

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 Wednesday, 28 September 2011
10 The hearing starts at 2.35 p.m.
11 (Open session)
12 COURT USHER: All rise. The International Criminal Court is now
13 in session.
14 PRESIDING JUDGE TRENDAFILOVA: Please be seated.
15 Good afternoon everyone who is today in the courtroom. I would
16 ask the Court Officer to please call the case.
17 COURT OFFICER: Good afternoon, Madam President, your Honours.
18 This is the Situation in the Republic of Kenya, in the case of the
19 Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and
20 Mohammed Hussein Ali, case reference ICC-01/09-02/11. Thank you,
21 Your Honours.
22 PRESIDING JUDGE TRENDAFILOVA: Thank you, Court Officer.
23 Now I would ask again the parties and Mr. Anyah whether there are
24 some new faces with you in the courtroom.
25 MS. ADEBOYEJO: Yes, Madam President, your Honours, we have one

1 of our legal reviewers who is new. Name is Tamar Japaridze.

2 PRESIDING JUDGE TRENDAFILOVA: Thank you, Ms. Adeboyejo.

3 Mr. Khan?

4 MR. KHAN: Madam President, your Honours, good afternoon. I'm
5 please to announce the return to court of Mr. Kennedy Ogetto.

6 PRESIDING JUDGE TRENDAFILOVA: Thank you very much. Is Mr. Kay
7 here? I don't see him. Oh, you're hidden.

8 MS. HIGGINS: There are no if you faces today.

9 PRESIDING JUDGE TRENDAFILOVA: Thank you, Ms. Higgins.

10 Now, Mr. Monari.

11 MR. MONARI: Madam President, there are no new faces on your
12 team.

13 PRESIDING JUDGE TRENDAFILOVA: Mr. Anyah.

14 MR. ANYAH: Good afternoon, Madam President. Good afternoon,
15 your Honours. No new faces for us.

16 PRESIDING JUDGE TRENDAFILOVA: No new faces. On behalf of the
17 Chamber, we have only with us Ms. Julianna Koppany, who is a legal
18 assistant with the Chamber.

19 Now I would ask the Court Officer to please bring in Mr. Mwangi
20 to the court, the witness, who I was told was supposed to go back today
21 to Kenya today. Unfortunately, we couldn't finish yesterday as provided
22 in the schedule, so we had to keep him for which he will receive the
23 apologies of the Chamber.

24 And the team of Mr. Muthaura, Mr. Khan, you have 20 minutes. Of
25 course, you're not obliged to exhaust them all.

Witness: Witness KEN-D12-PPPP-0001 (Resumed) (Open Session)
Further Questioned by Ms. Alagendra

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1 (The witness takes the stand)

2 WITNESS: WITNESS KEN-D12-PPPP-0001 (Resumed)

3 PRESIDING JUDGE TRENDAFILOVA: Good afternoon, Mr. Mwangi.

4 Please be seated. You're still under oath. This is my obligation to
5 inform you, although you have a law degree, so you're supposed know as
6 well. Now, you will have the last 20 minutes, and I would like to
7 express the regret of the Chamber that you couldn't go back to Kenya as
8 planned, but sometimes judicial proceedings do not develop as provided in
9 the schedule for the hearings, so you had to postpone your trip back for
10 tomorrow probably.

11 So who is going -- it's going to be you?

12 MS. ALAGENDRA: It will be me, your Honour.

13 PRESIDING JUDGE TRENDAFILOVA: Ms. Alagendra, please go ahead.

14 MS. ALAGENDRA: Good afternoon, your Honours.

15 Further Questioned by Ms. Alagendra:

16 Q. Good afternoon, Mr. Mwangi.

17 A. Good afternoon.

18 Q. Sir, you were asked some questions yesterday by the
19 Legal Representative for the victims, Mr. Anyah, about an opinion piece
20 that you wrote about the International Criminal Court, and in your
21 response you informed the Chamber that you were involved in the
22 negotiations on behalf of the Kenyan government *vis-à-vis* the
23 Rome Statute process. Sir, did these negotiations culminate in anything
24 as regards the position of Kenya on the ICC?

25 A. Yes, they did.

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1 Q. Could you please explain to the Court what that position was,
2 please.

3 A. Your Honours, as you're all aware these negotiations take -- took
4 quite a while, beginning in New York, and all the way up to the
5 diplomatic conference in Rome. Throughout the negotiations, the position
6 of the Kenya government generally supported throughout the negotiation
7 the creation of the International Criminal Court, and at the diplomatic
8 conference Kenya was one of those countries that voted to adopt the
9 Statute.

10 Q. And, sir, you informed the Court that you wrote this opinion
11 piece prior to the Prosecutor's visit to Kenya. Do you remember the
12 month and the year when you wrote this?

13 A. I believe I wrote the article sometime either in early November
14 or late October of 2009.

15 Q. And, sir, at that time was Ambassador Muthaura named as a suspect
16 in this case?

17 A. Not at all, your Honour.

18 Q. And at that time, did you have any idea that he would be named as
19 a suspect in this case?

20 A. Absolutely not. I had no idea.

21 Q. And, sir, you were referred to a newspaper article by the learned
22 Prosecutor at EVD-PT-OTP-00203.

23 MS. ALAGENDRA: And with the permission of your Honours, if I
24 could request that this be displayed on the screen for the witness,
25 please.

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1 PRESIDING JUDGE TRENDAFILOVA: Please, Court Officer.

2 MS. ALAGENDRA: Thank you.

3 Q. Sir, could you kindly give the Court the date of this document.

4 A. Your Honour, this article, that is the "Standard" newspaper
5 article, this titled "Kenya Storm Over Muthaura's PM's Powers," is that
6 the one?

7 Q. Yes, sir.

8 A. Yes, your Honours. The article is dated 22nd of August 2004.

9 Q. And, sir, the learned Prosecutor referred you to a paragraph,
10 paragraph 6, I believe it was, which refers to a directive by
11 Ambassador Muthaura suspending the post master general which was
12 overturned within hours after the minister in charge decided it would be
13 overturned.

14 A. Yes. I see the paragraph, your Honour.

15 Q. Yes. Now, sir, the "Standard" newspaper which has published this
16 article, to your knowledge is this a neutral newspaper or does it have
17 any political affiliation or is it partisan to any one or more political
18 groups or parties, to your knowledge?

19 A. Your Honour, I'm not entirely sure whether from the point of view
20 of editorial policy the "Standard" would be considered a paper that leans
21 one side or the other, I wouldn't, but for the record, I'm aware that
22 those who contribute, those who -- editorial staff, do from time to time
23 express preferences and sometimes do write materials that support one
24 party or the other.

25 Q. And which party is that that they support?

1 A. Your Honour, I would imagine that they would support a party from
2 time to time, but this is, as I said, to do with individual who writes
3 for the paper and were employees of the paper.

4 Q. Sir, how about the individuals who wrote this article,
5 Murithi Mutiga and David Makali? Do you know of them and do you know
6 their political inclination?

7 A. Your Honour, I wouldn't be able to say what political
8 inclinations they hold.

9 Q. Thank you, sir. And you told the Court that Ambassador Muthaura
10 was the permanent representative of Kenya to the United Nations in 1993.

11 A. That is correct, your Honour.

12 Q. Do you know who appointed him to that position?

13 A. Your Honour, Ambassador Muthaura was already an ambassador at the
14 time, but he was transferred from Brussels to become the new permanent
15 rep in New York, and that appointment was effected by the former
16 president, Moi.

17 Q. And do you know what was ambassador's position after New York?

18 A. Yes, your Honour.

19 Q. Could you inform the Court, please.

20 A. Your Honour, after Ambassador Muthaura served in New York for
21 about three or so years, he was then appointed to proceed to Arusha to
22 become the new secretary general of the just-created
23 East African Community.

24 Q. Do you know who appointed Ambassador Muthaura to that position?

25 A. Your Honour, Ambassador Muthaura was nominated by the government

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1 of Kenya, but he was appointed by the three presidents of Uganda,
2 Tanzania and Kenya.

3 Q. And at that time, sir, who was the president of Kenya?

4 A. At the time, your Honour, the president of Kenya was President
5 Daniel Arap Moi.

6 Q. Thank you. Sir, do you recall that yesterday one of my first
7 questions to you about the NSAC minutes was whether on any occasion where
8 you were not present at a NSAC session whether you received and read
9 these minutes?

10 A. Your Honour, I confirmed, yes, I received every set of minutes
11 even in those meetings that I skipped.

12 Q. And my learned friend for the Prosecution put some questions to
13 you about your non-attendance at certain meetings. Do you recall that,
14 sir?

15 A. Your Honour, non-attendance or attendance?

16 Q. Your non-attendance.

17 A. Yes, I do recall that.

18 Q. And, sir, you told the Court that on the 14th of November, you
19 were not in attendance?

20 A. I believe so.

21 Q. Sir, do you have the file on --

22 A. Yes. I will check if you will allow me. Yes, I have the minutes
23 of the 14th of November.

24 Q. You confirmed to the Court yesterday that you were not present.

25 A. Yes, I did confirm to the Court, your Honour.

Witness: Witness KEN-D12-PPPP-0001 (Resumed) (Open Session)
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1 Q. Sir, could you please look at the minutes of 28th November,
2 please.

3 MS. ALAGENDRA: And, your Honours, that is at EVD-PT-D12-00004.

4 A. Yes, I have the minutes of the 28th of November.

5 Q. And, sir, could you confirm whether you were present at this
6 meeting?

7 A. Your Honour, I was present at that meeting.

8 Q. Sir, could you turn to page 2, please. And could you read for
9 the Court the first item on the agenda for the day.

10 A. Confirmation of the minutes of the special meeting held on 13th
11 of November, 2007, and the 14th November 2007.

12 Q. Thank you. Sir, you were also referred to the minutes of
13 3rd January, and you told the Court you were not present.

14 A. Yes, I did.

15 MS. ALAGENDRA: Your Honours, that is EVD-PT-D12-00009.

16 Q. Sir, could you confirm for the Court whether soon after this
17 meeting you received and read the minutes of this meeting?

18 A. Your Honours, I did receive these minutes, and I did read them,
19 as I always did.

20 Q. Sir, you also referred to the minutes of 7th January, and you
21 confirmed for the Court by the questioning of my learned friend that you
22 were not present.

23 A. Your Honour, I confirmed that I was not present at the meeting of
24 7th January 2008.

25 Q. Sir, could I ask you to look at the minutes for 8th January,

1 please.

2 A. Yes, I have the minutes of 8th January.

3 MS. ALAGENDRA: Your Honours, that is at EVD-PT-D12-00013.

4 Q. Sir, could you look at page 2 of those minutes.

5 A. Your Honour, I see page 2.

6 Q. And, sir, could you please read for the Court what is the second
7 item on the agenda for that day.

8 A. Your Honour, the agenda reads, "Confirmation of minutes of
9 meeting held on the 7th of January, 2008."

10 Q. Sir, you were also referred to the minutes of 25th January, and
11 you confirmed for the Court that you were not present.

12 A. That is correct, your Honour.

13 Q. Sir, could I ask you to look at the minutes for 29th January.

14 A. Yes, your Honour. I have the minutes of the 29th of January.

15 MS. ALAGENDRA: Your Honours, I'm referring to EVD-PT-D12-00023.

16 Q. And, sir, could you refer to page 2 of that, please.

17 A. Yes.

18 Q. And, please, could you read for Their Honours what is on item 2
19 of the agenda for that day.

20 A. Agenda item 2, your Honours, reads: "Confirmation of minutes of
21 meeting held on the 25th and of the 27th of January, 2008."

22 Q. Sir, who was responsible for implementing cabinet decisions?

23 A. Your Honour, cabinet decisions are implemented by the respective
24 agencies whom they directed.

25 Q. And in your testimony yesterday, you testified extensively about

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1 the reporting structures of the police, the Kenya police. Sir, was that
2 your own opinion or is it emanating from the laws of Kenya?

3 A. Your Honour, that emanates from the laws of Kenya.

4 Q. Thank you very much, Mr. Mwangi.

5 MS. ALAGENDRA: Your Honours, I have no further questions.

6 PRESIDING JUDGE TRENDAFILOVA: Thank you, Ms. Alagendra. I was
7 about to give you even five more minutes because we started a little bit
8 later than 2.30. If you have --

9 MS. ALAGENDRA: I've finished my questioning, your Honours.
10 Thank you.

11 PRESIDING JUDGE TRENDAFILOVA: Thank you very much.

12 So, Mr. Mwangi, let me (* microphone not activated) ... let me
13 thank you on behalf the Chamber for coming all this way to The Hague in
14 order to meet Pre-Trial Chamber II and to answer questions that are very
15 important for the work that we are doing, and I would like to wish you a
16 safe trip back to your country.

17 Court Officer, would you escort Mr. Mwangi back to his -- to the
18 office where he ...

19 THE WITNESS: Thank you, your Honours.

20 (The witness withdrew)

21 PRESIDING JUDGE TRENDAFILOVA: Now we have to proceed with the
22 schedule. We are a little bit late. Of course, we can't be formalistic
23 in the sense that it's going to be prejudicial to the proper conduct of
24 the proceedings and the interest of the suspects and the case of the
25 Prosecutor, the interests of the victims, but now, finally, it's the time

1 of Mr. Kenyatta, the team led by Counsel Kay.

2 Who is going on behalf of your team? So, Ms. Higgins, you have
3 the floor, please.

4 MS. HIGGINS: Thank you, Madam President.

5 Madam President, your Honours, this half of our presentation will
6 take apart, deconstruct, expose fundamental assumptions and the
7 inherently unreliable nature of the Prosecution evidence put before you.

8 The Prosecution repeats time and time again the same sources.
9 It's for this reason that we say it is imperative at this stage that the
10 reality of the evidence is assessed in order to assist you to reach the
11 truth. Simply put at the outset, there is no evidence of individual
12 criminal responsibility of Mr. Uhuru Kenyatta.

13 We come first of all to the advice that you were given at the
14 outset by the Prosecution in respect of your crucial function in
15 assessing this evidence. Mr. Ocampo told you that "the credibility of
16 the Prosecution witnesses should not be discussed -- rather, should be an
17 issue that is discussed at trial," and that despite the Defence team's
18 invitation to you to embark on what he described as an in depth scrutiny
19 of the credibility and the reliability of individual pieces of
20 Prosecution evidence, that he tells you in his words "is not possible."

21 Notwithstanding this advice, in case you should ignore it,
22 Ms. Adeboyejo reassures you that they have, "complete confidence in the
23 credibility of their witnesses."

24 The Defence vehemently disagrees with the advice that you have
25 been given, which we submit is not in line with the Rules of Procedure

1 and Evidence and the Rome Statute.

2 Let us look briefly given the importance of this issue at the
3 outset.

4 Madam President, under Article 69(4) of the Rome Statute which by
5 virtue of Rule 122(9) applies at the confirm stage, the Statute provides
6 expressly the following, and I quote:

7 "The Court may rule on the relevance or admissibility of any
8 evidence taking into account *inter alia* the probative value of the
9 evidence and any prejudice that such evidence may cause to a fair trial
10 or to a fair evaluation of the testimony of a witness in accordance with
11 the Rules of Procedure and Evidence."

12 As a matter of statutory interpretation, moreover, we submit that
13 it is also clear that had the drafters intended to except you from
14 considering issues concerning probative value and credibility at the
15 confirmation hearing, it would have expressly provided thus.

16 Now, probative value cannot be, of course, assessed in a vacuum
17 but, rather, is made taking into account the credibility of witnesses.
18 Exempting the issues is inconsistent with your underlying purpose, namely
19 to ensure that no case goes to trial unless there is sufficient evidence
20 to establish substantial grounds.

21 Let me dwell briefly on this touchstone of sufficiency, and may I
22 submit that the Pre-Trial Chamber may also be guided by the approach that
23 was taken by the Prosecutor before the Special Tribunal of Lebanon, a
24 very different institution, but important nonetheless.

25 In April of 2009, it was the Prosecutor who requested the Judge

1 to release four suspects from detention as he made the determination that
2 the Office of the Prosecution did not have sufficient credible and
3 admissible evidence to file an indictment. Having rightly assessed his
4 duty as one to establish the truth, he stated expressly in his
5 submissions that lack of credibility directly impacts on the sufficiency
6 of the evidence, an approach which we submit is correct. And,
7 your Honours, we can provide you with that case law in due course should
8 it be necessary to do so.

9 Credibility is central. We will demonstrate during the course of
10 this half of our presentation that the main witnesses relied on by the
11 Prosecution must be set aside at this stage as centrally flawed and
12 thoroughly unreliable.

13 In responding to the Prosecution's evidence against
14 Uhuru Kenyatta, I'd like to start with some facts and figures, if I may,
15 to reveal the workings and the methodology of the Defence and to inform
16 your Honours the sources and the evidence that we have considered in this
17 case.

18 Having examined the document containing the charges, we began to
19 scrutinise the 6.644 pages of analysis tables of the evidence served by
20 the Prosecution intended, as we know, as an evidential aide to the
21 Defence and to the Chamber, a place where, we submit, one would expect to
22 find the main evidential components in support of their case.

23 Eager to identify each and every Uhuru Kenyatta specific
24 document, having done so, we say that the result are no less than
25 astonishing.

1 The first point is this: The main plank of the Prosecution's
2 case against Uhuru Kenyatta consists of just three witnesses, Prosecution
3 Witnesses 0011, 0012, and 0004.

4 Secondly, there is one further witness who I will deal with and
5 address separately, Prosecution Witness 0009, who we say has no evidence
6 to give in respect of Uhuru Kenyatta.

7 Thirdly, six anonymous witness summaries, witnesses not named,
8 two of whom have never been interviewed by the Office of the Prosecutor.

9 And fourthly, 11 other documents which I will address you on in
10 due course.

11 Your Honour, as I take you through this evidence, we submit that
12 this is the height of the Prosecution's case. These are the documents
13 that merit your scrutiny at this stage, and it is for that reason that my
14 presentation will seek to assist your Honours by allowing us to inform
15 you of our concerns.

16 In brief, it is our considered submission that each and every
17 item of the Prosecution's evidence falls into one or more of the
18 following categories: Inherently flawed and unreliable and/or irrelevant
19 and/or hearsay and/or un-attributable to author or source.

20 Our submissions speak to the heart of the matter, which is the
21 sufficiency of the Prosecutor's evidence. Our arguments are not capable
22 of being dismissed, shifted, or shelved as they concern the very
23 decision-making process that this Chamber must engage in, which, after
24 all, is a protection mechanism for everyone.

25 A close scrutiny of this evidence will reveal that the case

1 against Uhuru Kenyatta falls squarely within the category of unfounded
2 accusations.

3 In the first part of my presentation I will take you through each
4 of the sources that I have identified at the outset. In the second part,
5 I will address just seven other documents which are contained within the
6 charging document but do not appear in the Uhuru Kenyatta analysis tables
7 put forward by the Prosecution. In the third part of my presentation, I
8 will dissect and lay bare the specific arguments which have been put
9 forward by the Prosecution in the course of its opening and subsequent
10 presentation.

11 Madam President, let us begin, therefore, with Witnesses 0011
12 and 0012, Prosecution Witnesses 0011 and 0012.

13 These are, without argument, two of the three sources of evidence
14 most relied upon by the Prosecution. Coupled together, their evidence
15 forms perhaps bestly described as the widest plank of the Prosecution's
16 case against Uhuru Kenyatta. For varying reasons which will become
17 clear, we submit that these witnesses come rather as a pair but of course
18 must be assessed individually.

19 Both witnesses were interviewed by the Office of the Prosecution
20 sometime after February 2011. Both witnesses gave the Prosecution what
21 can only be described as a wide-ranging incriminating account of what
22 they said the role of Uhuru Kenyatta was within the post-election
23 violence and his alleged relationship with the Mungiki. As I indicated,
24 they form the critical mass of evidence.

25 Your Honours, both individuals were members of the Mungiki, and

1 both individuals were interviewed first by the Defence for
2 Uhuru Kenyatta. Their names having been given to the team by a Member of
3 Parliament who you will hear give live evidence during the course of this
4 hearing, Mr. Lewis Nguyai, who has requested to testify publicly.

5 Critically and remarkably, both individuals gave exculpatory
6 accounts of the innocence of Uhuru Kenyatta to the Defence and affirmed
7 that he had no role or involvement with the Mungiki.

8 Both individuals were told by the Defence in no uncertain terms
9 that they would only be refunded their travel and food expenses on those
10 occasions on which they visited the office to be interviewed by the legal
11 team. All receipts and amounts reimbursed were retained and logged by
12 the Defence and have even be submitted as evidence for this confirmation
13 hearing. Madam President, EVD-PT-D13-00568, confidential, and
14 EVD-PT-D13-00585 similarly.

15 Following our analysis of the Prosecution's last batch of
16 disclosure which was served on the Defence on the 19th of August, we
17 believed that we had identified the names of Prosecution Witnesses 0011
18 and 0012. So concerned were we and surprised about the evidence given to
19 them -- given by them, rather, to the Prosecution after the accounts
20 received by the Defence that we requested an independent counsel to
21 assess firstly whether we had made the correct determination, and
22 secondly, to provide us with information to make us sure that we could
23 then inform the Trial Chamber.

24 Independent counsel came in the form of Mr. Gary Summers, an
25 eminent barrister from England who has his own forensic investigation

1 consultancy in the Isle of Man. Mr. Summers travelled to Nairobi last
2 month to conduct his investigation, and his file consisting of 210 pages
3 was submitted to the Chamber on the 2nd of September of this year and
4 subsequently disclosed to the parties.

5 Now, in his conclusions, not only did Mr. Summers confirm that
6 the Defence had correctly identified the two protected witnesses, but he
7 also made the following startling conclusions: One, it appeared to be
8 the refusal to pay anything other than expenses that led to the
9 disenchantment of Prosecution Witnesses 0011 and 0012 with the
10 Uhuru Kenyatta legal team. Two, that both witnesses were knowing and
11 willing parties to an extortion attempt on Uhuru Kenyatta in 2011, and
12 thirdly, that in his opinion, both had attempted to pervert the course of
13 justice by giving a wholly inculpatory account to the Prosecutor after
14 having given a wholly exculpatory account to the Defence in February of
15 this year.

16 Mr. Summers included in his investigation file a collection of
17 sinister e-mails which had been sent to several members of the Defence
18 team in March of this year by Prosecution Witness 0011 before his
19 defection to the Prosecution. These e-mails included the following
20 threats: 13th of March, 2011, I quote:

21 "What Uhuru Kenyatta will lose, we hold you responsible."

22 Addressed to an individual assisting the Defence. Confidential
23 EVD-PT-D13-00582 at 0027.

24 On the same day, an e-mail sent to a member of the Defence team
25 stating the following, I quote:

1 "We promised our guys in the ground on what is cooking, and it is
2 risk to promise things to such guys and fail to honour the arrangements,
3 especially noting the fact some leaders after the post-election violence
4 crisis disappeared or were killed, that was betrayal of the highest
5 order."

6 No arrangements, I should clarify, Madam President, with any
7 witness had been made by the Defence.

8 Confidential EVD-PT-D13-00582, at 0033.

9 I dwell just a little longer. In another document signed by
10 Prosecution Witnesses 0011 and 0012 in March of this year, they suggest
11 that platoons of men are used to make sure that detractors, which in
12 context appears to mean those individuals who have given statements to
13 the Prosecution, stop their ongoing propaganda. They refer to the
14 platoons knowing the names and plans of individuals they refer to as, I
15 quote, "our rivals" and that they know all those who have already given
16 their statements and the witnesses who have been interviewed, the
17 implication being those individuals interviewed by the Prosecution of the
18 ICC. Confidential EVD-PT-D13-00581.

19 Your Honours, there is no addressee on the document, on the face,
20 but we know from the evidence that we diligently collected and from the
21 information before the Chamber in what I refer to as the Gary Summers
22 file, that the document was intended to reach Uhuru Kenyatta but was
23 stopped by the legal team.

24 Interestingly, the request in the document to put this criminal
25 plan into action amounted to 2.340.000 Kenyan shillings, which translates

1 as approximately 18.000 euros, a small fortune, we submit.

2 Both witnesses, once this document had come into our possession,
3 were pulled back into the office of the Defence. They were informed
4 directly and individually by the legal team that their view was that this
5 document amounted to a plan to intimidate witnesses constituting a very
6 serious offence. They were also informed that the Defence of
7 Uhuru Kenyatta wanted nothing to do with such criminal activity.
8 Confidential EVD-PT-D13-00583, and confidential EVD-PT-D13-00567.

9 In terms of the exculpatory accounts that these witnesses in
10 interview with the Defence had given, perhaps the following is worth
11 drawing to your Honours' attention: Prosecution Witness 0012 told the
12 Defence that Uhuru Kenyatta was a man who was preaching peace at the time
13 of the post-election violence, that he was, to quote, "a very good guy"
14 who was "helping people," and that he was not a member of the Mungiki,
15 and neither did he work with them. He explained that people, to quote,
16 "took money during the post-election violence and alleged incorrectly
17 that it was from Uhuru Kenyatta." He further explained that
18 Uhuru Kenyatta, to quote, "just gave money to local people. He did not
19 give money to fund the post-election violence."

20 Your Honours, all these documents are confidential, and I quote
21 for the record for the purpose of ease of access EVD-PT-D13-00559 at
22 0011, EVD-PT-D13-00560 at 0018, EVD-PT-D13-00567 at 0039, and finally,
23 EVD-PT-D13-00567 at 0040.

24 Prosecution Witness 0012 told the Defence that he had only met
25 Uhuru Kenyatta once in a group with others in 2002. He also stated that

1 he wanted to be relocated from his home in Kenya. EVD-PT-D13-00560 at
2 0015, and EVD-PT-D13-00567 at 0043, confidential.

3 Let's move to Prosecution Witness 0011, if I may, and the
4 exculpatory account he gave to the Defence, just some nuggets, perhaps.

5 He explained that he had never met Uhuru Kenyatta on a one-to-one
6 basis and that Uhuru Kenyatta had never made an approach or a request to
7 him. EVD-PT-D13-00575 at 0002, confidential.

8 Now, the finer details of the extortion attempt, the perversion
9 of the course of justice and the full run of the e-mails that were sent
10 to members of the Defence team are before the Chamber and with the
11 parties and can be located at EVD-PT-D13-00565, EVD-PT-D13-00567,
12 EVD-PT-D13-00573, and EVD-PT-D13-00582, for ease of access for
13 your Honours.

14 Now, importantly, perhaps, the Office of the Prosecutor was
15 informed of the conduct of both of these witnesses, but has neither
16 sought to withdraw the evidence nor inform the Defence of its position in
17 relation to what must only be described as the two most important
18 witnesses in its case.

19 The Defence submits that the evidence collected that is before
20 this Bench is no less than devastating to the credibility of these
21 witnesses, and it bears directly upon the sufficiency of the evidence in
22 this case. We submit that the Gary Summers file reduces the probative
23 value of these two witnesses to zero.

24 Crediting this evidence with any probative value at the
25 confirmation stage would not only directly impact upon the fairness of

1 these professionals, but would be also perhaps devastating to the way in
2 which evidence would be allowed to come before this Chamber and be relied
3 upon at this stage.

4 This is not all. As a demonstration of the fact that both are
5 professional criminal extortionists, and I say this with a basis, they
6 independently, as it has transpired, tried the same trick on Defence
7 witness Lewis Nguyai. Rather than protection here, they should be
8 prosecuted here.

9 May I move on to address you on Prosecution Witness 0004. He is
10 the third source of evidence most relied upon by the Office of the
11 Prosecutor.

12 Mr. Kehoe, you may remember, told you that this is the witness
13 whose memory improved with age and time, a classic sign, we say, of an
14 unreliable and untruthful witness.

15 The Defence submits that the plethora of direct evidence from not
16 only the Kenyatta team but also the Muthaura team destroys the very
17 fabric of the different accounts he gives. And you will hear more about
18 these sources from Mr. Kay, who will present the Defence evidence that we
19 bring to these proceedings. But let's just take for a moment the
20 Prosecution's evidence at its height and look at solely that alone,
21 leaving aside the Defence evidence for the moment.

22 Your Honours, the first statement that he ever gave on the 7th of
23 January, 2008, unassisted, nothing to do with these proceedings, makes no
24 mention whatsoever of Uhuru Kenyatta. EVD-PT-OTP-00084, confidential.

25 In that account, although Witness 0004 doesn't put a date to what

1 must be or seem to be the 26th of November State House meeting or what
2 seems to be the 3rd of January meeting, we ask you to look very carefully
3 at the way in which that statement has been written, because we submit
4 that the way he writes the statement importantly in the first person and
5 unprompted makes it clear that he was never at either meeting.

6 He does not mention in this first account anything, as I stated,
7 about Uhuru Kenyatta. However, he does mention an alleged meeting, one
8 now which we're familiar with, the Nairobi Members Club meeting on a date
9 unspecified at this stage. Crucially again, there is no reference to
10 Uhuru Kenyatta being in attendance. No mention of this well-known public
11 figure in Kenya whose father, Jomo Kenyatta, appears on every banknote.

12 Now, in the second statement he gave, EVD-PT-OTP-00041,
13 confidential, this was a statement that was for the Waki Commission in
14 September of 2008, and at 0490 of that document, he claims that on the
15 25th of November, he met with Uhuru Kenyatta with other Mungiki members,
16 including a man we ask you to look very carefully at, somebody who I will
17 call the shadow of Witness 0004. The shadow of Witness 0004 is not an
18 individual that was interviewed by the Office of the Prosecution. One
19 wonders why, but it was not the case. The shadow of Witness 0004 was
20 interviewed by the team of Mr. Muthaura, and you will know him as
21 D12-0037, at confidential EVD-PT-D12-00054.

22 The allegation in that statement is that these individuals met in
23 the Yaya Centre, Nairobi, in a public downstairs cafe at 8.00 p.m. We
24 ask the Bench to look carefully at the Defence evidence confidential
25 EVD-PT-D13-00538, a statement which confirms that the last cafe to close

1 on that date was 6.48 p.m.

2 In outline, Witness 0004 claims that it was at this location
3 crucial to the Prosecution's case, absolutely crucial, that
4 Uhuru Kenyatta informed this cabal that he had helped to set up a meeting
5 for them with the president of Kenya the next day in State House on the
6 26th of November. Confidential EVD-PT-OTP-00041 at 0490.

7 Importantly, and we say devastatingly crucial, Witness 0004's
8 detailed statement at this stage running to 13 pages does not even place
9 Uhuru Kenyatta at the State House on the 26th.

10 It's in this statement as well that Witness 0004 changes the
11 venue for the meeting on the 3rd of January from the Nairobi Members Club
12 to the Nairobi Safari Club, two very different geographically located
13 buildings. Crucially again, no mention of Uhuru Kenyatta ever attending
14 such a meeting. EVD-PT-OTP-00041 at 0493, confidential.

15 These, we submit, your Honours, are incredible omissions given
16 the accounts he later provides in respect of these proceedings.

17 The third statement now extends to 64 pages. Confidential
18 EVD-PT-OTP-00248, in 2010.

19 Here he decides to change the date of the alleged Yaya meeting
20 from the 25th of November back a bit. He goes back to the 17th of
21 November, and he shifts the precise location. He moves the meeting from
22 the cafe downstairs to the second floor of the Yaya Centre. He maintains
23 importantly that his shadow, Witness D12-0037, was present with others
24 with him with Uhuru Kenyatta and Uhuru Kenyatta's assistant, who he
25 names. It is only here for the first time that he claims that

1 Uhuru Kenyatta was present at the State House on the 26th of November in
2 a meeting in a tent, which took place between the witness, other Mungiki
3 members, including the shadow, D12-0037, Mr. Muthaura, the president, and
4 others names in this statement. He gives what can only be described as a
5 protracted account of that meeting. However, you will hear Defence
6 evidence in addition to that provided by the Muthaura team as to the fact
7 that such a meeting in a tent with Uhuru Kenyatta present could not have
8 taken place.

9 Witness 0004, interestingly again, changes the location back for
10 the meeting of the 3rd of January back to the Nairobi Members Club, and
11 for the first time places Uhuru Kenyatta at this meeting with the crucial
12 shadow, himself, other Mungiki members, Mr. Muthaura, Mr. Saitoti, and
13 others. The thrust of this meeting that has been described by the
14 Prosecution as crucial is the planning of violence using the Mungiki, so
15 Witness 0004 would have you believe.

16 More detail of this meeting is provide in his fourth statement.

17 But we say this, your Honours, that crucially in respect of
18 Witness 0004, there's not just one source of evidence which fundamentally
19 undermines the truthfulness, credibility, and, importantly, sufficiency
20 of evidence. There are many, but let's just dwell with one of the key
21 sources, perhaps, a man, the shadow, who Witness 0004 says was by his
22 side at Yaya, the State House, and the Nairobi Members Club. His
23 evidence, we say is quite simply devastating. He has never been to the
24 club. He has never met Uhuru Kenyatta. He has never been to Yaya.

25 He did state that he attended a State House meeting on the 26th

1 of November, but crucially, not as a member of the Mungiki. And you'll
2 hear more about the reality of that meeting. Absolutely devastating and
3 insurmountable.

4 I pause there, your Honour, noting the time.

5 PRESIDING JUDGE TRENDAFILOVA: Thank you very much. Yes. You
6 have up until 4.00.

7 MS. HIGGINS: I'm sorry, your Honour. My mistake. I'm ahead of
8 myself.

9 PRESIDING JUDGE TRENDAFILOVA: The days for the legal team
10 (* overlapping speaking).

11 MS. HIGGINS: Let me then continue with Prosecution
12 (* overlapping speakers).

13 PRESIDING JUDGE TRENDAFILOVA: Of course, please do. You were a
14 little bit astonished.

15 MS. HIGGINS: Thank you.

16 Prosecution Witness 0009. Let's turn to him now, if we may.

17 This is a witness the Prosecution seeks to rely on and appears
18 time and time again in the analysis tables but, we submit, does not
19 actually speak to the truth of the issues against Uhuru Kenyatta, and
20 it's perhaps important and interesting to just pause for a moment to
21 review the reality of Witness 0009's evidence.

22 Witness 0009 did not himself see anyone providing money or
23 weapons to the Mungiki. Confidential EVD-PT-OTP-00641 at 0216.

24 He explains that his belief that people in the government, who he
25 did not name, were supplying money and guns to the Mungiki came from

1 rumours that were being spread at the time. EVD-PT-OTP-00641 at 0216.

2 He refused to name anyone in the government who he alleges gave
3 money to individuals to register and fight in the post-election violence.
4 Confidential EVD-PT-OTP-00641 at 0217.

5 In the two to three months prior to the 2007 elections, the
6 witness says that Mungiki supported Uhuru Kenyatta because he was a
7 Kikuyu. No other reason was given. It wasn't even a matter he says of
8 being told. It's rather a matter of common sense, the aim being to have
9 a Kikuyu lead the country. Again, so what? This evidence, we submit,
10 has absolutely no probative value as far as the criminal charges are
11 concerned before this Court.

12 He alleges that meeting were held between politicians and Mungiki
13 for support with the elections for Kibaki and Uhuru Kenyatta. He refers,
14 importantly, to the Africana hotel, the Serena Hotel, and the Karua
15 forest. Crucially, however, no dates, no times, no named attendees, no
16 detail whatsoever. EVD-PT-OTP-00638 at 0150, 0151, and 0152.

17 He then clarifies that he didn't go to these meetings that he
18 alleges took place. EVD-PT-OTP-00638 at 0152. And he would not,
19 therefore, comment on their purpose.

20 When he was probed during the questioning about why Kenyatta was
21 popular in the run-up to the elections, he explained the following:
22 Mr. Kenyatta was a Kikuyu. He was young, and he understood Kikuyu issues
23 such as poverty and land sharing. Nothing sinister there, we submit.
24 Confidential EVD-PT-OTP-00637 at 0131.

25 In particular, he did not give any evidence whatsoever of any

1 relationship between Uhuru Kenyatta and the Mungiki or whether he liaised
2 with any particular Mungiki member. EVD-PT-OTP-00637 at 0132.

3 The fact of the matter is this: There is no evidence that
4 Uhuru Kenyatta ever solicited or sought or fostered the support of the
5 Mungiki. Indeed, there is the converse that you will hear, his
6 denouncements of the illegal criminal Mungiki.

7 The bottom line is, your Honours, that Prosecution Witness 0009
8 does not support these charges.

9 I'd like to now take your Honours to the six anonymous witness
10 summaries that I referred to at the start. These are the anonymous
11 summaries that concern Uhuru Kenyatta.

12 Perhaps it's important at the outset to just consider how the
13 Chamber must approach this evidence before we look at the nuts and bolts.
14 Of course the Defence has not been told the identity of these witnesses,
15 and such an approach has the following consequences: The Defence has not
16 been put, by virtue of the manner of the evidence relied upon, into a
17 position where we are able to investigate and scrutinise the claims
18 therein, a position, of course, which directly impacts, we say, on the
19 probative value of this evidence to be evaluated by the Bench.

20 The summaries are best characterised as containing generic
21 hearsay, unsourced, undated, to such an extent, I'm afraid, that we're
22 not even able to assess whether you're being asked to look at first-hand
23 hearsay, or second or third. The probative value, we say, is nil.

24 Now, the jurisprudence of the ICC on this point is very clear.
25 In both Lubanga and Katanga, it has been held that in light of the fact

1 that the Defence cannot contest effectively the truthfulness and the
2 authenticity of the evidence derived from these anonymous sources, those
3 Chambers have held at the pre-trial stage that that evidence can only be
4 used to corroborate other evidence, and I know your Honours are aware of
5 the jurisprudence.

6 We submit in this case that corroboration of anonymous evidence
7 with anonymous evidence is simply unacceptable as none of it can be
8 pierced by the Defence. And to assist, just let me draw to your
9 attention in the case of Abu Garda, a case in which of course the charges
10 were not confirmed. There the Pre-Trial Chamber found that it was unable
11 to confirm an allegation that was based solely on an anonymous summary.
12 In relation to a different allegation which was supported by several
13 anonymous summaries, the Pre-Trial Chamber found that firstly, considered
14 as a whole, the summaries of interviews of anonymous witnesses lack
15 specific information in that case to enable the Chamber to establish to a
16 satisfactory degree the allegation of the Prosecution of effective
17 control.

18 Secondly, that allegations in the anonymous summaries were not
19 supported by other evidence.

20 Important, we say, guidance for the Chamber when considering the
21 state of evidence before you.

22 Can I move now to particulars of those summaries, and let me go
23 first to confidential EVD-PT-OTP-00571, otherwise referred to as
24 Prosecution Witness 0005.

25 Your Honours, the only line in this summary that refers to

1 Uhuru Kenyatta, a four-page summary, is the following unsourced piece of
2 anonymous hearsay, and I quote at page 0023 of that document:

3 "The witness heard that Njenga Karume, Uhuru Kenyatta, and other
4 politicians supported the Mungiki."

5 Now, this evidence, we submit, is even significantly weaker than
6 your traditional hearsay where one person may report what he has heard
7 from another. Here not only do we not know who the witness is, we don't
8 know where he allegedly heard it, when, how, or in what circumstances.
9 The probative value of this one line is nonexistence, and yet our learned
10 friends rely time and time again on Witness 0005.

11 Second summary, confidential EVD-PT-OTP-00598. The quality, we
12 submit, of the witness summary evidence deteriorates as we proceed. This
13 11-line summary from an unknown source from an individual who was not
14 ever interviewed by the Office of the Prosecution contains the following
15 single line relevant to Uhuru Kenyatta, I quote:

16 "The witness heard that in some parts of Nairobi some of the
17 people believed that Uhuru Kenyatta was responsible for purchasing
18 *pangas*."

19 Now, we don't know the identity of the witness, nor can we know
20 to who he refers. The line is no more than an unsubstantiated rumour,
21 the basis of which can not be assessed.

22 Moreover, this individual doesn't even know that he's being used
23 by the Office of the Prosecutor to build a case against Uhuru Kenyatta,
24 the building blocks of which, we submit, are no more than sand.

25 Third summary, confidential EVD-PT-OTP-00605. This is the second

1 of the Uhuru Kenyatta relevant anonymous witnesses not interviewed by the
2 Office of the Prosecution.

3 Now, the relevant line in this half-page summary states the
4 following:

5 "In the area of Mathare, Nairobi, the people believe that
6 Uhuru Kenyatta purchased *pangas* for the youth."

7 What does this actually say, and what does it actually mean?

8 "The people believe." Well, your Honours, it defies our belief in fact
9 that this document can be relied on to prove or satisfy anything at this
10 stage. There can be no probative value in throw-away lines.

11 Next, confidential fourth witness summary, EVD-PT-OTP-00572,
12 otherwise known as Prosecution Witness 0001.

13 This anonymous individual alleges that Uhuru Kenyatta took the
14 Mungiki oath. No information to support the allegation, no date, no
15 information as to whether he saw it, heard it, or even gave it, nothing.

16 He also alleges that there were meetings that took place between
17 the Mungiki and the government representatives, whereby prior to the
18 elections the Mungiki were recruited to support the PNU. After the
19 breakout of violence, he alleges, the Mungiki were recruited to retaliate
20 against perceived ODM supporters in the Rift Valley. And he alleges as
21 your Honours have seen that both Uhuru Kenyatta and Francis Muthaura were
22 involved in these meetings.

23 The question has to be, surely, what the probative value of this
24 evidence is. No date, no detail, no information as to who participated,
25 whether the witness says he did or not, no opportunity whatsoever to

1 scrutinise this summary prepared by the Office of the Prosecution.

2 The question is whether this is really the quality of evidence
3 that this Chamber will allow to confirm the charges against this man. To
4 do so, we submit, would be to lower the stature of this court.

5 Fifth witness summary, confidential EVD-PT-OTP-00570, otherwise
6 known as Prosecution Witness 0006.

7 Anonymous summary, series of allegations, no foundation
8 whatsoever.

9 It's worth just pausing, although I say that, to look at the
10 quality of the allegation that is put, and I do so at 0017 of that
11 document. I quote:

12 "Witness heard that the displaced people knew that Uhuru Kenyatta
13 had incited his members of the community to retaliate and evict
14 opposition supporters from the place."

15 I continue:

16 "One source told witness that Kenyatta addressed a rally and that
17 it was after the rally that the locals started targeting the perceived
18 opposition supporters."

19 I continue:

20 "The opposition supporters believed that Kenyatta was providing
21 financial sponsorship to the locals to threaten them."

22 Is this really the level to which we must evidentially stoop?

23 I'm afraid that this sort of evidence raises more questions than
24 it answers. Neither the lawyer nor the layman could understand, perhaps,
25 how such evidence is being used in this court. Untenable, no probative

1 value. To accept this evidence puts us all at risk. This is not the
2 stuff of the International Criminal Court.

3 Your Honour, this same witness makes further allegations. He
4 says he was told about Kenyatta's involvement in Naivasha and the fact
5 that he initiated the meeting between the Mungiki and the president in
6 State House.

7 No date, no source, no information as to when even the meeting
8 was supposed to take place. Simply untenable.

9 It is importantly not just the Defence that is being prevented
10 from scrutinising this evidence. It is also more importantly, perhaps,
11 the Chamber.

12 The third allegation at 0018:

13 "The source told the witness that Kenyatta was responsible for
14 paying for the head of each and every person that was killed. Kenyatta
15 promised to pay the Mungiki 10.000 Kenyan shillings per head of a Luo or
16 Kalenjin person in retaliation of what apparently had happened to their
17 people."

18 I quote:

19 "Witness was not able to verify this information."

20 Even contained within the summary itself.

21 I go on, fourth and final allegation from the same individual, so
22 that I have comprehensively addressed them all in case I should perhaps
23 misquote or mis.

24 Witness alleges that he got information from one of his sources
25 who was close to the Mungiki that two meetings held at State House

1 between the members of the Mungiki and the government, the first during
2 the elections and the second during the post-election violence. I quote:
3 "Witness was informed by a source close to Mungiki that at the
4 second meeting Mungiki was summoned to the State House to discuss how to
5 protect members of the Kikuyu community who were being evicted. They
6 needed to retaliate during the post-election violence which seemed waged
7 by opposition members in the Rift Valley."

8 No information as to the source, no information as to where the
9 information came from, when or in what circumstances.

10 Neither, do we say, that you can allow this anonymous source to
11 be corroborated by Prosecution Witness 0004, who we say has been shown
12 and clearly demonstrated to be devastatingly untenable.

13 The sixth and final summary, confidential EVD-PT-OTP-00674,
14 Prosecution Witness 0010.

15 Allegation at 0550:

16 "The witness explained that many politicians such as
17 Uhuru Kenyatta (and others cited) were members of the Mungiki
18 organisation."

19 This witness is relied on by the Prosecution extensively. The
20 summary states:

21 "The witness is familiar with the long history of political
22 co-ordination between Uhuru Kenyatta and his political associates and the
23 Mungiki group."

24 At 0551, I quote:

25 "According to the witness, he believed that despite their absence

1 government members were involved in the Mungiki going along to
2 State House due to the fact that the meeting took place at State House.
3 According to him, those involved must include President Kibaki, who
4 resides there, and others who must have had knowledge, including, among
5 others cited," who I won't name, "Uhuru Kenyatta and Francis Muthaura."

6 No basis whatsoever for the beliefs, no dates.

7 Your Honour, that concludes my analysis of the six witness
8 summaries. I'd like to now move on to the other 11 documents I indicated
9 at the start and to address you in turn, because these are cited by the
10 Prosecution in the analysis tables as supportive of Uhuru Kenyatta's
11 individual criminal liability. So let's take the first. It's public.
12 EVD-PT-OTP-00272, and, it's from the internet, and it's a who's who
13 profile of Uhuru Kenyatta.

14 Now, reliance is repeatedly put on this document. It's
15 unauthored, it's un-footnoted, it's undated, and it's quite simply
16 hearsay from the net. It contains an unsupported allegation that after
17 December 2007, Uhuru Kenyatta dropped the inclusivist talk of the
18 independent nationalists and became a staunch defender of conservative
19 Kikuyu interests. Nothing to substantiate this throw-away line.

20 You will hear from the man himself as to what he said and did.
21 Indeed, one might even perhaps be a little bit embarrassed in an
22 international criminal trial to have to rely on such evidence. It's
23 certainly not, we submit, what the founders of this Court had in mind
24 when in Rome in 1998.

25 Let's see if the evidence improves as we go. Can I please cite

1 EVD-PT-OTP-00166. It's public. It's another article from the net. It's
2 a news article from "The Nation" entitled "Mungiki's long history of
3 clashes with the law."

4 Interestingly it's dated 2002, 25th of August, so five years
5 before the violence. No author's name, no footnotes, no sources. What
6 does the claim amount to? At 0232 it amounts to this:

7 "Last March, 3.000 of the sect," it appears they're referring to
8 the Mungiki, "said they would support local government minister
9 Uhuru Kenyatta. At a meeting in Laikipia, the sect's members urged
10 Mr. Kenyatta to gun for the presidency."

11 This concerned a rally that Uhuru Kenyatta never even attended,
12 solicited, requested, supported, or fostered. It has zero probative
13 value.

14 Third, public, EVD-PT-OTP-00260, and it's the third document from
15 the internet, and it's the second article from the "Daily Nation" on the
16 web, entitled "Kenya: KANU in show of force as Rainbow threatens
17 Kenyatta," and it's dated again back in the year 2002, the 8th of
18 September.

19 No author's name, no footnotes, no sources. What does it amount
20 to contextually? It amounts to the following: It concerns President Moi
21 starting the campaign for Uhuru Kenyatta to be his successor in the 2002
22 election at which allegedly 20 cabinet ministers, 66 MPs were present at
23 a rally in the Afraha stadium in Nakuru.

24 It contains comments about the campaign from opposition members.
25 It's no more and no less than an article about political campaigning. It

1 includes text reporting that Uhuru Kenyatta promised to form an
2 all-inclusive government whose priority would be to fight unemployment
3 and poverty, revive the agricultural marketing system and get the
4 economic back on its feet. It is reported that he said that he would
5 recruit talent from all sectors of society and that he didn't know he
6 would be Moi's successor until very recently. Nothing sinister there.

7 There is one line in the article which refers to the reporter
8 claiming that there was evidence of Mungiki presence at the rally.
9 Again, so what? No evidence of request, solicitation, fostering of
10 Mungiki support from this man.

11 Fourth document, your Honours, public, EVD-PT-OTP-00183.

12 We move from the net and the newspapers and we move to an
13 academic. We move to an article by Peter Mwangi Kagwanja entitled
14 "Facing mount Kenya or facing Mecca? The Mungiki, ethnic violence and
15 the politics of the Moi succession in Kenya, 1987-2002." The relevant
16 page can be found 0458 of the document I've cited.

17 It refers -- what does it amount to? Let's look at the reality
18 of this document. It refers to the Mungiki announcing that they would
19 back KANU and a number its candidates, including Uhuru Kenyatta.

20 It concerns the same rally that I've already addressed you on on
21 the 3rd of March, 2002.

22 No footnotes as to where the sources come from, which I submit
23 must be rather surprising for an academic article if the academic indeed
24 intends to be taken seriously.

25 Fifth document, public, EVD-PT-OTP-00267. Now, your Honours,

1 we're back to the internet. This article is from an unknown source
2 entitled "Kikuyu MPs close ranks," and it's dated 12th of April, 2008.
3 This concerns a group of 46 MPs holding meetings to try to create a
4 consultative committee to advise Kibaki in the run-up to the 2007
5 election.

6 The unknown author says that UK was one of those --
7 Uhuru Kenyatta was one of those who attended such meetings. The author
8 refers to this group of MPs as being ready to defend Kikuyu community
9 should they be subject to further acts of violence. I quote:

10 "It is to this end that some of them feel that the Mungiki sect,
11 an ultra-traditionalist Kikuyu movement should be ready in the wings,
12 even though this movement is in fact illegal."

13 Now, not only is it not known who wrote this article, neither are
14 the political persuasions of the person who wrote the article known.
15 Neither is it known whether it was written for propaganda purposes, where
16 it was published and what the sources were, and whether in fact it was
17 ever published anywhere other than the internet.

18 We say evidentially useless.

19 Sixth document, public, EVD-PT-OTP-00266. It comes from the same
20 source as the previous document, and it -- whatever that is, of course.

21 The title is "Battle for the Mungiki sect in Kenya."

22 What is does it allege? What's the meat of the evidence that the
23 Prosecution relies on? Well, it's this: It refers to the Mungiki, and
24 the author states:

25 "Uhuru Kenyatta would like to control this force because it has

1 turned out to be crucial in defending Kikuyu in the Rift Valley against
2 attacks from other ethnic groups during the political crisis. This would
3 restore his reputation in the eyes of the Kikuyu and give him more force
4 within his own community to go one day for the post of successor to
5 Kibaki."

6 Author anonymous. No information about whether it ever was
7 published anywhere other than the net.

8 At the risk of repeating myself, and I will take that risk, there
9 is no information about the political potential bias of this witness, no
10 source. Utterly valueless.

11 Now, I see that we are approaching 4.00, your Honours, and
12 perhaps I can pause there before addressing you on the seventh of the 11
13 documents.

14 PRESIDING JUDGE TRENDAFILOVA: Thank you, Ms. Higgins. Probably
15 it is good for you to take a break as well.

16 Let us suspend now the hearing and we shall resume at 4.30, and
17 you will have again the floor, Ms. Higgins.

18 COURT USHER: All rise.

19 Recess taken at 3.58 p.m.

20 On resuming at 4.31 p.m.

21 (Open session)

22 COURT USHER: All rise.

23 PRESIDING JUDGE TRENDAFILOVA: Please be seated. We resume the
24 hearing.

25 Ms. Higgins, please proceed.

1 MS. HIGGINS: Madam President, your Honours, I'm now on the
2 seventh document of the 11 that I will address you on. I will then move
3 to the seven other documents in the Document Containing the Charges which
4 the Prosecution cites, and I will finally address you on the arguments
5 that have been put by the Prosecution in their opening and presentation.
6 Mr. Kay will then address you on the Defence evidence.

7 Your Honours, the seventh document is EVD-PT-OTP-00134, and it's
8 confidential. This is a PowerPoint presentation from a human rights
9 organisation, let me put it that way. It's 80 pages, and only one of
10 those pages concerns Uhuru Kenyatta.

11 Now, the Prosecution stated that this document alleges. I'll go
12 to the content in a moment. This document doesn't allege anything. It
13 simply recites an allegation from an unknown source, and it's the
14 following: At 5018 of the number I have cited, it alleges that the
15 Mungiki was hired, funded, and transported by
16 Honourable Kabando wa Kabando, Honourable Uhuru Kenyatta, Njenga Karume,
17 Stanley Githunguri, Mwngi Kiunjuri, and Amos Kimunya. Businessmen
18 Chris Kirubi and Stanley Livondo were also mentioned.

19 No author, no sources, no date, no evidence to support this
20 information.

21 Eighth document, public, EVD-PT-OTP-00178. This is a report
22 compiled by Michael E Muragu under the banner of the "Peace and
23 development network trust," entitled "The challenges of national cohesion
24 and integration: Mungiki menace in Central Kenya region."

25 This report we know from its face was compiled in July 2009, and

1 the author refers at 0339 of the document to Uhuru Kenyatta denouncing
2 the Mungiki after they were allegedly involved in a mass killing in
3 Kariobangi slum only "under intense public criticism" and that he was
4 "forced to denounce them."

5 This section referred to by the Prosecution, again no footnote,
6 no source, not possible to know where the author obtained his information
7 or to even begin to assess the reliability of that information, and more
8 importantly, why he adopted the slant he did.

9 More alarmingly, not one single page of this 32-page report has
10 been footnoted. Neither, as one would expect, does the author ever refer
11 or clearly state the methodology he adopted to write this report. No
12 probative value whatsoever.

13 Your Honours, the last three documents I'm going to take you to,
14 9, 10, and 11, they all relate to the KNCHR report with which I know
15 you're familiar. First of all, document 9 is the report itself.
16 EVD-PT-OTP-00001, and I'm referring you to 0134, public.

17 Let me make it clear, it's only paragraph 509 of this report that
18 is Uhuru Kenyatta specific.

19 It alleges, as you may already be familiar that Uhuru Kenyatta
20 was involved in fund-raising meetings to plan and fund retaliatory
21 violence. No named source, no particulars of date, no knowledge of
22 whether it is first, second, third, or even more hearsay.

23 In contradistinction to the nature of the Prosecution's evidence,
24 you will hear direct evidence from witnesses who attended meetings at the
25 locations cited in paragraph 509. Here is perhaps a rather large word,

1 but you will hear their voices from the statements that have been put
2 before you telling the truth about meetings that took place, first-hand
3 accounts that give the truth and reality of those meetings.

4 Document ten, the second document which concerns the KNCHR
5 report, EVD-PT-OTP-00212, confidential, entitled "Report on post-election
6 violence: a journalist's perspective."

7 Your Honour, we submit that this is clearly the material which
8 underlies the KNCHR report allegations about the fundraising meetings,
9 heavily redacted, anonymous from a journalist. No evidence that the
10 individual attended any of the meetings, source unknown, dates unknown,
11 cannot be relied upon, we say to corroborate other redacted anonymous
12 information. Cannot be the subject of any scrutiny whatsoever.

13 The very last of the documents very briefly is EVD-PT-OTP-00169,
14 public.

15 All this is, and it can be dealt with very briefly, is a report
16 in something called "Africa Confidential (* sic)" which reports on the
17 KNCHR report. It adds nothing more.

18 Let me just pause for a moment before I bring you on to the other
19 seven documents to say this: The central foundational document aside
20 from the KNCHR report in this case is the Waki report. Public
21 EVD-PT-OTP-00004, and I take you to 0587.

22 Here is the only mention of Uhuru Kenyatta, and it's positive.
23 It's in relation to peace meetings convened by the DSIC on the 1st of
24 February, 2008, in Lumuru town, attended by MPs including Uhuru Kenyatta,
25 which the Waki report determinations, and I quote: "May have pacified

1 the situation." Of this you will hear more.

2 Your Honours, let me now move very briefly to the seven other
3 documents in the document containing the charges, because I want
4 your Honours to know that this Defence team has not only scrutinised over
5 of 6.000 pages of the analysis table as well as the prime sources of
6 evidence itself, we have also scrutinised the amended document containing
7 the charges to look and to try and assist you to see whether there are
8 any other documents there which do not directly fall under Uhuru Kenyatta
9 specific in the analysis tables.

10 We confirm and submit to you that there is nothing to support the
11 alleged individual criminal responsibility of this man. But let me be
12 very clear about what these documents contain as EVD numbers alone do not
13 perhaps do justice to the reality of the evidence.

14 First document, your Honours, Oscar Foundation report, public,
15 EVD-PT-OTP-00003, entitled "Ethnicity and a failed democracy: A critical
16 surgery of the pre- and post-election violence in Kenya."

17 We say that this document is in fact exculpatory. Let's look at
18 it, 0346 of the EVD number I cited. The only reference to Uhuru Kenyatta
19 states the following:

20 "As the situation evolved from being defensive to offensive with
21 people from offending communities being flashed from their houses in
22 various parts of Central Province in retaliation of the ongoing eviction
23 of ethnic Kikuyu in the North Rift, Western and Nyanza, key community
24 leaders led by the former opposition chief and now minister of local
25 government in Kibaki's government, Uhuru Kenyatta, moved in to calm

1 groups of Kikuyu youth who had assembled in parts of the Central Province
2 neighbouring Nairobi with an intention of invading Nairobi."

3 This is not evidence of individual criminal responsibility, but,
4 rather, we say evidence of Uhuru Kenyatta trying to reason and calm down
5 Kikuyu youth, which fits squarely with the Defence evidence you will hear
6 of the efforts he made to install peace during this devastating period of
7 Kenya's modern history.

8 The second document, and to be fair, I'll refer to it so it's
9 there, is of practically no value whatsoever other than to record a fact.
10 It's EVD-PT-OTP-00098 and it's confidential. It's a Thika District
11 Security and Intelligence Committee report for the period of the
12 21st of December, 2007 to the 22nd of January, 2008. And, your Honours,
13 the only mention there of Uhuru Kenyatta is at 0353, that he emerged the
14 winner for Gatundu South elections.

15 Third document, public, EVD-PT-OTP-00129. It's an article
16 entitled "Kenyan opposition leaders position upheld," and I'm afraid
17 again it's a document that comes from the internet.

18 Again, the only reference here at 0483 is that despite challenges
19 from Nicholas Biwott, a Kenyan court upheld Uhuru Kenyatta's position as
20 leader of KANU, something we don't dispute. It's nothing more, nothing
21 less.

22 The fourth document, EVD-PT-OTP-00194. It's public, and it's
23 perhaps rather surprisingly that this has found its way before the
24 International Criminal Court, and, your Honours, it's a Wikipedia entry
25 for Uhuru Kenyatta. Nothing of any relevance, probative value in this

1 internet entry.

2 Fifth document, EVD-PT-OTP-00245 at 0343, confidential. This is
3 a transcript of an individual interviewed by the Office of the Prosecutor
4 whose name hasn't been given to the Defence. He states merely, and I ask
5 you to look at this carefully, that Uhuru Kenyatta had called for
6 fundraising in one of the Nairobi hotels. He says, to assist, I quote,
7 "Kikuyus."

8 Now, there's no reference in that transcript to any such
9 fundraising being for sinister aim. In fact, it's quite telling that the
10 witness himself, in fact, wanted to know which project the money had gone
11 to.

12 Nothing of probative, relevant value here.

13 The sixth document, EVD-PT-OTP-00281, public. This document is a
14 political article from 2006, the 16th of July, about the race for the
15 Nakuru town parliamentary seat and the declarations that the outcome of
16 the by-election would be a reflection of the 2007 polls.

17 Nothing here that goes to his alleged individual criminal
18 responsibility.

19 Final document, your Honours, you might be pleased to hear,
20 document seven is EVD-PT-OTP-00284, public, and I quote at 0312 -- this
21 document is entitled "Warlord democracy, the proliferation of militias
22 and post-election violence in Kenya, 1999-2002."

23 Article harks back to 2002. Not relevant, we say, to the facts
24 of 2008. Again, Mungiki saying they would support Mr. Saitoti and
25 Mr. Uhuru Kenyatta. March 2002 rally. We've heard about that.

1 Uhuru Kenyatta did not attend. I've already addressed you on that.

2 Recycling of the same irrelevant material.

3 Now, my final observations concern and address the Prosecution's
4 opening and presentation, and I'd like to start with the fundamentals
5 here. Let's address and go straight to the common plan and the essential
6 contribution. As your Honours know, these are requirements 1 and 2 of
7 the mode of liability of indirect co-perpetration.

8 The Prosecution's presentation referred you to three essential
9 meetings: One, to get support from the Mungiki for the PNU presidential
10 campaign on the 26th of November, 2007; and two, alleged planning
11 meetings with the Mungiki on the 30th of December and the 3rd of January.

12 We submit that this case stands or falls at this stage on those
13 meetings. Without it, there is no organisational policy. There is no
14 origin of crime.

15 Let's deal firstly, then, briefly with the 26th of November
16 meeting on the Prosecution's own evidence.

17 The Prosecution tell you:

18 "The objective of this meeting was to discuss Mungiki support for
19 the PNU's presidential campaign in exchange for Mungiki demands."

20 Well, what evidence do they rely on? They rely on Witness 0004.
21 I've already addressed you about the inherent evidential inconsistencies
22 and to some extent the external evidence which we say destroys his
23 particular account of a meeting in a tent at State House.

24 You will hear more about the reality of this meeting, the youth
25 leaders who were in attendance in a meeting room in State House to

1 present the president with a youth charter which they had been unable to
2 do at the youth rally that had been held the day before, a meeting
3 arranged only that day before to allow them to have the president hear
4 their voice, a meeting not attended, in any event, by Uhuru Kenyatta.

5 The Prosecution also rely on Witness 0011, who refers to a
6 meeting at State House which he did not personally attend. I've
7 addressed you on Witness 0011.

8 Additional corroboration, the Prosecution says, can be found in
9 confidential EVD-PT-OTP-00013 at 0088. This is an NSIS report of the
10 1st of June, 2007, to the 28th of February, 2008.

11 I want to just tell you what it says, your Honours. The report
12 merely refers to some Mungiki having resolved to campaign for the
13 president through a group called Oka on the condition that they may be
14 recruited into the military or the police.

15 Put simply, there is no corroboration here for a meeting between
16 Kibaki, Uhuru Kenyatta, and others in a tent in State House grounds on
17 the 26th of November.

18 Crucially when you look at it the guidance contained in this NSIS
19 report to the government is that the government should resist the sect's
20 move as it amounted to blackmail. No other evidence in support of this
21 meeting.

22 Let's move to the second meeting, the meeting of the 30th of
23 December, this critical meeting where Uhuru Kenyatta, you are told, is
24 supposed to have proposed the policy to attack.

25 We have unpicked what you have been told, and we've gone back to

1 the sources. They are Witnesses 0011 and 0012, independently proved, we
2 say, through independent counsel to be inherently unreliable individuals
3 engaged in criminal conduct. Even the account given by Witness 0011
4 shows that he wasn't at the meeting he alleges, not clear about the
5 precise date nor the source provided in his redacted account.

6 Furthermore, the account of the meeting by Witness 0011 is simply
7 not corroborated by Witness 12 or anyone else. In fact, we ask you to
8 look at that, because the account cited in the Document Containing the
9 Charges by Witness 0012 is redacted to such an extent that it says
10 absolutely nothing. We urge you to have regard thereto.
11 EVD-PT-OTP-00667 at 0427 to 0429.

12 That's it, I'm afraid, for that meeting. So let's have a look at
13 the 3rd of January meeting, because here when we've gone back to it again
14 and unpicked it, at first blush there appears to be quite a lot. We've
15 got Witness 0004, we've got Witnesses 0011 and 0012, anonymous witness
16 summary 1, anonymous witness summary 6, anonymous witness summary
17 EVD-PT-OTP-00581, and anonymous summary EVD-PT-OTP-00341.

18 So at first blush, your Honours, you may be led to conclude that
19 there are seven sources of evidence to support this allegation. The fact
20 is when you go to those sources as we have done, there is only one
21 account which we say is toxically unreliable, and it comes from
22 Witness 0004.

23 Our arguments about Witness 0004, your Honours, are not arguments
24 of nicety made on the fringes of credibility but, rather, these are
25 arguments of great substance which we ask you to examine with particular

1 care. And for the purpose of entirety and having taken you through it
2 all, I will conduct a whistle-stop tour of the other sources. Let's look
3 at the sources I've quoted.

4 Witness 12, nothing from this witness about a meeting on the
5 3rd of January in the members club. Witness 0011, the same.

6 Witness 0001, anonymous summary, does not at any time refer to a meeting
7 on the 3rd of January at the Nairobi Members Club. Not corroborative.

8 He alleges that some meetings took place between the Mungiki and
9 the government. No place, no date, no detail. I have already addressed
10 you in respect of this summary.

11 Anonymous witness summary 6. Again, I've addressed you on this.
12 Information from a source he doesn't name, meetings between the
13 government and Mungiki. Uhuru Kenyatta's supposed to be at the second
14 one. No reference whatsoever to a meeting on the 3rd of January in
15 Nairobi Members Club.

16 The last two, very briefly. The witness summary that I cited,
17 EVD-PT-OTP-00581, again nothing corroborative there, we say. Meaningless
18 evidence with no substantiation, unfit to come before this Court.

19 Last one, anonymous witness summary EVD-PT-OTP-00341. Please
20 look at this document. There is no corroboration for the specifics which
21 must be there for your Honours to consider. Nothing about
22 Uhuru Kenyatta.

23 I'd like briefly just to address you on the allegation of a
24 meeting at Blue Springs Hotel on the 3rd of January where it was alleged
25 by the Prosecution that Uhuru Kenyatta spoke about this meeting where

1 logistics would be discussed and how things should be done in order to
2 send "our people" to the Rift Valley. Everything would be planned at
3 this meeting. Money would be allocated.

4 I'm afraid, your Honours, that Prosecution Witness 0004 is the
5 only person who speaks to this location and the allegation of a meeting.
6 Even he admits he didn't even attend the meeting, he said, happened.

7 Defence say the meeting is a fiction, never took place. But
8 crucially for your purposes, there is no other corroborating source.

9 What of the allegation of a meeting at Blue Post, a different
10 hotel cited, in January of 2008, which the Prosecution refers to as an
11 implementation of the organisational policy meeting. Again, crucial.

12 It's alleged here that George Thuo told members of the Mungiki
13 that he'd been sent by Uhuru Kenyatta with some money so they can buy
14 whatever they need to help "our people," send people to Naivasha. It's
15 even alleged that Uhuru Kenyatta put in an appearance at this meeting.

16 The only source is Witness 0011, who did not even attend a
17 meeting he purports to say took place. You have heard my submission on
18 Witness 0011.

19 You will hear from the Defence evidence that has been submitted
20 to you, and we ask you to take due regard to the details of the reality
21 of meetings that we know took place on the 3rd of January, the 28th of
22 January, and the 26th of February at this hotel, meetings to assist the
23 displaced people, meetings attended by senior members of the clergy, not
24 by Uhuru Kenyatta in any event.

25 What of the second element of the mode of liability requirement,

1 evidence of Uhuru Kenyatta's control over the Mungiki? The Prosecution
2 say there are several sources. Let us briefly examine them.

3 Prosecution Witness 0001. I've already addressed you on his
4 evidence. There is nothing that speaks to control.

5 Academic article by Professor Kagwanja. Already address you.
6 Nothing that speaks to his control.

7 Witnesses 0011 and 0012 rear their heads again. Nothing there
8 that can ever be relied upon by this Chamber.

9 And Witness 0010. Already addressed you. Nothing when you look
10 at that source that supports the Prosecution's contention.

11 Perhaps this is also worth a thought, that in order for this
12 proposition of control over the Mungiki to have any validity,
13 Uhuru Kenyatta must be in command of Maina Njenga. Well, if he was, he
14 certainly did a bad job, as Maina Njenga was supporting the ODM as you
15 saw in the video played in the opening of the Muthaura case by Mr. Khan.

16 Let us not mess around with the term of "effective control" which
17 is reserved for the mastermind whose power and authority cannot be
18 blocked by anyone above or below.

19 Paragraph 39 of the Amended Document Containing the Charges,
20 there the Prosecution pleads that Maina Njenga was the leader, founder,
21 and patron. In the same paragraph, Prosecution claims that
22 Uhuru Kenyatta himself is alleged to be a Mungiki leader. However, we
23 say it is notable that the Office of the Prosecutor has not pleaded that
24 Kenyatta exercised either *de facto* or *de jure* control over Maina Njenga
25 or that Maina Njenga was a co-perpetrator. Fatal omissions and made

1 perhaps knowingly, as there's absolutely no evidence to support that
2 contention.

3 It is fascinating and yet, we say, deeply troubling that the
4 Prosecution never even interviewed Maina Njenga.

5 We urge you to go to the sources cited in support of
6 paragraph 39, footnote 77. None of these provide evidence that
7 Uhuru Kenyatta was a leader of the Mungiki.

8 Another area, alleged mobilisation of Mungiki by Uhuru Kenyatta.
9 The evidence simply isn't there, your Honours.

10 Reliance on Witness 0004, reliance on a NSIS report which is
11 alleged to provide you with corroboration. Let's go to it.
12 Confidential, EVD-PT-OTP-00013 at 0069 to 0070, paragraph 321. This
13 document refers to Maina Njenga organising recruitment and oathing for
14 the Mungiki to take part in the skirmishes. There's absolutely no
15 mention of Uhuru Kenyatta in this report. Neither has Prosecution
16 provided you with any evidence of a criminal link between him and
17 Maina Njenga.

18 Financial and logistical support to the Mungiki by
19 Uhuru Kenyatta. We ask you to scrutinise the sources. No more than
20 anonymous unsupported hearsay and/or unauthored.

21 What about the evidence of the placing of the Mungiki under
22 Uhuru Kenyatta's responsible command? Again, when you look at it, it
23 comes to this: Witnesses 0011 and 0012, and a NSIS report from the 23rd
24 of January which doesn't even mention Uhuru Kenyatta. EVD-PT-OTP-00013
25 at 0048.

1 There simply has been no elucidation whatsoever of what the
2 responsible command structure is supposed to be.

3 To command is to exercise direct authority over, to have at one's
4 disposal, to lead; no evidence.

5 Finally, what of the Prosecution's evidence that Uhuru Kenyatta
6 was able to secure the execution of crimes agreed upon by almost
7 automatic compliance of the physical perpetrators with the orders he
8 gave? Your Honours know that that is also a requirement that must be
9 made out.

10 Well, the Prosecution rely here on Uhuru Kenyatta being able to
11 ensure compliance through the provision of sufficient funds to secure the
12 support of other members of the common plan and to enable the recruitment
13 of Mungiki.

14 The only evidence cited in support is Witness 0011, which we say
15 is incapable of reliance upon.

16 Even if it was the case, which is entirely, whole-heartedly
17 rejected by the Defence that Uhuru Kenyatta supplied money to the
18 Mungiki, it defies logic that such evidence, only that evidence
19 constitutes evidence of automatic compliance.

20 There is no evidence to support this requisite of indirect
21 co-perpetratorship.

22 What about, finally, the fundamental requirement of intent? The
23 Prosecution is correct on this one when it asserts that you will see
24 Uhuru Kenyatta's intent through, I quote, "his words and actions," and
25 perhaps it's time to take a good hard look.

1 Thank you, Your Honours.

2 PRESIDING JUDGE TRENDAFILOVA: Thank you very much, Ms. Higgins.

3 Now the floor is over to Mr. Kay.

4 Would you press --

5 MR. KAY: I'm out of practice after a few days. I thank my
6 learned colleague for her presentation to you. I was taught as a junior
7 lawyer, before I came into a court that I researched my facts that I was
8 asserting in the courtroom. I investigated my case, and I presented it
9 in a way that properly reflected the case that I was bringing, and that
10 was a Golden Rule that I hope I've passed down through the generations of
11 the young lawyers that I've trained over the years, but we are seeing
12 something in this courtroom that I am afraid does not meet up to the
13 rigorous standards that should be applied.

14 In the year 2000, Professor Cassese issues his commentary on the
15 Rome treaty. I wrote the chapter on the role of the Defence with
16 His Honour Judge Bert Swart who sadly passed away recently. I had never
17 any conception at the time of writing that chapter that I would be
18 standing here in court ten years later addressing you upon evidence such
19 as has been put before you that has caused an investigation, a summons,
20 and now a confirmation hearing for people who are public figures, whose
21 cases deserved to be investigated before they were put through the
22 process that has taken place, but there it is. There we are. That's
23 what we face, and we will meet the challenge.

24 The background of Uhuru Kenyatta is important because of his
25 leadership of the KANU party, and I addressed you in opening about that

1 party. And it's a very important fact to note that that was a political
2 party outside his political community of the Kikuyu. President Kibaki
3 was the man in charge of the Kikuyu party, but Uhuru Kenyatta had gone in
4 a different direction. Moi, who was a Kalenjin, he who was a Kikuyu, and
5 the thrust of his party was on the basis of all Kenya, not just of
6 tribalism or sectarianism. And that's a very important thing to note.

7 We've provided a witness statement for you, confidential,
8 Witness 0006, EVD-PT-D13-00479, pages 0418 to 0420.

9 He describes the 1997 election:

10 "At this point KANU, led by Daniel Arap Moi, was widely perceived
11 as the party of choice for the smaller tribes," and he names them,
12 "Kalenjin, Maasai, and Somali." He describes how Uhuru Kenyatta joined
13 the KANU party, "It was almost inconceivable for Uhuru Kenyatta, a
14 Kikuyu, to stand on a KANU ticket. However, Kenyatta has never based his
15 politics along ethnic lines. He has only ever been concerned with how
16 issues affect the national interest.

17 "Kenyatta wasn't afraid to challenge Kibaki on national issues,
18 despite the fact that many Kikuyu politicians were of the opinion that
19 Kenyatta should not question his fellow tribesmen.

20 "Uhuru Kenyatta joined Kibaki in September 2007 for a number of
21 reasons, none of which have any base in ethnic considerations. Firstly,
22 Kenyatta felt that the ODM's method of opposition to Kibaki's government
23 was irresponsible. The ODM was alarmist and purposefully sought to
24 encourage hatred against the Kibaki regime, as opposed to proposing
25 effective solutions.

1 "Secondly, the political union of the ODM was predicated on
2 stirring upset ethnic rivalry to consolidate communities against others.

3 "Thirdly, it was clear to Kenyatta that after the ODM faction
4 left Kibaki's government an admirable amount of development had taken
5 place which was testament to that faction's focus on development as
6 opposed to divisive politics."

7 So that's the background, and that's a very important thing to
8 bear in mind, because when we have cases presented on ethnic lines, it's
9 often quite important and quite challenging to look at the background of
10 the individual concerned.

11 Let's go again to his conduct during the election itself. We
12 know the stakes were high, the rivalry fierce. Great lengths were gone
13 to by the ODM to provide an effective campaign, to have a strategy, and
14 you saw the clip that we showed in our half-hour opening statement.

15 Back to Witness 0006, EVD-PT-D13-00479, page 0422 to 0423:

16 "Uhuru Kenyatta's campaigns centred on national concerns. He
17 would frequently state that the Kibaki government had brought roads and
18 improved health care and education for all Kenyans. When he was
19 campaigning, Kenyatta did not seek to excite tribal passions. Instead,
20 he referred to national concerns such as development and the economy. At
21 campaigns, he would frequently state, 'When you are addressing national
22 issues, it doesn't matter where you come from.'"

23 "I remember that Kenyatta hosted large town hall style meetings
24 with community leaders from the Rift Valley, especially the Kalenjin
25 which is a key tribe that the ODM were attempt to incite. At these

1 meetings, Kenyatta sought to diffuse the ethnic tension through dialogue.
2 These Kalenjin communities have been mistakenly informed by the ODM
3 politicians that their lack of jobs and land was as a result of the
4 Kikuyus. Kenyatta explained that Kikuyus and Kalenjins have lived in
5 harmony for hundreds of years, and in fact when his father, Jomo
6 Kenyatta, was president, he had chosen Daniel Arap Moi, a Kalenjin, as
7 his vice-president."

8 Other witnesses confirm this, and I cite to you confidential
9 Witness 0003 at EVD-PT-D13-00424 at page 0089, and also Witness 0011,
10 EVD-PT-D13-00535 at page 065. And that statement -- 0650. That
11 statement says at paragraph 10:

12 "During the election campaign of 2007, I was with him and
13 followed him almost every day and recorded what took place as he was
14 fighting the election with the PNU on behalf of his KANU party. The
15 alliance between them was from September 2007. During the campaign, I
16 never heard him promote violence or ethnic tension."

17 I mentioned in opening a statement before the Court several days
18 ago, that it was very important in a case to talk to those who were with,
19 who watched, who could say they were present with an accused. You know
20 from the evidence that has been analysed by Ms. Higgins that that has not
21 happened in this case and that there is a great reliance upon rumour,
22 gossip, what others have said.

23 That might be fine for an investigation, and one can understand
24 an investigation may cause a prosecutor to investigate if -- if there was
25 a belief there that such rumour and gossip needed scrutiny, but when you

1 come into court, your evidence must have moved beyond that gossip and
2 rumour.

3 A good matter to look at now is Uhuru Kenyatta's response to the
4 election results. An important component in this case were those results
5 which were bitterly contested by the ODM party. What was his position,
6 and how did he conduct himself? I'm going to refer you to a videotape
7 that we were able to obtain. I'm not going to play it as it's too long,
8 but it's at EVD-PT-D13-00070. It's the 28th of December, 2007, and
9 Mr. Kenyatta is interviewed by KTN TV at the Electoral Commission
10 Secretariat in the KICC building, Nairobi. And there you will see, as
11 people start challenging the results, what he said at that time:

12 "It is mere nonsense as was proved to be in Nyanza and
13 Rift Valley. There are just individuals who were just using that
14 conspiracy to basically indicate that they have won and the only way that
15 President Kibaki is going to win is if he rigs."

16 There was a feeling at this time that you can see in the evidence
17 that this allegation of rigging was being used as a tool to incite one
18 side against the other, and it was dangerous.

19 If you look at the evidence from the time, you will see
20 politicians mentioning such matters, but none of them at that time in the
21 early stage of the giving out of the election results were aware what was
22 going to happen and how on this occasion in Kenya the election violence
23 was going to be worse than it had been before.

24 But at a very early stage, it's Uhuru Kenyatta's position that he
25 wants talks with the opposition once trouble starts, and I refer you to

1 the newspaper the "Standard" on the 31st of December, 2007,
2 EVD-PT-D13-00074, headed "Ministers: State in talks with opposition":
3 "The government held a press conference in which it calls for
4 peace and announce that it is reaching out to the opposition to seek a
5 solution to the violence raging across the country."

6 Uhuru Kenyatta is present at that meeting.

7 Going back to Witness 0011, at EVD-PT-D13-00535, at page 0651,
8 and you will recollect I referred to you earlier a statement by him
9 because he was recording events that took place following Mr. Kenyatta
10 during the election and afterwards, and you will be seeing video-clips
11 later on recorded by this witness which go to the truth of what he was
12 saying and doing. But he was at the KICC when the votes were counted,
13 and he says at paragraph 12:

14 "I could see the conflicts starting as the results began to
15 favour PNU and Mwai Kibaki. The ODM started press conferences to
16 denounce the outcome even before the final results came in. Accusations
17 and counter-accusations started. I recorded all this. Some politicians
18 started to cause chaos and be aggressive. Uhuru was very calm and wanted
19 the ODM to wait for the final outcome as they had started their attack
20 even before the results were known. The ODM produced to the media a
21 returning officer in a stage-managed way to say he had seen
22 irregularities. The ODM claimed this and then sent him away so he could
23 not be spoken to directly. All this was happening live in the media and
24 causing great tension and anger. They wanted to proclaim the election
25 was stolen and to have that reported in the media and cause trouble.

1 "When reports of violence started to come in, Uhuru was visibly
2 disturbed and worried about what was happening. His attitude was that
3 ODM should be humble and wait for the results and not talk in such a
4 scathing manner. It was bad for Kenya and not good for our people."

5 Confirmation of this conduct and how he bore himself at the time
6 of the election results is also able to be derived from Witness 0020. Go
7 to EVD-PT-D13-00548 at 0757 to 0760, confidential witness statement.

8 And he describes what was happening and how, as news came in:

9 "I remember Uhuru speaking to the press alongside other
10 politicians and him calling for peace."

11 This event was reported, and you can see it in the press at the
12 Serena Hotel and exhibited. Go to EVD-PT-D13-00077:

13 "On the 2nd of January," this witness goes on to say at
14 paragraph 13, "we were at the house in Nairobi, and on this day I
15 remember that as the violence continued, some of the leaders felt that
16 they should yet again call for peace and recall there being a press
17 conference in which both Uhuru and my immediate boss, the foreign
18 minister, Honourable Tuju, were present. The gist of this press
19 conference was that the ODM should seek legal redress as stipulated for
20 in the constitution."

21 The Court has seen in the opening statement given by the Kenyatta
22 Defence other clips of Uhuru Kenyatta urging the ODM to challenge through
23 the courts and not resort to mass action. You remember the words where
24 he said, "Kenya is on the brink." And you can go to media clips at 3 --
25 for the 3rd of January, 2008, EVD-PT-D13-00082; the "Standard" newspaper

1 of the 3rd of January, "Seek court action, PNU tells Raila":

2 "We won the election and whoever feels aggrieved should go to
3 court and we will be available for response."

4 So there we have it in those early days of what is actually being
5 said in the media and publicly by Uhuru Kenyatta. Quite the opposite
6 from these allegations made on behalf of the Prosecution through these
7 three protected witnesses. Very, very different in real terms, and
8 probably those people, when they made those statements, never realise
9 that someone would go along and check publicly what was being said by
10 Uhuru Kenyatta to see if that supported them or contradicted them.

11 The plain fact of the matter is that it contradicts them. His
12 reaction from the election results was one of calmness. It was saying,
13 "Go to the courts to challenge. Do not use mass action."

14 So that takes us to the 3rd of January from those public sources.
15 We submit very important evidence, but we will now go further and put
16 before you his exact conduct in response to the violence.

17 I'm going to play you a clip from the 11th of January, 2008, at
18 EVD-PT-D13-00102 from KTN TV.

19 (Video-clip played)

20 "... that we were all ready for yesterday. The president was
21 sitting and waiting for them to come and dialogue. They didn't show up.
22 And then tomorrow you now hear that they are now saying mass action.
23 That doesn't show good faith."

24 Dialogue. He appreciated that dialogue was necessary to try and
25 stop what was happening. If one side has mobilised forces to try and

1 prevent the normal civil government and make Kenya ungovernable, as a
2 politician, he appreciated dialogue was necessary. First reaction, "Go
3 to the courts. Take your complaint there." But then "let's talk" was
4 his position and that's what he was putting out in the public and wanting
5 the ODM to follow.

6 Let's have a look at this at EVD-PT-D13-00106, on the
7 12th of January, 2008. It's the "People Daily," and it's page 24, and it
8 refers to the 11th of January, 2008. Can we show that extract from the
9 newspaper.

10 The newspaper records this from Uhuru Kenyatta under the headline
11 "Uhuru slams mass action calls."

12 I don't think it's come on the screens, but I don't want to lose
13 time. I'll refer you now to what was said:

14 "Dialogue requires people to resolve differences peacefully and
15 not throwing stones that could kill innocent people. It is not engaged
16 in the streets."

17 Let's play now another television clip from this time, also the
18 11th of January. EVD-PT-D13-00103, CTV, "mediation process."

19 (Video-clip played)

20 "On their part, government friendly leaders reiterated that they
21 are ready and open for dialogue.

22 "That idea and our position is that we are all interested in
23 peace in our country. We are all interested in dialogue and working
24 together as Kenyans. We believe strongly that President Mwai Kibaki won
25 these elections. We are not discussing or deliberating from a point of

1 view where we think that there was a stolen election."

2 That, of course, would have to be decided in a court as he'd
3 already made clear whether the election was stolen or not, and there was
4 clear position from him and his party that that should be the route.

5 On the 12th of January, at EVD-PT-D13-00106, if you could show
6 that, please. The "Daily Nation," "Uhuru slams mass action calls":

7 "Local government minister Uhuru Kenyatta has faulted ODM over
8 calls for mass protests, saying that it is not a demonstration of people
9 who are ready for dialogue. Dialogue requires people to resolve
10 differences peacefully and not throwing stones that could kill innocent
11 people. It cannot be engaged on the streets."

12 During the post-election violence, Uhuru Kenyatta preached that
13 peaceful message on the streets himself.

14 At EVD-PT-D13-00076, from the 1st of January, 2008, again the
15 "Daily Nation," pages 4 and 5, under the heading "Looting, rioting and
16 evictions continue as ODM youths cause chaos over polls":

17 "Uhuru Kenyatta," and he's photographed, "is present at a press
18 conference at Serena Hotel, Nairobi, where leaders condemn the killings
19 that have been going on in the country."

20 From the content that we've delivered to the Court as part of our
21 disclosure, the Court will know that he travelled to Tanzania on a
22 special mission on the 6th of January, 2008, EVD-PT-D13-00088, to have a
23 meeting with the head of state of Tanzania regarding the violence and
24 destruction in Kenya.

25 So we can see the development of his conduct by his acts and

1 deeds. This is the real evidence of what was happening in January 2008.

2 This is what he is actually saying and doing.

3 Let us now play a few clips from a radio station at 7.30 in the
4 morning on the 30th of January, 2008. It's Capital FM. It's
5 EVD-PT-D13-00122, at 01:05.

6 (Audio-clip played)

7 "Nothing in the world and in God's name nothing justifies the
8 death, maiming, destruction that we have seen over the last three weeks,
9 and really it behooves all of us as leaders, as Kenyans, to ensure that
10 begin to talk to one another as brothers and sisters and that, to me, is
11 the most important message one can put across to citizens at this time."

12 Another clip from Capital FM at 04:10.

13 (Audio-clip played)

14 "What is more important and what really is our duty, both as
15 leaders and as citizens, is to ensure that we create an environment that
16 is going to allow such discussion and dialogue to take place, and
17 therefore it behooves on all of us to call upon our brothers and sisters
18 to lay down their arms, to realise that you cannot, no matter how angry
19 you may be, whether you're a supporter of Raila, whether you're a
20 supporter of Kibaki. If you're a supporter of Raila and you believe that
21 the election was stolen, you are not going to get a solution through
22 killing, the so-called supporters of Mwai Kibaki. If you are a supporter
23 of Mwai Kibaki, you are not going to get a solution by taking revenge
24 because your brother or your sister was killed by a supporter because all
25 that you are doing is adding to the problem. Let us come to our senses,

1 let us lay down our weapons, let us talk to our neighbours, let us talk
2 to the people that we have lived next door to one another, and let us ask
3 ourselves what really is eating at this country and through dialogue can
4 we fix it."

5 This is not a politician just going against the other side. This
6 is a politician talking on both sides. Raila Odinga, Mwai Kibaki. He's
7 putting the message to both sides of Kenya.

8 Let us play at 17:55. It was a very long radio show and you have
9 the full evidence provided to you and I'm taking just a few clips. At
10 17:155.

11 (Audio-clip played)

12 "Let us take and allow the government and the authorities to
13 ensure that the lives of those people who live in affected areas are
14 protected, but revenge has never been an answer. Let us live in peace.
15 Let us be an example of people who can co-exist with one another and not
16 use the fact that we have minorities amongst us as a target for revenge
17 missions because of what has happened to our relatives or friends who
18 live in other areas."

19 Another radio station, Coro FM, 31st of January, 2008, at
20 EVD-PT-D13-00128. The transcript is at EVD-PT-D13-00390, at page 0107,
21 as it's a Kikuyu language radio station. I'll give you the translation.
22 We won't play this piece in Kikuyu. We have a long piece to come up, and
23 it will save time if I just read the translation:

24 "But the Englishman said, 'Two wrongs have never made a right.'
25 Personally, my plea to our people is that we should keep peace, that we

1 recognise that in our country there isn't anyone who doesn't have a right
2 to reside wherever they desire and to conduct their business whether it's
3 farming or living peacefully. And I am sure that for all those that have
4 committed acts to destroy the homes and lives our people, each and every
5 one of them, the government shall reckon with them and make sure that our
6 people return. But the most important is this: People should not take
7 the law into their own hands. They should agree to maintain peace and
8 live together with other people so that foreign lands will know we have
9 no ill-motive but were attacked. And when we shall be able to reckon
10 with the people that have done the things that have done, people will
11 know we were the peaceful ones and we were attacked."

12 What was happening here was reflected in the press as well as
13 EVD-PT-D13-00078, the "Kenya Times," "MPs embark on mission to preach
14 peace," 2nd of February, 2008, page 4, referring to the previous day, the
15 1st of February, and it reads thus:

16 "Uhuru Kenyatta assured the displaced persons that those
17 implicated in the ongoing skirmishing across the country would be
18 arrested and arraigned in court, saying it was wrong for people to do so.
19 Saying that the country belongs to all and sundry. The minister said all
20 Kenyans had the right to live and own property in any part of the
21 country. He at the same time assured all the victims of the PEV that
22 they would be compensated."

23 This isn't rumour and gossip picked up from the streets of
24 Nairobi and circulated. This isn't evidence that just comes about
25 because someone has an end to serve for themselves. This is direct

1 observational evidence at the time that was recorded.

2 Another one, EVD-PT-D13-00133, 2nd of February, 2008, "The
3 People," "MPs meet over chaos":

4 "Cabinet minister Uhuru Kenyatta yesterday led ten MPs in a peace
5 tour of three constituencies in Kiambu District. The MPs toured Kabete,
6 Nderi, Kari, Limuru, and Tigoni, and addressed families camping at Tigoni
7 and Kabete police stations. The families pleaded with the government to
8 provide them with transport and security to return to their rural homes
9 in Western and Nyanza Provinces. The local government minister urged
10 local residents to live peacefully with their neighbours."

11 So much for the reported press on this. What do others say who
12 were with him and around him? Confidential Witness 0006 at
13 EVD-PT-D13-00479 at page 0423 to 0424:

14 "After the outbreak of violence," this is at paragraph 52,
15 "following the release of the election results, Uhuru Kenyatta did not in
16 any way encourage retaliatory violence. Kenyatta is a compassionate man,
17 and he was moved greatly by the PEV. I remember watching the news
18 coverage of the violence with Kenyatta. He was in disbelief that people
19 of our country could sink to such a level.

20 "Kenyatta's view was that if we retaliated, there would be no
21 difference between us and the murderers of women and children. He was
22 not of the opinion that the Kikuyu could seek justice for the crimes
23 committed against their people if they themselves resorted to violence
24 and retaliation. He stressed that the people had voted to elect Kibaki
25 as their president, so we should let justice take its natural course.

1 His opinion was that Kibaki was the president and the system was there to
2 bring the perpetrators to justice and to protect citizens and their
3 property."

4 This is supported by other witnesses whom I'll refer to now.

5 Confidential Witness 0001 at EVD-PT-D13-00409. Also confidential
6 Witness 0004, EVD-PT-D13-00425, at page 0098. I'll just read that one
7 out, paragraph 20:

8 "I know that during the post-election violence Uhuru Kenyatta
9 went to different places, including Limuru, Kikuyu, and Tigoni, asking
10 the people to be calm and not to retaliate. In these places, the youth
11 were setting up roadblocks and were angry about the violence that was
12 happening in the Rift Valley. I know that these events are recorded in
13 the media."

14 Confidential Witness 0005 at EVD-PT-D13-00428, at pages 0117 to
15 0119. This person knows Uhuru Kenyatta as a politician:

16 "We've always been in different parties, he with KANU and I with
17 the NARC Kenya party.

18 "In February 2008, there was a Kikuyu uprising in Kikuyu town
19 which came to my knowledge as part of my networking as a member of
20 Operation Love Your Neighbour. The Kikuyu residents were demanding that
21 non-Kikuyus leave the area because of the influx of Kikuyu IDPs from
22 Rift Valley."

23 She contacted the office of Uhuru Kenyatta:

24 "I called the number, and either Kenyatta or his personal
25 assistant answered. I asked him to address the uprising personally in

1 Kikuyu.

2 "I never saw such quick action. The next thing I knew I saw
3 Uhuru Kenyatta on the television news standing on what looked like a
4 pickup truck on the Nairobi-Nakuru Road, Kikuyu ... he was addressing
5 those protesting in Swahili, Kikuyu, and English. His speech prevented
6 any violence from occurring and caused the rioters to disperse. I have
7 been shown a video-clip of Uhuru Kenyatta speaking in Kikuyu," and she
8 produces it.

9 We will now play EVD-PT-D13-00124, Annex 3. There is a
10 transcript of this in the English language because the majority of the
11 language in this clip is in the Kikuyu tongue and Swahili tongue, and
12 this clip is important for you to see the manner and demeanour of the
13 accused Uhuru Kenyatta.

14 Can you play that, please.

15 (Video-clip played)

16 MR. KAY: Your Honour, that would be a convenient moment for the
17 break.

18 PRESIDING JUDGE TRENDAFILOVA: Thank you very much. Where is the
19 translation, Counsel Kay?

20 MR. KAY: The translation is with the Court.

21 PRESIDING JUDGE TRENDAFILOVA: The transcript we have received.

22 MR. KAY: Yes.

23 PRESIDING JUDGE TRENDAFILOVA: So thank you very much.

24 MR. KAY: It's electronic as well, as you know, but I thought it
25 easier to play it rather than me read it.

1 PRESIDING JUDGE TRENDABILOVA: Yes. We were following some
2 parts, but I was not sure.

3 So we shall resume our hearing at 6.35.

4 COURT USHER: All rise.

5 Recess taken at 6.06 p.m.

6 On resuming at 6.35 p.m.

7 (Open session)

8 COURT USHER: All rise.

9 PRESIDING JUDGE TRENDABILOVA: Please be seated.

10 Mr. Kay, please proceed.

11 MR. KAY: Thank you, Madam President. Witness 0011 ends her
12 statement with these words:

13 "At the end of the video, Uhuru Kenyatta can be heard to refer to
14 what I believe may have been my phone call when he case in the Kikuyu
15 language, "The way you have called me, call me again and I will come."

16 Corroborative evidence from confidential Witness 0011,
17 EVD-PT-D13-00535 at page 0652. And at paragraph 18, he refers to being
18 present when Uhuru Kenyatta went to trouble stops and told people "not to
19 do what other were doing namely destroying things." And he refers and
20 attached the footage to his statement that you've seen as he recorded
21 that film.

22 As he goes on to say:

23 "Uhuru also initiated with ODM MPs such as Fred Ngumo to bring
24 peace. I saw him hold his arm which I recorded and Uhuru was assuring
25 the people that there would be peace and that security would be taken

1 seriously."

2 And he attached footage to his statement.

3 I'd like the Court now to see some photographs of this peace tour
4 that took place. Can we see EVD-PT-D13-00532, and it's a photo taken by
5 the witness on the 1st of February, 2008.

6 COURT OFFICER: Your Honours, I just wanted to indicate for the
7 record that this is a confidential document.

8 MR. KAY: Yes. This photo can be public. I'm sorry. Yes.

9 Is it possible to -- there we are.

10 What is important here is that -- Fred Ngumo is the man in the
11 white shirt, was an ODM MP. The man in the middle is Lewis Nguyai. You
12 also saw him on the car with Uhuru Kenyatta. He was standing at the end
13 and asking people, "Do you understand?" And making sure they understood
14 and got the message, and of course you see Mr. Kenyatta. And there are
15 further photos which I won't show at EVD-PT-D13-00131.

16 Many other witness that we filed with the court with statements
17 refer to seeing Mr. Kenyatta preaching peace. They are Witness 0018, at
18 EVD-PT-D13-00546, at page 0744, confidential; Witness 0019,
19 EVD-PT-D13-00547, at page 0753, confidential; Witness 0026,
20 EVD-PT-D13-00596, at page 0019; Witness 0025, EVD-PT-D13-00557, at 0865.
21 All those are confidential as they're witness statements. Witness 0020
22 as well, confidential, EVD-PT-D13-00548 at 0761.

23 Answer refers to a particular issue because it's quite clear that
24 Kikuyu people, PNU people would have been harmed, would have been upset,
25 would have been worried about what was happening, and this witness says

1 at paragraph 20:

2 "On some occasions people were chastising him, that since the
3 government seemed to be ineffective, then people should be allowed to
4 defend themselves. I clearly recall that in these instances, he was at
5 pains to persuade people that they should show restraint and that
6 although the government was overwhelmed, they should be left to do their
7 job and any attempt to take matters into their own hands would only make
8 the situation worse. This was something I heard him saying on numerous
9 occasions. Further to this, I also recall that he continued to maintain
10 that the violence should stop and that peace should prevail.

11 "I was both impressed and encouraged that in such an environment,
12 Uhuru was able to continue pushing for restraint. More so, I was equally
13 impressed that he was able to get people to heed his calls for
14 restraint."

15 Can I turn now to other areas of the Defence evidence which
16 concern the Prosecution case, the meetings, and in the very short period
17 of time, 30 days before this case started, 15 days before filing our
18 evidence, evidence that we were able to compile and put together which go
19 to the issue here. Let's turn first to the 17th of November, 2007, and
20 the Yaya Centre meeting, Witness 0004 and his case.

21 The Court should look for background to EVD-PT-D13-00027, and
22 it's a diary written by someone, and it contains day-by-day information
23 of what was happening involving this person and refers to Uhuru Kenyatta.
24 He refers to this particular date because it's the MPs and civic party
25 nominations on the 17th of November, a very important political day. As

1 he put it:

2 "It kicks off today throughout the republic. As of today, 25
3 former MPs were off."

4 Now, in taking these dates which have shifted as the Court's been
5 told by Ms. Higgins, one is forced to find evidence that goes against and
6 challenges the account given by Witness 0004.

7 Confidential Witness 0006 at EVD-PT-D13-00479 at 0428. He says:

8 "On Saturday the 17th of November, 2007, I did not go to the Yaya
9 Centre with Uhuru Kenyatta. I have never been to the Yaya Centre with
10 Uhuru Kenyatta in my life."

11 He describes having been there on his own and with his wife:

12 "I do not find it possible to believe he would have met Mungiki
13 or others in such circumstances and in a public place. It is
14 inconceivable. He has never said to me he had such a meeting."

15 And that was a person working with him day by day.

16 He describes paragraph 3 of his statement of what he was doing on
17 the 17th of November, because as I said, it was a very important day for
18 the civic and parliamentary nominations, important for all the political
19 parties, PNU, ODM, KANU, and all the others, and as you know,
20 Uhuru Kenyatta was the leader of the KANU party.

21 He describes where he went on that day and the events taking
22 place, and at one stage because of the conflict between the civic and
23 parliamentary candidates being nominated or not nominated, he said that:

24 "This meant that all the candidates and their representatives
25 were camped in the KANU office or moving in and out of the office,

1 completely disrupting the work we were trying to do. It was almost
2 impossible to listen to the large number of people all trying to talk at
3 once. For safety reasons, they took the files out of KANU and moved to
4 Uhuru's private office in Chancery where we could work without -- without
5 interruption or fear. And we also hired a room in Serena Hotel to be
6 able to meet with various candidates at KANU offices.

7 "On the evening of the 17th of November, from 6.00 p.m. until
8 9.30, I was either in either Uhuru Kenyatta's private office in Chancery
9 or at Serena hotel. I never went to the Yaya Centre at any time."

10 It would have been helpful perhaps if the Prosecutor with the
11 witness they had had made various investigations as to what was happening
12 on the 17th of November, because they would have learnt that that
13 particular day was an important date in the calendar of Uhuru Kenyatta's
14 party as well as him and the other political parties.

15 We suggest out of thin air this witness has taken a date, as he's
16 taken other dates, and made up his account as to who he met and what was
17 said.

18 Confidential Witness 0015, and we've included both these
19 witnesses because of the similarity of their name to cover, one way or
20 the other, Witness 0004 being wrong about the identity of one person or
21 the other. EVD-PT-D13-00543. And this witness says:

22 "I am not and never have been employed as his PA."

23 And it's his name that is used by Witness 0004 alleging he was
24 present at the Yaya Centre in the evening of the 17th of November.

25 He was asked whether he was in a cafe in the Yaya Centre on the

1 second floor on Saturday, the 17th of November. He describes that day of
2 the 17th of November, and he describes the issues he was dealing with at
3 the KANU offices and describes the issues at the PNU headquarters.

4 "The committee was relocated to a secret location for security
5 reasons."

6 He names the place and I can't pronounce the name. I apologise.

7 "It was at this point that Uhuru Kenyatta joined us on the
8 evening of the 17th of November. Kenyatta attended as a result of the
9 high-profile dispute over one of the nominations. He wanted to help us
10 resolve the conflict as quickly as possible to avoid tarnishing the
11 reputation of the coalition. After an entire night's deliberation and
12 negotiation, we all left" this place "at approximately 6.00 a.m. on
13 Sunday after the committee had decided ..." about the nomination.

14 "I did not go to the Yaya Centre on the 17th of November, 2007."

15 Very important evidence in the context of this case,
16 your Honours.

17 The other date previously taken by Witness 0004, the 25th of
18 November, Ms. Higgins has addressed you upon at length, and I refer you
19 here to confidential Witness 0012 at EVD-PT-D13-00538, at page 0689, who
20 produced records to show the closure times of all the coffee-shops in the
21 Yaya Centre on that particular day, and simply that account of the 25th
22 of November is utterly proved by us to have been a fiction.

23 Confidential Witness 0006, EVD-PT-D13-00479 at page 0429 also
24 deals with the 25th of November and where Uhuru Kenyatta was. He
25 attended a church service in Bomet on the invitation of a person who was

1 the KANU candidate for Bomet. Uhuru Kenyatta later joined
2 President Kibaki in Nairobi for the rally in Uhuru Park, which was
3 documented in the media. On this Sunday, he didn't attend the youth
4 rally in Uhuru Park with him when he addressed the crowd.

5 Likewise, confidential Witness 0015, EVD-PT-D13-00543, at
6 page 0724, also deals with the 25th of November.

7 I've included it because it's been out there and there, and what
8 I wanted to demonstrate was that dates that are given, we've gone back,
9 researched and proved that the event did not take place through other
10 evidence.

11 You see, this -- this happens with people who -- who tell lies,
12 who don't really know what they're talking about. They pick a date, not
13 realising that three or four years later someone's going to go back and
14 check and look and see and find. In a very short period of time that we
15 had, that we were able to do this and establish the falsity of the
16 remark. Who knows what would have happened if we'd have had a much
17 longer period of time to deal with their evidence.

18 But the real issue is the 26th of November, the alleged meeting
19 in a tent at State House, Mungiki with Ambassador Muthaura,
20 President Kibaki, and Uhuru Kenyatta. So where was Uhuru Kenyatta on the
21 26th of November, 2007?

22 Witness 0006, confidential, EVD-PT-D13-00479 at page 0430, gives
23 an account of events that day.

24 It was another very important political day, because it is a day
25 after the Uhuru Park rally that the president addressed the youth in

1 Nairobi, and the following day was a day much recorded in the media. And
2 what I would like to do now is play a clip to you which shows a
3 particular event that morning precisely at the same time that
4 Mr. Kenyatta is alleged to have been in a tent with the Mungiki in
5 State House.

6 Play EVD-PT-D13-00201.

7 (Video-clip played)

8 "Over 250 parliamentary candidates will be flying the PNU flag in
9 turn for a date with the president. The first one says the conclusion of
10 the joint nominations. Pursuant of the (* indiscernible) settling in the
11 plenary hall word came around that the president was not coming ..."

12 Right. You saw Uhuru Kenyatta attending a particular event there
13 at the KICC, and it was a political event that he actually skipped. He
14 remained at State House, as you know, and as you've been directed to the
15 evidence, where he met a group of young people that day but without
16 Uhuru Kenyatta. Uhuru Kenyatta was attending the event that he skipped
17 and should have been at, and that was at the KICC.

18 You see a slightly longer clip of that in the disclosure to you.

19 You actually see them rolling up the red carpet when the president
20 doesn't attend after the other delegates have been there.

21 And we will, just to show that matter, put on the screen
22 EVD-PT-D13-00199, a newspaper article showing President Kibaki missed the
23 function at the KICC on the 26th of November, 2007.

24 You just need to see the headline there which refers to the
25 26th of November, "Kibaki skips PNU strategy meeting," the meeting he was

1 scheduled to attend.

2 Witness 0006 takes up the story, and I've already given you the
3 reference number for him at paragraph 8:

4 "On the 26th of November, 2007, Uhuru Kenyatta attended the PNU
5 affiliates' meeting at KICC in the morning. This meeting was to resolve
6 the issues that had come up as a result of the nomination exercise that
7 had just been completed. The president was to attend the meeting, but
8 unexpectedly did not attend and left the strategy meeting to be chaired
9 by the vice-president."

10 And he produced a video-clip of Uhuru Kenyatta attending and the
11 carpet being rolled up, and he produced the copy of the newspaper report
12 as to the failure to attend.

13 "After the KICC meeting all the parliamentary aspirants attended
14 a luncheon at the Intercontinental Hotel at the invitation of the
15 president which he did attend and he can seen in the same video-clip
16 addressing the candidates."

17 And he produced the newspaper photograph.

18 Let's have a look then at EVD-PT-D13-00200, just a picture of
19 politicians walking from the KICC to the Intercontinental.

20 There you are. So, your Honours, you take some high-profile
21 person as your target to tell lies about, sometimes you can track them
22 through the media and elsewhere to show what they were actually doing.
23 Kibaki didn't go to the KICC meeting. Uhuru Kenyatta did. And
24 Uhuru Kenyatta went to the Intercontinental meeting that followed for
25 lunch that followed thereafter which Kibaki did attend.

1 So who, then, was at State House that day? Let's go to
2 confidential Witness 0023, EVD-PT-D13-00551 at page 0800.

3 He refers in his statement to the fact that the previous day:

4 "The president was aware that there had been a big problem in the
5 youth starter which had not been communicated at the rally, and that this
6 problem was due to mismanagement of the programme."

7 Then he says:

8 "Kimonye, as a result, organised a special meeting the following
9 day with President Kibaki. The meeting was to take place at the
10 State House."

11 And he identifies through a document produced from State House
12 who was present at that meeting, and he identifies those people. He also
13 refers to the video that you saw in the Muthaura case of President Kibaki
14 meeting young people on the 26th of November:

15 "At around 10.30 a.m., we met President Kibaki in one of the
16 boardrooms at State House. The meeting lasted for about one hour and 20
17 minutes. Francis Muthaura, Stanley Murage, Hyslop Ipu, Cyrus Gituai and
18 Mohammed Kuti accompanied President Kibaki. Uhuru Kenyatta did not
19 attend the meeting."

20 This witness who was there describes handing the youth charter to
21 the president, and he says:

22 "This was the only thing that was handed to the president during
23 the meeting."

24 And he describes the discussion with the president.

25 Next to his statements are various documents that identify the

1 people who were present. I'll just read them out: EVD-PT-D13-00441 and
2 EVD-PT-D13-00447 and EVD-PT-D13-00448:

3 "I have been asked whether Uhuru Kenyatta was present at the
4 meeting. He was not."

5 Paragraph 102:

6 "I have been asked whether any Mungiki members were present at
7 the meeting. To my knowledge, there were no Mungiki members present.
8 Neither the alleged presence of any Mungiki members nor any issues
9 relating thereto were discussed at that meeting."

10 Further corroborative witnesses on this point can be seen in
11 their statements at confidential Witness 0007, EVD-PT-D13-00491;
12 confidential Witness 0008, EVD-PT-D13-00504. And I will cite here the
13 Muthaura team evidence also on this point, confidential Witness
14 EVD-PT-D12-00054.

15 We don't have the time now to produce all pictures and videos for
16 you to look at it and see that event, but what it tells beyond a
17 peradventure, is that Witness 0004 has lied about the 26th of November,
18 and as I said, you take high-profile people, you make allegations. One
19 day that will come and bite you from behind when people go back to
20 research and investigate and are able to identify exactly where they
21 were.

22 Let us now turn to the 30th of December, 2007, another alleged
23 State House meeting.

24 A prospect as I look at it now of State House in Nairobi, Kenya,
25 being a place where Mungiki just seem to be able to walk in at well --

1 will is astonishing, and people in Kenya listening to it would be
2 astonished to hear such facts being relied upon. But the
3 30th of December, 2007, a date probably not foremost in the mind of OTP
4 Witness 0012 as to its political significance, because he wasn't able to
5 perhaps fully take part in such events, but that was day of the
6 swearing-in of President Kibaki. Let us go to EVD-PT-D13-00384 to remind
7 us of the sort of occasion that this was.

8 What I'm going to do is actually refer to a transcript for this
9 clip:

10 "Those who presided over Kibaki's swearing-in ceremony said the
11 election results were democratic no matter how many were annoyed by the
12 results, the winner remains the winner whether he is supported by all
13 ethnic groups or not."

14 But you saw that clip earlier in these proceedings, and you would
15 have noticed the line of ladies and gentlemen dressed up for a formal
16 ceremony and the swearing-in of the head of state. Right down at the far
17 end of the clip, if you look very carefully with a magnifying glass,
18 you'll see Mr. Kenyatta standing amongst the line of people as he was
19 present there.

20 But earlier in that day, on the 30th of December, 2007, the
21 results, of course, had come in, and Uhuru Kenyatta was at the KICC
22 building. So before the swearing-in, he'd been at the KICC building and
23 the results had come in after the election commission of Kenya had
24 announced Mwai Kibaki as the winner.

25 We'll just show a clip there of Uhuru Kenyatta at the KICC.

1 EVD-PT-D13-00073.

2 (Video-clip played)

3 MR. KAY: The reason why we see police there and other
4 representatives of the forces from the Kenyan armed forces is because
5 that building was cleared as a result of the disturbances taking place at
6 the time of the announcement of the results, and that's where
7 Uhuru Kenyatta was on that day.

8 Let's just think about it. 30th of December, what was happening?
9 The swearing-in of the President, the announcement of the results. That
10 was the business of the day. It wasn't setting up meetings with Mungiki
11 in such a formal setting as State House in -- in the grounds of the
12 premises of the head of state. You've been told how many people live and
13 work there and the kind of premises that it is. It is utterly beyond
14 belief that someone, unless they had no knowledge at all of what was
15 happening on that particular day, unless they made it up, would choose
16 such a date to describe a meeting between people and them in State House.
17 Mungiki around the swearing-in of the head of state, I think not.

18 We will now play EVD-PT-D12-00191.

19 (Video-clip played)

20 MR. KAY: A formal recorded occasion.

21 Witness statements that we have taken and presented to the Court
22 from people with Uhuru Kenyatta can be cited as follows: Confidential
23 Witness 0020, EVD-PT-D13-00548 at 0759. And this witness states that:

24 "After the ceremony at State House, we went to Uhuru Kenyatta's
25 house in Nairobi and the phones started to ring. It was people pleading

1 for help as they were being attacked. Calls came in from everywhere. I
2 answered some calls. Family members were also saying they received
3 calls. It was clear big trouble had started in certain parts of the
4 country and all we could do was hope people stayed by calm."

5 Various other witnesses to be cited in support could be seen in
6 the context of Ambassador Muthaura's case.

7 Let us turn to the 3rd of January and Witness 0004, the meeting
8 at the Nairobi Members Club.

9 Again, one stands back and draws breath over the
10 Nairobi Members Club, a traditional country club almost, a club with oak
11 panelled hallway, a club that is a formal place with a membership of a
12 very restricted nature. Visitors are signed in, mobile phones are not
13 allowed to be used and there are rules concerning the use of mobile
14 phones within the building, and we have a scene put before this Court
15 which could only come from the mind of someone who had never been there
16 in their life of four Mungiki walking in to the most prestigious club,
17 the equivalent to the Carlton Club in London, I dare say, and being able
18 to proceed through the door, past the reception, wander their way around
19 to the breakfast area and sit down at a table and someone shouts across
20 the room to them to join them. You have statements from witnesses
21 detailing the likelihood of that and the fact from people who were
22 present there at the time that such an event did not take place cited to
23 you by the Muthaura team in their evidence which we wholly endorse.

24 Witness 0020 confidential, EVD-PT-D13-00548, at 0760, was with
25 Uhuru Kenyatta on that day. It was the day of the 3rd of January, the

1 day that Raila Odinga had called for mass action, for one million people
2 to go to Uhuru Park, and that rally was prevented by the authorities.

3 Again, someone who has never been with Uhuru Kenyatta taking a
4 date like that won't know the research that could go into where they
5 were. You have had disclosed to you documents relating to litigation in
6 Nairobi, in Kenya, concerning comments and statements by Raila Odinga on
7 that day as a result of a defamation action taken on behalf of
8 Uhuru Kenyatta against the television station for producing, on the
9 screens live, without a retraction, a slanderous piece of newsreel.

10 Well, Witness 0020 who was with Uhuru Kenyatta describes being with him
11 in the house on that day and what had happened:

12 "The ODM had the previous night called for a day of mass action
13 and for people to congregate in Uhuru Park. They were looking to get one
14 million people. That morning, we stayed around the house waiting to see
15 what would materialise with the so-called rally. At midmorning, we were
16 joined by members of the family and others. We realised that due to
17 Uhuru's high-profile and on the advice of his security detail that he
18 would not be able to leave the compound of the house. Muhoho and I left
19 to see what was happening in town. We made a tour from the house ..."

20 And he describes where he went. And he describes being on the
21 tour and seeing the large security presence, and, in fact, a MP who was
22 with a group that was chased up a Valley Road by a group of policemen in
23 a Land Rover. He remembers this as he knew the MP personally.

24 As he said:

25 "Two incidents that I recall stood out, was the press statement

1 made by ODM leaders led by the Honourable Odinga in which they insinuated
2 that Uhuru Kenyatta was meeting in State House with Mungiki, and the
3 second being the president's address to the nation. I remember these two
4 because the statement by the ODM leaders angered Uhuru a lot, and he
5 directed his lawyers to take action immediately, and the president's
6 statement was the first time he addressed the nation since the troubles
7 began."

8 See also confidential Witness 0006, EVD-PT-D13-00479 at page
9 0411.

10 Some of the meetings, of course, have imprecise dates and that
11 makes it very difficult for anyone to get to -- to grips with what has
12 been said. Early January 2008 meetings at the KICC and State House. I
13 suppose as you take particular dates and they're closed off and closed
14 down you move around and get to generic dates and generic statements
15 about such meetings, but that's the sort of allegation that we have to
16 face.

17 If you go to Witness 0025, confidential EVD-PT-D13-00557, at
18 0861, you will see his accounts of meetings at State House, who was
19 present, and Uhuru Kenyatta's involvement or not in any such meetings.

20 This witness says:

21 "I did not meet anyone at State House who I considered to be
22 Mungiki. However, it is very difficult to be able to determine who is or
23 is not a Mungiki member. I am not aware of any visit to State House by
24 the Mungiki."

25 A key figure in the statements of Witnesses 0011 and 0012 is

1 someone I will identify as confidential Witness 0024. A statement was
2 taken by us from him, and it's at EVD-PT-D13-00552.

3 He describes dealings that he has had with Witness 0011 and
4 Witness 0012, and he gives a particular date and place. He describes
5 what they have done for a living and how he knows them. He was aware
6 that they were people who were, so to speak, on the street, and they
7 again, in course of their usual practice as they had done with the
8 Defence team, our witness, Mr. Nguyai, also tried to extort money from
9 him.

10 He was a witness central in their accounts, and I suggest you
11 read his statement, because it is alarming that the Prosecution did not
12 seek corroboration of anything those witnesses said and looked to
13 investigate where they were or what they did at the time of the
14 post-election violence.

15 One of the viva voce witnesses we will be calling, he will deal
16 precisely with where they were and what they said and did so far as he
17 knows during January and February 2008.

18 This witness described meeting Uhuru Kenyatta for the first time
19 on the 26th of November, 2009. So utterly contradicts by two years
20 allegations made by witnesses for the Prosecution numbers 0011 and 0012.
21 Utterly contradicts them as to the veracity of their accounts, and he
22 describes knowing the extortion document at EVD-PT-D13-00555 produced by
23 these witnesses, because he confirms he knows the document. It was
24 brought to him by OTP Witness 0011 and Witness 0012, and it was given to
25 him to look at in the Sagret Hotel in Nairobi. He denied that he was

1 involved in the preparation of that document.

2 There it is. That's what we were able to do in that passage of
3 time, and in our submission it is utterly overwhelming as to the
4 undermining of the facts of these meetings by recorded events and
5 material evidence. Of course you always get that question, well, you
6 can't say every minute of every day you know where someone was or what
7 they did, but let's look at the generality of this in a way of how people
8 were conducting themselves and what was going on. Let's look at the
9 reality of what was taking place. Let's look at where he was as others
10 are able to say and deliberately specify and prove through the media.

11 I'm now going to turn to the last of the matters that I will deal
12 with in our response to the Prosecution case at this stage, and it
13 concerns fundraising, and that has been an element within the
14 decision-making of the Court so far as to what was happening. The Court
15 has referred in its decisions on the permission to investigate, as well
16 as the decision to issue the summonses and relied store on fundraising
17 meetings that were alleged to be for purposes of retaliation and revenge
18 as well as holding meetings to try and cause revenge against the ODM
19 supporters as termed in this case.

20 Well, the Defence have many statements involved from people who
21 were exactly at those meetings, and I will try and go through them one by
22 one.

23 The Sagret Hotel on the 11th of January, 2008. I refer the Court
24 to Witness 0003, at EVD-PT-D13-00424, who refers to going to a meeting at
25 the Sagret Hotel in January, discussing with others "what we could do.

1 It was organised by Paul Muhoho, Uhuru's uncle." And this witness has
2 found documents from the time that show he collected goods from
3 Debenham & Fear Limited on the 12th of January, which causes him to think
4 that the first such meeting was on the 11th of January. This document
5 refers to the supply of goods and clothes to Uhuru Kenyatta's office,
6 "... as I used his name to encourage people to give. He is a good
7 respected man, and I felt his name would help people to give." And he
8 produces a document in Kenyatta's name, and it's a receipt for oil.

9 I'm not going look at every single one, but I would like us just
10 to look at this as I started there, EVD-PT-D13-00421.

11 COURT OFFICER: Your Honour, just to clarify for the record that
12 this is a confidential document as well.

13 MR. KAY: It can be public. The statement is confidential, the
14 document, no need to be.

15 Eighty-one cartons of fresh soya milk, 22 cartons of cereal, 4
16 jackets. Donation for displaced people. Thank you very much.

17 This witness describes this event was taking place. People were
18 coming to the meeting. There were decision to supply goods to help the
19 displaced people and is a genuine humanitarian exercise.

20 At paragraph 8 of his statement he describes collecting goods
21 from millers along with all other goods that went to Nakuru that was
22 taken there:

23 "I saw these goods were flagged off on my lorries," on his
24 lorries, this witness's lorries, "from the Kenyatta International
25 Conference Centre. This was an occasion attended by a number of

1 politicians including Uhuru Kenyatta, vice-president Kalonzo and
2 Professor Onger.".

3 Let me have a look now at EVD-PT-D13-00422, which can be public.

4 Again, donations for people who were victims of the clashes.

5 Let's look at this from the Red Cross, EVD-PT-D13-00423, at
6 page 0078. Again, it can be public.

7 Kenya Red Cross. You can see the quantities there. Very large
8 quantities.

9 Right. I will tell the Court what's been going on here. There
10 were meetings. People were meeting. They were concerned about victims.
11 These meetings, however, have been utterly misrepresented and distorted
12 as to their true nature of what good people were doing at the time. I've
13 just chosen a selection of documents there which you can take the thread
14 from.

15 No one was keeping these documents. They arise by luck more than
16 anything else, but there you have it. That's what was happening, and you
17 have to be very careful in a politically charged investigation and a
18 politically charged atmosphere when allegations are bandied around about
19 one side doing this. They were doing this. They were doing that. Sure
20 there were meetings, but those were not the meetings that they're talking
21 about, people sitting around describing how to revenge themselves against
22 other people, not at all. In fact, those good works have been utterly
23 misrepresented and distorted to be a complete travesty of the truth.

24 A careful investigation of agencies such as this would have
25 produced evidence. What if the Court had had this evidence before it

1 issued its decisions and relied on these fundraising allegations and had
2 statements from people physically at meetings who were able to describe
3 what took place?

4 I hope this will be of interest to the victims' counsel.

5 I'll go to Blue Post Hotel on the 3rd and 28th of January, and
6 the 26th of February, 2008. OTP Witnesses 0011 and 0012 refer to
7 Blue Post.

8 Confidential Witness 0002 at EVD-PT-D13-00420, at page 0065.

9 "We agreed that I would look to contact Blue Post in Thika and
10 book a room for a meeting, and we would then get clergy and other
11 respected groups to meet in the hotel. The purpose of the first meeting
12 was to ask everyone if they agreed that we must do something - this was
13 at Blue Post. I always have my meetings there. It's a central location
14 as we were calling people from all over Central Province. We identified
15 different community elders and clergymen to attend. The first meeting
16 was on 3rd of January. About 40 people came. It was ... 10.00 a.m.
17 The meeting lasted 3 hours. Uhuru Kenyatta was not there."

18 They agreed, paragraph 18:

19 "... to form a joint council that will seek to do relief and help
20 our people, and to represent them and their issues. They even wrote a
21 small paper, mandated a few people to set up a relief organisation to
22 begin work on creating a vehicle that could be used, and which we now
23 refer to as the Mount Kenya Disaster Relief Fund.

24 "At this meeting we did not discuss violence. 70 per cent of
25 the people at the meeting were clergymen."

1 Witnesses 0011 and 0012 wouldn't know that, of course:

2 "The aim of the meeting was to figure out how to assist."

3 They met again at Blue Post on the 28th of January and the 26th
4 of February and they set up the Mount Kenya Disaster Fund. They
5 "instructed a lawyer to assist them and open up a bank account, and we
6 began reaching out to various bodies to tell them about our relief
7 efforts.

8 "I find suggestions that the meetings I have referred to at
9 Blue Post were used to plan warfare and violence as ludicrous.

10 "No politicians attended these meetings. Once peace was
11 declared, our efforts changed into creating the
12 GEMA Cultural Association, as a means of pursuing efforts to make sure it
13 never happens again."

14 He produces full documents of the meetings at Blue Post from the
15 hire of the room, to what he did, to the rental of the hall. And a
16 document, EVD - let's see this - PT-D13-00416. It can be public. Thank
17 you, Mr. Clerk.

18 Mount Kenya Disaster Relief Fund refers to the displacement in
19 various parts of the country, massive displacement. Community leaders
20 have begun a initiative, and they identify who have been displaced,
21 located, who have been the victims of crimes, how to help people,
22 et cetera, et cetera.

23 We have no time to go into the detail but I hope I've guided the
24 Court around the sources of the evidence.

25 Let's go to the Landmark hotel, 11th of January, 2008, also known

1 as the Jacaranda Hotel. Confidential Witness 0001 at EVD-PT-D13-00409
2 relates what took place at the Jacaranda Hotel, and I've seen the
3 footnotes of your decision and the materials you've looked at,
4 your Honours, as to where you get the view that these places were being
5 used as some sort of meeting places to plan violence. It is far, far
6 from the truth. The accounts you've been reading are from people who
7 were never there. They are people who have known about something
8 happening and utterly distorted the truth.

9 They elect a person, the late Surveyor Njoroge to act as chairman
10 of the Nakuru committee, call meetings, head discussions. They had a
11 treasurer who was made responsible for collecting money. He refers to
12 the meeting on the 11th of January, 2008. They had a committee
13 secretary. They kept a record of donations of food, money, and clothing.
14 It was to assist post-election violence victims by sourcing and arranging
15 for the provision and distribution of necessary materials, including
16 food, water, shelter, and clothing. They attempted to raise funds in
17 order to pay costs of transporting aid from Nairobi to Molo.

18 These were self-help initiatives being done on the ground by good
19 people, much in sense by what is being said and written about in relation
20 to them.

21 The meeting at Jacaranda was organised so that anybody from
22 Nairobi with relatives or interest in Molo could meet to discuss the best
23 way to provide aid, and it was intended that the first meeting would be a
24 precursor to a bigger meeting. I have been asked whether the issue of
25 the Mungiki or funding retaliatory violence was mentioned at this

1 meeting. No mention was made during this meeting about the Mungiki or
2 raising funds for retaliatory violence. "I can't remember Uhuru Kenyatta
3 being mentioned at all at the meeting." All corroborating confidential
4 Witness 0014, EVD-PT-D13-00542; confidential Witness 17,
5 EVD-PT-D13-00545.

6 You've been referred to the Jacaranda Hotel on the
7 19th of January, 2008. The same witness, number 0001, at
8 EVD-PT-D13-00409. Paragraph 24 deals with this meeting:

9 "The attendees were predominantly Kikuyu and were not attending
10 to any particular or political party." It "was not a political meeting
11 but convened to address the sufferings of IDPs in Molo."

12 And they went on to try and organise further funds for relief
13 efforts. The Mungiki were not mentioned. I'm not aware of anyone
14 discussing retaliatory violence, et cetera. Corroborated by the same
15 witnesses I've already referred you to.

16 Another venue in the various papers, Galileo, 24th of January,
17 2008. Confidential Witness 0010 at EVD-PT-D13-00529, and he refers to
18 organising a meeting for displaced persons. His intention when he was
19 organising the event was to see what young entrepreneurs and
20 professionals from the Kikuyu, Embu, Meru community could contribute to
21 help ease the suffering of victims. He envisioned the potential Galileo
22 event would be aimed at raising funds to purchase essential items such as
23 food, water, and blankets. Some politicians attended. Uhuru Kenyatta
24 did attend on the 24th of January, 2008. He attended at about 10.00 p.m.
25 to 11.00 p.m. He appeared tired, even commenting on how sleepy he was,

1 and he briefly addressed the attendees. George Thuo was there and called
2 him, urging him to come to the Galileo. He arrived alone and was there
3 for an hour. He addressed the group briefly, stating that we all needed
4 to help our people by providing blankets, food, and water. He said that
5 to help also means that one should provide assistance in other ways. For
6 example, if you have a spare piece of land, then you should allow IDPs
7 to use it for a period. Kenyatta also explained that he had been to
8 Kikuyu to appeal to youths not to cause chaos and commit acts of
9 violence. He spoke for three to five minutes. I did not hear anyone
10 speak about the need to raise funds to carry out retaliatory or revenge
11 attacks, neither did any attendee or speaker advocate the use of violence
12 generally. It's corroborated by Witness 0009, EVD-PT-D13-00518,
13 confidential. Also confidential Witness 0022, EVD-PT-D13-00550. Also
14 corroborated by confidential Witness 0025, at EVD-PT-D13-00557, and
15 confidential Witness 0026, EVD-PT-D13-00596, although you will be hearing
16 from that witness as he is our second live witness in this court.

17 The KICC on the 30th of January, 2008. Witness 0011 was there,
18 describes what happens. That's at EVD-PT-D13-00535.

19 He took photographs at the KICC, as it was the launch of the
20 national humanitarian fund for mitigation of effects and resettlement of
21 victims of post 2007 election violence. He stayed for the duration of
22 this event, and it concerned the relief effort for the entire country:

23 "Uhuru Kenyatta attended this event. I didn't take a photo of
24 him arriving, but he is present in a crowd scene ... I took. There was
25 no mention of retaliatory violence at this meeting. It concerned

1 organising relief for all the people of Kenya."

2 And you can see that photograph at EVD-PT-D13-00533, and the next
3 one at 00534.

4 KICC on the 15th of February, 2008. This witness, Witness 0010
5 who was there, EVD-PT-D13-00529.

6 This event on the 15th of February was advertised in the
7 "Daily Nation" newspaper, and he confirms the advert. We shall now look
8 at the advert and you can see for yourselves the nature of event. It
9 won't be confidential. It can be made public. EVD-PT-D13-00525.

10 And I anticipate I'll be finished about three minutes,
11 your Honours.

12 PRESIDING JUDGE TRENDABILOVA: Thank you very much, Mr. Kay.

13 MR. KAY: Yes.

14 The advert is down in the bottom left-hand corner.

15 As -- as this witness says, it was organised for perfectly
16 respectable and legitimate purposes. It was an event that was set up to
17 help and provide organised and effective relief to displaced individuals
18 from Rift Valley, and the Mount Kenyan Region Disaster fund was to
19 receive the contributions, and the money was used to buy food, clothing,
20 and to give shelter.

21 Witness EVD-PT-D13-00428 corroborates that event which she
22 attended. Saying it wasn't planned for retaliatory violence.

23 Confidential Witness 0013, EVD-PT-D13-00541 corroborates. Confidential

24 Witness 18, a Bishop, EVD-PT-D13-00546, who was present there.

25 Confidential Witness 0022, EVD-PT-D13-00550.

1 Well, that comes to the end of my presentation of our journey
2 through the evidence in approximately two hours. What we've endeavoured
3 to show this Court is that we have produced evidence that rises above the
4 level of gossip, rumour, and people just saying bad things against
5 others. One saw in that clip on the 3rd of January, outside the Masaaba
6 hospital that I used in my opening statement how dangerous speech from
7 people when made publicly on the media can go when allegations are made
8 that are utterly unsubstantiated can be fed around the system and good
9 men who have done good deeds be defamed and slandered. And you have had
10 put before you live evidence. This has not been the words of a lawyer.
11 We've deliberately avoided that. This has been material direct evidence
12 that shows the acts and conduct of Uhuru Kenyatta at this time, and
13 logically follows a progression as I have shown you from when he tells
14 them to use the courts, when he tells them to have dialogue, when he
15 tells them to follow the rule of law, to when he physically goes out on
16 the streets, stands on a car, and make no bones about it, that group were
17 after revenge and retaliation. They'd blocked the road. When you look
18 at the full clip, you actually see the scene. And he stopped that
19 happening, and it took persuading. He had to get into their minds, as
20 you'll see in that clip for 15 minutes, and work the crowd in very
21 difficult circumstances, but there was no doubt what he had done at the
22 end as the witness who produced that video said. And as indeed there's a
23 spontaneous letter we've exhibited which I haven't read out today from
24 someone who watched it, who when you issued your summons -- your summons
25 on the 15th of December wrote a letter that day to us, and that's been

1 exhibited, who saw that scene. He's a lawyer and he's from the other
2 community, and he thanked Kenyatta for what he did that day.

3 Luckily we got it, because when you're facing a wealth in
4 plethora of bits of gossip here and bit of gossip there, people saying
5 things and talking about things they absolutely know nothing about, have
6 never been involved with, you get an utterly artificial presentation.

7 And as for the Mungiki going around in army trucks up to
8 State House, it's like a bunch of London rioters in a red double-decker
9 bus taking the 38 from East London down to Victoria Station and driving
10 into Buckingham Palace on their way. It's exactly the same scene. It's
11 inconceivable.

12 We ask this Court to get itself, as I know it will, because you
13 are dedicated Judges, firmly into the mind of looking very carefully at
14 this evidence, because we say this case should not go beyond this stage
15 and not only have we destroyed the Prosecution case and exposed it for
16 what it was, we have shown you the other side, the actuality.

17 Thank you.

18 PRESIDING JUDGE TRENDABILOVA: Thank you very much, Mr. Kay --
19 Counsel Kay. I would like to thank Ms. Higgins once again for being very
20 concise and to the point. Thank you.

21 We are quite behind our schedule. I'm speaking in general. Of
22 course today we shan't be able to do a proper job with regard to
23 questioning of Mr. Kenyatta, but just to save time, he might be sworn in
24 now so that tomorrow you proceed with the questioning. This is the
25 proposal from the Chamber.

1 MR. KAY: Thank you very much, your Honour. We'd be all for
2 saving time if that could help the Court.

3 PRESIDING JUDGE TRENDAFILOVA: Yes. Thank you very much.

4 So, Mr. Kenyatta, would you please. First of all, I have once
5 again to remind you of your right pursuant to Article 67(1)(h) to make an
6 unsworn statement in your defence. So the choice is yours.

7 MR. KENYATTA: (* Microphone not activated) ...choice.

8 PRESIDING JUDGE TRENDAFILOVA: So if you decide for the sworn
9 statement, this is your right. We cannot impose on you to take advantage
10 of the right to make an unsworn statement. Please just go. And of
11 course you have been through the proceedings all the way through the
12 proceedings up until now, and you know what are the -- the rules, just to
13 remind you about --

14 MR. KENYATTA: Yes.

15 PRESIDING JUDGE TRENDAFILOVA: -- the jurisdiction of the Court
16 regarding false testimony.

17 So, Court Officer, would you help Mr. Kenyatta.

18 COURT OFFICER: Yes, Madam President.

19 Please repeat after me. I solemnly declare.

20 THE WITNESS: I solemnly declare.

21 THE COURT OFFICER: That I will speak the truth.

22 THE WITNESS: That I will speak the truth.

23 THE COURT OFFICER: The whole truth.

24 THE WITNESS: The whole truth.

25 THE COURT OFFICER: And nothing but the truth.

1 MR. KENYATTA: And nothing but the truth.

2 WITNESS: WITNESS KEN-D13-PPPP-0001

3 PRESIDING JUDGE TRENDAFILOVA: Thank you very much, Mr. Kenyatta.

4 Of course I'm not going to ask you to identify yourself. It has been
5 done during the first day, and our suggestion is, of course, it will be
6 your team, Counsel Kay, that you start, and thereafter the Prosecutor and
7 you will have the last -- you will have the floor last if you would like
8 to ask some questions, but obviously this is going to happen tomorrow.
9 If you would like, you might proceed with some questions, or you -- we
10 just postpone it for tomorrow because the time is limited.

11 MR. KAY: It may be better to do it tomorrow, your Honour.

12 PRESIDING JUDGE TRENDAFILOVA: It is much better.

13 So on behalf of the Chamber there is nothing more to add to what
14 I have already said. If the parties, the Prosecutor, the
15 Legal Representative for Victims, I'm looking just at Mr. Anyah, not
16 because he's a party but just because he's to my left, if someone of the
17 Defence teams would like to raise some issue we have some minutes, which
18 does not mean that -- that we have to stay in the courtroom if it is not
19 necessary.

20 So then we proceed to tomorrow at 2.30 with you, Mr. Kenyatta, to
21 be questioned in the order that you know very well, and I have mentioned
22 it shortly now.

23 I would like to thank everyone. Today was quite a peaceful day.

24 The Prosecutor's team, the teams of the Defence, in particular the
25 Defence team of Mr. Kenyatta, Mr. Kay and his team, Mr. Anyah, our legal

1 officers, the public, always the interpreters. Thank you very much. The
2 court reporters, the security officers, the stenographers, everyone.

3 Enjoy a good evening. See you tomorrow.

4 COURT USHER: All rise.

5 The hearing ends at 7.53 p.m.

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