

1 International Criminal Court
2 Pre-Trial Chamber II - Courtroom I
3 Presiding Judge Ekaterina Trendafilova, Judge Hans-Peter Kaul and
4 Judge Cuno Tarfusser
5 Situation in the Republic of Kenya - ICC-01/09-02/11
6 In the case of the Prosecutor versus Francis Kirimi Muthaura,
7 Uhuru Muigai Kenyatta, and Mohammed Hussein Ali
8 Confirmation of Charges Hearing
9 Friday, 23 September 2011
10 The hearing starts at 2.31 p.m.
11 (Open session)
12 COURT USHER: All rise. International Criminal Court is now is
13 session.
14 PRESIDING JUDGE TRENDAFILOVA: Please be seated.
15 Court Officer, would you please call the case.
16 COURT OFFICER: Yes, Madam President, good afternoon. Good
17 afternoon, your Honours. This is the situation in the Republic of Kenya
18 in the case of the Prosecutor v. Francis Kirimi Muthaura,
19 Uhuru Muigai Kenyatta, and Mohammed Hussein Ali, case reference,
20 ICC-01/09-02/11. Thank you, Your Honours.
21 PRESIDING JUDGE TRENDAFILOVA: Thank you, Court Officer.
22 I welcome everyone who is here in the courtroom, the Prosecution
23 team, the Defence teams, the Legal Representative, Mr. Anyah, and those
24 who are in the public gallery. We proceed with the presentation of the
25 Prosecutor's team with the final count on persecution and thereafter the

1 individual criminal responsibility.

2 Please, Ms. Adeboyejo, the floor is over to your team.

3 MS. ADEBOYEJO: Thank you, Madam President, your Honours. My
4 colleague Mr. Akingbolahan Adeniran will be making the presentation on
5 the count of persecution. But I just also wanted to state for the
6 record, as is the established practice, that we also have
7 Ms. Bettina Schaefer as a new person on the team.

8 PRESIDING JUDGE TRENDAFILOVA: Thank you very much. Thank you
9 for reminding me. Are there some new members of any of the teams,
10 Defence or ... with you, Mr. Monari?

11 MR. MONARI: Yes, Madam President, your Honours. We have
12 John Philpot, who was always on our team but has joined us in the
13 courtroom today.

14 PRESIDING JUDGE TRENDAFILOVA: You are welcome, Mr. Philpot.
15 With you, Mr. Kay, you have someone new on your team?

16 MR. KAY: We just had a technical difficulty I was trying to sort
17 out, your Honour, with the screens, but we don't have anyone new in court
18 today.

19 PRESIDING JUDGE TRENDAFILOVA: Should we ask the Court Officer to
20 invite a technician.

21 MR. KAY: That would help us.

22 PRESIDING JUDGE TRENDAFILOVA: Court Officer, would you invite a
23 technician to sort out the problem of the Defence team of Mr. Kenyatta.

24 And finally the Defence team of Mr. Muthaura, do you have,
25 Mr. Khan, someone new?

1 MR. KHAN: Madam President, your Honours, good afternoon.

2 There's nobody new.

3 PRESIDING JUDGE TRENDAFILOVA: On behalf of Mr. Anyah.

4 MR. ANYAH: Good afternoon, Madam President, good afternoon,
5 your Honours, there is no one new on our side.

6 PRESIDING JUDGE TRENDAFILOVA: And on behalf of the Chamber now
7 we have Eva Maria, who is a legal assistant to the Chamber.

8 Let us now proceed.

9 Is the problem solved?

10 MR. ADENIRAN: Thank you, Madam President. Your Honours, my name
11 is Akingbolahan Adeniran. The fifth and final crime with which the
12 suspects are charged is a crime against humanity and persecution. This
13 crime is charged under count 9 and 10 in the Amended Document Containing
14 the Charges.

15 Your Honours, under Article 7(1)(h) of the Rome Statute and the
16 Elements of Crime, persecution as a crime against humanity has six
17 elements which for ease of reference are now displayed on the screen.

18 Before I go any further, let me state that unless, unless
19 otherwise indicated, the sources cited in this presentation are
20 confidential sources. However, the Prosecution has taken particular care
21 to ensure that any reference to confidential material does not compromise
22 the safety and well-being of witnesses and other persons at risk.

23 This presentation will focus on the first four elements, the
24 specific elements, of this crime. The contextual elements were addressed
25 in the presentation by Ms. Adeboyejo yesterday.

1 The first element is that the perpetrator severely deprived,
2 contrary to international law, one or more persons of fundamental rights.

3 As your Honours have heard, it is the Prosecution's submission
4 that the evidence included in the amended list of evidence and the
5 in-depth analysis chart establishes substantial grounds to believe that
6 Francis Muthaura, Uhuru Kenyatta, and Hussein Ali committed or
7 contributed to the commission of crimes against humanity of murder,
8 forcible transfer of population, rape and other forms of sexual violence
9 and other inhumane acts, hereinafter referred to as the crimes charged
10 under counts 1 to 8 in the Amended Document Containing the Charges.

11 The Prosecution submits that in the execution of these crimes,
12 that is, by killing persons who they perceived to be supporters of the
13 ODM, by forcibly expelling them from their homes, by raping them, by
14 forcibly circumcising their men, and by inflicting serious injury to
15 their mental and physical health, including by destroying and looting
16 their properties, the perpetrators thereby severely deprived these people
17 of their fundamental rights contrary to international law. These
18 fundamental rights displayed on the screen now include the right to life,
19 the right to physical and mental inviolability, the right to equality and
20 nondiscrimination, the right to property, the right to freedom of
21 movement, and the right not to be forcibly evicted or displaced from
22 one's home.

23 Madam President, your Honours, these rights are laid down under
24 customary international law and are enshrined in the international
25 treaties which are displayed on the screen. Your Honours, all of which

1 have either been ratified or acceded to by the Republic of Kenya.

2 It is the Prosecution's submission that these acts in and of
3 themselves are capable of constituting crimes against humanity and hence
4 satisfy the severity requirement. This is supported by consistent and
5 corroborated evidence which show that the underlying acts of persecution
6 in this case amount to severe deprivation of fundamental rights, the ones
7 just mentioned. Many examples have already been provided in the
8 presentation under the crimes charged in counts 1 to 8. I will therefore
9 not repeat them here.

10 Your Honours, the Prosecution would make further submissions in
11 respect of this element when it considers the fourth element.

12 I will now move to the second and third elements of the crime of
13 persecution which again for ease of reference are displayed on the
14 screen. Because these two elements are inter-related, I will deal with
15 them simultaneously. The elements are the perpetrators targeted such
16 person or persons by reason of the identity of a group or collectivity or
17 targeted the group or collectivity as such, and that such targeting was
18 based on political, again I stress political, racial, national, ethnic,
19 cultural, religious, gender or other grounds that are universally
20 recognised as impermissible under international law.

21 The visual displayed on the screen now shows a map of the
22 locations of the attacks addressed in the Amended Document Containing the
23 Charges. As your Honours have heard, the attacks committed in and around
24 Nakuru towns were aim at penalising perceived supporters of the ODM
25 through retaliatory attacks which were facilitated by the use of the

1 police in creating a free zone for the attacks to take place. As such,
2 Francis Muthaura and Uhuru Kenyatta initiated, and the perpetrators duly
3 executed, the attacks against a specific segment of the population of
4 these areas, that is, perceived ODM supporters.

5 The Prosecution submits that the evidence establishes to the
6 standard of substantial grounds to believe that people were targeted on
7 the basis of their political affiliation as ODM supporters. They were
8 identified as such by, amongst other things, their ethnicity, their
9 language, their physical features and ID cards. To be clear, the
10 Prosecution is not suggesting that all the victims of the attacks
11 supported the ODM. Rather, the evidence shows that they were targeted
12 because they are perceived to support the ODM. Effectively, this meant
13 that those who were targeted by the perpetrators were primarily of Luo
14 ethnicity, but members of the Kalenjin and Luhya ethnic groups were also
15 targeted.

16 Prosecution Witness 0011 put it in very simple terms when he
17 said, and I quote:

18 "The person who was considered to be an enemy was a tribe that
19 was not supporting PNU," referring here to the Party of National Unity.
20 "These tribes were considered to be the Kalenjin, the Luhyas and the
21 Luos."

22 This reference is available at EVD-PT-OTP-00326 at page 1757.

23 A media commentator on the post-election violence also observed
24 the following, again I quote:

25 "In Naivasha and Nakuru, there was a wave of revenge attacks by

1 PNU, which some have attributed to the Mungiki. The targets were tribes
2 assumed to support ODM, the same groups that were displaced in many part
3 of Central Province."

4 This public source can be found at 00209, at 0046.

5 According to Human Rights Watch, again I quote:

6 "From January 23rd to the 30th, Kikuyu militias in the
7 Rift Valley towns of Molo, Naivasha and Nakuru led programmes targeting
8 local communities of Luo, Luhya, Kalenjin and other minority groupings
9 seen as being associated with the ODM and, by extension, with the
10 violence against Kikuyu elsewhere in the country."

11 This public source can be found at EVD-PT-OTP-00002, at 0293.

12 The fact that Francis Muthaura, Uhuru Kenyatta and Hussein Ali
13 intended to target perceived ODM supporters is evident from evidence of
14 the preparatory activities and actions taken by members of the common
15 plan. You have heard considerable evidence about these meetings and the
16 purpose of the attacks. I will remind you of only a few pieces of
17 evidence. Consider the following: Prosecution Witness 0001 states that
18 after the outbreak of violence, and I quote:

19 "The Mungiki were recruited to retaliate against the perceived
20 ODM supporters in the Rift Valley," and that, "both Uhuru Kenyatta and
21 Francis Muthaura were involved in these meetings."

22 EVD-PT-OTP-00572, at page 0026.

23 Prosecution Witness 0012 provides evidence of a statement made by
24 a member of the common plan at another preparatory meetings in Naivasha.
25 I quote:

1 "She just told them," and she's referring here to Mungiki and
2 pro-PNU youth. "She just told them to attack the Luos who are against
3 our government."

4 EVD-PT-OTP-00664, at 0377.

5 The intention of Francis Muthaura and Hussein Ali to deliberately
6 target perceived ODM supporters is further demonstrated by evidence that
7 they had prior knowledge of the attacks in and around Naivasha and Nakuru
8 towns and yet acted to create a free zone for these attacks. The
9 evidence originates from situation reports prepared by the National
10 Security and Intelligence Service, the NSIS, which the two suspects had
11 access to during the period of the post-election violence. The reports
12 specifically identify the proposed targets of the attacks as Luhya and
13 Luo or non-Kikuyu. This issue of prior knowledge was addressed in the
14 presentation by Ms. Adeboyejo. For purposes of this presentation, I
15 simply wish to refer your Honours to the following reports:
16 EVD-PT-OTP-00013, at 0052, and the second report is at 0070.

17 In creating the free zone, Francis Muthaura and Hussein Ali
18 adopted two lines of action. First, they ordered the unhindered movement
19 of the Mungiki and pro-PNU youth from Nairobi and Central Province to the
20 Rift Valley. Second, despite accurate intelligence, they failed. They
21 failed. Ali ensured that the members of the Kenya police in Naivasha and
22 Nakuru were not adequately resourced to protect perceived ODM supporters
23 during the attacks. I refer your Honours to the following sources:
24 EVD-PT-OTP-00341 at 2179, and EVD-PT-OTP-00163 at 0186 to 0187.

25 The evidence indicates that the Mungiki and pro-PNU followed

1 through on the common plan developed by Francis Muthaura, Uhuru Kenyatta
2 and others by targeting the perceived ODM supporters by killing them, by
3 raping them, by forcibly circumcising their men, by inflicting serious
4 injury to their bodies and to their mental and physical health, by
5 destroying their homes and businesses, by looting their properties and
6 forcibly displacing them.

7 In perpetrating the attacks, the members of the common plan took
8 advantage of the existing tensions and animosity between the pro-PNU and
9 pro-ODM ethnic groups. The tension were is caused by horror stories told
10 by PNU supporters who had fled attacks targeting them in other parts of
11 the Rift Valley.

12 The International Crisis Group conducted witness interviews in
13 Nairobi in January 2008 while the violent was still ongoing. In a report
14 published in February 2008, the NGO concluded that the Mungiki was, and I
15 quote, "particularly targeting vulnerable Kikuyu youngsters displaced by
16 the violence," but the report continues. Again, I quote:

17 "The misunderstood message is stark: It is time for revenge.
18 The deadly interethnic clashes that rocked the industrial towns of Nakuru
19 and Naivasha are said to have been mostly carried out by these new
20 recruits."

21 This public source can be found at EVD-PT-OTP-00009, at 1093. I
22 equally refer your Honours to EVD-PT-OTP-00237, at 0037 to 0038.

23 This is why the attackers on the ground in both Naivasha and
24 Nakuru consisted of -- consisted of both local residents and foreign
25 elements of the Mungiki and pro-PNU youth. As you've heard, witnesses

1 have confirmed that victims of the attacks were identified by local
2 informants to took them from house to house, identifying perceived ODM
3 supporters. Other sources also provide evidence indicating that
4 perceived ODM supporters were identified using prepared lists.

5 Prosecution Witness 0002 informed the Prosecution that, and I
6 quote:

7 "In Kabati," and by this the witness is referring to a location
8 in Naivasha town, "In Kabati, water vendors were the ones going with
9 these other people from Mungiki and pointing out the plots where there
10 were Luo tenants and Kalenjins."

11 EVD-PT-OTP-00241, 0203 to 0204.

12 The International Crisis Group has noted that:

13 "In Naivasha and Nakuru Mungiki members were guided by local
14 youth who identified houses of non-Kikuyu, especially those of Luo and
15 Kalenjin."

16 This public source can be found at EVD-PT-OTP-00009 at 1093.

17 I wish to refer your Honours to the following additional sources:

18 EVD-PT-OTP-00674, at 0552; and EVD-PT-OTP-00002, at 0298.

19 Witnesses have also confirmed that the Mungiki and pro-PNU youth
20 set up roadblocks leading in and out of Nakuru towns, and asked questions
21 of persons attempting to pass or demanded identification in order to
22 determine their identity. If the person indicated, or their
23 identification led the attackers to suspect that they were supporters of
24 the ODM, they were killed, forcibly circumcised or otherwise severely
25 injured.

1 Prosecution Witness 0004 observed that Kikuyu youths were on the
2 roads in Naivasha and Nakuru targeting the Luo, Kalenjin and Luhya
3 travelling in *matatus*. This is available at EVD-PT-OTP-00248, at 0047,
4 paragraph 238.

5 In describing the killing of perceived ODM supporters at a
6 roadblock 2 kilometres outside of Nakuru town, Prosecution Witness 0012
7 states, and I quote:

8 "After they," referring to the Mungiki and pro-PNU youth, "After
9 they flash a vehicle to stop, they ask for your IDs. If you are a
10 Kalenjin, you are taken out. If you are a Luo, you are taken out. And
11 after you're taken out, you're slaughtered there. You would not be taken
12 anywhere. You're just slaughtered outside the bus."

13 EVD-PT-OTP-00665, at 0394.

14 Your Honours, taking into account the varied corroboration of
15 individual items of evidence, the Prosecution submits that when viewed as
16 a whole, it establishes substantial grounds to believe that in executing
17 the crimes, the perpetrators targeted a specific group of persons and
18 that those persons were targeted on political grounds, that is, their
19 perceived political affiliation to the ODM.

20 Finally, I will address the fourth and final element specific to
21 the crime of persecution, and that is that the conduct was committed in
22 connection with any act referred to in Article 7(1) of the Statute or any
23 crime within the jurisdiction of the court.

24 The Prosecution submits that the crime of persecution is
25 inextricably linked with the crimes charged under counts 1 to 8 of the

1 Amended Document Containing the Charges. The underlying acts for these
2 charges simultaneously contribute severe depravation contrary to
3 international law, of fundamental rights of perceived ODM supporters.

4 The requirement that the persecutory conduct be committed in
5 connection with any act referred to in Article 7(1) or any crime within
6 the jurisdiction of the court is satisfied by the concurrence of the
7 underlying acts.

8 Madam President, the presentations by Ms. Adeboyejo and Ms. Lurf
9 have adequately addressed these crimes as charged under counts 1 to 8. I
10 would therefore ask that you incorporate their presentations for purposes
11 of this element.

12 In conclusion, all of the evidence, when viewed as a whole and in
13 conjunction with the Prosecution's earlier submission on the crimes
14 charged under counts 1 to 8, establishes substantial grounds to believe
15 that perpetrators mobilised and directed by Francis Muthaura and
16 Uhuru Kenyatta together with Hussein Ali and others killed, forcibly
17 transferred, raped, forcibly circumcised, severely injured, destroyed and
18 looted the property of one or more persons; that in doing so, they
19 severely deprived these persons of fundamental rights; that they targeted
20 these persons by reason of their identity as a group; and that such
21 targeting was on political grounds, namely, their support for a rival
22 political party, the ODM; and that they did so in connection with an act
23 referred to in Article 7(1) of the Statute, namely, murder, rape, and
24 other forms of sexual violence, forcible transfer of population, and/or
25 other inhumane acts.

1 The Prosecution submits also that the facts as established
2 through the evidence and as charged should be confirmed under the
3 different counts to encompass the entire range of criminal conduct that
4 was directed against perceived ODM supporters. The conduct qualifying as
5 crimes charged under counts 1 to 8 further qualifies as persecution since
6 it satisfies the additional specific elements requiring the targeting of
7 a group on political grounds and in connection with an act referred to in
8 Article 7(1).

9 This concludes the Prosecution's submission on counts 1 and 10,
10 and on all counts with which the suspects are charged in the
11 Amended Document Containing the Charges.

12 Thank you, Madam President; thank you, your Honours.

13 PRESIDING JUDGE TRENDAFILOVA: Thank you, Mr. Adeniran. I would
14 ask -- we have one hour to the break. Ms. Adeboyejo, you can proceed
15 further on with the individual criminal responsibility regarding each of
16 the suspects.

17 MS. ADEBOYEJO: Thank you, Madam President, your Honours. My
18 colleague is going to continue with the presentation.

19 PRESIDING JUDGE TRENDAFILOVA: So proceed, Mr. Adeniran.

20 MR. ADENIRAN: Thank you, Madam President. I will now address
21 you on the responsibility of Francis Muthaura and Uhuru Kenyatta under
22 Article 25(3)(a) of the Rome Statute.

23 The Prosecution will show that Francis Muthaura and
24 Uhuru Kenyatta are criminally responsible as indirect co-perpetrators for
25 the crimes charged. Their coordinated contribution were essential to the

1 implementation of the common plan.

2 According to the jurisprudence of the Pre-Trial Chamber, there
3 are eight elements of indirect co-perpetration as currently displayed on
4 the screen. The Prosecution will present evidence establishing
5 substantial grounds to believe that these elements are fully met in this
6 case.

7 The first requirement, that a suspect be part of a common plan or
8 agreement with other persons. The factual basis for both the common plan
9 and the agreement with other persons have been addressed in the
10 presentation of Ms. Adeboyejo on the organisational policy.

11 As stated, the policy was implemented by, one, using the Mungiki
12 to conduct retaliatory attacks; and two, using the police to create a
13 free zone for the Mungiki attacks. Both aspects of the common plan were
14 essential to the plan's success.

15 The second requirement, that the suspects made coordinated
16 essential contribution which resulted in the realisation of the objective
17 elements of the crime. For a summary of the essential contributions of
18 Francis Muthaura, Uhuru Kenyatta, and other members of the common plan, I
19 wish to direct the attention of your Honours to the screen.

20 In the case of Francis Muthaura, he adopted the common plan.

21 Secondly, Francis Muthaura and Uhuru Kenyatta jointly procured
22 the services of Mungiki leaders and directed them to implement the common
23 plan.

24 Thirdly, through subordinates, Francis Muthaura provided
25 logistical support for the Mungiki operations.

1 Fourthly, Francis Muthaura used his position create a free zone
2 to allow the Mungiki and pro-PNU youth to operate with impunity. In
3 other words, he issued instructions to the police to ensure that they did
4 not interfere with the movement of the Mungiki to the incident locations,
5 despite having had prior knowledge of the attacks.

6 In the case of Mr. Kenyatta, he also adopted the plan.
7 Uhuru Kenyatta mobilised and secured the support of the Mungiki in the
8 implementation of the common plan. Uhuru Kenyatta financed and provided
9 logistical support for the Mungiki and pro-PNU youth. Uhuru Kenyatta
10 specifically placed the Mungiki under the responsible command of a former
11 Kenya African National Union Party, KANU, Member of Parliament for the
12 Nakuru attack.

13 Your Honours, the summary of the contributions of other members
14 of the common plan now appears on your screen. These members organised
15 and planned meetings in Naivasha and Nakuru.

16 They coordinated the funding, supply of weapons and logistical
17 arrangements for the attacks. They recruited new Mungiki members and
18 mobilised pro-PNU youth for the attacks. They appointed operational
19 commanders to implement the common plan. They transported the Mungiki
20 and pro-PNU youth to the locations of the attacks, and they coordinated
21 the attacks on the ground.

22 The Prosecution will now turn to the evidence to illustrate these
23 essential contributions. The Prosecution will first illustrate how
24 Francis Muthaura and Uhuru Kenyatta made some of these essential
25 contributions at one of the key meetings addressed yesterday by

1 Ms. Adeboyejo, that is, at the Nairobi Members' Club on the
2 3rd of January, 2008. These contributions resulted in the realisation of
3 the objective elements of the crimes. For this part of my presentation,
4 I refer your Honours to the chart currently displayed on your screen.

5 An account of this meeting is provided by a direct witness,
6 Prosecution Witness 0004 at EVD-PT-OTP-00248, at 0038 to 0042. According
7 to this witness, he was invited to this meeting along with three other
8 Mungiki leaders. The meeting was also attended by Francis Muthaura,
9 Uhuru Kenyatta, and approximately ten other individuals. Your Honours,
10 permit me to discuss the essential contributions made at this meeting.

11 First, Francis Muthaura adopted the common plan.

12 In the just cited statement of Prosecution Witness 0004, at page
13 0039, paragraph 194, the witness states, and I quote:

14 "Then he," referring to Francis Muthaura, "then he said that our
15 community in the Rift Valley was being finished and that we needed to
16 revenge or retaliate. He said we could not stay quiet while our people
17 were being killed. I could see that he was emotional and angry. He made
18 us feel like there was a sense of emergency."

19 This is corroborated by the evidence of Prosecution Witness 0001,
20 at EVD-PT-OTP-00572, at 0026, who alleges that after the outbreak of
21 violence, "the Mungiki were recruited to retaliate against perceived ODM
22 supporters in the Rift Valley" and that "both Uhuru Kenyatta and
23 Francis Muthaura were involved in these meetings."

24 Second essential contribution: Uhuru Kenyatta and
25 Francis Muthaura mobilised the Mungiki to implement the common plan.

1 In the words of Prosecution Witness 0004, the
2 Nairobi Members' Club meeting, and I'm quoting here, "really looked like
3 a follow-up meeting based on the discussions."

4 This is at page 0040, paragraph 197.

5 It is in this context that the response of one of the Mungiki
6 leaders present should be interpreted, at page 0039, paragraphs 195 and
7 196. This Mungiki leader said that the youth were ready and their plans
8 depended on the government officials present. Prosecution Witness 0004
9 understood this to mean, and I quote:

10 "The youth were ready to revenge the killings of the Kikuyus in
11 the Rift Valley."

12 By the 7th of January, 2008, the NSIS had received the following
13 information, at EVD-PT-OTP-00013, at 0069 to 0070, paragraph 2 -- pardon
14 me, at paragraph 321. I quote:

15 "Mungiki sect leader has directed sect coordinators to carry out
16 recruitment and oathing ceremonies in preparation to joining the current
17 skirmishes in some parts of the country."

18 Third essential contribution: At the Nairobi Members' Club
19 meeting, Uhuru Kenyatta placed the Mungiki under the responsible command
20 of a former KANU MP.

21 Prosecution Witness 0004 also informed the Prosecution that, and
22 I quote:

23 "Uhuru Kenyatta also said that they had some people already on
24 the ground in the Rift Valley. He said to one of the Mungiki leaders
25 present that a former KANU MP would be our contact person in Nakuru. He

1 said that we should meet with him because he was organising his own
2 people there in Nakuru."

3 This is available at page 0041, paragraph 202 of the statement of
4 Prosecution Witness 0004.

5 The role played by the former KANU MP in the Nakuru incident,
6 including his relationship with Uhuru Kenyatta, is indeed corroborated by
7 Prosecution Witness 0012, who provided the following testimony. This
8 testimony is available at EVD-PT-OTP-00652, at 0126, and I quote:

9 "So they," and here he's referring to the former KANU MP and
10 another individual. "So they coordinated the members of the Mungiki who
11 were on the ground, plus the Kikuyus. They give them guns, and, at the
12 same time, the former KANU MP was acting with Uhuru Kenyatta. Now he was
13 being called by Uhuru and advised on where to get money."

14 Fourth essential contribution: Uhuru Kenyatta made arrangements
15 for the provision of logistical support and money.

16 According to Prosecution Witness 0004 at EVD-PT-OTP-00248, at
17 page 0040 to 0041, paragraphs 201 to 202, I quote:

18 "Uhuru Kenyatta spoke about another meeting at the
19 Blue Springs Hotel. He said that the landlords and business people would
20 meet there to discuss the logistics and how things should be done in
21 order to send our people to the Rift Valley. He said that everything
22 would be planned at this meeting and that money would be allocated to us
23 so that we could send our people to the Rift Valley."

24 The evidence of Prosecution Witness 0006 is also instructive. I
25 refer to EVD-PT-OTP-00570, at 0018. This witness was told by sources

1 within the Kenya police that most of the activities emanating from the
2 Mungiki and the transport that they were using and money they were being
3 paid came from Kenyatta.

4 Fifth essential contribution: Francis Muthaura instructed the
5 police to create a free zone as part of the common plan.

6 At the meeting, one of the Mungiki leaders asked if the police
7 would interfere with the movement of pro-PNU youth going into the
8 Rift Valley. Francis Muthaura's response is best captured directly from
9 the statement of Prosecution Witness 0004, at page 0040, paragraphs 198
10 to 199. In his words, and I quote:

11 "Francis Muthaura stood up and immediately said, 'The police will
12 not interfere with your work.' This assurance was given
13 instantaneously." It continues, and I quote:

14 "He said, 'Let me call the commissioner.' He took out his cell
15 phone, made the call. Muthaura said, 'Our youth will be going to the
16 Rift Valley and we do not want them to be disturbed.'"

17 What was the outcome of this phone call? Prosecution
18 Witness 0010 and other Mungiki members had to pass through several
19 check-points on their way to -- on their way from Nairobi to Naivasha
20 prior to the Naivasha incident. According to the evidence, which is
21 available at EVD-PT-OTP-00674, at 0552, and I quote:

22 "The truck carrying the group the Mungiki and weapons had to slow
23 down at several police as well as army check-points along the highway in
24 order for them to remove the roadblocks before letting the truck proceed.
25 The back of the truck was open and the guards could see that the truck

1 was not carrying military persons, yet no one questioned them."

2 My colleague Ms. Lurf will address this aspect of the case more
3 fully in her presentation on Hussein Ali's responsibility under
4 Article 25(3)(d).

5 Prosecution submits that the evidence of the 3rd of January
6 meeting is sufficient to show the essential nature of the contributions
7 of Francis Muthaura and Uhuru Kenyatta to the standard required under
8 Article 61(5). Prosecution would nevertheless present evidence of
9 additional essential contributions.

10 Your Honours, it is important to note that Uhuru Kenyatta and
11 Francis Muthaura employed several channels in securing the services of
12 the Mungiki to implement the common plan. This presentation will focus
13 on the chronology of important preparatory activities and meetings for
14 the commission of the crimes charged. It will attempt to discuss as many
15 of these channels that they employed as possible. The essential
16 contributions mentioned here are those of Francis Muthaura Uhuru Kenyatta
17 and other members of the common plan.

18 Your Honours, permit me to begin by addressing a meeting at the
19 Nairobi State House on the 30th of December, 2007.

20 At this meeting, as highlighted yesterday, Uhuru Kenyatta
21 formulated the policy of keeping the PNU in power by any means necessary.
22 He set up local structures for the mobilisation and supervision of the
23 Mungiki and pro-PNU youth and provided funds for this exercise in
24 preparation for the implementation of the policy.

25 Prosecution Witness 0011 provides an account of this meeting.

1 This account is available at EVD-PT-OTP-00322, at pages 1513 to 1515.

2 According to this witness, Uhuru Kenyatta looked angry and
3 addressed a number of MPs and Mungiki leaders. Mr. Kenyatta said he was
4 not ready to hand over power and that he had the capability to organise
5 his people and, I quote here, "mobilise them for any eventuality." This
6 is at page 1514. He then gave money to some of the MPs and Mungiki
7 coordinators present.

8 Prosecution Witness 0012 provides an account of one of the
9 preparatory meetings hosted by a Central Province MP who, as can be seen
10 in the chart displayed on the screen, is another member of the common
11 plan. This meeting was at the Blue Post Hotel in Thika District in
12 Central Province. The account is available at EVD-PT-OTP-00666, at 0410.

13 According to the witness, Uhuru went to the meeting but did not
14 stay for long. He called a Mungiki leader who the witness refers to by
15 name, and he also called his group. The Mungiki leader was given
16 6 million shillings. And this is at EVD-PT-OTP-00664, at pages 0374 to
17 0375.

18 The witness further states that a former local MP, another member
19 of the common plan as indicated in the chart, was given a part of the
20 money raised at the hotel.

21 Prosecution Witness 0011 also states that a Central Province MP
22 was responsible for hiring the trucks to ferry Mungiki members to fight
23 in Naivasha. And this is available at EVD-PT-OTP-00321 at 1490.

24 Your Honours, the names of these members of the common plan were
25 provided to you in yesterday's private session. The involvement of

1 current and former MPs in the mobilisation of the Mungiki is corroborated
2 by other sources. A report by the Oscar Foundation highlights the role
3 played by certain MPs in the mobilisation of the Mungiki. This report is
4 available at EVD-PT-OTP-00134, at 5018.

5 The report alleges that the Mungiki were responsible for attacks
6 in Naivasha and Nakuru and further states that the Mungiki were hired,
7 funded, and transported by six current and former MPs, including
8 Uhuru Kenyatta.

9 In a statement submitted to the Kenya National Commission on
10 Human Rights, KNCHR, the same set of politicians are linked to the
11 Mungiki. This is at EVD-PT-OTP-00212, at 0106.

12 This witness mentions the name of four of those MPs previously
13 mentioned, stating that they actively took part in meetings to plan the
14 violence and helped organise finances and weapons to be used. In
15 particular, the witness says, and I quote:

16 "Uhuru Kenyatta organised finances and helped organise pro-Kikuyu
17 militias."

18 The next meeting was held on the 3rd of January, 2008, at
19 Nairobi Members' Club. This meeting has already been discussed at length
20 and will not be discussed further. The meeting was followed by the
21 Blue Springs Hotel meeting on the same day. Again, this meeting has
22 already been discussed and will not be repeated here.

23 Also previously discussed is the NSIS report of the
24 7th of January, 2008, in which the Mungiki leader ordered the recruitment
25 and oathing of new members in preparation for the violence.

1 During the month of January 2008, a member of the common plan
2 provided administration police, AP, uniforms to the Mungiki in
3 preparation for the attacks.

4 At EVD-PT-OTP-00310, at page 1327, and EVD-PT-OTP-00323, at
5 page 1535, Prosecution Witness 0011 informed the Prosecution that in
6 preparation for the Naivasha attack, the now deceased Mungiki spokesman
7 was given AP uniforms by a senior government official, another member of
8 the common plan depicted as PNU Liaison I on the chart.

9 At EVD-PT-OTP-00319, at page 1464, the witness explains that
10 PNU Liaison I was a link between another member of the common plan who
11 dealt with the Mungiki, PNU Liaison II. He was the link between
12 PNU Liaison II on one hand, and Francis Muthaura and Uhuru Kenyatta on
13 the other hand.

14 There is evidence to corroborate -- to corroborate the
15 acquisition of these AP uniforms by the Mungiki before the attacks.

16 In a situation report dated the 9th of January, 2008, the NSIS
17 noted, at EVD-PT-OTP-00013, at 0065, that pro-ODM communities residing in
18 certain parts of Nakuru were afraid of being attacked by Mungiki. The
19 report continues, and I quote:

20 "The situation has been made worse by SMS messages warning
21 members of the communities of an impending attack by Mungiki adherents
22 dressed in police gear."

23 This was followed by a similar report on the
24 10th of January, 2008, in which the NSIS again stated, and I quote:

25 "Mungiki elements are reportedly meeting or assembling at

1 Stem Hotel, Nakuru, with a view to attacking ODM supporters or
2 strongholds in Eldoret, Kisumu, Kakamega, Kericho, and Nakuru. They will
3 impersonate policemen as they unleash violence on the victims."

4 This is available at EVD-PT-OTP-00013, at 0064, paragraph 299.

5 In preparation for the attacks, the Mungiki purchased weapons in
6 the month of January 2008.

7 According to Prosecution Witness 0009, sometime in January 2008,
8 the Mungiki received a shipment of weapons, including guns and machetes,
9 which had just arrived from Somalia. These and other weapons were
10 distributed to some Mungiki members who went to fight in various
11 locations in Kenya. This is available at EVD-PT-OTP-00639, at 0175 to
12 0176; and EVD-PT-OTP-00640, at 0179 and 0188.

13 Around the 17th of January, some Mungiki leaders met to appoint
14 operational commanders to implement the common plan. One of the Mungiki
15 leaders present at the Nairobi Members' Club meeting of the 3rd of
16 January, 2008, was present at this meeting which was held in Nairobi as
17 well. According to an NSIS report on the meeting, and this is available
18 at EVD-PT-OTP-00013, at 0053, paragraph 226, the Mungiki leaders present
19 resolved, amongst other things, to, and I quote, "protect their kinsmen
20 against the violence orchestrated by ODM leaders and embark on oath
21 administration with a view to binding the members."

22 The report noted in particular, again I quote:

23 "The operation would be supervised by, amongst others, a named
24 former sect leader."

25 The former Mungiki leader was also a member of the common plan.

1 This is corroborated by Prosecution Witness 0011 who stated that
2 the former Mungiki leader "was given a go ahead to even start oathing,
3 new oathing. So much of the oathing during these retaliatory attacks was
4 done by him."

5 This is available at EVD-PT-OTP-00308, at page 1303 to 1304.

6 By the 23rd of January 2008, the NSIS had received reports of the
7 mobilisation of Mungiki in Nakuru town by the former KANU MP.

8 In one situation report, it was reported, at EVD-PT-OTP-00013, at
9 0048, it was reported that the former KANU MP was "allegedly organising
10 Mungiki members to attack non-Kikuyus residing within Nakuru town."

11 This is corroborated by the final report of the KNCHR, which is
12 available at EVD-PT-OTP-00001, at 0227.

13 The next events occurred around the third week of January of
14 2008. In rallies across Central Province, prominent PNU politicians
15 mobilised pro-PNU youth for the attacks.

16 Prosecution Witness 0009 informed the Prosecution that he
17 attended these rallies. He says that the rallies were organised by MPs
18 in Central Province for the mobilisation of pro-PNU youth around the
19 middle or third week of January, 2008. At the rallies, the MPs urged the
20 crowd participating -- I will repeat that. At the rallies, the MPs urged
21 the crowd to participate in the fighting, saying, and I quote:

22 "You can't just stay back and watch our brothers and sisters or
23 fathers and mothers being killed. We have to do something about it."

24 After the rallies, volunteers had to register with the Mungiki
25 and were subsequently paid and transported to various locations,

1 including Nakuru, to fight. This is available at EVD-PT-OTP-00640, at
2 0188 to 0191; EVD-PT-OTP-00642, at 0233 to 0235; and EVD-PT-OTP-00643, at
3 0243.

4 Prosecution Witness 0002 provides corroboration on the point that
5 the fighters on the ground were paid to fight. According to the witness,
6 the Naivasha attack "was a clearly organised thing. There were people
7 being paid for it." This is available at EVD-PT-OTP-00238, at 0062.

8 The evidence of Prosecution Witness 0012 is also instructive. At
9 EVD-PT-OTP-00664, at 0376, the witness says, and I quote:

10 "The ones," and here he's referring to the Mungiki, "The ones who
11 were in Thika were paid to enter the lorry. Each one of them were given
12 150.000 to share amongst themselves."

13 In late January 2008, members of the common plan gave more money
14 to the Mungiki leader to ensure their continued participation in the
15 common plan.

16 Prosecution Witness 0012 informed the Prosecution, at
17 EVD-PT-OTP-00650, at 0089, he informed the Prosecution that the Mungiki
18 leader, and I quote, "was given money so that he could give orders for
19 the Mungikis to be used in the post-election violence in Naivasha."

20 The witness further explains, at EVD-PT-OTP-00662, at 0332 to
21 0333, he next explains that PNU Liaison II took 20 million shillings to
22 this Mungiki leader on a certain occasion at the end of January 2008.

23 The evidence places PNU Liaison II as a *de facto* subordinate of
24 Francis Muthaura and Uhuru Kenyatta in the implementation of the common
25 plan.

1 According to Prosecution Witness 0012, and I quote:

2 "Ambassador Muthaura had a network on the ground. A man he
3 used -- a man he used was called," and he refers specifically to this
4 PNU Liaison II by name, but I will end the quote there.

5 This is available at EVD-PT-OTP-00661, at 0304; and
6 EVD-PT-OTP-00660, at 0297.

7 In explaining PNU Liaison II's role, Prosecution Witness 0011
8 also states, at EVD-PT-OTP-00319, at 1464 to 1465, he states that on some
9 issues he would be "answerable to Muthaura, some issues he would be
10 answerable to Uhuru. And there was a link person whom he can talk to
11 anytime."

12 The witness goes on to name PNU Liaison I as that link person.

13 Also in late January 2008, the Mungiki carried out oathing
14 ceremonies for the recruitment of new members specifically for the
15 attacks.

16 Prosecution Witness 0011 was told about how a group of people
17 went from house to house in search of locals in Naivasha just before the
18 retaliatory attacks. The witness says, and I quote:

19 "This group of people wore military uniforms, and they were
20 having government trucks. And they will knock in the house. They will
21 ask, 'How many young men are here?' Every home they went to, they
22 gathered the young men. They were taken to a bush in groups of 70s,
23 where they were given that oath. I understood that that operation of the
24 former Mungiki leader was sanctioned by the authorities."

25 This is available at EVD-PT-OTP-00309, at 1306 to 1307.

1 Prosecution Witness 0011 states that PNU Liaison I provided
2 uniforms and weapons to the Mungiki in January 2008.

3 At EVD-PT-OTP-00310, at 1326 to 1327; also EVD-PT-OTP-00320, at
4 1482; and EVD-PT-OTP-00321, at 1489, this witness explained that at the
5 request of PNU Liaison I, Mungiki coordinators in Nakuru went with the
6 former KANU MP to the Nakuru State House to pick up police and military
7 uniforms and weapons. Prosecution Witness 0012 provides similar
8 evidence, and this is available at EVD-PT-OTP-00665, at 0391 to 0392.

9 There is corroboration in a NSIS report of the
10 28th of January, 2008, which states, and I quote:

11 "There are allegations that armed Mungiki sect members wearing AP
12 uniforms have been moving from house to house in Nakuru posing as police
13 officers in search of members of certain communities whom they intend to
14 attack or kill."

15 This is available at EVD-PT-OTP-00013, at 0043.

16 On the 23rd and 26th of January, 2008, members of the common plan
17 organised planning meetings in Naivasha.

18 A Human Rights Watch report states, and I quote:

19 "According to some of the young men that took part," referring to
20 the Naivasha attack, "several who were self-proclaimed Mungiki members
21 and several who were not, there had been a meeting earlier in the week,
22 on Wednesday, January 23rd, in a local hotel. There was then another
23 meeting on Saturday, January 26th, in the afternoon. The organisers
24 present at the meeting were well-known local businessmen who had
25 campaigned for a PNU candidate and former MP during the election."

1 This public source is available at EVD-PT-OTP-00002, at 0295 to
2 0296.

3 This is corroborated by Prosecution Witness 0002, who states --
4 and this evidence is available at EVD-PT-OTP-00236, at 0011; and
5 EVD-PT-OTP-00239, at 1 -- at 0107 to 0108. The witness states, and I
6 quote:

7 "During that period," referring to the week before the violence,
8 "I could also get calls from Luos telling me that there were people at
9 Belle Inn. It's a hotel in Naivasha."

10 This witness was told that the meeting was attended by the former
11 local MP and known associates.

12 Prosecution Witness 0012 provides additional corroboration, and
13 this corroboration is at EVD-PT-OTP-00667, at 0448. The witness stated
14 that the perpetrators did not attack Naivasha directly, but had first met
15 at Belle Inn, at Belle Inn, where they were addressed by the former local
16 MP and another named individual. I refer you to see also
17 EVD-PT-OTP-00652, at 0118.

18 According to the same witness, the former local MP was the
19 commander of the Naivasha attack. The former MP incited people to fight
20 by telling them that they had to get rid of the Luo. This is available
21 at EVD-PT-OTP-00664, at 0373 and 0378.

22 At the end of January 2008, the Naivasha District Intelligence
23 Committee recommended the arrest and arraignment of the formal local MP
24 and former Mungiki leaders, amongst others, for their involvement in
25 war-like activities in Naivasha. This corroboration is available at

1 EVD-PT-OTP-00093, at 0197.

2 Around the 27th of January, members of the common plan were
3 transported -- pardon me. Members of the common plan transported Mungiki
4 members to one of the locations of the attacks.

5 Prosecution Witness 0010 provides an account of a State House
6 meeting on the day of Naivasha attack. According to the summary of the
7 statement at EVD-PT-OTP-00674, at 0551 to 0552, and I quote:

8 "This was an organised gathering, and there were approximately
9 100 Mungiki members in total. They were addressed by the Mungiki
10 organisation's spokesperson in the presence of the former Mungiki leader.
11 They were served food and refreshments at the State House before getting
12 on a military truck carrying military colours and driven by men in Kenyan
13 army uniforms. They were going to Naivasha."

14 The co-ordination between the Mungiki and the elements within the
15 Kenyan military is corroborated by the NSIS in a situation report dated
16 the 7th of January, 2008. At EVD-PT-OTP-00013, at 0070, the former
17 Mungiki leader is reported to have met with some top military personnel
18 to strategise the Mungiki's intervention measures in the Rift Valley.

19 The Prosecution submits that the third to fifth elements may be
20 subsumed in one requirement, that Francis Muthaura and Uhuru Kenyatta
21 exercised joint control over the commissions of these crimes.

22 With this in mind, I will now proceed to the third element, and
23 the third element is that Francis Muthaura --

24 PRESIDING JUDGE TRENDAFILOVA: Mr. Adeniran, I would ask you to
25 proceed after the break, because there are just three minutes left.

1 MR. ADENIRAN: Thank you.

2 PRESIDING JUDGE TRENDAFILOVA: So we shall take now a break, and
3 we shall resume our session at 4.30 p.m.

4 MR. ADENIRAN: Very well, Madam President.

5 COURT USHER: All rise.

6 Recess taken at 3.57 p.m.

7 On resuming at 4.30 p.m.

8 (Open session)

9 COURT USHER: All rise.

10 PRESIDING JUDGE TRENDAFILOVA: Please be seated.

11 We resume our session. We're in the second session of today's
12 hearing, so the Prosecutor's Office can proceed further on with the
13 presentation. The third element that you were about to start discussing.

14 MR. ADENIRAN: Thank you, Madam President.

15 Your Honours, I will now address the third element, that
16 Francis Muthaura and Uhuru Kenyatta controlled the organisation.

17 In the implementation of the common plan, Francis Muthaura and
18 Uhuru Kenyatta relied on two existing structures, the Mungiki and the
19 police. By reason of his long-standing relationship with the Mungiki
20 since the year 2000, Uhuru Kenyatta exercised *de facto* influence and with
21 other Mungiki leaders he had control over the Mungiki.

22 Francis Muthaura exercised *de facto* control over Hussein Ali and,
23 by extension, the Kenya police, as can be seen by the number of direct
24 interventions he made with the police in which his orders were routinely
25 obeyed. In addition, through the National Security Advisory Committee,

1 Francis Muthaura exercised direct *de jure* authority over Hussein Ali and
2 the Kenya police. Through the involvement of Mungiki leaders in the
3 common plan, Francis Muthaura also exercised control over the Mungiki.

4 On these points, the Prosecution incorporates its previous
5 presentation on the nature of the organisation.

6 The fourth element, that Francis Muthaura and Uhuru Kenyatta
7 created a hierarchy through which the attacks were executed.

8 The organisation, which was based on two existing structures,
9 consisted of an organised and hierarchical apparatus of power. Both the
10 Mungiki and the Kenya police are hierarchically organised. Both have a
11 functioning internal structure with features such as the centralisation
12 of important decision-making and the existence of an effective
13 disciplinary regime. Again, this has been dealt with by my colleague
14 Ms. Adeboyejo, and I will not go into it any further.

15 The fifth element, that Francis Muthaura and Uhuru Kenyatta were
16 able to secure the execution of the crimes agreed upon by almost
17 automatic compliance of the physical perpetrators with the orders given
18 by the leaders.

19 The Prosecution will adduce evidence to show that
20 Francis Muthaura, Uhuru Kenyatta, and others ensured the near automatic
21 compliance with their instructions in a number of ways.

22 In the implementation of the common plan, Francis Muthaura and
23 Uhuru Kenyatta secured the co-operation of Mungiki leaders and thereby
24 procured the services of a violent, proscribed and criminal organisation
25 known for its brutal and efficient disciplinary regime. I refer your

1 Honours to the following public sources: EVD-PT-OTP-00158, at 0169 to
2 0170; and EVD-PT-OTP-00275, at 0117 to 0118.

3 The evidence shows that the perpetrators did not act alone but in
4 large groups. I refer your Honours to EVD-PT-OTP-00004, at 0721. This
5 is a public source.

6 Prosecution Witness 0002 also explains that even those who did
7 not want to perpetrate could not speak out against the deeds of the
8 perpetrators because they were in the minority. This source can be found
9 at EVD-PT-OTP-00237, at 0034 to 0035.

10 Uhuru Kenyatta established local structures to mobilise the
11 Mungiki and pro-PNU youth and supervise their activities. This has
12 already been covered in this presentation.

13 The other members of the common plan, particularly the Mungiki,
14 capitalised on the tensions and animosity in Naivasha and Nakuru due to
15 horror stories of Kikuyus displaced from the North Rift. They were
16 therefore easy to manipulate into joining the retaliatory attacks.
17 Your Honours, I already made mention of this during my presentation on
18 the crime of persecution.

19 Francis Muthaura ensured that the Mungiki and pro-PNU youth moved
20 into the Rift Valley without interference by so instructing Hussein Ali,
21 knowing that Mr. Ali had control over the Kenya police.

22 Uhuru Kenyatta ensured compliance through the provision of
23 sufficient funds to secure the support of other members of the common
24 plan and enable the recruitment of as many Mungiki members and pro-PNU
25 youth as possible. According to Prosecution Witness 0011 at

1 EVD-PT-OTP-00308, at 1303, some Mungiki members did not like the idea of
2 the retaliatory attacks, and I quote now:

3 "All the same, the idea went on. It was pushed through money, a
4 lot of money."

5 The sixth element, that Francis Muthaura and Uhuru Kenyatta
6 intended to commit the crimes or were aware that the crimes would occur
7 in the ordinary course of events.

8 Francis Muthaura and Uhuru Kenyatta planned and encouraged the
9 crimes in accordance with the evidence presented here and by
10 Ms. Adeboyejo.

11 Francis Muthaura and Uhuru Kenyatta's intention and awareness
12 that the crimes would occur in the ordinary course are proven in two
13 ways: Through their words and by their actions. In particular,
14 Francis Muthaura and Uhuru Kenyatta held meetings and discussions to
15 activate the Mungiki and pro-PNU youth and to implement the common plan.
16 Francis Muthaura additionally issued instructions to ensure the
17 unhindered movement of the Mungiki and pro-PNU youth to the incident
18 locations. Your Honours, I've dealt with this issue, and I will not
19 repeat myself here.

20 The seventh element, that Francis Muthaura, Uhuru Kenyatta, and
21 other co-perpetrators were mutually aware and mutually accepted that
22 implementing the common plan might result in the realisation of the
23 crimes charged.

24 Francis Muthaura and Uhuru Kenyatta were aware of the political
25 tension and fear in Kenya around the time of the 2007 elections. In his

1 CIPEV testimony, and this is available at EVD-PT-OTP-00338, at 2004, in
2 his testimony, Hussein Ali said and I quote:

3 "First, we got proper intelligence from the intelligence
4 services and we have to commend them." "First, we got proper
5 intelligence from the intelligence services and we have to commend them.
6 And secondly, anybody who was in the country could get a sense that there
7 was a lot of tension."

8 By including the element of retaliation in the common plan,
9 Francis Muthaura and Uhuru Kenyatta intended the consequences that
10 naturally flowed from the implementation of the plan.

11 Francis Muthaura and Uhuru Kenyatta, either directly or through
12 subordinates, provided money, weapons, and logistical support for the
13 Mungiki and pro-PNU youth with the aim of facilitating the retaliatory
14 attacks. At the same time, other members of the common plan acting on
15 their instructions incited pro-PNU youth to participate in the attacks.
16 Again, this issue was dealt with in the section on the essential nature
17 of the contributions.

18 Francis Muthaura and Uhuru Kenyatta were aware that the Mungiki
19 was a proscribed, violent, and criminal organisation. Like most Kenyan
20 citizens, they were aware of the Mungiki's reputation for terrorising
21 civilians. I refer your Honours to the following public sources:
22 EVD-PT-OTP-00275, at 0118; and EVD-PT-OTP-00183, at 0457.

23 Francis Muthaura was aware that the creation of a free zone was
24 essential to enabling the Mungiki and pro-PNU youth operate with impunity
25 during the attacks. His awareness may be deduced from his immediate

1 reaction to the concern raised during the Nairobi Members' Club --

2 Nairobi Members' Club meeting about a possible police interference.

3 Francis Muthaura and Uhuru Kenyatta were aware of the crimes
4 committed through local and international media which provided
5 contemporaneous coverage of the violence.

6 Finally, Francis Muthaura received regular updates through NSIS
7 reports of steps taken by the Mungiki in preparation for the attacks. A
8 number of these NSIS reports have already been cited in this and other
9 presentations.

10 The eighth element, that Francis Muthaura and Uhuru Kenyatta were
11 aware of the factual circumstances enabling them to exercise joint
12 control over the crimes.

13 Francis Muthaura was aware of the *de facto* authority he exercised
14 over the police. This is evident from the interventions he made with the
15 police as discussed previously.

16 Francis Muthaura and Uhuru Kenyatta, like many Kenyan citizens,
17 were aware that the services of the Mungiki were available on a
18 willing-buyer, willing-seller basis. I refer your Honours to
19 EVD-PT-OTP-00004, at 0401.

20 Additionally, by virtue of his long-standing relationship with
21 and membership of the Mungiki, Uhuru Kenyatta was aware that he could
22 secure their support for the common plan. Again, this point was
23 adequately covered during the presentation on organisational policy.

24 Also, as previously discussed, Uhuru Kenyatta was personally
25 involved in establishing effective local structures to mobilise and

1 supervise the activities of the Mungiki and pro-PNU youth.

2 Francis Muthaura and Uhuru Kenyatta placed significant emphasis
3 on providing money, weapons and logistical support to the Mungiki and
4 other members of the common plan knowing that the retaliatory attacks
5 would not have been as effective without these contributions. It is not
6 surprising, therefore, that the contributions featured prominently in the
7 chronology of preparatory activities discussed previously.

8 In assuring the Mungiki, at the Nairobi Members' Club, that the
9 police would not interfere with their work, Francis Muthaura was no doubt
10 aware of his power to frustrate the commission of the crimes.

11 Madam President, your Honours, all of this evidence, viewed in
12 its totality, establishes the eight elements of indirect co-perpetration.
13 It establishes that Francis Muthaura and Uhuru Kenyatta made essential
14 contributions to the crimes committed by the Mungiki and pro-PNU youth
15 with the aim of furthering the criminal activities of members of the
16 common plan.

17 This concludes the Prosecution's submission on the responsibility
18 of Francis Muthaura and Uhuru Kenyatta under Article 25(3)(a) of the
19 Statute.

20 Thank you, Madam President. Thank you, your Honours.

21 PRESIDING JUDGE TRENDABILOVA: Thank you, Mr. Adeniran.

22 Now, Ms. Adeboyejo.

23 MS. ADEBOYEJO: Yes.

24 PRESIDING JUDGE TRENDABILOVA: Who is going on from your team to
25 take the floor on individual criminal responsibility of the third

1 suspect?

2 MS. ADEBOYEJO: Ms. Lurf has the honour. Thank you, your Honour.

3 PRESIDING JUDGE TRENDABILOVA: Ms. Lurf, please, the floor to
4 over to you.

5 MS. LURF: I will now present the mode of liability for Mr. Ali
6 under Article 25(3)(d)(i) of the Rome Statute. All documents I refer to
7 are confidential unless stated otherwise.

8 The legal elements that are applicable are five and they are
9 currently depicted on the screen. First, the first element is that
10 crimes within the jurisdiction have been committed. Second, that the
11 crimes were carried out by a group of persons acting with a common
12 purpose. To avoid repetition, I will ask your Honours to incorporate the
13 presentations that have already been made by my colleagues regarding
14 these two aspects of the crimes.

15 In this presentation, I will focus on remaining objective and
16 subjective elements regarding Mr. Ali's liability, and I will show that
17 the evidence establishes substantial grounds to believe that Mr. Ali
18 contributed to the crimes charged and that he did so intentionally, with
19 the aim of furthering the crimes according to Article 25(3)(d)(i).

20 Mr. Ali contributed to the crimes charged as follows:

21 Mr. Ali actively contributed to the organisational policy created
22 and pursued by Mr. Muthaura and Mr. Kenyatta by deliberately ensuring
23 that his police forces would not intervene in or around Nakuru and
24 Naivasha. Mr. Ali had both control over the forces and knowledge that
25 the crimes would occur, and yet Mr. Ali under the direction of

1 Mr. Muthaura actively contributed to the commission of the crimes by
2 creating a free zone in which the crimes could occur with impunity.
3 Mr. Ali thereby actively furthered the common purpose by taking the
4 following affirmative steps:

5 He actively and deliberately caused the Kenya police to stand
6 down, thereby providing the Mungiki and PNU youths space to commit the
7 crimes and to travel to the incident locations. He did so by ensuring
8 that the police would not interfere with the movement of the Mungiki to
9 Naivasha and to Nakuru. These acts taken together create add free zone
10 in which the crimes were committed.

11 In addition, Mr. Ali did not properly investigate or prosecute
12 those most responsible for the post-election violence and thereby
13 effectively shielded them from prosecution.

14 It is the Prosecution's position that Mr. Ali actively furthered
15 the common purpose through positive actions. However, even if Mr. Ali's
16 acts were somehow characterised as an omission, a policy by extension is
17 recognised under the Elements of Crime. And I refer to the submissions
18 made by colleague Ms. Adeboyejo on this matter yesterday.

19 Mr. Ali, as commissioner of the police, ensured that the Kenya
20 police did not intervene before, during, or after the attacks, and this
21 despite having prior knowledge of the attacks and the explicit authority
22 to intervene.

23 Mr. Ali had *de jure* and *de facto* control over the police. He was
24 the person in charge over the Kenya police during the post-election
25 violence. I refer your Honours to EVD-PT-OTP-00020, at 0290. Mr. Ali

1 was the commissioner of police from April 2004 through September 2009 and
2 therefore had command over the entire Kenya police force during the
3 post-election violence. EVD-PT-OTP-00164, at 0188, and EVD-PT-OTP-00160,
4 at 0178 and 0179. The second document is public.

5 The structure of the Kenya police has already been presented by
6 my colleague Ms. Adeboyejo, and I will therefore refrain from repeating
7 it here. I would instead refer your Honours to her submissions.

8 It suffices to say that Mr. Ali in his testimony before the CIPEV
9 explained that he reported to the minister of state for provincial
10 administration and internal security and head of the public service, who
11 is Mr. Muthaura, but he, Mr. Ali, had the sole responsibility for all the
12 matters concerning the operations of the police. He explained to the
13 CIPEV, and I quote:

14 "The co-ordination, the prioritising, the focus of all internal
15 security operations were co-ordinated and emanated by the office of the
16 commissioner of the police, because we are responsible for internal
17 security."

18 EVD-PT-OTP-00338, at 1992. This is corroborated by
19 EVD-PT-OTP-00148, at 0190. This is public. And you one more,
20 EVD-PT-OTP-00153, at 0355.

21 In addition, Mr. Ali, and I quote again from his CIPEV statement,
22 explained that:

23 "All units and formations of police take instructions from the
24 police headquarters, which takes instructions from me. These include all
25 provisions of police officers who are in charge of various operations in

1 the eight provinces. So in totality, all these units and their chains of
2 command report back to me and allocations of duties and distribution as
3 given to them by myself."

4 He was asked:

5 "So you are the sole responsibility of all the matters that
6 concern the operations of the police?"

7 Mr. Ali answered, and I quote:

8 "Yes. You could say the back stop."

9 EVD-PT-OTP-00338 at 1981 and 1982.

10 Furthermore, according to Prosecution Witness 0008, the Kenya
11 police became more centralised and militaristic under Mr. Ali's reign.
12 EVD-PT-OTP-00219, at paragraph 64.

13 The Kenya police was a well-structured, hierarchical and
14 centralised organisation. Mr. Ali, by his own admission, had sole
15 responsibility for all matters concerning Kenya police operations.
16 Mr. Ali, therefore, exercised *de jure* and *de facto* control over the Kenya
17 police.

18 Your Honours, furthermore, Mr. Ali had prior knowledge of the
19 planned attacks. As chairman and member of the national security
20 committee, Mr. Muthaura and Mr. Ali received NSIS situation reports
21 warning of planned attacks and the high risk of significant violence
22 around 2007 election. EVD-PT-OTP-00004, at 0736. This is a public
23 document.

24 Mr. Ali additionally received daily intelligence reports prepared
25 by the NSIS. EVD-PT-OTP-00340, at 2038. This is corroborated by the

1 CIPEV testimony of General Michael Gichangi, head of the NSIS.

2 EVD-PT-OTP-00340, at 2038.

3 By means of example, I would present two examples. On
4 21 January, 2008, six days before the Naivasha incident, the
5 National Security Intelligence Service warned of an impending attack on
6 the Maasai, Luhya and Luo in Naivasha by Kikuyu youth. And I will quote
7 from the report:

8 "Kikuyu youth in Naivasha are also planning to revenge violence
9 by attacking Maasai, the Luhya, and Luo in Naivasha. They also plan to
10 block Nakuru-Naivasha and Gilgil-Mai-Mahiu roads to block or intercept
11 vehicles from Western and Nyanza regions to fish out the targeted
12 communities. "

13 EVD-PT-OTP-00013 at 0052, paragraph 219.

14 An earlier situation report regarding Nakuru of 14 January, 2008,
15 states, and I quote:

16 "Some politicians in Limuru are reportedly organising Mungiki
17 sect members from Muranga, Thika, and Banana areas to attack the Luo and
18 Luhya employees of Bata Shoe and KPL companies in the area. The
19 adherents also plan to attack members of the Luo community residing in
20 major slum areas in Nairobi and Nakuru on the evening of
21 16 January 2008."

22 EVD-PT-OTP-00013, at 0059, paragraph 264.

23 Your Honours, there were several warnings of violence -- of
24 possible violence against perceived ODM supporters in Nakuru, and I will
25 refer your Honours to the EVD numbers: EVD-PT-OTP-00013, paragraphs 174

1 to 175, 199, 226, 254, 264, 304, 321, and 324.

2 Your Honours, the examples mentioned are reports that were sent
3 to Mr. Ali six to ten days before the attacks, which shows that the
4 police commissioner had ample time to organise police forces to prevent
5 such violence from occurring. In addition Mr. Ali was also in constant
6 contact with his subordinates and received update on the situation on the
7 ground on a daily basis. One such example is provided by Evrett Wasike
8 who was the provincial officer for Rift Valley. He testified before the
9 CIPEV that during the post-election violence, the commissioner of police
10 communicated with him on a daily basis. EVD-PT-OTP-00337 at 1945.

11 Wasike also confirmed that he had received information beforehand
12 that there were going to be attacks on Naivasha, Gilgil, and Nakuru
13 between the 24th and the 27th, and that he had passed this information to
14 the officer commanding police divisions, which were his superiors.
15 EVD-PT-OTP-00337, at 1946, 1947.

16 Finally, with regards to Nakuru, the commission -- excuse me, the
17 CIPEV concluded, and I quote:

18 "From the available evidence placed before us, we are convinced
19 that information on the impending wave of violence was available to the
20 relevant authorities early enough to prevent the fighting that followed.
21 Furthermore, the fact that the violence erupted in the manner predicted,
22 especially by the NSIS, discloses a failure on the part of the police and
23 provincial administration who showed no signs of being proactive.
24 Instead, they chose to fire fight when the prudent action dictated
25 pre-emptive measures against the organisers, planners, and instigators

1 who, as we have seen, were implicated and sufficiently identified."

2 I refer your Honours to EVD-PT-OTP-00004, at 0486. This is
3 public.

4 Your Honours, for this purpose Mr. Ali ensured that the police
5 did not interfere with the movement of the Mungiki to the incident
6 locations. We have heard about the meetings in which Mr. Muthaura
7 instructed Mr. Ali not to intervene. I will mention only these essential
8 points.

9 The first meeting took place at the time of the Kibera attacks,
10 when Mungiki dressed in police uniforms were committing crimes against
11 perceived ODM supporters. During a meeting in John Michuki's office as
12 reported by Prosecution Witness 0012, Mr. Muthaura instructed Mr. Ali not
13 to intervene in the Mungiki actions in Kibera. He told him over the
14 phone, and I quote:

15 "The people on the ground are our people, and they are fulfilling
16 our own interest as the government's, and you may, Major Ali, as employed
17 by this government, so don't try to harass anybody perceived to be a
18 Mungiki man and keep off that affair."

19 I refer to EVD-PT-OTP-00662, at 0327.

20 Your Honours, it cannot have been a mere coincidence that after
21 this meeting the police were sent to locations where less Luo were
22 present in Kibaki and not to those where the Luo were attacked by the
23 Mungiki dressed in police uniforms. Prosecution Witness 12 describes the
24 events in Kibera after that meeting, and I quote:

25 "Now, the police, the regular police and the normal GSU and APs

1 were given the areas they would monitor. So the Mungikis were given the
2 sites that had many Luos, and the police was told not to go to that area.
3 So the Mungiki was left to deal with the Luos in that area. That is how
4 they were working."

5 EVD-PT-OTP-00662, at 0328.

6 In our submission this, shows that the orders given to Mr. Ali
7 were implemented in practice.

8 The second meeting took place on or around 3rd of January, 2008,
9 at the Nairobi Members' Club. As described by Prosecution Witness 0004,
10 during that meeting, Muthaura said, "Let me call the commissioner," and
11 then phoned Mr. Ali to say, "Our youth will be going to Rift Valley, and
12 we do not want them to be disturbed." EVD-PT-OTP-00248, at 0048,
13 paragraph 199.

14 Mr. Ali obeyed these orders and affirmatively made certain that
15 his subordinates did as well. As we have heard, Mr. Ali had detailed
16 warning of the attacks in Nakuru and Naivasha but ensured that his police
17 force would not intervene during the attacks. The aim was nothing less
18 than to create a free zone in which crimes could be committed with
19 impunity.

20 Your Honours, Prosecution Witness 0010 describes how he was
21 transported into the Rift Valley on a military truck, passing several
22 police check-points without being stopped. Prosecution Witness 0010's
23 account begins in Nairobi where he was taken to the State House in a
24 City Hoppa bus together with 40 other Mungiki, and although they took
25 strategic routes to avoid public exposure they encountered police on road

1 but they were not stopped. After the meeting at the State House at which
2 high-ranking policemen were present, Prosecution witness boarded another
3 truck, this time a military truck, together with 30 to 40 other Mungiki
4 men. And even though the truck was travelling on the road to Naivasha
5 before the attacks with all the ample information the authorities had
6 that these attacks were due to occur and this truck was loaded with
7 Mungiki and with bags of arms, it was not stopped by the police at the
8 check-points. EVD-PT-OTP-00674, at 0551-0553.

9 Your Honours, in our submissions, a bus full of Mungiki is
10 noticeable; military trucks carrying Mungiki men even more. Just why did
11 the police not stop them? The sole plausible explanation, in our
12 submissions, your Honour, is that the police was acting on instructions
13 to allow passage to Mungiki, and these instructions came from Mr. Ali.

14 I will now provide your Honours with examples of deliberate
15 noninterference by the police.

16 A policeman on duty around the time of the Nakuru attacks told
17 the BBC that in the hours before the violence in Nakuru, police officers
18 had orders not to stop a convoy of minibus taxis called *matatus* packed
19 with men when they arrived at police check-points. In the words of
20 policeman, and I quote:

21 "When we were there I saw about 12 of them, *matatus*, packed with
22 men."

23 EVD-PT-OTP-00163 at 0186 to 0187. This is public.

24 Another witness reported that on 25 January 2008, the Mungiki
25 started beating people in Naivasha. According to her, the police arrived

1 and started dispersing everyone, Kikuyus and Luos alike. However, the
2 chief from Karakata called for a meeting with Kikuyus and chased the
3 police away. He told the police that Karakata was peaceful and there was
4 no need for them to interfere. Soon after the police left, the Kikuyu
5 started chasing the Luo. EVD-PT-OTP-00341, at 2177.

6 Prosecution Witness 0012 states, and I quote:

7 "The police acted in a manner in which you can see that they are
8 compromised because they could quell what was going on. They were
9 compromised because many of them were hired by these leaders and they
10 were told to go slow. Okay. You will just pretend that something is not
11 happening. Let those people do whatever they are doing, because if it is
12 barricading roads, they knew what they were doing. They were barricading
13 roads so that they can attack their opponents along the road."

14 EVD-PT-OTP-00672, at 0515.

15 By providing the free access for the passage for the Mungiki to
16 carry out their crimes in or around Nakuru and Naivasha, knowing fully
17 well the purpose of the attacks, Mr. Ali contributed to the execution of
18 the common plan to target and attack unarmed civilian supporters of the
19 ODM. In a CIPEV statement, Mr. Ali explains how during the elections he
20 invoked section 48 of the Police Act to appoint officers of the prison
21 service. He specified that in so doing, they come under his direct
22 control. EVD-PT-OTP-00338, at 1962, 1988, and 1989.

23 As was reported by the officer commanding police division for
24 Naivasha, Mr. Willy Lugusa in a statement also before the CIPEV, in
25 Naivasha these additional forces were patrolling with the regular police

1 from 9th of January, 2008, onwards, and by additional forces he's
2 referring to the prison guards. However, they were withdrawn right
3 before the violence started on January 27. On that day, large group of
4 Kikuyu were demonstrating in Naivasha. They were monopolising the
5 attention of the security forces. About 2.000 of them armed with crude
6 weapons set up a roadblock and requested the lifting of the curfew and
7 the withdrawal of the prison guards. They accused the prison guards of
8 being ODM supporters and of harassing the local population. Instead of
9 increasing -- excuse me. Instead of increasing police presence under
10 these circumstances, Lugusa addressed the crowd and announced that the
11 curfew was lifted and the prison guards would be withdrawn.
12 EVD-PT-OTP-00331 at 1666-1675.

13 According to Prosecution Witness 0001, Lugusa then left with all
14 police forces. Lugusa's intervention was immediately perceived by the
15 demonstrators as an encouragement to carry on with the planned attacks,
16 and organised and co-ordinated groups went with precision into different
17 directions. This is the statement of Witness 0002 at EVD-PT-OTP-00236,
18 at 0013. I also refer your Honours to EVD-PT-OTP-0004, at 0500 to 0501.
19 This is public.

20 The CIPEV report states that the withdrawal of the prison guards,
21 and I quote, "Occurred at the very time the police were under severe
22 pressure," and as such was a curious coincidence.

23 EVD-PT-OTP-0004 at 0755. This is public.

24 Madam President, your Honours, the withdrawal of the prison
25 guards is a clear example of Mr. Ali's contribution to creating a free

1 zone. As we know from the evidence, after the prison guards withdrew,
2 the attacks hit Naivasha in full swing, subjecting perceived ODM
3 supporters to heinous crimes. This shows the division of labour: The
4 police provided a free zone by not intervening, while the Mungiki were
5 committing the crimes.

6 As one CIPEV witness who found her brother mutilated and
7 succumbing to his injuries said, and I quote:

8 "I found a crowd of people, including policemen, who were
9 standing nearby but at a distance from the other people. They did not
10 look bothered. I talked to the policemen around and requested them to
11 take my brother to the hospital so that even if he died, he would die at
12 the hospital. The police told me to get away from them, that I should
13 not disturb them, that if I insisted, I would end up like my brother and
14 that it was not their work."

15 EVD-PT-OTP-00004, at 0494 to 0495. This is public.

16 Another witness reports, and I quote:

17 "A witness reported that his business was burnt down. He
18 believed that the police could have responded in time to save his
19 business, but they didn't respond because he was a Luo and an ODM
20 supporter."

21 EVD-PT-OTP-00341, at 2180.

22 Your Honours, the evidence of what occurred on the ground and the
23 failure of the police to act corroborates, therefore, the evidence
24 Mr. Ali's implementation of the instructions to ensure that the police
25 would not stop the Mungiki.

1 Your Honours, it is true that not every single police officer in
2 Nakuru and Naivasha failed to assist civilians under the attack. The
3 Prosecution acknowledges that out of moral duty or perhaps ethnic loyalty
4 some police officers acted, but these instance were in the minority. The
5 Prosecution submits that the general trend, the systematic practice --
6 sorry, the systematic practice was deliberate in action.

7 The deliberate inaction can also be evidenced by the fact that
8 during the second wave of violence in Naivasha, first hundreds, then
9 thousands of displaced persons gathered at the police station and the
10 prison. They felt safe there because, as displaced people, they believed
11 that the police and the infrastructure would provide them adequate
12 protection. However, the reality was that the IDPs were gathered at the
13 police station in inhumane conditions with no sanitary facilities, and
14 once more, they were still exposed to violence. I refer to
15 EVD-PT-OTP-00238, at 0065 to 0066, and EVD-PT-OTP-00593.

16 Despite the fact that the police had ample notice that the
17 attacks would occur, it was due to the deliberate inaction of Mr. Ali
18 that they were not resourced or staffed accordingly.

19 Your Honours, after the attacks, Mr. Ali did not investigate into
20 the crimes committed and made sure that the direct perpetrators were not
21 held accountable for their crimes.

22 The Kenyan Constitution places the power to appoint public
23 prosecutors in the hands of the Attorney General. However, the
24 Attorney General delegated the power to prosecute in subordinate courts
25 to the Kenya police. Within the Kenya police, investigations are

1 therefore conducted by the criminal investigations department, which
2 Mr. Ali refers to, and I quote, as:

3 "The investigative arm of the Kenya police that handles all
4 investigative matters and supervises also police prosecutions on behalf
5 of the Attorney General."

6 Mr. Ali's CIPEV statement emphasises there are no clearly defined
7 lines of where police investigative work ends and prosecution begins.
8 EVD-PT-OTP-00338 at 1982.

9 Currently, there are over 300 police prosecutors in Kenya
10 compared to 73 state counsel prosecutors. EVD-PT-OTP-00153, at 0357.

11 Therefore, your Honours, the responsibility to investigate and
12 prosecute the crimes in Nakuru and Naivasha were the responsibilities of
13 the Kenya police and its head at the time of the post-election violence,
14 Mr. Ali. The Prosecution submits that Mr. Ali failed to seriously
15 investigate and prosecute any of the main perpetrators of the attacks in
16 Naivasha and Nakuru and thereby shielded members of the common plan from
17 prosecution.

18 Ali's failure to investigate, together with Mr. Muthaura's
19 promise of impunity to the Mungiki youth demonstrate a concise form of
20 contribution to the common plan. Examples of nonintervention by the
21 Kenya police have been provided by witnesses and other sources.
22 Prosecution Witness 0011, a former Mungiki member, recalls that very few
23 Mungiki members were arrested immediately before and during the
24 post-election violence. In these few instances when Mungiki members were
25 arrested, members of the common plan quickly secured their release.

1 Prosecution Witness 0011 explains, and I quote:

2 "Muthaura were call the police if the person is arrested, like in
3 one occasion where they had arrested two people in Murang'a. He will
4 call the officer commanding police division there or the DC there and he
5 will release those Mungiki members, or he would have called the
6 commissioner of police at that time, who was Major-General Mr. Ali, and
7 he would instruct -- he would instruct them, 'Release that person.'"

8 EVD-PT-OTP-00320 at 1475, at 1477.

9 Another example of non-investigation is given by
10 Human Rights Watch, and Human Rights Watch reviewed Naivasha's court
11 records after the violence had subsided and found that in Naivasha, 156
12 persons were arrested on charges of preparing to commit a felony. All
13 were released on bail. The charge was later downgraded to a
14 misdemeanour. In Nakuru, the police made approximately 30 arrests in the
15 attacks, but all of those suspects were released on bail.

16 EVD-PT-OTP-00002, at 0302 to 0303, and 0312. This is a public document.

17 Prosecution Witness 0002 explains that out of the people the
18 witness knew that got arrested during the height of the violence in
19 Naivasha, none of them were seriously prosecuted or punished. The
20 witness elaborates, and I quote:

21 "At least 19 people were arrested and they were charged with
22 preparation to commit a felony. Those who didn't plead guilty were given
23 a bail of 3.000. Others paid a fine of 3.000 and that was that. The
24 irony is that most of them were arrested doing the actual thing with
25 weapons, burning, but they were just charged with the preparation to

1 commit a felony."

2 EVD-PT-OTP-00239, at 0092 to 0093.

3 The manner which these cases were prosecuted shows a lack of
4 intent to hold these individuals truly responsible. Even more telling is
5 the fact that Mr. Ali did not seriously investigate or prosecute the main
6 perpetrators of the crime even though he had reliable, actionable
7 evidence.

8 Your Honours, my colleague had just passed me a note because I
9 mentioned the number of 3.000. That refers to Kenyan shillings.

10 A clear example of non-investigation in Naivasha occurred on
11 the -- January 31, 2008. The Naivasha District Security Committee held a
12 special meeting, and the minutes of the meeting reveal that the committee
13 recommended the arrest and prosecution of 14 of the local organisers of
14 the violence. EVD-PT-OTP-00093, at 0197.

15 Despite these recommendations, none of these individuals were
16 arrested. On the contrary, the NSIS documented how during the following
17 weeks they continued to fuel and incite violence. EVD-PT-OTP-00013, at
18 0016 and 0036.

19 Your Honours, as we have heard yesterday in the presentation on
20 rape, a large number of cases of sexual violence have been reported in
21 Kenya, and many more have gone unreported. They all relate to the
22 post-election violence in Kenya.

23 According to the CIPEV, rape victims who attempted to report
24 their cases to the police were turned down, and I quote:

25 "Witnesses from Nairobi recounted to this commission how when

1 they attempted to report the incidents of rape to the police, they were
2 told to choose between reporting cases of destruction of property or
3 cases of sexual violence, which in any event, according to the police
4 officers to whom they attempted to make the reports, were over."

5 EVD-PT-OTP-00011, at 1516, 1517.

6 However, as Witness 0007 states, and I quote from the summary:

7 "The witness testified about the attempts to investigate sexual
8 violence by the police forces. The witness qualifies such attempts as
9 not serious. The witness also stated that Major-General Hussein Ali was
10 not co-operative in investigating sexual and gender based violence during
11 the post-election violence."

12 I refer your Honours to EVD-PT-OTP-000617 at 0037.

13 This statement is corroborated by the fact that Mr. Ali, in his
14 presentation on intervention before the CIPEV did not find it necessary
15 or appropriate to include crimes of a sexual nature and could not provide
16 figures or any information on whether these crimes had been investigated
17 or persons have been prosecuted for crimes of a sexual nature.

18 EVD-PT-OTP-00338, at 1999 to 2000.

19 Your Honours, the examples presented show that no serious
20 investigations or prosecutions in relation to those responsible for the
21 post-election violence were conducted. Given the magnitude and impact of
22 the attacks, the sole plausible conclusion therefore is that Mr. Ali
23 intended to shield the main perpetrators from prosecution.

24 Your Honours, Mr. Ali's contribution to the common plan can also
25 be implied from his attempts to cover up the criminal activities of the

1 members of the common plan. This cover-up included later killings of
2 Mungiki leaders who had participated in the implementation of the common
3 plan. As has been widely reported, these killings were orchestrated by
4 the Kenya police under Mr. Ali's leadership.

5 Your Honours, Mr. Ali contributed to the crimes charged by
6 eliminating Mungiki members who could testify about the collaboration
7 between Mr. Muthaura, Mr. Kenyatta, and himself with the Mungiki during
8 the post-election violence.

9 The violent Mungiki sect had been outlawed -- excuse me, had been
10 outlawed in the past, their lead imprisoned and its members targeted
11 through killings. In July 2006, a special police squad, the Kwekwe was
12 set up at a time when Mungiki violence reached its peak. The members of
13 the squad were directly accountable to the commissioner of police.

14 EVD-PT-OTP-00006 at 0919. This is a public document.

15 It was with a view to the elections that in the fall of 2007,
16 Mr. Kenyatta reconciled with -- excuse me, reconciled the government with
17 the Mungiki to ensure their support in the upcoming elections.

18 EVD-PT-OTP-00248 at 0032.

19 After the post-election violence, the Kwekwe squad killed several
20 high-ranking Mungiki members who were in close relationship with members
21 of the common plan. Prosecution Witness 0004, for instance, explained,
22 and I quote:

23 "Before he was killed by the police, Njuguna Gitau said publicly
24 in the media that he would reveal information about the government and
25 Mungiki. He said he was going to reveal the names of the politicians

1 behind the Mungiki activities. He was killed a few days after he said
2 that."

3 EVD-PT-OTP-00302 at 1056.

4 Prosecution Witness 0012 states that after the post-election
5 violence, and I quote:

6 "The government of Kenya had formed a special squad called the
7 Kwekwe, the Kwekwe squad. It's main work was to eliminate the
8 justice-seekers in that country and even to kill the members of the
9 Mungiki who were used in a way or another by the government for one
10 simple reason, to cover up the whole issue."

11 EVD-PT-OTP-00653 at 0131.

12 Extrajudicial killings of high ranking Mungiki members at the
13 hand of the Kwekwe squad have widely been reported in the media. To
14 provide two examples, on 13 April 2008, the wife of a Mungiki leader,
15 Maina Njenga, and her driver were killed. They were carjacked and
16 brutally killed. They were transporting money and were knowledgeable
17 about the negotiations between the government and Maina Njenga regarding
18 his release."

19 EVD-PT-OTP-00586. This is public.

20 On 28 April 2008, two Mungiki top leaders, who were the contacts
21 between Maina Njenga and PNU leadership were killed on their way to meet
22 Maina Njenga in Naivasha prison. EVD-PT-OTP-00585. This is public.

23 These examples shows that the renewed Kwekwe squad operation
24 focused on targeting high level Mungiki leaders who had direct knowledge
25 of the crimes and who could potentially testify against the suspects.

1 In order to protect the members of the common plan, Mr. Ali instructed
2 the elimination of those who could speak the truth.

3 UN Special Rapporteur on extrajudicial summary or arbitrary
4 killings, Philip Alston, in his report on his mission to Kenya from 16 to
5 25 February 2009 therefore recommended the removal of Mr. Ali as
6 commissioner of police. Alston confirmed that the death squads including
7 one called Kwekwe still existed within the police and that they were set
8 up to "eliminate the Mungiki and other high profile suspect criminals
9 upon the order of senior police officials."

10 EVD-PT-OTP-00006, at 0919. This is public.

11 Prosecution Witness 0011, a Mungiki himself, directly links
12 commissioner, Mr. Ali, to the extrajudicial killings by the Kwekwe squad.

13 I refer your Honours to the EVD-PT-OTP-00321, at 1494.

14 And according to Alston, I quote, "There is abundant evidence
15 linking him," he's referring to the commissioner -- the police
16 commissioner, Mr. Ali. I start again:

17 "There's abundant evidence linking him to a central role in
18 division and overseeing the policy of extrajudicially executing large
19 numbers of suspected criminals."

20 EVD-PT-OTP-00006, at 0925. This is public.

21 These killings demonstrate Mr. Ali role in masking the crimes
22 committed during the post-election violence pursuant to a command plan,
23 and it thereby shows his intents to further the criminal purpose of the
24 group.

25 Your Honours, Mr. Ali's contribution was intentional, and Mr. Ali

1 contributed to the crimes alleged with the aim of furthering the criminal
2 activity or criminal purpose of the group.

3 I will now turn to the remaining two elements of the mode of
4 liability of common purpose, namely that Mr. Ali's contribution were
5 intentional and that Mr. Ali contributed to the crimes with the aim of
6 furthering the criminal activity or purpose of the group.

7 These two elements are established by the same evidence. I will
8 therefore address them simultaneously.

9 First, Mr. Ali used his position to create a free zone by
10 ensuring that the Mungiki and pro-PNU youth had unhindered access to
11 Nakuru and Naivasha towns and that they could operate with impunity,
12 specifically targeting perceived ODM supporters.

13 Mr. Ali's action was consciously aimed at encouraging the attacks
14 in question. Mr. Muthaura explained to Mr. Ali precisely why he needed
15 to not intervene. By complying with these respects -- excuse me. By
16 complying with these requests, Mr. Ali ensured the success of the attacks
17 and success of Mr. Kenyatta and Mr. Muthaura's organised policy.

18 Second, Mr. Ali was aware of the attacks. He had the ability to
19 act to decrease the loss of life and property, but he did not take
20 serious action. His failure to prepare forces for the attack and his
21 subordinates' decision to withdraw forces at critical moments and to
22 allow direct perpetrators to bypass roadblocks all demonstrates his
23 conscious intention and his active contribution to the organisational
24 policy.

25 In addition, Mr. Ali chose not to investigate or prosecute those

1 most responsible for the post-election violence. This together with his
2 intentional cover-up of the co-perpetrators' actions provides evidence of
3 Mr. Ali's intention to further the common purpose and his knowledge of
4 its illegality.

5 Your Honours, all of this evidence viewed together as a whole
6 establishes that Mohammed Hussein Ali contributed to the common plan with
7 the specific knowledge and intention of furthering the principal
8 perpetrators' criminal activities and criminal purpose.

9 This concludes my presentation, your Honours. Thank you.

10 PRESIDING JUDGE TRENDAFILOVA: Thank you, Ms. Lurf.

11 Is this all on behalf of the Prosecutor's team?

12 MS. ADEBOYEJO: Yes, Madam President, your Honours. That
13 concludes the presentation of the Prosecution's case.

14 PRESIDING JUDGE TRENDAFILOVA: Thank you very much.

15 Now, following the schedule and as clarified in the decision on
16 the schedule in paragraph 12 and as clarified also in the introductory
17 remarks and mentioned yesterday as well, we shall proceed with the
18 Defence teams, with their presentation.

19 Of course, I would suggest, as Judge Tarfusser was proposing as
20 well, that we take now half an hour break and we start the final third
21 session at 15 minutes past 6.00. Now we adjourn the session, the
22 hearing, and we shall come back in half an hour.

23 COURT USHER: All rise.

24 Recess taken at 5.42 p.m.

25 On resuming at 6.15 p.m.

1 (Open session)

2 COURT USHER: All rise.

3 PRESIDING JUDGE TRENDAFILOVA: Please be seated.

4 We come to the third session of today's part of the hearing, and
5 as we have decided in paragraph 12 of the decision on the schedule that
6 in case a party does not fully use the time allotted to it in the
7 schedule, the Chamber will automatically move to the next presentation
8 even if it is scheduled for the following day, and this was the case with
9 the Prosecutor. Yesterday, in the introductory remarks I also mentioned
10 this paragraph, and yesterday I asked Mr. Khan on behalf of Mr. Muthaura
11 whether they will be ready to proceed. However, I received a message by
12 the Court Officer that you would like to raise an issue with the -- in
13 this regard, Mr. Khan.

14 MR. KHAN: Madam President, your Honours, I'm most grateful, I'm
15 grateful as always to the Court Officer for relaying the message. Your
16 Honours, we are, of course, aware of the decision and are willing and
17 able to comply with it in -- in part, in part.

18 The decision, of course, in the respectful submission of the
19 Defence, was borne out of your responsibilities to efficiently manage the
20 proceedings in the best way possible, but, your Honours were -- there was
21 enough foresight in the decision not to set the schedule in stone.

22 Your Honour, in the decision, your Honour noted that the final
23 schedule for the hearing is subject to change and developments if the
24 proceedings necessitate it.

25 PRESIDING JUDGE TRENDAFILOVA: As we already did, Mr. Khan.

1 MR. KHAN: Indeed.

2 PRESIDING JUDGE TRENDAFILOVA: So what is your request, or point
3 to make.

4 MR. KHAN: Your Honour, if you'll bear with me I'm attempting to
5 come to it. For the reasons I'm given -- I'm going to give, it's my
6 submission that the Defence shows good cause as to why the schedule
7 should be changed so as to allow us to address your Honours for 30 or 40
8 minutes today and then proceedings should be adjourned until tomorrow.

9 Now, your Honours, I don't make that application lightly. It's
10 not made on a whim, and I'd ask your Honours to bear in mind the record
11 of these proceedings. We are not a Defence team that lightly seek to
12 delay matters, that lightly seek adjourn many. Indeed, we withdrew our
13 application to adjourn these proceedings despite really the unprecedented
14 workload that we've been straining under, conducting six or seven
15 interviews in the last 24 hours to comply in good faith to the very best
16 of our abilities and limitations with your Honours' decision regarding
17 the submission of evidence.

18 Your Honour, the Prosecution --

19 PRESIDING JUDGE TRENDAFILOVA: If -- if -- if I may just make a
20 point on behalf of the Chamber.

21 MR. KHAN: Of course.

22 PRESIDING JUDGE TRENDAFILOVA: We understand that you're
23 suggesting, Mr. Khan, because you know that you have three sessions of
24 one hour and a half, and you suggest that today you just use partially
25 the time for the first session.

1 MR. KHAN: Madam President --

2 PRESIDING JUDGE TRENDABILOVA: Half an hour or 40 minutes so that
3 you proceed tomorrow with the rest of the time.

4 MR. KHAN: Indeed, Madam President, and for this reason: We have
5 under the Code of Conduct a professional responsibility to accurately
6 present our submissions to your Honours. At the outset, I was very
7 critical of the Prosecution, as you'll note, for what I say have been a
8 rather lackadaisical attitude to their responsibilities. Now,
9 your Honours, today, for example, let me give you one example. The team
10 has not been idle. You'll notice that yesterday and also today two
11 senior members of my team are not here, they are beavering away working
12 trying to address the difficulties that we have we faced. Now,
13 your Honours, what are those difficulties --

14 PRESIDING JUDGE TRENDABILOVA: So you need some more time to
15 properly prepare your presentation.

16 MR. KHAN: Indeed, and I can give reasons and particulars as to
17 why new matters have arisen that have taken us by surprise but that's the
18 basis of the application.

19 PRESIDING JUDGE TRENDABILOVA: Mr. Khan, let me confer with my
20 colleagues although we have discussed the matter.

21 (The Trial Chamber confers).

22 PRESIDING JUDGE TRENDABILOVA: Well, Mr. Khan, of course the
23 Chamber, as I have pointed on several occasions, is flexible and you
24 would like that the parties, the Prosecutor's team, the three Defence
25 teams, are at ease with the way they could prepare best for their

1 presentations, and the Chamber is open for two options. Either you would
2 commence and proceed up until 7.00, or you will start tomorrow and the
3 whole day tomorrow, the three sessions of tomorrow's day are just for the
4 Defence team for Mr. Muthaura. So this time the Chamber is very flexible
5 and ready to accommodate any proposal.

6 My personal opinion is that it will be much better that you start
7 tomorrow and use the three sessions just for the Defence team of
8 Mr. Muthaura.

9 (Defence counsel confer)

10 MR. KHAN: Madam President, I'm most grateful to your Honours.
11 I'm in your hands. I can continue until 7.00 or I can start tomorrow
12 morning. Your Honour, I'm completely in the hands of the Bench, and
13 perhaps because of the consideration, the latter option is the best.

14 PRESIDING JUDGE TRENDAFILOVA: Well, thank you, Mr. Khan. I just
15 stated my personal opinion, but I'm a servant of the Chamber, so I have
16 to ask my colleagues.

17 (The Trial Chamber confers)

18 PRESIDING JUDGE TRENDAFILOVA: Well, Judge Kaul prefers that you
19 start and proceed until 7.00.

20 MR. KHAN: I'm most grateful, your Honours.

21 PRESIDING JUDGE TRENDAFILOVA: Thank you. But let us be strict
22 about 7.00. Of course, before Mr. Khan starts his presentation, I would
23 like very much to ask the Prosecutor's team and to ask the two Defence
24 teams not to intervene within the presentation, just if there are really
25 compelling reasons that need the urgent resolution of the Chamber, only

1 then to interrupt your opponent or co-Defence parties.

2 Mr. Khan, the floor is over to you.

3 MR. KHAN: Madam President, your Honours, I'm most grateful.

4 There is perhaps a central question that helps shed light on why
5 this case is in this court here today, and, your Honour, it's the genesis
6 of this case was not an exercise unilaterally of jurisdiction by the
7 Prosecutor or even the ICC itself despite Kenya being a State Party. In
8 fact, the genesis was the recommendation of His Honour Judge Waki and the
9 Waki Commission. It was that learned Judge that set proceedings in
10 motion that brought this case and case number I to this court.

11 Your Honour, how was the Waki Commission formed? It was formed
12 on the basis of a recommendation of the National Security Advisory
13 Committee of which Ambassador Muthaura is -- was the chairman.

14 Your Honour, I refer to EVD-PT-D12-00016, page 9, which are the
15 NSAC minutes, and that makes it very clear of the 14th of January, 2008.
16 The date is critical. 14th of January, 2008. Before the allegations of
17 crimes in Naivasha and Nakuru, what did NSAC recommend? It recommended a
18 judicial, and I quote:

19 "A Judicial Commission ... Inquiry should be constituted to
20 inquire into the matter and advise the government on the course of action
21 to take to forestall a similar occurrence. The Attorney General was
22 requested to facilitate formation of the Commission."

23 Action for the Attorney General.

24 Your Honour, that wasn't a -- simply a recommendation in the
25 usual course of events. It was followed up. The recommendation of NSAC

1 was relayed to the appropriate department, in this case the office of the
2 Attorney General, and Ambassador Muthaura, himself, suspect in this case
3 that wrote to the then Attorney General Amos Wako by way of letter dated
4 the 15th of January, 2008, and that's EVD-PT-D12-00157. And what does
5 Ambassador Muthaura say? He says, referring to the previous day's
6 meeting at NSAC, the meeting noted that as part of the healing process
7 and in order to bring to book those involved in planning and executing
8 the post-election violence, there was need for formation of a commission
9 of inquiry. The commission of inquiry will also unearth exactly what
10 happened as well as recommend appropriate legal action against the
11 perpetrators.

12 Your Honours, tomorrow and in our closing, we will touch upon,
13 perhaps on a couple of occasions, what the Prosecution would ask of you
14 in order to have this case confirmed. It is the temporary suspension of
15 disbelief. They're asking you to -- to look away from the evidence on
16 the basis of hearsay, conjecture, inferences, and completely
17 unsatisfactory, and what we will say is one of the grounds for the
18 application start tomorrow, absolutely changing accounts even today and
19 yesterday in their presentations. New allegations for the first time
20 being made today and yesterday, and I'll deal with those hopefully
21 tomorrow.

22 Your Honour, this date is important, because the Prosecution
23 would have you believe that after this or at the time this recommendation
24 was being made, Ambassador Muthaura was part of a criminal plan to commit
25 crimes himself, and yet he, himself, had written to the AG to start a

1 commission of inquiry to bring perpetrators to book. What is more
2 probable, that he would put a noose around his own neck, put himself in
3 jeopardy of criminal sanctions, or, in fact, that he is a very devoted,
4 very dignified member of the Kenyan civil service who is trying to do his
5 job throughout?

6 Your Honours, we say the evidence compels to but one conclusion,
7 and it is the former. It is that Ambassador Muthaura set up the
8 commission of inquiry because he came to his tasks with clean hands,
9 without an ulterior motive and definitely without a scintilla of bad
10 intent, never mind criminal intent, towards the people of his beloved
11 country, the Republic of Kenya.

12 Your Honour, we've heard a lot about the victims of this case and
13 it's very true. Kenya suffered heartbreak and anguish in the
14 post-election violence. Ambassador Muthaura himself said in moving
15 terms, your Honours may think, that there had been a huge effort to pull
16 Kenya out from the -- the slavery of poverty and backwardness and
17 economically move itself forward, but the Prosecution are saying despite
18 that singular achievement 7.1 per cent growth, things moving forward,
19 people looking forward finally not to rhetoric but to better days, that
20 Ambassador Muthaura and others said, Okay, let the country go to hell.
21 Let the country burn. Let it go on fire. For what? For what?

22 Your Honour, it's not likely, it's not likely, in our submission,
23 that Ambassador Muthaura would have started the Waki Commission and yet
24 be criminally responsible. It's useful to note that the Prosecution's
25 own witness, I think it's Witness 0008, himself says that there was no

1 attempt to interfere with the Waki Commission by the government. He had
2 free rein. Sorry, that wasn't Waki, that was the police task force. But
3 there's been no evidence of any attempt by Ambassador Muthaura to use
4 this executive *de jure, de facto* authority over the security apparatus of
5 Kenya, head of NSIS, the Prosecutor have you believe, head of the police,
6 head of the civil service, head of everybody. The reason, there's no
7 evidence. The reason he appears here on a summons is, your Honour, he
8 has not tampered with the administration of justice not only because he's
9 not the kind of man to do that but because he is absolutely not
10 responsible for any wrongdoing at all.

11 Your Honours, another essential plank of this Prosecution's case
12 is what can only be described as an unholy alliance, a deal with the
13 devil, between the government and Kenya and a criminal, a lamentable, an
14 invidious criminal group called the Mungiki. Now, your Honours, I can
15 and your Honours perhaps can envisage circumstances for selfishness,
16 material benefit, where criminal gangs, whether it's the mafia in Italy
17 or whether it's -- whatever criminal gang, they can view their interests
18 lying in a particular direction and seek to give support to a -- a
19 particular political party without that political party being part of a
20 criminal common plan. But, your Honour, in my respectful submission,
21 what is -- what one cannot imagine is a common plan of the type alleged
22 by the Prosecution without political support. It's a very basic point.
23 How can there be a common plan without political support, without the
24 Mungiki supporting the PNU? Well, your Honours, let's see who the
25 Mungiki actually supported. And, your Honours, I'd ask that we play

1 video at EVD-PT-D12-00190.

2 (Video-clip played)

3 COURT OFFICER: Your Honours, I just want to quickly remind the
4 parties and participants that to be able to view this video you have to
5 press the "PC 1" button" --

6 (Video-clip played)

7 "Now let's revisit out earlier story. Just a day after he was
8 released from prison, leader of the outlawed Mungiki sect, Maina Njenga,
9 spoke about his life behind the bars and/or in the sect saying that his
10 tribulations began in 2005 during the referendum. Njenga also revealed
11 how the Mungiki voted in 2007 and made serious claims about the extent of
12 Mungiki's membership. Our reporter (* indiscernible) Kahumi (* phon)
13 spoke to Maina Njenga and got this information.

14 "Let's talk about the Prime Minister Raila Odinga. What is your
15 relationship with the prime minister and do you see yourself holding
16 talks with him?

17 "There is a chance of talking (* indiscernible) (* speaking
18 Kiswahili). So myself and the rest of the Central Kenya youth, do we
19 support, no, the referendum. The same case (* speaking Kiswahili)."

20 MR. KHAN: Now, your Honour, the transcript for the portion of
21 that interview in Kiswahili is at EVD-PT-D12-00227. And, Madam President
22 and your Honours, at page 0011, the interviewer asks that:

23 "Let's talk about Prime Minister Raila Odinga, what's your
24 relationship with the prime minister, and do you see yourself holding
25 talks with him?"

1 Now, what is the answer of the leader of this criminal gang,
2 Mungiki? What is the answer of Maina Njenga? It's this:
3 "If there is the chance of talking, why fight? My problem
4 started during the referendum period, and during the referendum period, I
5 said I will do things for Orange. So myself and the rest of the Central
6 Kenya youth, we supported no during the referendum, the same case we did,
7 just as the same way we did, just as the same way we did during the
8 general elections. Personally, I wanted Raila Odinga to be president."

9 Your Honour, this is pivotal, central, and unavoidable evidence
10 that presents huge difficulties to the Prosecution's flawed theory of
11 this case.

12 Your Honours, it's made even more remarkable when one compares it
13 to Prosecution evidence that supports this assertion that they have
14 conveniently looked away from, an inconvenient truth that has to be
15 addressed, not avoided, and I refer to EVD-PT-OTP-00013, and it's the
16 situation report of NSIS and the Prosecution have relied upon that source
17 many, many times today and yesterday. At paragraph 256, what does NSIS
18 say? It says this: "Some Mungiki members --"

19 PRESIDING JUDGE TRENDABILOVA: Mr. Khan, I'm sorry. The level of
20 confidentiality, are you going to refer when it is only confidential?

21 MR. KHAN: I will.

22 PRESIDING JUDGE TRENDABILOVA: Okay.

23 MR. KHAN: "Some Mungiki members allied to the sect national
24 chairman Maina Njenga are said to be in support of ODM's call for mass
25 action claiming that ODM's leaders had promised to recognise the sect and

1 give them jobs, had the party formed the government. Some are planning
2 to discredit the government by instigating chaos in Nairobi and Nakuru
3 while others would raid Kamiti and Naivasha prisons to rescue their
4 colleagues held there, among them Njenga. Meanwhile sect members allied
5 to form a national co-ordinator, Ndura Waruinge, led by a sect leader
6 Gikonyo Mutitu, from Mathare area in Nairobi are planning to attack
7 demonstrators using crude weapons."

8 Your Honours, this is a NSIS report that the Prosecution
9 themselves refer to that supports what Maina Njenga himself has said that
10 Mungiki was supporting the ODM, but, your Honour, it's not --

11 PRESIDING JUDGE TRENDAFILOVA: Mr. Khan, just excuse me for
12 interrupting you. There is a question from the Chamber. Can you tell us
13 when this interview was taken from Maina Njenga?

14 MR. KHAN: Your Honour, we have the full transcript that's been
15 disclosed.

16 PRESIDING JUDGE TRENDAFILOVA: Just the date.

17 MR. KHAN: Your Honour, it's the 29th of October, 2009.
18 29th of October, 2009, so before the investigation in this matter.

19 PRESIDING JUDGE TRENDAFILOVA: Thank you.

20 MR. KHAN: Your Honour, Prosecution Witness 0012, Prosecution
21 Witness 0012, what does this witness say? I mean, the Prosecution can't
22 cherry pick. What does their witness say? EVD-PT-OTP-00652, at 0115.
23 Your Honour, let me start in fact with 0060-0191, and Witness 0012 says
24 this:

25 "We had our own way of trying to move people to vote for ODM, not

1 for PNU, for ODM. Even in Naivasha we were telling people we want Matutu
2 (* phon) Raila. We did not say Matutu and Kibaki. We wanted Matutu for
3 MP and presidential Raila Odinga. That's what we were telling people."

4 That's at line 0911.

5 Later on he says at 0458:

6 "Mostly members of the Mungiki supported ODM."

7 At 0199:

8 "I voted for Matutu and Raila Odinga.

9 Your Honour, if you put this together with the witness's earlier
10 statement at 0115 where he says and I quote:

11 "I was so bitter, I knew they had not won the elections."

12 Your Honours, you may see some motivations, but there's a much
13 more important issue here. It goes back to my primary argument. How on
14 earth can the Prosecution, what I say is a fundamentally flawed theory,
15 withstand the very scrutiny when there's no political support during the
16 elections to the PNU --

17 THE INTERPRETER: Message from the English booth,

18 Madam President. Could counsel please be requested to slow down.

19 PRESIDING JUDGE TRENDABILOVA: Mr. Khan, there is a request that
20 you slow down.

21 MR. KHAN: I'm so sorry.

22 Your Honour, our witness, Defence Witness D1237,
23 EVD-PT-D12-00054, at paragraph 53, and this is an important witness,
24 because it's a witness that Prosecution witness purportedly -- the
25 Prosecution witnesses refer to and is said to be an important player in

1 this whole what I say is nonsense. But what this witness says, and I
2 quote is:

3 "During the 2007/2008 election period, the Mungiki was totally on
4 the side of the ODM. This was because of the government operations to
5 eradicate them."

6 In fact, he goes on and says extrajudicial killings.

7 Your Honours, in light of this evidence, one may think that can
8 be the end of the story, but the actual failure of the Prosecution to
9 show political support, and in fact of the clear evidence, I don't say
10 out of the horse's mouth, but that's the colloquial expression in
11 English, from the leader of the Mungiki, the leader of the centralised
12 organised criminal gang that the Prosecution on evidence say that when he
13 says jump the answer is how high, and if you don't your head is cut off,
14 I mean that's the gist of the Prosecution evidence, that person is saying
15 support the ODM.

16 Your Honour, I wish to play video EVD-PT-D12-00189 with your
17 assistance.

18 (Video-clip played)

19 "... hiding under the community veil to start politicising the
20 ICC and instead allow the Court to undertake its prosecution process.

21 "People of Central Province should not say that Ocampo is
22 pointing at them. No. Ocampo is looking for criminals. Even me,
23 myself, I'm ready to go to the international court of law if I have any
24 mistake."

25 MR. KHAN: Madam President, your Honours, with your leave,

1 tomorrow morning I will give you the date of that video of Maina Njenga.

2 What is clear is that we don't know if he was interviewed or not.

3 We don't have any evidence from him. We don't have any evidence from the

4 Prosecution relating to the alleged interview that the commentator refers

5 to, but what strains credulity is how, given this theory that's put

6 together of rampaging violence at the hands of the Mungiki that the

7 Prosecution put forward, how is it possible given the mandate that that

8 individual is not before you?

9 Now, your Honours, why is this relevant? It is relevant because

10 it's a small aspect of the failure to investigate and the incoherence,

11 the general incoherence, of the Prosecution's case that we will touch

12 upon in more detail tomorrow.

13 Your Honour, the Prosecution, and we mentioned it previously, we

14 were in some difficulties because we thought there was -- the Defence

15 position was there was a lack of specificity in the charges that we

16 faced, and perhaps tomorrow you'll see some of the difficulties we

17 encountered. But originally we thought that the 26th of November was

18 going to occupy a central role regarding the allegations that the

19 Prosecution put forward, and now it's -- it's clear. What the

20 Prosecution say is the 26th of November was the occasion when there was

21 some kind of rapprochement, some kind of building of bridges between the

22 Mungiki and the government in order to get political support and so that

23 date is really important.

24 Your Honour, Witness 0004, Prosecution -- Prosecution

25 Witness 0004 is a critical witness, and he's a witness that we can only

1 describe as incapable of telling the truth, incapable of telling the
2 truth, and we will discuss that in more detail.

3 It's said -- Witness 0004 says that on the 26th of November there
4 is a meeting and attempt outside State House and President Kibaki is in
5 attendance, Uhuru Kenyatta, George Thuo, Ipu (* phon),
6 Ambassador Muthaura, Isaiah Kibera, Stanley Murage and others. And,
7 your Honours, a lot of detail is given and the Prosecution say that at
8 EVD-PT-OTP-00248, at 0031 to 0034, that in that meeting, the president
9 tells or invites Uhuru Kenyatta to speak. That's at 162.

10 He then invites, it's said, Ambassador Muthaura or tells
11 Ambassador Muthaura and tells him in Kikuyu something to the effect,
12 You've heard what the youth want. Now it's upon you. And, your Honour,
13 then Prosecution Witness 0011 says, EVD-PT-OTP-00307, at page 1283,
14 lines 262 to 267, this witness is a different witness says, We personally
15 sat with the president. We talked about A, B, C, D. So it was agreed,
16 Okay, we are set. There 's going to be no problem. Mungiki can support
17 the PNU.

18 Well, your Honour, what has the Prosecutor said very recently
19 about the evidence of Witness 0004 and Witness 0011 which, in fact, has
20 been in his possession, I think, since September 2010? Your Honours, I
21 play, with your leave, video of the Prosecutor's own voice.
22 EVD-PT-D12-00193.

23 (Video-clip played)

24 "At the same time, you normally go for the very top. That's
25 what you do. You did that in Sudan. You went for the very top.

1 "Yes, according with the evidence.

2 "You didn't do the same in Kenya.

3 "I did the same in Kenya. I'm not doing political
4 responsibilities. I just followed the evidence. I have no evidence of
5 Mr. President Kibaki involved in these issues. I have zero evidence. So
6 I will prosecute -- Mr. Kibaki has nothing -- I have zero evidence to say
7 he was discussing this issue, was involve in this issue. Nothing."

8 MR. KHAN: Mr. -- I have no evidence against Mr. Kibaki, no
9 evidence, nothing, zero evidence. Your Honour, we agree. Zero evidence
10 against Kibaki. These witnesses that say that Kibaki, president -- His
11 Excellency President Kibaki is present during a criminal agreement, a
12 criminal plan, that Ambassador Muthaura is charged for speak nonsense.
13 It is zero evidence. And in the same way that there is zero evidence
14 against His Excellency Kibaki, the president of the Republic of Kenya,
15 the Defence say there is zero evidence against Ambassador Muthaura. The
16 statements put forward by the Prosecution that make this assertion cannot
17 be passed in the sense the Prosecution would have you believe. They
18 cannot say that there is no evidence and the evidence is zero when it's
19 convenient. And, your Honour, as you will recall, the Prosecutor himself
20 has said in this court, in this courtroom, in the Lubanga closing speech,
21 and I quote, in fact, he was addressing His Honour the President,
22 Judge Adrian Fulford, he said:

23 "Yes, because I'm the Prosecutor, I think the Chamber should take
24 my word as the position of the office. Thank you."

25 That was the word of Prosecutor. His view is definitive in his

1 mind. ICC-01/04-01/06 at T 356 at page 55 to 56.

2 Your Honour, we couldn't have put it better than the Prosecutor
3 except to be a little bit more complete. The evidence is zero against
4 President Kibaki, it's zero against Ambassador Muthaura, and tomorrow I
5 don't want to stray over my time -- well, your Honour, perhaps I can
6 continue.

7 Let me read what President Kibaki has said himself about these
8 allegations, and, your Honour, let me quote from the Defence witness
9 statement at paragraph 14 and His Excellency, the president, says this:

10 "With respect to the allegations of the Prosecutor that there
11 were meetings held at the State House with members of the outlawed
12 Mungiki group, I state that those allegations, to the best of my
13 knowledge, are not true. No group claiming to be Mungiki would have been
14 allowed into State House. Those who have provided these facts to the
15 Prosecutor have made evil and mischievous allegations. On the 25th of
16 November, 2007, I was supposed to address a youth rally at Uhuru Park
17 which had been organised by some youth leaders of my Kibaki tent campaign
18 group. I had been delayed because I was presenting a paper out of time
19 in Othaya and was travelling by road, and on my way back I stopped in
20 several places to address the people as part of my campaign and that
21 delayed me. I arrived at Uhuru Park and briefly addressed the crowd."

22 Your Honour, you have the video of this crowd in evidence.

23 "It was decided that I would meet the youth leaders again the
24 next day since the rally did not go ahead as planned by reason of my
25 delay."

1 Paragraph 16, His Excellency says this:

2 "The meeting of the 26th of November 2007 at State House was a
3 meeting of youth leaders who were supporting my campaign. I discussed
4 the government youth agenda with the young leaders of that meeting.
5 Muthaura was at that meeting since it involved a government policy issue
6 on the youth. Muthaura does not participate in my political campaigns.
7 He is present when matters of government would be discussed. Groups who
8 support me would not allow Mungiki to infiltrate them, as it would
9 seriously prejudice my campaign and me."

10 And then he says this at paragraph 27:

11 "I am asked whether I attended a meeting in a tent in the
12 State House along with Muthaura and Uhuru Kenyatta together with one or
13 more Mungiki members in 2007 or if (* indiscernible) ever.
14 Notwithstanding the personal indignation I feel to this crass suggestion,
15 I will nonetheless answer this question out of my personal respect for
16 the Court and the Judges of the International Criminal Court --

17 THE INTERPRETER: Message from the English booth. Apologies for
18 interrupting.

19 PRESIDING JUDGE TRENDAFILOVA: Mr. Khan, again a request to slow
20 down.

21 MR. KHAN: I will.

22 "I will nonetheless answer this question out of my personal
23 respect for the Court and the Judges of the International Criminal Court.
24 I unconditionally and without any reservation attest that no such meeting
25 ever took place. Such a meeting would be immiscible to me and contrary

1 to everything I stand for. From the commencement of my term," His
2 Excellency says, "I have been implacably opposed to the Mungiki. Indeed
3 the Mungiki organisation was proscribed by my government and it remains
4 banned to date. You must remember that this organisation was in
5 existence long before I entered office as president. You will see that
6 all actions to quell the Mungiki menace was and is, during my term, my
7 record, *vis-à-vis* the Mungiki organisation speaks for itself."

8 Your Honours, it seems the Prosecutor is in agreement with
9 President Kibaki in one regard, and, your Honours, we will say tomorrow
10 and in closing commissions, we'll invite you to agree with the Defence,
11 invite you to agree with the Defence that the charges raised against
12 Ambassador Muthaura are really perhaps unprecedented in their flimsiness
13 before this Court, and they should be really very summarily rejected.
14 Your Honours, with your leave, tomorrow hopefully we'll go into more
15 detail and present a complete picture we where can forensically, I hope,
16 forensically dissect some of these allegations so the truth hopefully
17 will emerge.

18 Your Honour, I'm most grateful. Your Honour, I think I have five
19 minutes so --

20 PRESIDING JUDGE TRENDAFILOVA: You have -- you have five minutes,
21 yes, you do.

22 MR. KHAN: Yes, I'm sorry. I think my watch is five minutes fast
23 so I'm not late. So your Honours I would seek to play the video of --
24 your Honour, just one moment, and there's one video so I'm right at the
25 line. EVD-D12-00018. If that could be played, please.

1 (Video-clip played)

2 "And how are you?

3 "(* indiscernible)

4 "Good. Thank you, your Excellency (* indiscernible) youth
5 leaders and (* indiscernible) issues that (* indiscernible) opportunity
6 to raise these same issues (* indiscernible).

7 "I want to explain that (* indiscernible) delay has not been at
8 all the whole time and (* indiscernible.) I did not expect it myself and
9 actually (* indiscernible) normally be able to arrange (* indiscernible).
10 Then (* indiscernible) there (* indiscernible).

11 "(* indiscernible)

12 "(* indiscernible)"

13 MR. KHAN: Madam President, this is the meeting at State House
14 that the Prosecution say -- or this is a -- this is an event at
15 State House on the 27th -- 26th of November, 2007. It's not a Mungiki
16 meeting. It is exactly what the president of the Republic of Kenya says
17 it was, a meeting of youth. There's no fabrication here. Your Honours,
18 look at EVD-PT-D12-00235 in due course. This is a press release from the
19 government of Kenya dated November the 26th, 2007, showing the photograph
20 and saying government to develop a martial plan for youth employment.
21 This has been available from the get-go, as my friend Mr. Kehoe said
22 yesterday. It's been available, really, from the beginning of this
23 investigation. The Prosecution have looked away and have sought to
24 convert this meeting into something completely different and,
25 your Honours, tomorrow in more detail we will say why this is a complete

1 fabrication, almost a wilful looking away from the truth that was staring
2 the Prosecution fully and squarely in the face.

3 Your Honours, that's, I think, 7.00, and I'm most grateful for
4 your indulgence.

5 PRESIDING JUDGE TRENDAFILOVA: Thank you very much, Mr. Khan, for
6 being so strict about the timing.

7 I thank very much the Prosecutor's team. Ms. Adeboyejo, you
8 would make a point?

9 MS. ADEBOYEJO: Just a quick question, Madam President I want to
10 put my learned friend for purposes of planning for our side. We want to
11 know how far he's planning to go tomorrow. In other words, is he
12 planning to bring his witness tomorrow, so that we can make the necessary
13 arrangements.

14 PRESIDING JUDGE TRENDAFILOVA: First of all, Ms. Adeboyejo, if I
15 can just make a comment, there is a schedule, but as far as the Defence
16 team of Mr. Muthaura has taken only half an hour, obviously tomorrow we
17 shan't be able to proceed with the witness because there are three
18 sessions of one hour and a half. So we shall obviously finish one hour
19 and a half earlier, although I have to hear the opinion of the lead
20 counsel of Mr. Muthaura's team. But finally it is -- it is the -- the
21 schedule is such and the decision of the Chamber.

22 Mr. Khan.

23 MR. KHAN: Madam President, I'm -- whatever -- on this issue
24 I'm -- we're quite flexible. The witness is here. It may be convenient
25 to -- to give some certainty to my friends on the other side and say the

1 witness can come on -- on Monday and focus tomorrow on the presentation
2 of the -- of the case and that way they can allocate their work in the
3 most efficient manner. That is my respectful suggestion.

4 PRESIDING JUDGE TRENDAFILOVA: Thank you. We have received the
5 two familiarisation reports regarding the two witnesses of the Defence
6 team of Mr. Muthaura, but as far as our calculations are such that if the
7 witness is brought tomorrow, he is to be questioned only for half an
8 hour, it doesn't appear very pertinent that we commence with this
9 questioning tomorrow, so the suggestion on behalf the Chamber would be --
10 just a moment.

11 (The Trial Chamber confers)

12 PRESIDING JUDGE TRENDAFILOVA: Yes, that we start on Monday with
13 the first witness of Defence team of Mr. Muthaura. So this is to the
14 best of information that we can provide to you.

15 MS. ADEBOYEJO: Thank you, Madam President.

16 PRESIDING JUDGE TRENDAFILOVA: So that is all on behalf of the
17 Chamber. Of course, with our thankfulness to everyone, the interpreters
18 in particular, the stenographers, the court officers, everyone, I'm sorry
19 if I am omitting someone, it is not because of lack of respect for the
20 contribution of everyone but just a simple admission at the end of the
21 day. Enjoy a good evening. So tomorrow at 9.30 sharp we shall start
22 with the first session. Enjoy good evening.

23 COURT USHER: All rise.

24 The hearing ends at 7.03 p.m.

25