by Pre-Trial Chamber.

and Nakuru.²⁹ These attacks were carried out by Mungiki and other youths mobilized and recruited for that purpose (hereinafter “pro-PNU youth”).³⁰

15. To implement the policy, the Principal Perpetrators devised a common plan to commit widespread and systematic attacks against perceived ODM supporters, including attacks in and around Nakuru and Naivasha.³¹
16. Prior to the election, intermediaries acting on behalf of KENYATTA and MUTHAURA facilitated a series of contacts from at least November 2007 involving MUTHAURA, KENYATTA, other senior PNU government officials, politicians, businessmen and Mungiki leaders.³² One purpose of these contacts was to solicit the assistance of the Mungiki in supporting the government in the December 2007 elections.³³ Among the pre-election contacts was a 26 November 2007 meeting at Nairobi State House, attended by Mungiki members and government officials.³⁴
17. After the election, KENYATTA in conjunction with MUTHAURA facilitated the meetings with the Mungiki with a view to organizing retaliatory attacks against perceived ODM supporters in the Rift Valley.³⁵ The primary purpose of the attacks was to strengthen the PNU’s hold on power after the swearing in of the President.³⁶
18. KENYATTA (who had associated with the Mungiki since 2000)³⁷ along with MUTHAURA mobilized the Mungiki and pro-PNU youth to attack perceived ODM supporters in Nakuru town (Nakuru District, Rift Valley Province) between

²⁹ Confirmation Decision, paras 333-336, 341-344, 360-368, 375-396.

³⁰ Confirmation Decision, para 123; see also paras 117-122, 133-137, 164-167, 385-396.

³¹ Confirmation Decision, para 400 (citing paras 301-397).

³² Confirmation Decision, paras 301-308.

³³ Confirmation Decision, paras 301-308, 400 (citing paras 301-359).

³⁴ Confirmation Decision, paras 310-314.

³⁵ Confirmation Decision, paras 333-336, 341-344.

³⁶ Allegation not addressed by Pre-Trial Chamber.

³⁷ Allegation not addressed by Pre-Trial Chamber.

24 and 27 January 2008 and Naivasha town (Naivasha District, Rift Valley Province) between 27 and 28 January 2008.³⁸

19. Relying on a network of loyal pro-PNU government officials, businessmen and local politicians, MUTHAURA and KENYATTA provided funding,³⁹ transportation, accommodation, uniforms, weapons and logistical support to the Mungiki and pro-PNU youth to carry out coordinated attacks in and around Nakuru and Naivasha.⁴⁰
20. In carrying out the attacks, the Mungiki and pro-PNU youth killed approximately 150 people, including at least 82 perceived ODM supporters.⁴¹ The attacks also resulted in the rape, forcible displacement, forcible circumcision and penile amputation, looting and destruction of the properties of perceived ODM supporters.⁴² The Mungiki and pro-PNU youth targeted civilians in a number of ways, including by going from door to door in search of perceived ODM supporters,⁴³ and setting up roadblocks for intercepting vehicles and identifying perceived ODM supporters.⁴⁴
21. Furthermore, MUTHAURA issued instructions, including to Major General Mohammed Hussein Ali ("Ali"), the Commissioner of Police, for the Kenya Police not to interfere with the attacks.⁴⁵
22. The contributions of MUTHAURA and KENYATTA to the implementation of the common plan included (1) adopting the plan,⁴⁶ (2) establishing links with Maina Njenga and the Mungiki for the purpose of securing Mungiki support and

³⁸ Confirmation Decision, paras 333-336, 341-344, 360-368, 375-396..

³⁹ Confirmation Decision, paras 148, 150, 363-364, 384-395, 406 (citing paras 333-340, 385-386, 389, 393-395).

⁴⁰ Confirmation Decision, paras 147-150, 166-170, 175, 363-364, 377-379, 383-396.

⁴¹ Confirmation Decision, paras 132, 134, 233-240. The Pre-Trial Chamber relied on evidence demonstrating that a number of perceived ODM supporters were killed in the attacks (*see id.*); it did not address the Prosecution's specific allegation that over 150 perceived ODM supporters were killed in the attacks.

⁴² Confirmation Decision, paras 145, 243-253, 257-263, 270.

⁴³ Confirmation Decision, paras 121, 176-179.

⁴⁴ Allegation not addressed by Pre-Trial Chamber.

⁴⁵ Confirmation Decision, paras 342, 379.

⁴⁶ Confirmation Decision, para 400.

services for the PNU coalition;⁴⁷ (3) exercising their authority over the Mungiki obtained by virtue of their agreement with Maina Njenga and the Mungiki to support the PNU coalition;⁴⁸ (4) mobilizing and authorizing the Mungiki and pro-PNU youth to implement the common plan, in particular by directing them to carry out the attacks in Nakuru and Naivasha, thus activating the mechanisms leading to the commission of the crimes;⁴⁹ and (5) soliciting the support and contribution of local politicians and businessmen.⁵⁰

23. MUTHAURA made the following additional contributions: (1) instructing the Kenya Police not to interfere with the attacks;⁵¹ and (2) providing institutional support on behalf of the PNU coalition to secure (a) the support of the Mungiki,⁵² and (b) the execution of the common plan through the attacks in Nakuru and Naivasha.⁵³ The institutional support provided by MUTHAURA included his intervention to secure the release of arrested Mungiki members, ensuring that weapons and uniforms were provided to the attackers, and instructing the Kenya Police not to interfere with the attacks.⁵⁴

24. KENYATTA made the following additional contributions: (1) providing local politicians and Mungiki leaders with funds and logistical support for the attacks;⁵⁵ (2) mobilizing, through mid-level perpetrators, Mungiki members and pro-PNU youth to carry out the attacks in Nakuru and Naivasha;⁵⁶ and (3) placing Mungiki members and pro-PNU youth under the operational command of local politicians.⁵⁷

25. Sections IV, V and VI below are incorporated by reference. These sections set forth the Article 7 chapeau elements, including the time and place of the crimes,

⁴⁷ Confirmation Decision, paras 395, 400 (citing paras 301-374).

⁴⁸ Confirmation Decision, para 404 (citing paras 310-374).

⁴⁹ Confirmation Decision, paras 400, 404 (citing paras 333-359).

⁵⁰ Allegations not addressed by Pre-Trial Chamber.

⁵¹ Confirmation Decision, paras 342, 379.

⁵² Confirmation Decision, para 405 (citing paras 305-306, 310-322, 341-359).

⁵³ Confirmation Decision, para 405 (citing paras 377-383).

⁵⁴ Confirmation Decision, paras 378-379.

⁵⁵ Confirmation Decision, paras 384-396, 406 (citing paras 333-340, 385-386, 389, 393-395).

⁵⁶ Confirmation Decision, para 406 (citing paras 333-359, 385, 387-396).

⁵⁷ Confirmation Decision, para 406 (citing paras 342, 385-386).

their factual basis and the modes of liability for MUTHAURA and KENYATTA (the “Accused”).

III. TERRITORIAL, TEMPORAL AND MATERIAL JURISDICTION

26. All crimes alleged occurred in the Republic of Kenya, a state party to the Rome Statute since 2005.⁵⁸

27. All crimes alleged occurred between 24 and 28 January 2008,⁵⁹ although the contributions of MUTHAURA and KENYATTA to the crimes were not confined to that time period, as further explained below.

28. Murder, forcible transfer of population, rape, other inhumane acts and persecution are crimes against humanity as defined in Article 7 of the Statute.

IV. FACTS RELEVANT TO THE ARTICLE 7 CHAPEAU ELEMENTS

A. Widespread or Systematic Attack

29. The crimes alleged occurred in the context of a widespread or systematic attack against members of the civilian population, within the meaning of Article 7(1) of the Statute.⁶⁰ The Accused are responsible for coordinated attacks that were perpetrated by the Mungiki and pro-PNU youth in different parts of Nakuru and Naivasha.⁶¹ The direct perpetrators implemented the common plan of the Principal Perpetrators by subjecting perceived ODM supporters to systematic acts of violence, including rapes, killings, looting, burning and destruction of their properties.⁶² These attacks were not random occurrences but were targeted at perceived ODM supporters using a variety of means of identification such as lists, physical attributes, roadblocks and language.⁶³

⁵⁸ Confirmation Decision, para 25.

⁵⁹ Confirmation Decision, paras 115, 117, 133.

⁶⁰ Confirmation Decision, para 115.

⁶¹ Confirmation Decision, paras 117-123, 133-137, 146-179.

⁶² Confirmation Decision, paras 142-145, 233-253, 257-263, 279.

⁶³ Confirmation Decision, paras 121, 142-145, 176-179.

30. The attacks affected a large number of civilian victims over a large geographical area.⁶⁴ As a result, approximately 112 people were killed,⁶⁵ including at least 43 perceived ODM supporters, and thousands displaced⁶⁶ in or around Nakuru town between 24 and 27 January 2008. At least 359 cases of injuries were reported in Nakuru hospitals during this period.⁶⁷ These injuries included wounds sustained from the use of sharp objects and burns.⁶⁸ Nakuru also recorded 29 cases of rape, including gang rape,⁶⁹ perpetrated on both male and female victims,⁷⁰ as well as six cases of male penile amputation and traumatic circumcision.⁷¹

31. In or around Naivasha town, the Mungiki and pro-PNU youth killed approximately 50 people, including women and children,⁷² of whom at least 39 were perceived ODM supporters, and displaced over 9,000 civilians in the last week of January 2008.⁷³ In Kabati Estate within the town, 19 women and children were burnt to death in a house in which they had sought refuge during the attacks.⁷⁴ The direct perpetrators injured over 53 civilians, including 37 injured by sharp pointed objects,⁷⁵ and destroyed at least 300 houses and businesses believed to belong to ODM supporters. At least four cases of traumatic circumcision were

⁶⁴ Confirmation Decision, paras 115, 145, 233-240, 243-252, 257-263, 270-280, 283.

⁶⁵ Confirmation Decision, paras 132, 235, 238-240. The Pre-Trial Chamber relied on evidence demonstrating that a number of perceived ODM supporters were killed in the Nakuru attack (*see id.*); it did not address the Prosecution's specific allegation that approximately 112 people were killed during the attack.

⁶⁶ Confirmation Decision, paras 126, 243-248.

⁶⁷ Allegation not addressed by Pre-Trial Chamber.

⁶⁸ Confirmation Decision, paras 132, 238, 262-263. The Pre-Trial Chamber relied on evidence regarding injuries sustained during the Nakuru attack (*see id.*); it did not address the Prosecution's specific allegation that 359 cases of injuries were reported in Nakuru.

⁶⁹ Confirmation Decision, paras 257 and 258. The Pre-Trial Chamber found that rape and gang rape occurred during the Nakuru attack (*see id.*); it did not address the Prosecution's specific allegation that 29 rape cases were reported.

⁷⁰ Allegation not addressed by Pre-Trial Chamber.

⁷¹ Confirmation Decision, paras 262 and 263. The Pre-Trial Chamber relied on evidence regarding penile amputation and forced circumcision in Nakuru (*see id.*); it did not address the Prosecution's specific allegation that six cases were reported in Nakuru.

⁷² Confirmation Decision, paras 233-240. The Pre-Trial Chamber relied on evidence that killings occurred in Naivasha during the attack (*see id.*); it did not address the Prosecution's specific allegation that over 50 people were killed.

⁷³ Confirmation Decision, paras 243, 249-252.

⁷⁴ Confirmation Decision, paras 234, 237.

⁷⁵ Confirmation Decision, paras 145, 244, 261-263, 272. The Pre-Trial Chamber relied on evidence regarding injuries sustained during the Nakuru attack (*see id.*); it did not address the Prosecution's specific allegation that the direct perpetrators injured over 53 civilians, including 37 by sharp pointed objects.

reported during the period notwithstanding the gross under-reporting of this type of violence in Kenya.⁷⁶

32. MUTHAURA and KENYATTA knew that their conduct was part of, or intended for their conduct to be part of, a widespread and systematic attack.⁷⁷

B. The Existence of an Organizational Policy

33. The Principal Perpetrators, together with Mungiki leaders, including Maina Njenga, and other prominent PNU supporters, agreed to pursue an organizational policy to keep the PNU in power through every means necessary.⁷⁸ To implement the policy, the Principal Perpetrators devised a common plan to commit widespread and systematic attacks against perceived ODM supporters, including attacks in and around Naivasha and Nakuru.⁷⁹

34. To achieve their goals, the Principal Perpetrators activated and utilized the pre-existing structures of the Mungiki to perpetrate the widespread and systematic attacks.⁸⁰ MUTHAURA also issued instructions for the Kenya Police, including through Major General Ali, not to interfere with the attacks.⁸¹

(i) The Principal Perpetrators

35. Since 2000, KENYATTA has been closely associated with the Mungiki.⁸² In 2002, in preparation for the general election of that year, KENYATTA's candidacy for the Office of the President was publicly endorsed by the Mungiki.⁸³ At all times relevant to the crimes charged, KENYATTA had the capacity to mobilize and influence Mungiki members who in turn received protection and patronage from

⁷⁶ Confirmation Decision, paras 134, 260-263.

⁷⁷ Confirmation Decision, paras 417.

⁷⁸ Allegations not addressed by Pre-Trial Chamber.

⁷⁹ Confirmation Decision, para 400 (citing paras 301-397).

⁸⁰ Confirmation Decision, paras 368, 404 (citing paras 333-359), 408 (citing paras 333-359).

⁸¹ Confirmation Decision, paras 342, 379.

⁸² Allegation not addressed by Pre-Trial Chamber.

⁸³ Allegation not addressed by Pre-Trial Chamber.

him.⁸⁴ KENYATTA had control over the Mungiki, in part due to his wealth and privileged background.⁸⁵

36. At all times relevant to the crimes charged, MUTHAURA was the Chairman of the NSAC and Secretary to the Cabinet Security Committee, the highest decision making body of the Kenyan security and intelligence machinery.⁸⁶ MUTHAURA exercised both *de jure* and *de facto* authority over the various Kenyan security agencies, including the Kenya Police, Administration Police and the National Security and Intelligence Service (“NSIS”).⁸⁷ MUTHAURA therefore exercised direct authority over Ali, the Commissioner of Police, who was during the period of the PEV, a member of the NSAC.⁸⁸ As Commissioner of Police during the period of the PEV, Ali routinely reported to MUTHAURA.⁸⁹

(ii) The Mungiki and pro-PNU youth

37. The Mungiki, a criminal organization, is under the leadership of its founder and patron, Maina Njenga.⁹⁰ KENYATTA himself is alleged to be a Mungiki leader.⁹¹ The Mungiki is organized into local and regional branches,⁹² the leaders of which are directly below the national coordinating committee in the Mungiki structure.⁹³ The local leader is the executive of the local branch and is also vested with judicial powers in the locality he oversees.⁹⁴ All local leaders are bound by the general rules of the Mungiki as well as by instructions issued by the patron.⁹⁵ The

⁸⁴ Allegations not addressed by Pre-Trial Chamber.

⁸⁵ Allegations not addressed by Pre-Trial Chamber.

⁸⁶ Allegations not addressed by Pre-Trial Chamber.

⁸⁷ Confirmation Decision, paras 377, 383 (Pre-Trial Chamber’s finding regarding MUTHAURA’s *de facto* authority). The Pre-Trial Chamber did not address the Prosecution’s allegations regarding MUTHAURA’s *de jure* authority.

⁸⁸ Allegation not addressed by Pre-Trial Chamber.

⁸⁹ Allegation not addressed by Pre-Trial Chamber.

⁹⁰ Confirmation Decision, paras 186, 190-194.

⁹¹ Allegation not addressed by Pre-Trial Chamber.

⁹² Confirmation Decision, paras 195, 201, 203.

⁹³ Confirmation Decision, paras 201, 203.

⁹⁴ Confirmation Decision, paras 213, 217.

⁹⁵ Confirmation Decision, paras 191, 194, 201, 207-213.

Mungiki used meetings and mobile phones as their primary means of communication and communicated in Kikuyu language.⁹⁶

38. The Mungiki has a political wing known as the Kenya National Youth Alliance, a political party.⁹⁷ It also has a militant wing, sometimes referred to as the Mungiki Defence Council, with members who are trained to carry out violent operations, including killings.⁹⁸ In order to enforce discipline, dissidents within the organization are severely dealt with.⁹⁹ Traitors and defectors are persecuted and killed.¹⁰⁰
39. Up until the time of the PEV, the Mungiki controlled the public transport system, provided power through illegal electricity connections, demanded a fee for accessing public toilets and sold water to residents in the poorest parts of Central Province and Nairobi.¹⁰¹ It also provided protection services to businesses¹⁰² and was enlisted by politicians to intimidate opponents.¹⁰³
40. Different sources estimate the number of active Mungiki members to be around 20,000 to 30,000, and 500,000 “oathed” or inactive members or supporters.¹⁰⁴ While estimates diverge on the size of Mungiki membership, at all times relevant to the charges it was a large organization, capable of carrying out complex operations without depending on the will of individual members.¹⁰⁵ During the PEV, the Mungiki mobilized additional human resources among local pro-PNU youth through aggressive recruitment before and after the elections.¹⁰⁶

(iii) Policy involving common plan to commit widespread and systematic attacks

⁹⁶ Confirmation Decision, para 202.

⁹⁷ Allegation not addressed by Pre-Trial Chamber.

⁹⁸ Confirmation Decision, paras 214-215.

⁹⁹ Confirmation Decision, paras 210-212.

¹⁰⁰ Confirmation Decision, paras 210, 212-213.

¹⁰¹ Confirmation Decision, para 218.

¹⁰² Confirmation Decision, para 219.

¹⁰³ Allegation not addressed by Pre-Trial Chamber.

¹⁰⁴ Allegation not addressed by Pre-Trial Chamber.

¹⁰⁵ Confirmation Decision, para 204.

¹⁰⁶ Confirmation Decision, paras 123, 164-167, 396.

41. The existence of an organizational policy can be inferred from the numerous activities carried out by the Principal Perpetrators at the central and local levels to adopt and implement the common plan and the systematic nature of the attacks perpetrated against perceived ODM supporters.¹⁰⁷ These activities include preparatory meetings and other activities to mobilize, instruct, incite, arm and supply the Mungiki as well as to finance, coordinate and provide logistical support for their operations during the PEV.¹⁰⁸ Section V.A is incorporated here by reference.
42. The organized and systematic nature of the policy can be inferred from the large numbers of Mungiki and pro-PNU youth who were transported from outside the Rift Valley to Naivasha and Nakuru, despite the presence of numerous police checkpoints along the way.¹⁰⁹ Section V.B is incorporated by reference.
43. Other indicia of the existence of a policy include: the deliberate failure by MUTHAURA to act to prevent the attacks despite adequate prior warning; the grant of impunity by MUTHAURA to the main perpetrators of the attacks; and the later killings orchestrated by the Kenya Police of Mungiki leaders who were directly involved in PEV planning meetings with KENYATTA and other prominent PNU politicians.¹¹⁰
44. As Chairman of the NSAC, MUTHAURA received NSIS situation reports warning of planned attacks and the high risk of significant violence around the 2007 election¹¹¹. Six days before the Naivasha incident, the NSIS warned of an impending attack on the Maasai, Luhya and Luo in Naivasha by “Kikuyu

¹⁰⁷ Confirmation Decision, paras 146-179, 400 (citing paras 333-359, 375-397).

¹⁰⁸ Confirmation Decision, paras 301-397, 400 (citing paras 301-397), 404 (citing paras 310-374), 405 (citing paras 305-306, 310-322, 341-359, 377-383), 406 (citing paras 301-308, 310-359, 385-386, 387-396).

¹⁰⁹ Confirmation Decision, paras 148, 158, 160, 161, 390-395.

¹¹⁰ Allegations not addressed by Pre-Trial Chamber.

¹¹¹ Allegation not addressed by Pre-Trial Chamber.

youth”.¹¹² A day before the Nakuru incident, the NSIS reported that the Mungiki were organizing to attack non-Kikuyu residing in the town.¹¹³

45. On the issue of impunity, although 37 people, including a former KANU MP, were arrested in Nakuru after the PEV,¹¹⁴ they were immediately released on bail and the Prosecution is not aware that there has been any follow-up on their cases.

46. Since the end of the PEV, the Kenya Police is reported to have killed several Mungiki leaders.¹¹⁵ There are substantial grounds to believe that the perpetrators of these killings specifically targeted Mungiki leaders with knowledge of the involvement of KENYATTA and other PNU politicians in the planning of the PEV.¹¹⁶

V. FACTS RELEVANT TO INDIVIDUAL CRIMES CHARGED

A. Preparatory Meetings and Activities

47. From on or about 30 December 2007 to the end of January 2008, MUTHAURA, KENYATTA and other members of the common plan participated in a series of activities, including preparatory meetings, to mobilize, coordinate, finance and provide logistical support for the Mungiki during the PEV.¹¹⁷ The key preparatory meetings include those held in Nairobi on or about 30 December 2007 (at the State House),¹¹⁸ on or about 3 January 2008 (at the Nairobi Club)¹¹⁹ and in early,¹²⁰ mid¹²¹ and late January 2008.¹²² There were also preparatory meetings in Central

¹¹² Confirmation Decision, para 156.

¹¹³ Confirmation Decision, para 155.

¹¹⁴ Allegation not addressed by Pre-Trial Chamber.

¹¹⁵ Allegation not addressed by Pre-Trial Chamber.

¹¹⁶ Allegations not addressed by Pre-Trial Chamber.

¹¹⁷ Confirmation Decision, paras 301-397, 400 (citing paras 301-397), 405 (citing paras 305-306, 310-332, 341-359), 406 (citing paras 301-308, 310-359, 385-396).

¹¹⁸ Confirmation Decision, paras 333-336.

¹¹⁹ Confirmation Decision, paras 341-359, 379, 385.

¹²⁰ Confirmation Decision, paras 341-344.

¹²¹ Allegation not addressed by Pre-Trial Chamber.

¹²² Allegation not addressed by Pre-Trial Chamber.

Province on or about 31 December 2007,¹²³ in Nakuru in early to mid January 2008¹²⁴ and in Naivasha in late January 2008.¹²⁵

48. In the meetings they attended, including the one at the Nairobi Members' Club on or about 3 January 2008, KENYATTA and MUTHAURA enlisted the services of Mungiki leaders and concluded plans for the launching of retaliatory attacks in the Rift Valley.¹²⁶ After the eruption of violence targeting perceived PNU supporters in the Rift Valley, KENYATTA and MUTHAURA put in place concrete plans to ensure the smooth initiation and success of retaliatory operations to be carried out by the Mungiki and pro-PNU youth.¹²⁷
49. The recruitment, mobilization and payment of pro-PNU youth to participate in the retaliatory attacks in Naivasha and Nakuru were carried out in offices belonging to KANU, headed by KENYATTA.¹²⁸ KENYATTA specifically tasked a former KANU MP to organize the Nakuru operations, thereby placing the Mungiki under a responsible command.¹²⁹ He directly provided funding for Mungiki operations during the PEV and provided information as to where to secure funding.¹³⁰ In preparation for the attacks, KENYATTA was also responsible for arming and providing transportation for pro-PNU youth.¹³¹
50. By the time of the PEV, MUTHAURA had also developed particularly close links with the Mungiki through individuals including [REDACTED].¹³² MUTHAURA once intervened to secure the release of Mungiki members who had been arrested by the police at a Mungiki gathering prior to the 2007 election.¹³³

¹²³ Allegation not addressed by Pre-Trial Chamber.

¹²⁴ Confirmation Decision, paras 147, 154, 168-169.

¹²⁵ Confirmation Decision, paras 148, 150, 153, 391, 393.

¹²⁶ Confirmation Decision, paras 310-397, 400 (citing paras 301-397).

¹²⁷ Confirmation Decision, paras 333-397, 400 (citing paras 301-397), 405 (citing paras 305-306, 310-332, 341-359), 406 (citing paras 301-308, 310-359, 385-386, 387-396).

¹²⁸ Confirmation Decision, para 152.

¹²⁹ Confirmation Decision, paras 147, 149, 151, 342, 385.

¹³⁰ Confirmation Decision, paras 147-148, 150, 166, 363-364, 395 400 (citing paras 375-397), 406 (citing paras 333-340, 385-386, 389, 393-395).

¹³¹ Confirmation Decision, paras 175, 334, 385, 389-395.

¹³² Confirmation Decision, paras 301-308.

¹³³ Confirmation Decision, paras 305-306, 378.

51. At the Nairobi Members' Club on or about 3 January 2008, MUTHAURA requested Mungiki leaders to deploy their members to the Rift Valley to carry out retaliatory attacks.¹³⁴ MUTHAURA also assured the Mungiki leaders that the police would not interfere with their work.¹³⁵ During the meeting, he placed a phone call to Ali to instruct him to ensure that pro-PNU youth would not be prevented from going into the Rift Valley.¹³⁶ During another phone conversation with Ali in mid January 2008, MUTHAURA reminded Ali that the Mungiki were working with them and ordered him not to arrest them.¹³⁷
52. In preparation for the Naivasha attack, [REDACTED] provided Administration Police uniforms to the Mungiki,¹³⁸ and [REDACTED] delivered a significant amount of money in cash to Maina Njenga, the Mungiki leader.¹³⁹
53. The evidence demonstrates that the common plan was duly executed at the local level.¹⁴⁰ Subsequent preparatory meetings took place in the Rift Valley, particularly in Nakuru and Naivasha, with the active participation of local members of the common plan.¹⁴¹ In these meetings, prominent local PNU supporters planned and organized operations in pursuance of the common plan.¹⁴² They mobilized additional financial resources, distributed weapons and arranged means of transport.¹⁴³
54. The attacks entailed a high level of coordination between different Mungiki groups as well as between local and non-resident Mungiki members and pro-PNU youth. The attacks involved the: (1) distribution of weapons to direct perpetrators;¹⁴⁴ (2) transportation of foreign Mungiki and pro-PNU youth from

¹³⁴ Confirmation Decision, para 342.

¹³⁵ Confirmation Decision, para 342.

¹³⁶ Confirmation Decision, paras 342, 379.

¹³⁷ Allegation not addressed by Pre-Trial Chamber.

¹³⁸ Confirmation Decision, paras 168-170, 378.

¹³⁹ Allegation not addressed by Pre-Trial Chamber.

¹⁴⁰ Confirmation Decision, paras 117-185.

¹⁴¹ Confirmation Decision, paras 147-148, 150, 153-154, 168-169, 391, 393.

¹⁴² Confirmation Decision, paras 147-148, 150, 153-154, 168-169, 391, 393.

¹⁴³ Confirmation Decision, paras 147-148, 150, 153-154, 168-169, 391, 393.

¹⁴⁴ Confirmation Decision, paras 147, 168-170, 174-175, 343, 378, 385.

Central Province and Nairobi to the Rift Valley;¹⁴⁵ (3) identification of perceived ODM supporters by local pro-PNU youth;¹⁴⁶ and (4) perpetration of acts of violence by groups of attackers moving together.¹⁴⁷

B. The Attacks

INCIDENT 1 - Mungiki/pro-PNU youth attacks in Nakuru (Nakuru District, Rift Valley Province)

55. The Principal Perpetrators, a former KANU MP and other Mungiki leaders were responsible for planning and coordinating the attacks in Nakuru.¹⁴⁸ A large sum of money and police uniforms were distributed to the Mungiki from the State House in Nakuru.¹⁴⁹ Pro-PNU youth were recruited and registered at the local KANU offices and funds were made available to them as a down payment for the attacks to be launched.¹⁵⁰ [REDACTED], a former Mungiki National Coordinator spearheaded the Mungiki mobilization and organized oath-taking ceremonies to initiate newly recruited Mungiki members to participate in the fighting.¹⁵¹

56. The most serious wave of violence in Nakuru town erupted during the night of 24 January and lasted until 27 January 2008.¹⁵² The evidence suggests that this wave of violence was launched by the Mungiki and pro-PNU youth.¹⁵³ Among the attackers were large groups of pro-PNU youth who came from outside Nakuru town.¹⁵⁴ They were armed with machetes (called *pangas*), knives and petrol bombs.¹⁵⁵ They were deployed to various parts of Nakuru, including Kaptembwa, Kwarhoda, Mwariki, Free Area and Kiti¹⁵⁶ where they went from house to house

¹⁴⁵ Confirmation Decision, paras 148, 150, 152, 160-163, 390-396.

¹⁴⁶ Confirmation Decision, paras 121, 176-179.

¹⁴⁷ Confirmation Decision, paras 134, 148, 150, 160, 177-179.

¹⁴⁸ Confirmation Decision, paras 147, 149, 151, 342.

¹⁴⁹ Confirmation Decision, paras 168-174, 378.

¹⁵⁰ Confirmation Decision, para 152.

¹⁵¹ Confirmation Decision, paras 166-167, 396.

¹⁵² Confirmation Decision, paras 118-122.

¹⁵³ Confirmation Decision, paras 118-123, 147, 149, 151, 154-155, 157, 168-170.

¹⁵⁴ Confirmation Decision, para 163.

¹⁵⁵ Confirmation Decision, paras 262, 414.

¹⁵⁶ Allegation not addressed by Pre-Trial Chamber.

rounding up and forcibly circumcising Luo men using *pangas* and broken bottles.¹⁵⁷ Some of those who resisted were beheaded.¹⁵⁸

57. Available evidence indicates that the Mungiki and pro-PNU youth attacked in a well-organized and regimented manner.¹⁵⁹ They communicated in Kikuyu and mainly targeted perceived ODM supporters.¹⁶⁰ The target of the attacks was further made obvious by attackers who stated that “all Luos should go back to Nyanza”.¹⁶¹ In some instances, they shot their victims and then mutilated their bodies to conceal the gunshot wounds.¹⁶² This was reported in Kaptembwa, Sewage, Ponda Mali, Barut and Kapkures.¹⁶³ The attacking pro-PNU youth were paid or rewarded according to their performance.¹⁶⁴

58. Mungiki members and pro-PNU youth being transported from other provinces enjoyed unhindered passage into Nakuru town.¹⁶⁵ The response by the Kenya Police to the attacks was notably weak and inadequate,¹⁶⁶ despite having prior knowledge of the attacks, Mungiki deployment plans and the identities of the sponsors and leaders of the attacks.¹⁶⁷ The Kenya Police were slow to respond to the violence, and in many cases they refused to enforce the law or respond to calls to help victims.¹⁶⁸

59. Throughout the PEV, between 161 and 213 people were killed in Nakuru, including 48 people killed during the night of 26 January 2008 alone.¹⁶⁹ Those killed during the PEV included at least 43 perceived ODM supporters.¹⁷⁰ At least

¹⁵⁷ Confirmation Decision, paras 262, 263.

¹⁵⁸ Allegation not addressed by Pre-Trial Chamber.

¹⁵⁹ Confirmation Decision, paras 121, 179.

¹⁶⁰ Confirmation Decision, paras 142-145.

¹⁶¹ Confirmation Decision, para 244.

¹⁶² Confirmation Decision, para 126.

¹⁶³ Allegation not addressed by Pre-Trial Chamber.

¹⁶⁴ Confirmation Decision, paras 314, 371.

¹⁶⁵ Allegation not addressed by Pre-Trial Chamber.

¹⁶⁶ Confirmation Decision, paras 225-226.

¹⁶⁷ Allegation not addressed by Pre-Trial Chamber.

¹⁶⁸ Confirmation Decision, paras 225-226.

¹⁶⁹ Confirmation Decision, paras 132, 235, 238-240. The Pre-Trial Chamber relied on evidence demonstrating that a number of perceived ODM supporters were killed in the Nakuru attack (*see id.*); it did not address the Prosecution’s allegations regarding the specific numbers of people killed during the attack.

¹⁷⁰ Confirmation Decision, paras 132, 238.

359 people were injured.¹⁷¹ The majority of killings and injuries were caused by sharp objects or instruments.¹⁷² Based on a list of reported deaths compiled by the CIPEV, at least 45 perceived ODM supporters out of approximately 112 people were killed in Nakuru town between 24 and 27 January.¹⁷³ During the violence, the attacking Mungiki and pro-PNU youth severely injured hundreds of ODM supporters and forcibly displaced thousands from their homes into IDP camps.¹⁷⁴

60. Between 24 and 27 January 2008, the Mungiki and pro-PNU youth also committed rape and perpetrated forced male circumcisions and penile amputations on perceived ODM supporters in Nakuru.¹⁷⁵ Forty-five cases of sexual violence were reported during this period, including forced male circumcision and rapes.¹⁷⁶ Six people were treated at the Provincial General Hospital of Nakuru for traumatic circumcision and penile amputation; 29 rape cases were also treated at the same hospital.¹⁷⁷ In Nakuru, a number of women were gang raped – often in the presence of their husbands – and/or maimed and killed.¹⁷⁸ Others were made to watch as the attackers killed their husbands and children.¹⁷⁹

INCIDENT 2 – Mungiki/pro-PNU youth attacks in Naivasha (Naivasha District, Rift Valley Province)

61. The attacks in Naivasha were launched in an orderly and well-planned manner on the morning of 27 January 2008.¹⁸⁰ Mungiki members in Nairobi who had been designated to carry out the attacks were mobilized through text messages

¹⁷¹ Confirmation Decision, paras 145, 262-263. The Pre-Trial Chamber relied on evidence regarding physical injuries inflicted in Nakuru during the attack (*see id.*); it did not address the Prosecution's specific allegation that at least 359 people were injured.

¹⁷² Confirmation Decision, para 238. The Pre-Trial Chamber relied on evidence that certain Nakuru victims had died as a result of sharp object injuries (*see id.*); it did not address the Prosecution's allegation that a majority of the Nakuru killings and injuries were caused by sharp objects.

¹⁷³ Allegation not addressed by Pre-Trial Chamber.

¹⁷⁴ Confirmation Decision, paras 145, 243-248, 262-263, 271.

¹⁷⁵ Confirmation Decision, para 145, 257-258, 260, 262-263.

¹⁷⁶ Confirmation Decision, paras 257-258, 262-263. The Pre-Trial Chamber relied on evidence regarding rape, forced circumcision and penile amputation during the Nakuru attack (*see id.*); it did not address the Prosecution's specific allegation that at least 45 cases were reported.

¹⁷⁷ Confirmation Decision, para 262.

¹⁷⁸ Confirmation Decision, para 258.

¹⁷⁹ Allegation not addressed by Pre-Trial Chamber.

¹⁸⁰ Confirmation Decision, paras 133-137.

requesting them to report to specific locations in Nairobi from where they were picked up by Citi Hoppa buses and transported through secret routes to the State House in Nairobi.¹⁸¹ Upon arrival at the State House, the Mungiki members were addressed by a Mungiki leader in the presence of senior government officials.¹⁸²

62. The Mungiki members were then transported from the State House to Naivasha in the backs of military trucks by men wearing Kenyan army uniforms.¹⁸³ The trucks contained brand new machetes as well as wooden clubs which the Mungiki were instructed to use for the battle in Naivasha.¹⁸⁴ The Mungiki were broken up into groups of ten fighters each to be commanded by an experienced Mungiki member of the military wing.¹⁸⁵

63. The strategy employed by the attacking Mungiki and pro-PNU youth was to (1) deploy secretly through the forests on the outskirts of town;¹⁸⁶ (2) mix with the other local Kikuyus to swell the numbers available for the fighting;¹⁸⁷ (3) deploy simultaneously in different places in town;¹⁸⁸ (4) monopolize the attention of the authorities and efforts of the Kenya Police;¹⁸⁹ and (5) demand the lifting of a curfew within the town and withdrawal of a unit of deployed prison guards¹⁹⁰ whom they accused of harassing the local population and supporting the ODM.¹⁹¹

64. Despite knowing that there was a shortage of policemen, the Naivasha District Commissioner lifted the curfew and directed the withdrawal of the prison guards.¹⁹² Following the District Commissioner's actions, groups of Mungiki and pro-PNU youth deployed immediately to immobilise local transport and set up barricades and checkpoints to block transit and request people to identify

¹⁸¹ Allegation not addressed by Pre-Trial Chamber.

¹⁸² Allegation not addressed by Pre-Trial Chamber.

¹⁸³ Allegation not addressed by Pre-Trial Chamber.

¹⁸⁴ Allegation not addressed by Pre-Trial Chamber.

¹⁸⁵ Allegation not addressed by Pre-Trial Chamber.

¹⁸⁶ Allegation not addressed by Pre-Trial Chamber.

¹⁸⁷ Confirmation Decision, paras 134, 150, 177, 179.

¹⁸⁸ Allegation not addressed by Pre-Trial Chamber.

¹⁸⁹ Confirmation Decision, para. 139.

¹⁹⁰ The prison guards had been deployed as additional officers to assist the Kenya Police.

¹⁹¹ Allegation not addressed by Pre-Trial Chamber.

¹⁹² Allegation not addressed by Pre-Trial Chamber.

themselves in Kikuyu language.¹⁹³ They began to target and kill perceived ODM supporters.¹⁹⁴ They conducted door to door searches in a manner suggesting that they had pre-identified targets.¹⁹⁵ The attackers burnt several perceived ODM supporters to death and chased others down before hacking them to death with machetes and clubs.¹⁹⁶

65. The Mungiki members worked with pro-PNU youth burning, destroying and/or looting the property and businesses of perceived ODM supporters.¹⁹⁷ They targeted and vandalized the houses of persons believed to be hosting or housing ODM supporters.¹⁹⁸ The attackers forced other PNU supporters to join in the attacks and accused them of supporting the enemy when they refused.¹⁹⁹

66. The attackers used slogans saying all Luos should leave Naivasha and that they were going to “finish” the Luo.²⁰⁰ They forcibly circumcised Luo men.²⁰¹ In one incident, a perceived ODM supporter was ambushed by a group of pro-PNU youth who cut off his testicles and placed them in his hands before cutting off his penis and putting it in his mouth.²⁰² The next day, the victim’s headless body was found lying on the road.²⁰³ The attackers had mutilated his body in front of his five-year old son.²⁰⁴

67. In another incident, the Mungiki and pro-PNU youth targeted a house in Naivasha where a perceived ODM supporter was known to live.²⁰⁵ The targeted tenant had fled his house as soon as he saw the approaching attackers.²⁰⁶ In

¹⁹³ Confirmation Decision, para 134.

¹⁹⁴ Confirmation Decision, paras 134, 143-145, 176-179.

¹⁹⁵ Confirmation Decision, paras 176-179.

¹⁹⁶ Confirmation Decision, paras 233-234.

¹⁹⁷ Confirmation Decision, paras 134, 145 and 244.

¹⁹⁸ Allegation not addressed by Pre-Trial Chamber.

¹⁹⁹ Allegation not addressed by Pre-Trial Chamber.

²⁰⁰ Confirmation Decision, para 244.

²⁰¹ Confirmation Decision, paras 134, 260-263.

²⁰² Allegation not addressed by Pre-Trial Chamber.

²⁰³ Allegation not addressed by Pre-Trial Chamber.

²⁰⁴ Confirmation Decision, para 276.

²⁰⁵ Allegation not addressed by Pre-Trial Chamber.

²⁰⁶ Allegation not addressed by Pre-Trial Chamber.

fleeing the house, he left women and children alone locked inside.²⁰⁷ The attackers poured petrol on the house, set it on fire and completely destroyed it.²⁰⁸ All 19 people who sought refuge inside, including two babies, were killed.²⁰⁹

68. The attacks lasted until 28 January 2008.²¹⁰ The evidence shows that the Kenya Police were instructed not to interfere with pro-PNU youth being transported to the Rift Valley.²¹¹ As in the Nakuru incident, the Police response was inadequate,²¹² despite having had prior knowledge of the attacks and being well-informed of the situation on the ground.²¹³

69. Although one of the local organizers of the violence publicly admitted that the Mungiki were used during the attacks in Naivasha, the Prosecution is not aware of any of the main organizers having been prosecuted for the attacks.²¹⁴ On 31 January 2008, the Naivasha District Security Committee held a special meeting and requested the immediate arrest and prosecution of 12 individuals involved in organizing and financing the Naivasha attacks.²¹⁵

70. The NSAC, chaired by MUTHAURA, did not enforce this request. None of these individuals was arrested but instead they were allowed to continue to fuel and incite violence.²¹⁶ Only 19 people were arrested during the height of the PEV in Naivasha.²¹⁷ They were charged with preparation to commit a felony and released on bail of 3,000 Kenyan Shillings. None were thereafter convicted; indeed, there is no evidence even that the Kenya Police followed up on warrants of arrest issued against them.²¹⁸

²⁰⁷ Allegation not addressed by Pre-Trial Chamber.

²⁰⁸ Allegation not addressed by Pre-Trial Chamber.

²⁰⁹ Confirmation Decision, paras 234, 235, 237.

²¹⁰ Confirmation Decision, para 133.

²¹¹ Allegation not addressed by Pre-Trial Chamber.

²¹² Confirmation Decision, paras 225-226.

²¹³ Confirmation Decision, para 156.

²¹⁴ Allegation not addressed by Pre-Trial Chamber.

²¹⁵ Confirmation Decision, para 140.

²¹⁶ Allegation not addressed by Pre-Trial Chamber.

²¹⁷ Allegation not addressed by Pre-Trial Chamber.

²¹⁸ Allegation not addressed by Pre-Trial Chamber.

71. As of 31 January 2008, at least 50 people were killed during the PEV in Naivasha,²¹⁹ including at least 39 civilians perceived to be ODM supporters, some of whom were women and children.²²⁰ Twenty-three victims, including 13 children, were burnt to death,²²¹ and 16 were killed by crude weapons, mostly machetes, but also local clubs called *rungus*, pieces of metal and spiked clubs.²²² Another 53 people were injured during the attacks, including 37 injured by sharp pointed objects.²²³ Four cases of forcible circumcision were reported.²²⁴ One woman in particular was gang raped by five men.²²⁵ It is suggested that many other cases of rape went unreported due to the trauma caused by such crimes and societal stigma.²²⁶

72. Additionally, about 9,000 perceived ODM supporters were forced to seek refuge in the Naivasha Police Station where they stayed under dire conditions, with no water, food or proper sanitation.²²⁷

VI. MUTHAURA and KENYATTA's criminal responsibility pursuant to Article 25(3)(a) of the Rome Statute

Article 25(3)(a): Indirect co-perpetration

73. MUTHAURA and KENYATTA bear individual criminal responsibility, pursuant to Article 25(3)(a) of the Rome Statute, for crimes against humanity as defined in

²¹⁹ Confirmation Decision, paras 234-240. The Pre-Trial Chamber relied on evidence demonstrating that a number of perceived ODM supporters were killed in the Naivasha attack (*see id.*); it did not address the Prosecution's specific allegation that at least 50 people were killed during the attack.

²²⁰ Confirmation Decision, paras 233-240.

²²¹ Confirmation Decision, paras 234-235, 237-238.

²²² Confirmation Decision, para 234. The Pre-Trial Chamber relied on evidence that Naivasha victims died as a result of machete wounds and arson (*see id.*); it did not address the Prosecution's specific allegation regarding the numbers of people killed by gunshots and crude weapons.

²²³ Confirmation Decision, paras 145, 244, 260-263, 271 and 272. The Pre-Trial Chamber relied on evidence demonstrating that a number of people were injured in the Naivasha attack (*see id.*); it did not address the Prosecution's specific allegation that 53 people were injured.

²²⁴ Confirmation Decision, paras 134, 260-263, 270.

²²⁵ Confirmation decision, para. 259.

²²⁶ Allegation not addressed by Pre-Trial Chamber.

²²⁷ Confirmation Decision, paras 243, 249-252.

Article 7 of the Statute. MUTHAURA and KENYATTA are criminally responsible for committing the crimes charged as indirect co-perpetrators.²²⁸

(i) Existence of an agreement or a common plan between two or more persons

74. The Principal Perpetrators, together with Mungiki leaders, including Maina Njenga, and other prominent PNU supporters, agreed to pursue an organizational policy to keep the PNU in power through every means necessary.²²⁹ This policy included attacks against perceived ODM supporters in and around Naivasha and Nakuru.²³⁰ The root of this policy was criminal and implemented through a common plan to commit widespread and systematic attacks against perceived ODM supporters,²³¹ including the attacks in and around Naivasha and Nakuru.²³²

75. The Principal Perpetrators, together with prominent PNU supporters and Mungiki leaders, including Maina Njenga, shared the policy.²³³ The Principal Perpetrators further espoused the common plan as evidenced by (1) their participation in multiple meetings held by MUTHAURA and KENYATTA among others to activate the Mungiki and pro-PNU youth by placing the organization under a central authority and to coordinate the implementation of the common plan,²³⁴ including the meetings held on or about 26 November 2007 (at State House Nairobi),²³⁵ on or about 30 December 2007 (at State House Nairobi),²³⁶ on or about 3 January 2008 (at the Nairobi Club),²³⁷ and in early,²³⁸ mid²³⁹ and late January 2008;²⁴⁰ (2) the mobilization and coordination of direct perpetrators who were loyal to, or under the authority of, members of the common plan in order to

²²⁸ Confirmation Decision, para 398.

²²⁹ Allegation not addressed by Pre-Trial Chamber.

²³⁰ Confirmation Decision, paras 333-336, 341-344, 360-368, 375, 384-396.

²³¹ Confirmation Decision, paras 142-144.

²³² Confirmation Decision, para 400 (citing paras 301-397).

²³³ Confirmation Decision, para 400 (citing paras 301-397).

²³⁴ Confirmation Decision, paras 147-155, 310-397.

²³⁵ Confirmation Decision, paras 310-332, 366-367, 388.

²³⁶ Confirmation Decision, paras 333-336.

²³⁷ Confirmation Decision, paras 341-359, 379, 385.

²³⁸ Confirmation Decision, paras 341-344.

²³⁹ Allegation not addressed by Pre-Trial Chamber.

²⁴⁰ Allegation not addressed by Pre-Trial Chamber.

implement the plan;²⁴¹ (3) the provision of finances, weapons and logistical support to the direct perpetrators;²⁴² (4) the concerted and consistent implementation of the common plan by its members and the direct perpetrators who were loyal to or under the authority of the members of the common plan;²⁴³ and (5) a systematic pattern of crimes against perceived ODM supporters.²⁴⁴

76. MUTHAURA additionally espoused the common plan as evidenced by his instructions to the Kenya Police and other security agencies under his control not to interfere with the attacks, including his instructions to that effect to Major General Ali.²⁴⁵

(ii) Coordinated essential contribution by each co-perpetrator resulting in the realisation of the objective elements of the crime

77. MUTHAURA and KENYATTA had essential tasks in the implementation of the common plan, the execution of which resulted in the realization of the objective elements of the crimes charged.²⁴⁶ It is not alleged that they physically carried out any of the crimes.²⁴⁷ Instead, they contributed by conceiving the idea of the coordinated attacks against ODM supporters;²⁴⁸ mobilizing the Mungiki and pro-PNU youth to implement the common plan;²⁴⁹ recruiting pro-PNU youth as direct perpetrators and providing them with logistical and other support;²⁵⁰ directing

²⁴¹ Confirmation Decision, paras 147-179, 333-336, 341-344, 360-368, 375-379, 384-396.

²⁴² Confirmation Decision, paras 147-148, 150, 166, 168-170, 174-175, 333-336, 341-344, 363-364, 377-396, 400 (citing paras 375-397), 405 (citing paras 377-383), 406 (citing paras 333-359, 385-396).

²⁴³ Confirmation Decision, paras 117-185, 231-283, 301-396, 400 (citing paras 301-397), 405 (citing paras 305-306, 310-332, 341-359, 377-383), 406 (citing paras 301-308, 310-359, 385-396).

²⁴⁴ Confirmation Decision, paras 146-179.

²⁴⁵ Confirmation Decision, paras 342, 379.

²⁴⁶ Confirmation Decision, paras 403-406.

²⁴⁷ Allegation not addressed by Pre-Trial Chamber.

²⁴⁸ Confirmation Decision, para 400 (citing paras 333-397).

²⁴⁹ Confirmation Decision, paras 301-396, 400 (citing paras 301-397), 405 (citing paras 305-306, 310-332, 341-359, 377-383), 406 (citing paras 301-308, 310-359, 385-396).

²⁵⁰ Confirmation Decision, paras 147-151, 164-170, 174-175, 333-336, 341-344, 363-364, 377-396, 400 (citing paras 375-397), 405 (citing paras 377-383), 406 (citing paras 333-359, 385-396).

the perpetrators to implement the common plan;²⁵¹ and by MUTHAURA instructing the Kenya Police not to intervene in the attacks.²⁵²

78. MUTHAURA's contributions included securing the Mungiki's agreement to the common plan.²⁵³ In particular: (1) MUTHAURA and other members of the common plan met with Mungiki leaders in early January 2008 in Nairobi to plan and organize attacks against ODM supporters;²⁵⁴ (2) MUTHAURA used his position to instruct the Kenya Police, including through Major General Ali, not to interfere with the work of the Mungiki and pro-PNU youth in the Rift Valley;²⁵⁵ (3) MUTHAURA further used his position to ensure that the main perpetrators escaped punishment for the crimes committed;²⁵⁶ and (4) through his subordinates, MUTHAURA provided other forms of support to the Mungiki, including the supply of Administration Police uniforms and funds.²⁵⁷

79. KENYATTA's contributions included securing the support and cooperation of and funding for the Mungiki for the implementation of the common plan.²⁵⁸ In particular: (1) KENYATTA played an active role in securing the support of the Mungiki for the PNU and the implementation of the common plan by organizing and facilitating meetings between the Mungiki and the other members of the common plan during the PEV;²⁵⁹ (2) KENYATTA mobilized, armed and financed the Mungiki and pro-PNU youth for the purpose of carrying out operations in the Rift Valley during the PEV, including the attacks in and around Nakuru and Naivasha;²⁶⁰ (3) through a series of meetings held in Nairobi between the end of December 2007 and end of January 2008, KENYATTA organized²⁶¹ and financed retaliatory attacks by the Mungiki against perceived ODM supporters in the Rift

²⁵¹ Confirmation Decision, paras 333-336, 341-344, 404 (citing paras 333-359).

²⁵² Confirmation Decision, paras 342, 379.

²⁵³ Confirmation Decision, paras 400 (citing paras 301-374).

²⁵⁴ Confirmation Decision, paras 341-344.

²⁵⁵ Confirmation Decision, paras 342, 379.

²⁵⁶ Allegation not addressed by Pre-Trial Chamber.

²⁵⁷ Confirmation Decision, paras 168-170, 174-175, 378.

²⁵⁸ Confirmation Decision, paras 400, 404, 406.

²⁵⁹ Confirmation Decision, paras 400 (citing paras 301-374), 406 (citing paras 301-308, 310-359, 385-396).

²⁶⁰ Confirmation Decision, paras 147-151, 166, 333-336, 341-344, 363-364, 384-396, 400 (citing paras 375-397), 406 (citing paras 333-359, 385-396).

²⁶¹ Confirmation Decision, paras 333-336, 341-343.

Valley, including the attacks in and around Nakuru and Naivasha;²⁶² (4) in one particular meeting with Mungiki leaders in Nairobi in early January 2008, KENYATTA gave the Mungiki some operational directions for the retaliatory attacks;²⁶³ and (5) at the local level in Nakuru, KENYATTA specifically tasked a former KANU MP to coordinate the retaliatory attacks.²⁶⁴

(iii) Control over the organization

80. MUTHAURA and KENYATTA exercised control over the Mungiki organization in the following ways: (1) by using existing structures in the Mungiki, MUTHAURA and KENYATTA put the direct perpetrators under a responsible command;²⁶⁵ (2) MUTHAURA and KENYATTA participated in meetings with other members of the common plan to ensure that they understood and espoused the common plan,²⁶⁶ including the meetings held on or about 26 November 2007 (at State House Nairobi),²⁶⁷ on or about 30 December 2007 (at State House Nairobi),²⁶⁸ on or about 3 January 2008 (at the Nairobi Club),²⁶⁹ and in early,²⁷⁰ mid²⁷¹ and late January 2008;²⁷² (3) as KANU Chairman, KENYATTA utilized a former KANU MP to mobilize and control newly recruited pro-PNU youth in Nakuru;²⁷³ (4) through the involvement of Mungiki leaders in the common plan, MUTHAURA and KENYATTA exercised control over Mungiki members and pro-PNU youth and ensured that they were recruited and instructed to perpetrate

²⁶² KEN-OTP-0001-0002 at 0134, para. 509 and 0187; KEN-OTP-0033-0186 at 0186.

²⁶³ KEN-OTP-0043-0002 at 0040-0041, para.201-202 and 204-206.

²⁶⁴ KEN-OTP-0033-0240 at 0241.

²⁶⁵ KEN-OTP-0041-0209 at 0218, paras. 63-64.

²⁶⁶ KEN-OTP-0001-0002 at 0134, para. 509 and at 0187.

²⁶⁷ Confirmation Decision, paras 310-332, 366-367, 388.

²⁶⁸ Confirmation Decision, paras 333-336.

²⁶⁹ Confirmation Decision, paras 341-359, 379, 385.

²⁷⁰ Confirmation Decision, paras 341-344.

²⁷¹ Allegation not addressed by Pre-Trial Chamber.

²⁷² Allegation not addressed by Pre-Trial Chamber.

²⁷³ Confirmation Decision, paras 147, 149, 151, 342, 385.

the attacks;²⁷⁴ (5) in coordination with wealthy PNU supporters, KENYATTA exercised control over the financial aspects of the common plan.²⁷⁵

(iv) Existence of an organised and hierarchical apparatus of power

81. At all times relevant to the charges, the Mungiki constituted a hierarchically structured organization.²⁷⁶ In procuring the services of Mungiki leaders and securing their participation in the common plan, MUTHAURA and KENYATTA placed themselves on top of the Mungiki hierarchy.²⁷⁷ Their authority and control over the Mungiki and pro-PNU youth was augmented by their status, wealth and/or position as senior party or government officials.²⁷⁸ The Mungiki had a functioning internal structure with features such as centralization of the taking of important decisions and the existence of an effective disciplinary system.²⁷⁹
82. The power hierarchy of the Mungiki and pro-PNU youth was reinforced by the capacity of MUTHAURA and/or KENYATTA to (1) establish a functioning command structure by making use of existing structures of the Mungiki;²⁸⁰ (2) establish a localized level of subordinates among local PNU politicians who were responsible for geographical areas familiar to them, allowing for maximum control over attacks on specific locations;²⁸¹ (3) provide money, weapons and logistical support to the physical perpetrators of the crimes;²⁸² (4) use meetings to communicate with other members of the common plan to ensure that they acted

²⁷⁴ Confirmation Decision, paras 146-167, 375-396, 400 (citing paras 333-359, 375-379, 408 (citing paras 301-374)).

²⁷⁵ Confirmation Decision, paras 147-148, 150, 363-364, 384-396, 406 (citing paras 333-340, 385-386, 389, 393-395).

²⁷⁶ Confirmation Decision, paras 186-222.

²⁷⁷ Confirmation Decision, paras 360-368, 404 (citing paras 310-374), 405 (citing paras 305-306, 310-332, 341-359), 408 (citing paras 301-374).

²⁷⁸ Allegation not addressed by Pre-Trial Chamber.

²⁷⁹ Confirmation Decision, paras 186-222.

²⁸⁰ Confirmation Decision, paras 408 (citing paras 333-359).

²⁸¹ Confirmation Decision, paras 147-151, 153, 155, 166-167, 333-336, 342, 385-396.

²⁸² Confirmation Decision, paras 147-148, 150, 166, 168-170, 174-175, 333-336, 341-344, 363-364, 377-396, 400 (citing paras 375-397), 405 (citing paras 377-383), 406 (citing paras 333-359, 385-396).

in concert in the implementation of the common plan;²⁸³ and (5) impose order through existing disciplinary regimes of the Mungiki.²⁸⁴

(v) Execution of the crimes through compliance by the subordinates with the orders given by the leaders

83. The Mungiki and pro-PNU youth, including the direct perpetrators of the crimes, were all linked through the organizational policy described above and the superiors of the direct perpetrators were linked with MUTHAURA and KENYATTA through the common plan.²⁸⁵ As a result of the structure and size of the Mungiki and pro-PNU youth, MUTHAURA and KENYATTA were assured that the direct perpetrators would comply with their instructions.²⁸⁶

84. The interchangeable nature of the perpetrators is evidenced by the following facts: (1) the perpetrators did not act alone but attacked in groups of between ten and hundreds of persons;²⁸⁷ (2) the superiors of the direct perpetrators understood and agreed with the objectives of the common plan;²⁸⁸ (3) despite a decentralized structure, the most important decisions of the Mungiki were taken centrally;²⁸⁹ (4) the Mungiki is known to offer its support on a willing seller, willing buyer basis;²⁹⁰ (5) the Mungiki enforced a brutal and efficient disciplinary regime;²⁹¹ (6) KENYATTA and other members of the common plan provided economic or financial inducements.²⁹²

²⁸³ Confirmation Decision, paras 333-336, 341-344.

²⁸⁴ Confirmation Decision, paras 207-213.

²⁸⁵ Allegation not addressed by Pre-Trial Chamber.

²⁸⁶ Confirmation Decision, para 409 (citing paras 395-396).

²⁸⁷ Allegation not addressed by Pre-Trial Chamber.

²⁸⁸ Confirmation Decision, paras 360-368.

²⁸⁹ Confirmation Decision, paras 191-195.

²⁹⁰ Confirmation Decision, paras 371-372. The Pre-Trial Chamber did not address the Prosecution's "willing seller, willing buyer" allegation directly, but it concluded that the Mungiki participated in the Nakuru and Naivasha attacks because they were mobilized through money and an order given by their leader, Maina Njenga. *See id.*

²⁹¹ Confirmation Decision, paras 207-213.

²⁹² Confirmation Decision, paras 147-148, 150, 166, 333-336, 363-364, 400 (citing paras 375-397), 406 (citing paras 333-340, 385-386, 389, 393-395).

(vi) MUTHAURA and KENYATTA fulfil the subjective elements of the crime charged

85. MUTHAURA and KENYATTA intended to bring about the objective elements of the crimes or were aware that the objective elements of the crimes would occur in the ordinary course of events.²⁹³ They also knew that their conduct was part of a widespread and systematic attack against a civilian population pursuant to or in furtherance of an organizational policy.²⁹⁴ As the leaders of the organizational group and the architects of the common plan, they had full knowledge that their actions would bring about the objective elements of the crimes charged.²⁹⁵

86. MUTHAURA and KENYATTA (1) shared the common plan;²⁹⁶ (2) held meetings and discussions to activate the Mungiki and pro-PNU youth and to implement the common plan;²⁹⁷ and (3) used their positions and took concerted action together with the Mungiki and pro-PNU youth to implement the common plan.²⁹⁸ MUTHAURA additionally instructed the Kenya Police, including through Major General Ali, not to interfere with the retaliatory attacks,²⁹⁹ knowing fully well that the Mungiki and pro-PNU youth would thereby be given a free rein during the attacks.³⁰⁰

(vii) MUTHAURA and KENYATTA and the other co-perpetrators were mutually aware and mutually accepted that implementing their common plan would result in the realization of the objective elements of the crimes

87. MUTHAURA and KENYATTA and other co-perpetrators were aware and accepted that implementing the common plan would, in the ordinary course of

²⁹³ Confirmation Decision, para 412.

²⁹⁴ Confirmation Decision, para 417.

²⁹⁵ Confirmation Decision, paras 413-415.

²⁹⁶ Confirmation Decision, para 400.

²⁹⁷ Confirmation Decision, paras 310-314, 333-336, 341-344.

²⁹⁸ Confirmation Decision, paras 310-314, 333-336, 341-344, 375-396, 400 (citing paras 301-397), 405 (citing paras 305-306, 310-332, 341-359, 377-383), 406 (citing paras 301-308, 310-359, 385-396).

²⁹⁹ Confirmation Decision, para 342, 379.

³⁰⁰ Allegation not addressed by Pre-Trial Chamber.

events, result in direct perpetrators attacking the locations identified and committing the crimes charged.³⁰¹

88. This awareness and knowledge can be inferred for all members of the common plan from the following facts: (1) they were aware of the political tension and fear that prevailed at the time;³⁰² (2) they played a central role in the development of the operational plans of the Mungiki and pro-PNU youth;³⁰³ (3) they procured weapons for the direct perpetrators knowing that the weapons would be used for non-peaceful purposes;³⁰⁴ (4) they met or otherwise discussed the implementation of the common plan by sharing information on the planning, organization, logistics and other details of the attacks,³⁰⁵ including at meetings held on or about 30 December 2007 (at State House Nairobi),³⁰⁶ on or about 3 January 2008 (at the Nairobi Club),³⁰⁷ and in early,³⁰⁸ mid³⁰⁹ and late January 2008;³¹⁰ (5) it was publicly known that the Mungiki was a proscribed, violent and criminal organization;³¹¹ (6) they were aware that the Kenya Police's non interference with the attacks would significantly contribute to the crimes;³¹² and (7) through local and international media during the PEV, they were aware of the commission of crimes resulting from the implementation of the common plan.³¹³

89. The awareness and knowledge of MUTHAURA and KENYATTA is further demonstrated by the following facts: (1) by virtue of his position, MUTHAURA had privileged access to relevant intelligence and security information;³¹⁴ (2) due to their official capacities and/or past interactions, MUTHAURA and KENYATTA had detailed inside knowledge of the structure and the prior criminal activities of

³⁰¹ Allegation not addressed by Pre-Trial Chamber (see Confirmation Decision, para 418).

³⁰² Allegation not addressed by Pre-Trial Chamber.

³⁰³ Allegation not addressed by Pre-Trial Chamber with respect to intent.

³⁰⁴ Allegation not addressed by Pre-Trial Chamber with respect to intent.

³⁰⁵ Allegation not addressed by Pre-Trial Chamber with respect to intent.

³⁰⁶ Confirmation Decision, paras 333-336.

³⁰⁷ Confirmation Decision, paras 341-359, 379, 385.

³⁰⁸ Confirmation Decision, paras 341-344.

³⁰⁹ Allegation not addressed by Pre-Trial Chamber.

³¹⁰ Allegation not addressed by Pre-Trial Chamber.

³¹¹ Allegation not addressed by Pre-Trial Chamber.

³¹² Allegation not addressed by Pre-Trial Chamber.

³¹³ Allegation not addressed by Pre-Trial Chamber.

³¹⁴ Allegation not addressed by Pre-Trial Chamber.

the Mungiki;³¹⁵ and (3) KENYATTA and MUTHAURA participated in meetings intended to implement the common plan, including those held on or about 30 December 2007 (at State House Nairobi),³¹⁶ on or about 3 January 2008 (at the Nairobi Club),³¹⁷ and in early,³¹⁸ mid³¹⁹ and late January 2008,³²⁰ and played a central role in those meetings by directing the activities of the Mungiki and pro-PNU youth, and in the case of MUTHAURA, the Kenya Police through Ali.³²¹

(viii) MUTHAURA and KENYATTA were aware of the factual circumstances enabling them to exercise joint control over the crime

90. MUTHAURA and KENYATTA were aware of the factual circumstances that enabled them to exercise joint control over the crimes:³²² (1) they were aware of the authority that they had over the Mungiki and pro-PNU youth, as well as their leadership role in the implementation of the common plan;³²³ (2) they were aware that through the involvement of Mungiki leaders in the common plan, the Mungiki would actively support its implementation by carrying out the attacks;³²⁴ (3) they were aware that the Mungiki and pro-PNU youth were well-funded, which ensured the smooth implementation of the common plan;³²⁵ (5) they were aware of the hierarchically organized structure of the Mungiki and pro-PNU youth;³²⁶ (6) they were aware of the existence of effective local structures of the Mungiki;³²⁷ and (7) they were aware of the circumstances allowing automatic compliance with their instructions, such as the size, composition and command structures of the Mungiki, and the disciplinary regime within the Mungiki.³²⁸

³¹⁵ Allegation not addressed by Pre-Trial Chamber.

³¹⁶ Confirmation Decision, paras 333-336.

³¹⁷ Confirmation Decision, paras 341-359, 379, 385.

³¹⁸ Confirmation Decision, paras 341-344.

³¹⁹ Allegation not addressed by Pre-Trial Chamber.

³²⁰ Allegation not addressed by Pre-Trial Chamber.

³²¹ Allegation not addressed by Pre-Trial Chamber with respect to intent.

³²² Confirmation Decision, para 419.

³²³ Confirmation Decision, para 413.

³²⁴ Allegation not addressed by Pre-Trial Chamber.

³²⁵ Allegation not addressed by Pre-Trial Chamber.

³²⁶ Allegation not addressed by Pre-Trial Chamber.

³²⁷ Allegation not addressed by Pre-Trial Chamber.

³²⁸ Allegation not addressed by Pre-Trial Chamber.

VII. CHARGES

The Prosecution charges FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA with the following crimes set forth below. Paragraphs 11 to 25 and 29 to 54 are incorporated by reference in their entirety. As further detailed in paragraphs 73 to 90 of the Updated DCC, the Prosecution alleges that the Accused Muthaura and Kenyatta committed the crimes set forth below in the following manner, by:

- a. Adopting and implementing the common plan to commit widespread or systematic attacks in retaliation against perceived ODM supporters including attacks in or around Nakuru and Naivasha;
- b. Establishing links with the Mungiki and securing Mungiki support and services for the PNU coalition;
- c. Exercising their authority over the Mungiki organisation obtained by virtue of the Mungiki's agreement to support the PNU coalition;
- d. Establishing a fully functioning command structure by making use of the existing structures of the Mungiki and by establishing a localised level of subordinates among local PNU politicians, allowing for maximum control over the attacks, and by imposing order through the existing disciplinary regimes of the Mungiki;
- e. Participating in multiple meetings, in particular, in particular, those held in Nairobi on or about 30 December 2007 (at the State House) on or about 3 January 2008 (at the Nairobi Club), and in early, mid and late January 2008, to activate the Mungiki and pro-PNU youth by placing the organisation under their central authority, and to coordinate the implementation of the common plan;
- f. Mobilising and authorising the Mungiki and pro-PNU youth loyal to, or under the authority of the members of the common plan, to implement the common plan, in particular by directing them to carry out the attacks in Nakuru and Naivasha, thus activating the mechanisms leading to the commission of the crimes;

- g. Soliciting the support and contribution of local politicians and businessmen;
- h. Providing weapons and funds to the direct perpetrators.

MUTHAURA additionally contributed by:

- a. Instructing the Kenya Police not to interfere with the attacks in the Rift Valley. ;
- b. Providing institutional support on behalf of the PNU coalition to secure (a) the support of the Mungiki, and (b) the execution of the common plan through the attacks in Nakuru, which included his acts to secure the release of arrested Mungiki members and ensure that weapons and uniforms were provided to the attackers.

KENYATTA additionally contributed by:

- a. Organising and facilitating meetings between the Mungiki and other members of the common plan during the PEV;
- b. Providing local politicians and Mungiki leaders with funds and logistical support for the attacks;
- c. Mobilizing, through mid-level perpetrators, Mungiki members and pro-PNU youth to carry out the attacks in Nakuru and Naivasha; and
- d. Placing Mungiki members and pro-PNU youth under the operational command of local politicians.

Count 1 (MUTHAURA and KENYATTA)
Murder constituting a crime against humanity
 (Articles 7(1)(a) and 25(3)(a) of the Rome Statute)

From on or about 24 January to 27 January 2008, FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA committed, jointly with each other and through

members of the Mungiki group and other pro-PNU youth, the crime against humanity of the murder of civilians perceived to be supporters of the Orange Democratic Movement political party in or around Nakuru town (Nakuru District, Rift Valley Province), Republic of Kenya. The Mungiki and pro-PNU youth were deployed to various parts of Nakuru, including Kaptembwa, Kwarhoda, Mwariki, Free Area and Kiti where they attacked the targeted civilians using various weapons, including guns, broken bottles, machetes (*pangas*), knives and petrol bombs. Some victims were beheaded, and in some instances, the Mungiki and pro-PNU youth shot their victims and then mutilated their bodies to conceal the gunshot wounds. This was reported in Kaptembwa, Sewage, Ponda Mali, Barut and Kapkures. At least 45 perceived ODM supporters were killed in Nakuru town between 24 and 27 January. The majority of killings were caused by sharp objects or instruments. A number of women were killed. FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA committed the murder of civilians in or around Nakuru as indirect co-perpetrators, in violation of Articles 7(1)(a) and 25(3)(a) of the Rome Statute.

From on or about 27 January to 28 January 2008, FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA committed, jointly with each other and through members of the Mungiki group and other pro-PNU youth, the crime against humanity of the murder of civilians perceived to be supporters of the Orange Democratic Movement political party in or around Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya. The Mungiki and pro-PNU youth targeted and killed perceived ODM supporters by conducting door to door searches, burning several perceived ODM supporters to death and chasing others down before hacking them to death with machetes and clubs. From on or about 27 January to 28 January 2008 at least 50 people had been killed during the PEV in Naivasha, a majority of whom were perceived ODM supporters. Twenty-three victims, including 13 children, were burnt to death, and 16 by crude weapons. FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA committed the murder of civilians

in or around Naivasha as indirect co-perpetrators, in violation of Articles 7(1)(a) and 25(3)(a) of the Rome Statute.

Count 2 (MUTHAURA and KENYATTA)

Deportation or forcible transfer of population constituting a crime against humanity

(Articles 7(1)(d) and 25(3)(a) of the Rome Statute)

From on or about 24 January to 27 January 2008, FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA committed, jointly each other and through members of the Mungiki group and other pro-PNU youth, the crime against humanity of the deportation or forcible transfer of a civilian population perceived to be supporting the Orange Democratic Movement political party in or around Nakuru town (Nakuru District, Rift Valley Province), Republic of Kenya. The Mungiki and pro-PNU youth used various means to forcibly displace thousands of perceived ODM supporters from their homes, including killing, raping, forcibly circumcising and wounding perceived ODM supporters, mutilating the bodies of victims and making perceived ODM supporters watch as family members were raped or murdered. The Mungiki and pro-PNU youth mainly targeted perceived ODM supporters and used various slogans to compel them to leave, including by stating that “all Luos should go back to Nyanza”. The Mungiki and pro-PNU youth forcibly displaced thousands from their homes into IDP camps. The Mungiki and pro-PNU youth attacked these targeted civilians using various weapons, including guns, broken bottles, machetes (*pangas*), knives and petrol bombs. FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA committed the deportation or forcible transfer of the civilian population in or around Nakuru as indirect co-perpetrators, in violation of Articles 7(1)(d) and 25(3)(a) of the Rome Statute.

From on or about 27 January to 28 January 2008, FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA committed, jointly each other and through members of the Mungiki group and other pro-PNU youth, the crime against

humanity of deportation or forcible transfer of the civilian population perceived to be supporting the Orange Democratic Movement political party in or around Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya. The Mungiki members and pro-PNU youth used various means to forcibly displace thousands of perceived ODM supporters from their homes, including burning, destroying and/or looting their property, vandalising the houses of persons believed to be housing ODM supporters, and killing, raping, forcibly circumcising and wounding perceived ODM supporters. At least 300 houses and business belonging to ODM supporters were destroyed. The attackers used various slogans to compel perceived ODM supporters to leave, including by saying all Luos should leave Naivasha and that they were going to “finish” the Luo. About 9,000 perceived ODM supporters were forced to seek refuge in the Naivasha police station. FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA committed the deportation or forcible transfer of the civilian population in or around Naivasha as indirect co-perpetrators, in violation of Articles 7(1)(d) and 25(3)(a) of the Rome Statute.

Count 3 (MUTHAURA and KENYATTA)
Rape constituting a crime against humanity
 (Articles 7(1)(g) and 25(3)(a) of the Rome Statute)

From on or about 24 January to 27 January 2008, FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA committed, jointly each other and through members of the Mungiki group and other pro-PNU youth, the crime against humanity of rape against civilians perceived to be supporters of the Orange Democratic Movement political party in or around Nakuru town (Nakuru District, Rift Valley Province), Republic of Kenya. Armed with various weapons including guns, broken bottles, machetes (*pangas*), knives and petrol bombs, the Mungiki and pro-PNU youth raped and gang-raped scores of women, at least 29, often in the presence of their husbands. Twenty-nine cases of rape were reported during this period. FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA

committed the rape of civilians in or around Nakuru as indirect co-perpetrators, in violation of Articles 7(1)(g) and 25(3)(a) of the Rome Statute.

From on or about 27 January to 28 January 2008, FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA committed, jointly each other and through members of the Mungiki group and other pro-PNU youth, the crime against humanity of rape against civilians perceived to be supporters of the Orange Democratic Movement political party in or around Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya. FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA committed the rape of civilians in or around Naivasha as indirect co-perpetrators, in violation of Articles 7(1)(g) and 25(3)(a) of the Rome Statute.

Count 4 (MUTHAURA and KENYATTA)
Other inhumane acts constituting a crime against humanity
 (Articles 7(1)(k) and 25(3)(a) of the Rome Statute)

From on or about 24 January to 27 January 2008, FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA committed, jointly each other and through members of the Mungiki group and other pro-PNU youth, the crime against humanity of inflicting great suffering and serious injury to body or to mental or physical health by means of inhumane acts upon civilians perceived to be supporters of the Orange Democratic Movement political party in or around Nakuru town (Nakuru District, Rift Valley Province), Republic of Kenya. These inhumane acts included male forcible circumcision, penile amputation, maiming of women and other severe physical injuries, as well as forcing husbands to watch their wives being raped and forcing individuals to watch as their family members were killed. Armed with various weapons, including guns, broken bottles, machetes (*pangas*), knives and petrol bombs, the Mungiki and pro-PNU youth went from house to house rounding up and forcibly circumcising Luo men using *pangas* and broken bottles. Six people were treated at the Provincial General Hospital of Nakuru for traumatic circumcision

and penile amputation. Hundreds of perceived ODM supporters were injured. At least 359 cases of injuries were reported in Nakuru hospitals during this period, including wounds sustained from the use of sharp objects and burns. FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA committed the inhumane acts against civilians in or around Nakuru as indirect co-perpetrators, in violation of Articles 7(1)(k) and 25(3)(a) of the Rome Statute.

From on or about 27 January to 28 January 2008, FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA committed, jointly each other and through members of the Mungiki group and other pro-PNU youth, the crime against humanity of inhumane acts against civilians perceived to be supporters of the Orange Democratic Movement political party in or around Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya. These inhumane acts included the forcible circumcision of Luo men, penile amputation and the injuring of over 53 people, including 37 injured by sharp pointed objects. At least four cases of forcible circumcision were reported during the period. FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA committed the inhumane acts against civilians in or around Naivasha as indirect co-perpetrators, in violation of Articles 7(1)(k) and 25(3)(a) of the Rome Statute.

Count 5 (MUTHAURA and KENYATTA)
Persecution constituting a crime against humanity
 (Articles 7(1)(h) and 25(3)(a) of the Rome Statute)

FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA committed, jointly each other and through members of the Mungiki group and other pro-PNU youth, the crime against humanity of persecution by intentionally and in a discriminatory manner targeting civilians based on their political affiliation, committing murder, rape, , other inhumane acts, and deportation or forcible transfer from on or about 24 January to 27 January 2008, in or around Nakuru town (Nakuru District, Rift Valley Province), and from on or about 27 January 2008 to 28 January

2008 in or around Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, as indirect co-perpetrators, in violation of Articles 7(1)(h) and 25(3)(a) of the Rome Statute. The facts and circumstances referred to in counts 1-4 are incorporated by reference.