

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, 5 October 2011
10 The hearing starts at 9.00 a.m.
11 (Open session)
12 COURT USHER: All rise. International Criminal Court is now in
13 session.
14 PRESIDING JUDGE TRENDAFILOVA: Good morning. Please be seated.
15 Once again, good morning to everyone in the courtroom and in the
16 public gallery.
17 Court Officer, I would ask you again to call the case.
18 COURT OFFICER: Good morning, Madam President, your Honours.
19 This is the Situation in the Republic of Kenya, in the case of the
20 Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and
21 Mohammed Hussein Ali, case reference ICC-01/09-02/11. Thank you,
22 your Honours.
23 PRESIDING JUDGE TRENDAFILOVA: Today, we approach the last part
24 of the confirmation hearing, the closing statements of the parties and of
25 the Legal Representative for Victims as granted in the decision on

1 victims' participation. The time that was allocated in the schedule to
2 every team was half an hour for each party and for the Legal
3 Representative for Victims.

4 As I have informed you during our first session, the Judges of
5 this Bench will grant the parties and the Legal Representative to submit
6 written observations by way of which they can exploit and develop all
7 issues deemed vital for the case pending before the Chamber.

8 Given the request of Mr. Khan yesterday, the Chamber has decided
9 to grant, if the parties would like to take advantage of a little bit
10 more time to develop their closing statements and in order for the
11 Chamber to equally treat all parties and participants in this case,
12 40 minutes for the team of the Prosecutor, for the three Defence teams,
13 and for the Legal Representative. Of course, it's not mandatory. It's
14 up to you whether you would like to take advantage of this additional
15 time.

16 Lastly, before I give the floor to the Office of the Prosecutor,
17 I would like to remind the parties and the Legal Representative that they
18 cannot present during their closing statements new evidence that has not
19 been presented, that has not been disclosed and has not been presented
20 during the confirmation hearing.

21 Now the floor is over to the Office of the Prosecutor.

22 Ms. Adeboyejo, is it you to make the closing statements? Please, the
23 floor is over to you.

24 MS. ADEBOYEJO: Good morning, Madam President, your Honours.

25 PRESIDING JUDGE TRENDAFILOVA: I'm sorry, just for the record are

1 there new faces?

2 MS. ADEBOYEJO: None in the Office of the Prosecutor.

3 PRESIDING JUDGE TRENDAFILOVA: No, Mr. Kay.

4 MR. KAY: No, your Honour.

5 PRESIDING JUDGE TRENDAFILOVA: And, Mr. Monari, no.

6 Mr. Anderson Carvalho is not a new face but today he's again in
7 the courtroom, a legal assistant to the Chamber.

8 I'm sorry for interrupting you. Please go ahead, Ms. Adeboyejo.

9 MS. ADEBOYEJO: Thank you, Madam President, your Honours.

10 Your Honours, this confirmation hearing has clearly demonstrated
11 that there are substantial grounds to believe that the three suspects are
12 criminally responsible for the crimes charged and that this case should
13 proceed to trial.

14 The Prosecution reiterates that Francis Muthaura and
15 Uhuru Kenyatta adopted a common plan and policy to retaliate against
16 perceived ODM supporters and keep the PNU in power through every means
17 necessary, including the commission of crimes. This was at a time when
18 the ODM had mounted a serious challenge to PNU's stake on power. That
19 the policy was implemented through a common plan to commit widespread and
20 systematic attacks against perceived ODM supporters by, one, penalising
21 them through retaliatory attacks, and two, create a free zone for the
22 retaliatory attacks; that Uhuru Kenyatta and Francis Muthaura procured
23 the services of Mungiki leaders and directed them to implement the common
24 plan; that in conjunction with Hussein Ali, Francis Muthaura used his
25 position to create the free zone to allow the Mungiki and pro-PNU youth

1 to operate with impunity; that as a consequence, areas in and around
2 Naivasha and Nakuru towns were attacked by the Mungiki and pro-PNU youth
3 in late January 2008, resulting in the crimes of murder, forcible
4 transfer of population, rape, and other forms of sexual violence, other
5 inhumane acts, and persecution.

6 Your Honours, before I address the evidence, let me first
7 reiterate the purpose of the confirmation hearing. As your Honours have
8 repeatedly pointed out, the confirmation hearing is not a trial. It is
9 not a mini-trial. The purpose of the confirmation hearing is not to
10 decide on the guilt or innocence of the suspects. The purpose of the
11 confirmation hearing is to determine whether there's sufficient evidence
12 to establish substantial grounds to believe that the suspects committed
13 the crimes charged. It is to protect suspects against wholly unfounded
14 charges by filtering out those cases that should go to trial from those
15 that should not.

16 During the course of the hearing, the Defence teams have argued
17 that the statements of anonymous witnesses or summary evidence is somehow
18 unreliable or of little or no value. Their position overlooks the plain
19 and express meaning of the Statute and the Rules.

20 Because of the limited scope of the confirmation hearing,
21 Articles 61(5), 68(5) and Rule 81(4) explicitly permit the use of summary
22 evidence at this stage. The Prosecution has not been required to
23 disclose the name of all its witnesses at this stage, because their
24 protection cannot be assured. The Prosecution continues to receive
25 reports of threats, intimidation, and attempts to bribe them. In order

1 to protect them and their families, their identities were redacted in
2 accordance with Article 68 of the Rome Statute. These protection issues,
3 however, do not make these witnesses unreliable. Maintaining anonymity
4 at this stage is a critical mechanism designed to protect witnesses and
5 preserve their evidence for trial. It should not, and I repeat, it
6 should not at the same time be used as a means to bar the case from
7 proceeding to trial at this stage.

8 The Defence teams have also repeatedly invited this Court to
9 assess the credibility of the Prosecution witnesses. They want this
10 Court to make this determination without even hearing from the witnesses
11 and on the basis of untested allegations and accusations from Defence
12 statements and documents. This is simply not possible. It is not
13 possible to assess the credibility of witnesses based on just part of the
14 evidence. It is also not possible to begin weighing the evidence based
15 on just part of the evidence. Judging credibility and weighing the
16 evidence is not what happens at the confirmation stage. That, I submit,
17 your Honours, is what the trial is for.

18 The evidence presented by the Prosecution is credible and
19 compelling when viewed in totality. It is corroborated not only by
20 multiple and varied external sources but also by admissions in the
21 evidence of the Defence. It reflects the reality of events and is
22 largely consistent with the statements provided by victim participants in
23 this case.

24 In addition to evidence from NSIS reports, NGO reports, media
25 articles, academic pieces, scholarly works, and other documentary

1 evidence, the Prosecution has also presented the evidence of 12 of its
2 witnesses. The Prosecution reiterates its confidence in the credibility
3 of the witnesses it has put before this Court.

4 Your Honours, the strategy of the Defence teams have been simple.
5 They have tried to label Prosecution Witness 0004 a liar, Prosecution
6 Witnesses 0011 and 0012 extortionists and the rest of the Prosecution's
7 witness statements and evidence as irrelevant rumours.

8 There is no doubt that Prosecution Witnesses 0004, 0011, and 0012
9 do provide wide-ranging and highly detailed accounts of the criminal
10 conduct of Mr. Muthaura, Mr. Kenyatta, and Mr. Ali. These witnesses were
11 well-placed Mungiki insiders. They were present at or aware of the
12 critical preparatory meetings and thus had special knowledge and detailed
13 facts of the common plan.

14 In particular, these three witnesses could provide to the
15 Prosecution the names of the mid-level perpetrators, the details of
16 Mr. Ali's involvement, and the logistical details surrounding the
17 planning and implementation of the attacks, all of which are corroborated
18 by other sources. But, your Honours, the Prosecution's case extends far
19 beyond the testimony of these three witnesses. We therefore urge the
20 Chamber to take a careful and close examination of the testimony of other
21 Prosecution witnesses as well as our documentary evidence.

22 Why? That's the question that I pose. Why are these other
23 witnesses and documents valuable? Well, first, because these witnesses
24 have personal and direct knowledge of other issues that are at the heart
25 of this case, and second, the witnesses consistently and independently

1 support the details offered by Prosecution Witnesses 0004, 0011 and 0012.
2 In other words, although most of the Prosecution witnesses were not
3 present at the critical preparatory meetings, their testimony and the
4 other materials in our amended list of evidence clearly demonstrate that
5 the accounts of Prosecution Witnesses 0004, 0011, and 0012 are reliable.

6 Who are some of these other witnesses? Prosecution Witness 0001
7 is not a Mungiki member and was not at the 26th November 2007 or the
8 3rd January 2008 meetings. Nevertheless, in his statement, he asserts
9 that the Mungiki were not only recruited before the elections to support
10 the PNU but also to retaliate against perceived ODM supporters in the
11 Rift Valley following the outbreak of violence.

12 Prosecution Witness 0002 was a resident of Naivasha and watched
13 as the violence unfolded in the town on 27 January 2007 and subsequent
14 days. The witness saw first-hand crowds of Kikuyu youth swinging into
15 action to attack perceived ODM supporters in Naivasha following the
16 withdrawal of prison guards in the town. According to the witness, the
17 violence was organised. The witness moved around during the violence and
18 also received reports from different sources about the involvement of the
19 Mungiki in the attack.

20 The identity of Prosecution Witness 0003, one of the CIPEV
21 commissioners, was disclosed to the Defence. As part of the
22 authentication of the CIPEV collection, this witness informed the
23 Prosecution about the working methodology of the commission, particularly
24 in relation to the collection of evidence, storage of information, the
25 production of the final report, and witness protection issues.

1 Prosecution Witness 0005, your Honours, provided an overview of
2 the structure of the Kenyan security agencies, particularly the
3 administration police, Kenyan police, and security committees. In
4 relation to the Mungiki, the witness explains that the police are
5 helpless against the politicians who usually have the last word
6 concerning criminal gangs.

7 Despite operations to squash criminal gangs, the witness informed
8 the Prosecution that the gangs managed to resuscitate themselves due to
9 political support.

10 Prosecution Witness 0006 provides an account of the later
11 killings of Mungiki members involved in the post-election violence by
12 Kwekwe squad within the Kenyan police. The witness received reports that
13 Mr. Kenyatta was using members of the Mungiki hierarchy and KANU to
14 mobilise other members of the Mungiki. He also received reports from a
15 Mungiki insider about the State House meeting which was organised to
16 discuss logistics and the financing of Mungiki activities during the
17 post-election violence. According to the witness, Mr. Kenyatta was
18 present at this meeting.

19 Prosecution Witness 0007, your Honours, is a specialist on sexual
20 and gender-based violence in Kenya. This witness has direct knowledge of
21 Mr. Ali's own willingness to investigate sexual crimes which were
22 committed during the post-election violence.

23 The witness met with several victims of sexual and gender-based
24 violence, including rape, in Nakuru and asserts that all the victims were
25 civilians. The witness assessed that acts of forcible circumcision were

1 viewed as a punishment for supporting the ODM.

2 Prosecution Witness 0008's identity has been revealed to the
3 Defence. This witness was a senior member of Kenya's national task force
4 on police reform of 2009. The witness explains that this task force
5 received information that politicians rely on the Mungiki for political
6 support and that due to the political interference of these politicians,
7 the police are restrained from fully tackling the Mungiki phenomenon. He
8 also found that Mr. Ali introduced a more militaristic and centralised
9 approach to decision-making in the Kenyan police, a charge which has not
10 been denied by my friends on the other side.

11 Prosecution Witness 0009 is a former Mungiki member. He attended
12 rallies organised by MPs from Central Province to mobilise pro-PNU youth.
13 He was personally involved in the registration of pro-PNU youth for
14 purposes of fighting in various locations, including Nakuru. He informed
15 the Prosecution that KANU offices, KANU offices, were utilised for the
16 recruitment, mobilisation, and payment of pro-PNU youth for the attacks.

17 Prosecution Witness 0010, your Honours, is also a former Mungiki
18 member. He was present at a gathering at the State House shortly before
19 being transported in a military truck to Naivasha. When the witness
20 arrived at Naivasha, he explains how the Mungiki joined forces with
21 locals in the town to attack perceived ODM supporters.

22 Your Honours, at this junction the Prosecution will address the
23 so-called inconsistencies in the statement of Prosecution Witness 0004 as
24 alleged by the Defence teams.

25 It is rather surprising that in referring to these

1 inconsistencies between Witness 0004's ICC statement and other
2 statements, none the Defence teams directed the attention of the Chamber
3 to the sections of his ICC statement that address the inconsistencies.

4 The Prosecution interviewed this witness twice over a period of
5 nine days, resulting in 87 pages of internally consistent witness
6 testimony.

7 During the interviews, the witness was probed on various aspects
8 of his testimony for the purpose of eliciting as much details as
9 possible, and in his statement, he clarified a number of the so-called
10 inconsistencies with his previous statements.

11 Regarding his first statement, Prosecution Witness 0004 explains
12 that he did not want people to know that he was present at the
13 State House with the Mungiki on 26th November 2007, because he wanted to
14 keep his Mungiki membership hidden. I refer your Honours to
15 EVD-PT-OTP-00248 at 0054, 0055, paragraph 277.

16 This earlier two-page statement had a limited purpose as
17 explained on page 0056, paragraph 286, and I quote:

18 "I gave my statement voluntarily. I did it because my life was
19 in danger and because of the threats and phone calls that I was
20 receiving. I wanted to record a statement about these issues."

21 Concerning his CIPEV statement, this is what Prosecution
22 Witness 0004 had to say, and I quote again:

23 "I also confirmed that despite having signed all the pages of
24 that document," referring to his CIPEV statement, "I did not read any of
25 the pages of that document, because I did not have the time to do that.

1 I was asked to sign in a hurry. It is possible that I also made mistakes
2 about some dates concerning my Mungiki membership and related events. I
3 think I may have made mistakes about these dates because the CIPEV
4 investigator was in a hurry. She was pushing a lot to obtain
5 information, and because of the time pressure, I was just not sure about
6 some of the details that I gave, but I was not lying."

7 See pages 0059, paragraphs 303 to 304.

8 It is for this reason that the Prosecution has presented only
9 those CIPEV statements it has found to be reliable through corroboration.

10 Your Honours, the rather selective and haphazard evaluation of
11 Prosecution evidence by the Defence is in itself evidence of its
12 compelling nature. The Defence has failed to address all the pertinent
13 aspects of identified evidence, and in any case, often misrepresented the
14 evidence. An example of such misrepresentation is provided by Mr. Ali's
15 Defence in relation to Prosecution Witness 0004. At page 9, lines 16 to
16 24 of the transcript of 3rd October 2011, the counsel for Mr. Ali stated,
17 and I quote:

18 "I point your Honours to one page in his statement, and he says,
19 talking about the police: 'I don't think they're human beings.'"

20 Your Honours, what Prosecution Witness 0004 actually said is
21 this, I quote:

22 "We, however, asked the GOK," meaning the government of Kenya,
23 "to increase police salaries so that they can change and become human
24 beings. I do not think they're human beings because of what they do. We
25 had our first demonstration asking for better salaries for the police,

1 and it was very successful. The next day, the former
2 Vice-President Kijana Wamalwa announced that police salaries would be
3 doubled. We thought it was a very important victory for us."

4 EVD-PT-OTP-00248 at 0006, paragraph 15.

5 The Defence would also like the Chamber to discount all other
6 evidence simply because they do not contain the names of the suspects.
7 This reasoning, we submit, is overly simplistic. The Prosecution again
8 reiterates and emphasises that the other evidence independently confirms
9 and supports the statements of witnesses that explicitly refer to the
10 suspects. The essence of corroborative evidence is that it confirms,
11 supports, or strengthens other evidence in the sense that it renders that
12 other evidence more probable. It is not necessary that the corroboration
13 extend to every part of the evidence. The corroboration need not be
14 conclusive. I refer your Honours to the ICTY case of the Prosecutor
15 against Astrit Haraqija another, IT-04-84/R77.4, paragraphs 32 to 33.

16 Were the Chamber minded to undertake an evaluation of the
17 evidence presented by the Defence *vis-à-vis* the Prosecution, the
18 Prosecution makes the following observations on the quality of that
19 evidence: One, the Prosecution has not had the opportunity to conduct
20 its own independent investigations to test the credibility and
21 reliability of the bulk of Defence evidence. Taking the example of
22 minutes of NSAC meetings covering the period of November 2007 to
23 March 2008 as submitted by the Muthaura Defence team, the Prosecution
24 had, in August 2010, requested the Kenyan government to provide NSAC
25 minutes covering a shorter time period, December 2007 to March 2008.

1 This request was turned down by the Kenyan government on the basis that
2 it was too broad.

3 The remarkable ease with which the witnesses recall precise times
4 and details of meetings which they did not attend is rather unusual given
5 that the events occurred more than three years ago. For example, a
6 witness for Mr. Muthaura recalled in his statement that he saw
7 Mr. Muthaura, and I quote, put captions, "at about 8.30 a.m." on
8 3 January 2008. EVD-PT-D12-00044 at 0331.

9 And in these proceed, Mr. Mwangi, another witness for
10 Mr. Muthaura, testified at length about meeting discussions in 2000 and
11 2008, some of which he did not attend. See page 44, line 9, to page 58,
12 line 5, and page 72, line 25, to page 74, line 7 of the transcript of
13 27 September 2011.

14 Equally alarming, your Honours, Mr. Nguyai forgot to mention in
15 his written statement that he called the Nairobi provincial police
16 officer after his initial meeting with Witnesses A and B. This,
17 your Honours, sat page 58, line 23 to page 60, line 22 of the 30th
18 September 2011 transcript.

19 A significant number of witness statements were taken from
20 individuals whose relationship with the suspects hardly qualifies them as
21 independent witnesses. For example, in respect of Mr. Kenyatta,
22 Mr. Lewis Nguyai stated, "I would refer to him as a friend." See
23 page 51, lines 16 to 17 of the transcript of 30 September, 2011.

24 On Mr. Muthaura, Mr. Thuita Mwangi also admitted to serving under
25 Mr. Muthaura on two occasions, that is from 1992 to 1997 and 2005 to

1 2006. See page 16, line 11 to page 17, line 17 of the transcript of
2 27 September 2011.

3 Other examples, your Honours, include statements taken from
4 current or former subordinates or colleagues and family members. In
5 other words, persons with interest.

6 A significant number of statements were similarly provided by
7 mid-level perpetrators or other members of the common plan who also have
8 an interest in ensuring that this case does not go to trial.

9 Regarding alibi evidence, in this oral closing the Prosecution
10 will only address two cases that merit closer scrutiny.

11 Mr. Muthaura and the Nairobi Members Club meeting of
12 3rd January 2008. Mr. Muthaura's Defence relies in part on the minutes
13 of a NSAC meeting of the same date in seeking to establish an alibi.
14 This meeting does not start until 9.50 hours. See EVD-PT-D12-00009 at
15 0056.

16 Even if one were to assume that these minutes are authentic,
17 Mr. Muthaura would have had ample time, consistent with Prosecution
18 Witness 0004's testimony, to get from a breakfast meeting at
19 Nairobi Members Club to Harambee house in time for the NSAC meeting.
20 Your Honours, the distance between these two locations is just
21 2.4 kilometres.

22 Mr. Kenyatta and the State House meeting of 26 November 2007. In
23 this case, Mr. Kenyatta's Defence relies on a video-clip showing
24 Mr. Kenyatta going into the Kenyatta International Conference Centre,
25 KICC, on 26 November, 2007. EVD-PT-D13-00201. The Defence team further

1 relies on a newspaper clipping and photos to show that the KICC meeting
2 and subsequent lunch at the Intercontinental Hotel actually took place.
3 EVD-PT-D13-00199 and 00200.

4 In the most generous light, however, the evidence only shows that
5 Mr. Kenyatta went into the KICC building at an unknown time. It does not
6 show how long he stayed at the KICC. In fact, there is no further
7 indication of his presence at the KICC or Intercontinental Hotel. He is
8 conspicuously missing from the video showing people walking from the KICC
9 to the Intercontinental Hotel. He's also missing from photos taken of
10 the event.

11 The alleged alibi further crumbles in light of the testimony of
12 Mr. Nguyai, who informed the Chamber that Mr. Kenyatta lives just
13 400 metres or a walking distance from the State House. See page 49,
14 lines 6 to 14 of the transcript of 30 September 2011.

15 As regards the witness statements provided by the suspects, a
16 certain contrary evidence to establish alibi, the probative value and
17 reliability of these are a matter for a Trial Chamber. An evaluation of
18 Prosecution *vis-à-vis* conflicting Defence evidence, we submit most
19 humbly, your Honours, is not an exercise for a Pre-Trial Chamber at
20 confirmation stage.

21 The Prosecution has also carefully reviewed the 11-page report of
22 Mr. Gary Summers, who was commissioned, your Honours, commissioned by the
23 Kenyatta Defence team. This report is manifestly unreliable for the
24 following reasons:

25 One, Mr. Summers failed to address or investigate any of the

1 security concerns raised by Witnesses A and B.

2 Two, he accepted at face value statements made by known
3 associates of Mr. Kenyatta, particularly those alleged to have been
4 involved in witness tampering.

5 And three, he adopted a rather one-sided approach to the analysis
6 of the evidence that was placed before him.

7 Finally, your Honours, the phone records which the Defence team
8 of Mr. Muthaura wishes the Chamber to rely on are inconclusive. Besides
9 the obvious point that the Prosecution has not been able to verify the
10 accuracy of the records, it is highly unlikely that an individual feeling
11 the three hearts of Mr. Muthaura during the chaotic period of the
12 post-election violence made only a handful of calls on a daily basis and
13 sometimes did not make any calls at all.

14 Based on the foregoing, the Prosecution submits that it has met
15 the requirements of Article 61(5). There are additional reasons for this
16 conclusion. First, the evidence establishes to the standard of
17 substantial grounds to believe that perceived ODM supporters were
18 targeted in areas in and around Naivasha and Nakuru towns. In his
19 testimony, Mr. Katee Mwanza stated, and I quote:

20 "The IDPs who were in the police station and prisons were mainly
21 from the Luo, Kalenjin, and to some extent some Kisiis and Luhyas. At
22 the end of the violence in Naivasha, we had between 42 and 50 people who
23 were killed."

24 See page 80, lines 1 to 3, and page 81, lines 3 to 4 of the
25 transcript of 26 September 2011.

1 Your Honours, the Defence team of Mr. Ali also provided evidence
2 of the targeting of Luo and Kalenjin in Nakuru. EVD-PT-D14-00061 at 0033
3 to 0034, and page 105, lines 2 to 8 of the transcript of
4 3rd October 2011.

5 Secondly, these attacks were carried out by the Mungiki and
6 pro-PNU youth. Prosecution witness testimony on the involvement of the
7 Mungiki in the attacks is supported by external sources, including
8 numerous NSIS reports such as EVD-PT-OTP-00013 at 0043, paragraph 164;
9 0045, paragraph 174; 0046, paragraph 184; and 0048 to 0049,
10 paragraph 199, confidential.

11 Mr. Katee Mwanza did not foreclose the possibility of Mungiki
12 involvement in the Naivasha attack. He said and I quote:

13 "I can't say that I saw Mungiki. I don't know Mungiki. They
14 don't have labels."

15 See page 56, lines 5 to 6 of the transcript of 26 September 2011.

16 In their presentation of evidence, Mr. Muthaura's Defence even
17 acknowledged the presence of the Mungiki in Nakuru. According to
18 counsel, Nakuru was already a Mungiki stronghold anyway. See page 94,
19 lines 9 to 10 of the transcript of 24 September 2011.

20 Thirdly, the police under Mr. Ali's command and at Mr. Muthaura's
21 request were complicit in the attacks by allowing the Mungiki and pro-PNU
22 to pass through check-points en route to the Rift Valley. Despite
23 detailed intelligence, Mr. Muthaura and Mr. Ali also ensured that the
24 police were not adequately resourced to deal with the attack. In his
25 statement, Mr. Peter Otieno stated that there were only about 30 police

1 officers in Naivasha at the time of the attack. See page 169, lines 21
2 to 23 of the transcript of 3rd October 2011. He also said, and I quote:

3 "I'm saying they, that is the police, were overwhelmed because
4 the number was not enough. And the attack was in seven estates, which is
5 a larger group, a large area," that place is indiscernible, "was
6 attacked, so it was difficult for the number which was at Naivasha that
7 time to control the situation."

8 I'm quoting the witness. See page 147, line 22 to page 148,
9 line 3 of the transcript of 3rd October 2011.

10 Fourthly, Mr. Muthaura and Mr. Kenyatta adopted the common plan
11 to retaliate against perceived ODM supporters. Together, they ensured
12 its implementation by utilising two pre-existing structures under their
13 control, the Mungiki and the police.

14 In his testimony yesterday, Mr. Mohamed Amin admitted that the
15 Mungiki, and I quote, "Engaged themselves in all sorts of violent acts,
16 robberies, rape, murders, and extortion, and they are ready for hire."
17 See page 21, lines 19 to 21 of the transcript of 4 October 2011.

18 We were also given an insight into the muddied waters of *de jure*
19 and *de facto* powers within the Kenyan security apparatus. Mr. Nguyai's
20 testimony was that he refused to report an alleged crime to the police
21 but instead reported to, and I quote, "the permanent secretary who is in
22 charge of internal security and who has the capacity to do his
23 investigation."

24 See page 64, lines 23 to 24, of the transcript of
25 30 September 2011.

1 Your Honours, we learnt during this hearing that Mr. Kenyatta is
2 referred to as the boss by two Mungiki leaders. See page 65, lines 7 to
3 12 of the transcript of 30 September 2011.

4 Madam President, your Honours, this case must be looked at from
5 the perspective of a state where powerful individuals wielding enormous
6 political and financial clout can distort a state structure by adopting
7 and implementing policies which lead to violence and impunity.

8 On the basis that the evidence presented is sufficient to
9 establish substantial grounds to believe that the suspects committed the
10 crimes charged, the Prosecution asks this Chamber to confirm the charges
11 and to commit Francis Muthaura, Uhuru Kenyatta, and Hussein Ali to trial.

12 Thank you, Madam President and your Honours.

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

14 Now it's your turn, Mr. Anyah. Please, the floor is over to you.

15 MR. ANYAH: Thank you.

16 Madam President, your Honours, may it please the Court. It seems
17 appropriate that I begin in the first instance by thanking your Honours
18 for allowing me the latitude to participate to the degree to which you
19 did, and of course by implication, you extended it to the victims in this
20 case.

21 Ordinarily, it would be the case that the victims may not be
22 heard as much as you have allowed in this proceeding, and I think that
23 this sets a precedent of sorts for future proceedings, because I believe
24 the contribution the victims have made to these proceedings, despite not
25 participating in the disclosure regime, despite not being privy to

1 confidential evidence, I think it has been meaningful. We wish we could
2 have seen all the witness statements that have been disclosed by and
3 between the parties. We wish that we had the opportunity to present
4 evidence, but such is not the regime under the Rome Statute. I will
5 respect that. And there are reasons for that, of course. And I think
6 during the course of this hearing, your Honours have struck the proper
7 balance. We found the right balance along the way, protecting the
8 interests of the suspects, the interests of the Prosecution, and the
9 interests of the victims, so we are grateful.

10 I have reflected on what were the primary reasons for the victims
11 to participate at this hearing, and there are several, and I mentioned
12 those during the opening statement, but two that stand out, that come to
13 mind easily, is the fact that we provide some sort of reality check to
14 what would otherwise be a pure criminal case between the Prosecution and
15 the suspects. That reality check implicates the fact that real lives are
16 at stake here. Real lives are affected by this process and in this case.
17 We're talking about lives, some of whom for the last two and a half years
18 have been living in tented communities, lost ones never to be replaced,
19 children in particular. We haven't spoken much about the children, but
20 many of them, their schooling has been disrupted severely. They will
21 tell tales some 25 years from now that: "I did not finish primary school
22 or I did not finish secondary school because it was during the time of
23 the post-election violence that I was of school age and that my schooling
24 was disrupted. That was the time my parents had to go live in a tented
25 camp, and that's why I never was educated."

1 That's what will happen 15, 20 years from now. We have seen in
2 Africa other instances where people whip up ethnic passions for political
3 purposes or otherwise. To an egregious extent we saw it in Rwanda, and
4 here it is again in Kenya. So this case is not as some in the media
5 would say Ocampo versus somebody else or such and such person. This case
6 is about Kenyans. It's about Africans. It is about their suffering. It
7 is about what one Kenyan has done to another Kenyan. It is about one
8 Kenyan exciting the passions of a fellow Kenyan. And the victims that I
9 represent, none of them, not one of them deserved what they suffered.
10 Not one of them caused it and not one of them is responsible for it. So
11 that is the reality check we bring to the proceedings.

12 Another important aspect of victim participation is to let
13 your Honours know, with all due respect, the impact of your decision on
14 the ground, because the responsibility that you have and in the way you
15 execute it and whatever decisions you arrive at will have impacts on the
16 ground in the lives of Kenyans, in the lives of citizens and civilians,
17 some of whom are victims in this case. So those are two things that
18 stand out in my mind.

19 The case law of this Court says that this is an essential stage
20 of the process. The case law also makes clear that victims have a right
21 to the truth, that victims have a right to justice, that the personal
22 interests of victims are affected by the outcome of this proceeding. And
23 therefore it is appropriate that we comment to some degree on the
24 evidence in the case, but first of all, what is the scope of the evidence
25 to be considered?

1 Your Honours, Madam President, admonished us at the beginning
2 about the parameters of this evidence. You have before you Prosecution
3 evidence by way of summary, by way of presentation, submissions. You
4 have testimonial evidence from the respective suspects. You also have
5 documentary evidence and other disclosed information.

6 The case law makes clear that it is in their totality, both
7 disclosed evidence pursuant to Rule 121(2)(c), testimonial evidence and
8 submissions that are to be considered by the Court in arriving at its
9 decision.

10 That being the case, I dare say, and I don't think it will be
11 disputed, that the crime base evidence is not in contest. Everybody
12 sitting here, I think, agrees that terrible things happened in Kenya,
13 people died, persons were displaced. Mr. Kenyatta, when he testified on
14 the 29th, said that there were 600.000 displaced persons. The figures
15 may change plus or minus, but most people agree that hundreds of
16 thousands of Kenyans were displaced.

17 So what is at issue in the case? It's the linkage evidence.
18 It's a case about linkage. The Prosecution's responsibility is to tie
19 the links together, but in doing so, and this is where the victims come
20 in, context matters. Your Honours have to look at the context that the
21 evidence develops as to what happened in Kenya.

22 One of the things your Honours could look at is the nature of the
23 victim participants in this case. Of the 233 that I represent, 218 are
24 Luos, 14 are Luhyas, and there's one Kalenjin. So what does that say?
25 That demonstrates to us that the predominant and majority of the victims

1 were Luos. They were targeted. That's what it shows.

2 When you look at the nature of the attacks in Naivasha and
3 Nakuru, you look at the scope, you look at the magnitude of those attacks
4 and then you look at who was targeted, the victims, our submission is
5 that it demonstrates that this was planned, it was organised, it was
6 co-ordinated, and it was systematic. The result element shows it, who
7 suffered what, when and how.

8 One particular incident that your Honours have heard testimony
9 about at Kabati estate in Naivasha where 19 persons were burnt, there is
10 additional evidence on the record about that incident, disclosures by the
11 Muthaura Defence team, EVD-PT-D12-00120, and EVD-PT-D12-00122.

12 The additional evidence confirms that before the violence
13 erupted, all machetes at the local supermarket were purchased, that those
14 weapons were used in the attack, that the police urged people to go back
15 to their homes and that they would be protected, but that when the
16 violence started, the police were nowhere to be found, and it was in
17 broad daylight. That the Mungiki were responsible, and that there's
18 reason to believe that the Mungiki were transported from Nairobi and
19 elsewhere to Naivasha.

20 That for us shows a degree of co-ordination, of planning in a
21 systematic way.

22 Now, Mr. Otieno, Peter Otieno testified here, and he made some
23 statements that also show that the Luos were targets from the outset. He
24 said shortly after the election results were announced - and this is at
25 page 127, lines 15 and 25 of his evidence, and Mr. Otieno testified on

1 the 3rd of October - he made reference to words being said to the effect
2 that certain people would be evicted and certain people would be
3 circumcised. And later on he said it took political overtones when
4 reference was made to the ODM and other tribes, in particular the Luos.
5 This is at page 127, lines 9 through 14.

6 Now, he said nothing happened after these were said shortly after
7 the 30th of December, and then in mid-January 2008, he refers to some
8 disenchantment due to harassment by prison guards and that the Kikuyu
9 community were upset by the harassment and shortly after that the
10 violence broke out. But how is it that it ends up being the Luos that
11 were indeed targeted, evicted, and circumcised, because that's part of
12 the allegations in this case. There is a direct link between the
13 politics of it, the election results and the results after the violence,
14 the consequences. There's a direct link, and it fits in the pattern of
15 events as alleged in the document containing the charges. And where does
16 the Mungiki fit into all of this?

17 The Prosecution has referred to testimony yesterday by the police
18 commissioner, I think. I think he was an assistant police commissioner,
19 Mr. Amin. Mr. Amin said they're for hire. He was speaking in the
20 context of other criminal gangs, but he included the Mungiki. These
21 persons are for hire.

22 The Defence for Mr. Muthaura has provided a statement of a
23 George Thuo. I think he is a business man who owns the City Hoppa
24 business his statement at EVD-PT-D12-00050 at paragraph 15. He says:

25 "I have always refused to engage with the Mungiki. For instance,

1 when I was candidate in Juja, I was approached by persons claiming to
2 represent Mungiki members asking me to meet with their leadership in
3 Thika so that I could secure the support of their 10.000-strong group in
4 my companies. I refused, and I conducted my campaign without any Mungiki
5 support or involvement."

6 He said this was sometime in 2006, 2007.

7 He continues:

8 "In fact, prior to and subsequent to my election, I was one of
9 the very few MPs in Central region who publicly spoke out against them."

10 So what does that tell you? Some kind of relationship between
11 the MPs and the Mungiki, that the politicians are perhaps afraid of the
12 Mungiki. We believe it demonstrates that.

13 And then we look at the applicable legal standard in the case.
14 The Prosecution has addressed that. It is not a trial. The case law
15 even says it is not a mini-trial. It's a committal hearing. The Bemba
16 case says that the substantial-grounds-to-believe standard involves
17 significant evidence, something that is solid, well-built, concrete and
18 tangible proof demonstrating a clear line of reasoning underpinning the
19 specific allegations.

20 I believe your Honours, Judge Trendafilova and Judge Kaul, were
21 involved in that case. And then we have --

22 PRESIDING JUDGE TRENDAFILOVA: Judge Tarfusser well. At the end
23 he was the one to sign the final decision.

24 MR. ANYAH: I apologies for omitting Judge Tarfusser, but
25 Judge Tarfusser featured prominently in Abu Garda, and from Abu Garda we

1 get the notion that it does not go -- it should go beyond mere theory and
2 suspicion. And that's where we are. It is not an entirely difficult
3 standard to meet. I have seen the evidence, all of it, I have heard
4 things in the court for the first time, given our inaccess to
5 confidentiality *inter partes* disclosures, but the victims' position is
6 that that standard has been satisfied and the case should be committed to
7 trial.

8 The victims in this case have additional concerns that I wish to
9 bring to your Honours' attention. They are concerned about what you
10 would call the foot soldiers, the actual direct perpetrators the crime.
11 They still see some of these people from time to time. They recognise
12 some of these people. Most of these persons have not been prosecuted,
13 and it is a source of concern to the victims.

14 I mentioned when I gave the opening statement that the victims
15 have security concerns. Those concerns remain. The security concerns
16 prevail for many different reasons, but two are particularly important at
17 this point.

18 The first is this case, the prominence of the suspects in this
19 case. Many of the victims are still in camps for displaced persons.
20 They feel that the level of security that they will enjoy is directly
21 related to the outcome of this proceeding and also to the outcome of the
22 proceeding in the Kenya I case, the Ruto et al. case. And the second
23 source of concern is the upcoming elections in 2012 in Kenya.

24 Now, there may not be much that your Honours can do about the
25 2012 election and the prospects for violence during those elections, but

1 with respect to this case, if possible, the victims have expressed a
2 hope, a wish, a desire that whatever decisions your Honours arrive at in
3 this case and in the first case, in the Ruto et al. case, that
4 your Honours issue those decisions simultaneously because they affect
5 different communities, and regardless of which way your Honours decide,
6 it would be helpful to them if everything were resolved at the same time.
7 I've been asked to convey this to your Honours.

8 The victims are also concerned about fatigue and the length of
9 the criminal process. Many of them are reminded about their
10 victimisation each time the case is back in the news, and it's going on
11 now two and a half years since the events happened. So that is a source
12 of concern for the victims.

13 I received quite a number text messages because they do have my
14 mobile number, my clients. I received quite a number of text messages
15 complaining about the statement given by the president of the
16 Republic of Kenya, His Excellency Moi Kibaki, on behalf of
17 Ambassador Muthaura. My clients have told me that the president is a
18 president for all Kenyans, including them, the displaced persons, and
19 they do not find it appropriate that he would give a statement for
20 Mr. Muthaura. This is a concern that has been raised by my clients.

21 I will say a few words about the law, because the law is
22 important in the case.

23 I said during the opening statement that depending on how the
24 evidence turned out, it might be appropriate to consider whether factual
25 allegations have been characterised properly legally. The case law

1 allows us to comment on the legal characterisation of the facts. We're
2 not allowed to expand the facts to new facts, but we can comment on their
3 characterisation.

4 There has been evidence present of acts of destruction of
5 property, burning and looting, in both Naivasha and Nakuru, and this is
6 important. It's important to my clients. Most of them are displaced.
7 They lost their homes. They lost all their personal property.

8 We will accept the invitation of your Honours to brief this issue
9 in writing, that is, the specific question posed whether these acts of
10 destruction of property and looting may qualify as a crime against
11 humanity of persecution and/or forcible transfer. And the evidence about
12 looting and burning of property provided by the Prosecution in its
13 presentation was on the 22nd of September this year, page 11, lines 1
14 through 9; the evidence of Katee Mwanza on the 26th of September,
15 page 104 and 105, implicating looting and burning of property in
16 Naivasha.

17 So we are going to brief those issues, because we do believe that
18 there is a basis for a charge under crime against humanity for burning
19 and looting *vis-à-vis* forcible transfer and persecution.

20 I said also that it might be appropriate to consider Article 28
21 as applicable in this case, that is, superior responsibility. I've
22 listened to what evidence was presented, and I don't believe it is
23 appropriate. We do not find a sufficient basis for proceeding with
24 charges under Article 28.

25 There is something that was said by Mr. Kenyatta's counsel,

1 learned counsel opposite, that is worth noting. This was said on the
2 28th of September, at page 52 of the transcript, starting at lines 10
3 through lines 21. And counsel said that:

4 "Well, the Prosecution rely here on Uhuru Kenyatta being able to
5 ensure compliance through the provision of sufficient funds to secure the
6 support of other members of the common plan and to enable the recruitment
7 of Mungiki."

8 A few lines down counsel said:

9 "Even if it was the case, which is entirely, whole-heartedly
10 rejected by the Defence that Uhuru Kenyatta supplied money to the
11 Mungiki, it defies logic that such evidence, only that evidence,
12 constitutes evidence of automatic compliance. There is no evidence to
13 support the requisite of indirect co-perpetratorship."

14 This is about control of the crime. In essence, if you find that
15 he did provide financial support, that in and of itself is not sufficient
16 under Article 25(3)(a). That is the submission of the Defence in a
17 nutshell. And we say that if you make such a finding that financial
18 support was provided, even if not sufficient under Article 25(3)(a), it
19 would be applicable under Article 25(3)(c), facilitating the commission
20 of a crime, aiding and abetting. And your Honours have the discretion
21 under Article 61(7)(ii) from the Bemba case to adjourn and ask that the
22 Prosecution consider an amendment. It has been done before in this
23 court. So that's something your Honours should consider, and I will put
24 it in writing.

25 In closing, Madam President, I will end where I began, by just

1 briefly telling your Honours about another victim of sexual violence,
2 because in the context of the attacks in Naivasha and Nakuru, they were
3 the most silenced. They were the ones with untold stories that nobody
4 could hear about and nobody had found. This is a 41-year-old woman from
5 Naivasha, identity withheld. There is so much about her suffering that I
6 cannot read because it would identify her, but she says it happened on
7 Sunday, the 27th of January, 2008, when somebody and another person, and
8 I cannot say the names, were running to the prison for security after
9 they were chased. While running, more than 20 men emerged from a fence,
10 and they knocked her down on her shoulder with a big iron and she fell.
11 She fainted in the process. Ten men remained with her, another ten
12 continued to chase the persons they were chasing. She was raped for
13 almost three hours by the ten men. They did it repeatedly. She woke up
14 in the morning, and she said those Kikuyu men thought she was dead and
15 that is why they ran and left her.

16 She was taken to the prison where she was headed. She stayed
17 there for five days without medical help before she was taken to the
18 hospital.

19 She is now mentally disturbed. Her uterus has been taken out.
20 She suffers from high blood pressure, severe headaches daily. She lost
21 all her property.

22 That's a victim in this case, and that is what this case is
23 about.

24 Thank you.

25 PRESIDING JUDGE TRENDABILOVA: Thank you, Mr. Anyah.

1 Now we start with the Defence teams. Mr. Khan, the floor is over
2 to you.

3 MR. KHAN: Madam President, your Honours, in order to confirm
4 this case fair we'll have to seem foul, and foul will have to seem fair.
5 I've heard the eloquent submissions of my learned friends opposite. It,
6 I must confess, made me wonder if I've been in the same courtroom for the
7 last 12 days or so, but, your Honour, before I proceed to the substance
8 of my submission, and I will try to address really the -- some of the
9 proposition put forward by learned counsel opposite and address in more
10 detail matters in our written brief, but before I proceed, it would be
11 useful to have some reference from the Prosecution in light of
12 your Honours' clear admonition at the outset that the parties are
13 restricted to referring to evidence that's been disclosed to her
14 contention that letters have been written regarding NSAC minutes, because
15 I must confess I was looking through the list of evidence and the
16 disclosure and I don't see any evidence to back that up, but perhaps I've
17 missed it. So, your Honour, before I proceed, as that's a material
18 averment that's come from the bar table, it would be useful to have an
19 EVD reference so I can respond to it.

20 Your Honour, I'd ask for that brief clarification with the
21 assistance of counsel for the Prosecution with leave -- with leave of
22 your Honour.

23 PRESIDING JUDGE TRENDABILOVA: (* Microphone not activated) ...
24 you can proceed.

25 MR. KHAN: Indeed.

1 PRESIDING JUDGE TRENDAFILOVA: Ms. Adeboyejo could you refer to
2 some EVD numbers?

3 MS. ADEBOYEJO: Madam President, your Honours, we cannot provide
4 it right away, but I would ask someone on my team to look through ...

5 PRESIDING JUDGE TRENDAFILOVA: Mr. Khan, could you be able to
6 proceed with the rest of your presentation and you will
7 (* overlapping speakers)

8 MR. KHAN: Madam President, I will, but I will say that no such
9 evidence has been disclosed by the Prosecution. They have, despite the
10 admonition of the Bench, put forward a proposition that is not before the
11 Court and to which we cannot, at the moment, answer. I will in due
12 course ask because I do know the background that perhaps as part of our
13 final brief I can attach some correspondence on this issue if I am
14 correct that the Prosecution have not put this in evidence.

15 Your Honours, going to the substance of the matters, the
16 Prosecution really have made a number of submissions regarding the
17 purpose of the confirmation hearing, and your Honours know very well what
18 the real purpose is. You've had the opportunity to create, in part, the
19 jurisprudence of the Court, and we've heard an awful lot about what a
20 confirmation is not, but it is important to reaffirm what it is. It is a
21 mechanism to protect the rights of the Defence and to prevent
22 unmeritorious cases going forward, and to protect. It is a device to
23 protect suspects who come before the Court from wholly unfounded charges
24 and we say this is manifestly such a case.

25 Now, your Honours, Madam President, you, yourself, referred to

1 the jurisprudence about this proceeding being a filter. Now, for there
2 to be a filter, it's another way of saying a sieve. You -- you must
3 review, weigh, analyse evidence, otherwise, how can you possibly sieve
4 it?

5 The Prosecution wish you to somehow look away from all the
6 difficulties that this case presents and under eloquent submission and
7 detailed list of evidence somehow say, well, your Honours, these
8 difficulties do not need to concern you at the moment. These can be
9 resolved at trial.

10 Your Honours, this is not good enough, in our respectful
11 submission. It is not to be taken lightly to put an individual who, of
12 course, not only has the presumption of innocence and has complied with
13 all order of Court but to put somebody under the sword of Damocles of a
14 trial and the pressure of a trial in a case that is manifestly unfounded.

15 Your Honour, the Prosecution have repeatedly put forward
16 contentions both in the opening submission of the learned Prosecutor and
17 again today that your Honours are not to weigh and analyse evidence, and
18 that is a trial process, but, your Honours, what they really want is just
19 to ignore the difficulties and move forward, but it's our submission that
20 any way you look at the evidence, even if you dress up the evidence in
21 its Sunday best, it's still in rags. It's still in tatters and it's
22 simply not of the sufficiency of a cogency of reliability that will meet
23 the confirmation standard. And, your Honours, I note at the end that
24 learned counsel for the Legal Representatives for the Victims, he said
25 it's a low standard. It's an easy standard to meet. Well, your Honours,

1 I couldn't differ more. It's a meaningful standard. It's a standard
2 that has effect and your Honours know better than anybody else what is
3 required of your Honours to discharge this important step in a criminal
4 process.

5 Your Honours, for the reasons we've given over the last few days
6 we say this case simply cannot go forward.

7 Your Honours, when it comes to corroboration, the Prosecution
8 have simply got it wrong. They refer to the case of Haraqija at the
9 ICTY. In fact, I had the honour of being lead counsel in that case, and
10 they refer to the jurisprudence of the Trial Chamber. That was
11 overturned on appeal. And the case law that they refer to, the
12 paragraphs they refer to, were overturned on appeal because the
13 Appeals Chamber accepted the arguments I put forward regarding
14 corroboration and the European Convention of Human Rights. Your Honours,
15 so they get the law wrong on this basic issue of corroboration.

16 But, your Honours, let's go forward, and my learned friend will
17 keep me apprised of the time I'll try to keep within the parameters.

18 Your Honours, the Legal Representative of the Victims has been
19 accurate in noting the latitude and generosity and decision of the Bench
20 to allow them the privilege and the right to participate, and,
21 your Honours, it must be said on behalf of Ambassador Muthaura that the
22 suffering of the victim is not the preserve of the Prosecution. Empathy
23 for the victims is not the preserve of the Legal Representative that's
24 been appointed and appears in this court. It is a matter that galvanises
25 all people of conscience, and it is a matter that has vexed tangibly

1 Ambassador Muthaura.

2 Your Honours, you have before you the NSAC minutes and
3 correspondence from the ambassador as well dealing with the fate of
4 victims, IDPs, and the efforts, the very real efforts, the long hours
5 over the Christmas period afterwards and even till today that have been
6 made by him to alleviate their plight and their suffering.

7 Your Honours, victims, in my respectful submission, do not want
8 vengeance. They do not want simply an individual's head on a platter.
9 They want justice. And it's my humble submission that with regret we are
10 no further forward today than we were after the Waki Commission, and that
11 is because of the huge torrent, huge litany of investigative failings
12 that I detailed last Saturday.

13 Now, your Honours, this was not simply counsel being
14 self-indulgent and kicking the Prosecution on numerous points.
15 Your Honours, the failure of investigation are directly relevant to your
16 assessment of the sufficiency of evidence. The evidence they have not
17 got speaks volumes. And, your Honours, you -- the evidence put forward
18 by the parties has equal value, yet the Prosecution wish you to look away
19 from the evidence, the very significant evidence that the Defence has put
20 before you.

21 Now, your Honour, it's not good enough for the Prosecution to
22 cast aspersions. They're very good at it. Excellent, in fact, past
23 masters, but, your Honours, clouds of suspicion must be vented in the
24 courtroom. All these suggestion of witness intimidation, of evidence --
25 of evidence they have impugning the credibility of Prosecution witnesses

1 disappears, in our respectful submission, in the light of clear evidence.

2 Your Honours, the evidence we've put forward comes from the head
3 of state, the previous head of state, NSAC members, cabinet members,
4 senior police officers, right down to the perpetrators. And,
5 your Honours, the Prosecution can't simply dismiss it and say, "Well,
6 this may be fabricated even if it's authentic. Even if it's authentic
7 there's this deficiency and that deficiency."

8 Your Honours, for the Prosecution case to be confirmed, they are
9 asking you effectively to say all this evidence put forward by very
10 notable individuals is false, is tainted, is not worthy of belief, or at
11 the very least, your Honours, it may be worthy of belief but that's for
12 trial, not for now.

13 Your Honours, despite the clear injunction of the Bench at the
14 outset, are to rubber stamp their very sincere, very emphatic
15 protestations that they have confidence in the integrity of their
16 witnesses. Your Honours, that's not the purpose of this hearing. What's
17 important, of course, is your Honours' assessment, not mine. Definitely
18 not the Prosecutor's, and not the Legal Representatives. It is your
19 assessment as independent Judges as to the sufficiency of evidence, that
20 the evidence put forward by the Prosecution is really deficient.

21 But what the Legal Representative of the Victims has failed to do
22 is accurately and fairly represent the views of his clients.
23 Your Honours, I can't put it any other way, and I'll give you examples
24 why.

25 A central pillar of the Prosecution case is this collusion, this

1 common plan between allegedly Ambassador Muthaura, Uhuru Kenyatta, and
2 the Mungiki, and the police were ordered to stand aside and do nothing so
3 that the common plan could flourish and take effect in order to keep the
4 PNU in power. And we've addressed some of this -- these what we say are
5 absurdities, but let's see what the victims themselves say.

6 Did the police stand aside and do nothing? Well, your Honours,
7 applicant KEN-A/8501/11 is a Luo from Nakuru, and regarding the 24th of
8 January, 2008, he says that:

9 "I saw people running as others were shouting. I carried my
10 items, and I run away. I went to the bus-stop and boarded a *matatu* back
11 to my house.

12 "All the roads were blocked as things were being burnt. I stayed
13 in my house one week because were being killed and they were being cut.
14 Our landlord then called police officers who came and ensured security.
15 We were then carried back home in redacted with police security."

16 Let's turn to Naivasha. Maybe there the Prosecution have shown
17 police collusion, police attempts to forward a common plan and engage in
18 a criminal conspiracy to attack the civilian -- part of the civilian
19 population of Kenya. Well, let's look at applicant KEN-A/8531/11,
20 27th of January, 2008, the witness speaks to, and he says that at 9.00
21 a.m. on the 27th, he's on the way to church:

22 "And we came across a man who had been slashed to death. People
23 running helter-skelter by men who had hoods on their heads and faces. We
24 ran up to redacted where we took refuge. A police land cruiser came by
25 and rescued us to the police station. We stayed at the police station

1 for six days. A lorry came by and took us."

2 Your Honour, Nakuru again, 27th of January, applicant

3 KEN-A/8538/11, 27th of January. He says that they were told not to go
4 home. "We slept at for three days. Later the police escorted us to our
5 estates. We were then taken to redacted police post. I left there and I
6 came home."

7 Turning again to Naivasha, 27th of January 2008 terrible events
8 of course to be condemned. Crimes took place. People suffered. People
9 suffered. But let's see, actually, what the role of the police was. He
10 says describing the wailings and weepings in his words, he phoned for
11 help, and he said:

12 "I decided to run and collect my family for refuge at the police
13 station. When I was nearing a plot I used to live I saw a group of men
14 carrying machetes slashing a woman and a man just next to where I used to
15 live. I ran back, I spent the night at the police station --

16 THE INTERPRETER: Message from the English booth: Could counsel
17 please be requested to slow down. Thank you.

18 MR. KHAN: "Armed APs, administration police. Next day, I
19 requested the management of the farm I was employed to give me police
20 officers to escort me where I used to live so I could know the fate of my
21 family. When I reached, I found an empty place. Later, the police, the
22 police, escorted me to the police station and my family was not there
23 either. Later, I phoned my wife and I was told that the prison officers
24 had rescued them to the prison station."

25 Your Honour, I also refer you to KEN-A/9068/11 dealing with

1 Nakuru of the 25th of January. Police came to the rescue.
2 KEN-A/9076/11, Naivasha, 24th of January. Here, your Honour, again they
3 say a mob of people came with *rangas* (* sic) and *pangas*. They were
4 shouting and telling Luos to evacuate the area:

5 "They threw our properties, burned and looted others. And I went
6 to the police station for security of the police officer who came to the
7 scene."

8 Your Honour applicant KEN-A/9070/11, Nakuru, 24th to the 27th of
9 January, your Honour, again, police rescuing the individual. Police
10 officers looking after them. KEN-A/8794/11, a Luo from Naivasha.
11 Your Honours, of course it seems tedious, it seems boring, it seems there
12 could be a hundred of these. Well, your Honours there are. There are.
13 But I'm reading them for a purpose because these witnesses, these
14 victims, are saying they are -- they are protected by the very arm of
15 government that is said to have engaged in a criminal plan that
16 Ambassador Muthaura was part of. It is ludicrous. When these
17 individuals are in the clutches by the palm of the hands of the police,
18 do the police squeeze and destroyed them? Your Honours, they don't.
19 Victim after victim says they are protected. Their lives are saved from
20 those individuals.

21 Your Honours, applicant KEN-A/8794/11 is a Luo from Naivasha.
22 And on the 28th of January 2008, the witness says this:

23 "I saw some people carrying *pangas* and *rungus* coming towards my
24 house in redacted estate in Naivasha. I rung to the prison for our
25 rescue so the police came immediately and took us to the prison hall for

1 three days. Later we were transported to homes. They also destroy the
2 homes."

3 Your Honours, KEN-A/9086/11 is a Luo, 26 of January, 2008, he
4 talks about 20 men carries machetes asking Luos and cutting them. And
5 this witness -- it's very vivid account:

6 "I locked myself inside with my children. They, Mungiki gang,
7 invaded the estate and entered. They chopped one of the neighbours. Our
8 landlord managed to escape leaving us behind. I phoned her for rescue.
9 She responded immediately by calling the police who swiftly responded."

10 Not my words. The words of the victims represented by my learned
11 friend opposite. The police swiftly responded immediately for our
12 rescue. They, Mungiki, ran away. Your Honour, this is not unimportant.
13 This goes to the heart of the case. The fact that there's 233 or
14 something is even more to the good. It even more obviously shows how
15 ludicrous the Prosecution's case is.

16 Your Honour, I could go on and on and on. One more example for
17 Nakuru. KEN-A/9088/11, 26th of January. I won't read all of it. A Luo.
18 And the witness talks about men carrying machetes. He tries to -- the
19 witness tries -- the victim tries to seek refuge at a neighbour's house:

20 "Suddenly I heard gunshots in the air which forces the group
21 (Mungiki) who flew away. The police came for my rescue and they took us
22 to a church."

23 Your Honours, important evidence we say, but what is
24 Ambassador Muthaura's and what was the government of Kenya's view towards
25 these IDPs? Your Honours, you've got the statement of Andrew Mondo, the

1 permanent secretary for special programmes. I don't have the exact
2 amount. It's about 2 billion shillings. Some victims are given two and
3 a quarter acres of land in Kenya. Your Honours, this is -- Kenya should
4 be -- I think and I don't bulk at it -- I -- I -- despite the terrible
5 suffering that people have endured and the bravery they've shown the
6 stoicism and the victims have shown, it is my respectful submission that
7 the statement of Andrew Mondo and the annexures thereto shows real
8 efforts that Kenya and the Kenyan government and Kenyan people can be
9 proud of. It is not easy as your Honours know from your experience
10 rebuilding after terrible conflicts that fracture the very soul of a
11 country and yet Kenya has done so. Efforts have been made. Of course
12 more can be done. But, your Honour, if somehow the parties opposite are
13 wishing to draw some hostile intent, some ethnic animosity by some of the
14 deficiencies, your Honour, that simply is not supported by the evidence
15 before you.

16 Your Honours, I will refer to the NSAC minute also of the 21st of
17 January while I'm on this topic of 2008 EVD-PT-D12-00019, and,
18 your Honour, at page 10 of that talks about injunctions from NSAC,
19 recommendations from NSAC that steps be taken to ensure that those who
20 are displaced are not deprived of their land, that the -- and it's
21 relevant to the forcible transfer charge.

22 Your Honours, if one looks also at EVD-PT-D12-00163, you'll see a
23 letter from Ambassador Muthaura himself to the permanent secretary
24 ministry of lands And, your Honour, and it refers to the NSAC meeting of
25 the 21st of January. And Ambassador Muthaura wrote this, in particular,

1 the meeting observed that attempts could be afoot by fraudsters to take
2 advantage of the post-election violence and use land registry offices in
3 the country to fraudulently alter the ownership of property belonging to
4 internally displaced persons thereby defrauding them. And, your Honour,
5 it continues, that the land registry staff need to be extra vigilant in a
6 concerted effort to pre-empt these illegal plans.

7 Your Honours, we'll refer in due course to EVD-PT-D12-00160, the
8 first which is dated the 15th of January. The previous EVD number was
9 the 21st of January which talks about illegal occupation of evicted
10 person's property. This is not part of some terrible -- this is not
11 case I. This was not part of some policy that's -- that -- to move
12 people out, alter demographics, some kind of gerrymandering to change the
13 political complexion of a country. In fact, the opposite. There are
14 attempts here to ensure that people stay in their localities. And
15 your Honours have heard witnesses regarding that, that people move to the
16 flower farms so they can continue with however difficult the situation
17 is with a degree of normalcy.

18 Your Honour, the Prosecution have failed also to comprehend the
19 basic organisational structure of the Kenyan government and we've seen
20 that time and time and time again. Now, your Honours, the reason they
21 failed could be multifarious, but it may also be because of a failure to
22 properly speak to the relevant individuals, to look on Google and look at
23 the organisational structure and simply seek to squeeze their preferred
24 theory into a place that doesn't fit. Your Honours, they are trying to
25 ramrod a really incredible case through to trial and asking for the

1 barest scrutiny in the process.

2 Your Honour, what do I mean? DCC paragraph 39 alleges that
3 Ambassador Muthaura had *de jure* and *de facto* control of various security
4 agencies including NSIS. And, your Honour, we touched upon this briefly
5 on Saturday. Your Honour, that contention is contradicted not just by
6 the welter of evidence that we've brought forward, the welter of evidence
7 we have brought forward. Your Honour, look at Witness 0005.
8 EVD-PT-OTP-00571, EVD-PT-OTP-00020, EVD-PT-OTP-0006, EVD-PT-OTP-00216.
9 Your Honour, the list goes on and this -- these make it very clear that
10 the police report to the minister of provincial administration and
11 internal security. The police operationally independent. In fact, that
12 was the evidence and submissions of the Ali team yesterday. Yesterday
13 seems a long time ago.

14 Your Honour, the Prosecution have ignored that, but more
15 importantly they've ignored their own evidence, and I refer you in due
16 course to the evidence numbers that I've mentioned.

17 President Kibaki, who is -- has a right to speak like anybody
18 else, and more importantly Ambassador Muthaura has the right for any
19 witness to speak on his behalf, whether people like it or not. And of
20 course there are these pressure lines in Kenya. Of course they are
21 somewhat historic, and a lot of what needs to be done to heal the wounds
22 and soften the division between tribal groups. But, your Honours, this
23 somehow -- the contention that Ambassador Muthaura should be accorded the
24 same right as everybody else to have all relevant evidence brought before
25 a Chamber is really a rather unsavory and unmeritorious, in my respectful

1 submission, proposition. But President Kibaki says at paragraph 18 of
2 his statement the allegations by the Prosecutor about Muthaura having
3 control over the Kenya police and the police commissioner are wrong and
4 without a proper understanding of the structure of the Kenyan security
5 apparatus.

6 Your Honours, the Prosecution may want to wish all of this away.
7 They may wish to erase it out of the history books. They may want to
8 look away from the organisational structure and the organigrammes of
9 Kenya. This is not a tin pot country. It is an organised country and,
10 your Honour, it's very clear wherever you look at the Police Act, you
11 look at the constitutional structure that the police commissioner simply
12 does not report to Ambassador Muthaura. Their characterisation of
13 Ambassador Muthaura of course is convenient. They want him to be the
14 linchpin. Now, your Honour, it is -- it cannot be right for very ardent
15 attempts by the Prosecution to have a case go forward. It cannot be a
16 licence for them to ramrod evidence constantly by -- with assertions of
17 the truth with assertions of veracity that simply do not withstand the
18 evidence, their own evidence, Defence evidence, and objective evidence.

19 Your Honour an example of this is their constant attempts, I
20 mean, I actually don't understand it, their constant incessant stubborn
21 attempts to say Ambassador Muthaura is a politician. Your Honour, look
22 at Witness 0011 during his questioning at EVD-PT-OTP-00319 at 1464. The
23 associate analyst says:

24 "Correct me if I am wrong, but Mr. Kimemia and Mr. Muthaura are
25 very high level important politicians."

1 Well, your Honour, is this analyst on a frolic of his own? These
2 things happen. We all make mistakes. But, your Honour, unfortunately
3 not. It's a systemic failing. It's a deliberate attempt to
4 mischaracterise what is patently obvious to anybody who opens their eyes.
5 And, your Honours, the learned Prosecutor himself on the
6 21st of September, at page 52, lines 2 to 3, when he's referring to the
7 meeting of the -- the alleged meeting on the 30th of December told the
8 Court, and I quote, "Top PNU leaders were present there including
9 Muthaura and Kenyatta.

10 Your Honour, it's little wonder then that learned counsel sitting
11 in this courtroom on the 3rd of October repeated this misconception when
12 she put to Peter Otieno, without any foundation, leaving aside the fact
13 that it's leading, the very strident view, "but you would agree with me
14 he's a politician, is that right?" Your Honour, these things are not --
15 we cannot -- we all make mistakes, but we cannot be simply characterised
16 as a lack of experience. They cannot simply be characterised as mistakes
17 from the bar. Your Honour, there's a clearly systemic attempt by the OTP
18 as a policy to characterise my client as a politician, in defiance of all
19 the evidence that he's a civil servant. And he's not a Kikuyu civil
20 servant. Leaving aside the fact he's a Meru, he's worked at very high
21 office for a Kalenjin president, President Moi. How can, your Honours,
22 counsel from the bar table tell you with a straight face repeatedly,
23 repeatedly, through interviews, through the Prosecutor's own words, and
24 through counsel that my client sitting behind me is a politician?
25 Your Honour, there's no credibility in such constant stubborn averments

1 and they reveal much.

2 Your Honours, we'll refer in due course to what President Kibaki
3 says at paragraph 5, the position of the head of public service is a
4 position for government and not for politics. Thuita Mwangi himself
5 spoke about that. Your Honours, again there was a clear attempt in the
6 questioning of Uhuru Kenyatta by the Prosecutor to somehow link
7 Ambassador Muthaura into State House, this idea that somehow he's a
8 colossus standing astride every aspect of life in Kenya. And
9 your Honours will draw your own conclusions, but it seemed the Prosecutor
10 really wanted an answer that the comptroller of State House reported to
11 Ambassador Muthaura. And, your Honour, he seemed your Honours may view
12 -- your Honours may think he seemed a little bit disappointed when he got
13 the answer that no the comptroller of State House refers to the -- refers
14 to -- reports to the president. Your Honour, the constant assertion that
15 all permanent secretaries report to Ambassador Muthaura is sourced up one
16 newspaper article, and, your Honour, I think the correct position,
17 understandable position, anybody who understands any civil -- any
18 government service has been expressed by Thuita Mwangi in his testimony.

19 Your Honour, going on to meetings and planning. Well, let me
20 move first, in fact, to Nakuru/Naivasha. I've ten minutes left, I
21 believe. Your Honours, we've dealt with some of the credibility issues.
22 We've touched upon some of the defects in our previous submissions, but
23 let's talk about Witness 0012. Your Honours, the Kenyatta team have gone
24 into some detail as to why extraneously this witness should not be
25 believed and the Prosecution, of course, have given some kind of

1 response, but, your Honour, let's look at what he says himself because
2 the Prosecution cannot cherry pick. They cannot have their cake and eat
3 it. It's an expression I used on the first day, and it hasn't gone past
4 its sell by date yet. Your Honour, this witness says, a witness they put
5 forward as truth, says that Mungiki were not involved, but it was local
6 Kikuyus that were involved in the crimes in Naivasha. EVD-PT-OTP-00652
7 to 0119, lines 250 to 254, now that's contrary to paragraph 70 of the
8 DCC. The witness says that this was not a Mungiki war. It was a Kikuyu
9 war. The witness says that the population in Naivasha opening up
10 roadblocks, not Mungiki. EVD-PT-OTP-00664 to 0834.

11 But, your Honour, perhaps it's in relation to Nakuru that the
12 absurdity of this witness, the deceit of this witness and the
13 self-serving nature of this witness becomes apparent. Your Honour, the
14 witness states at EVD-PT-OTP-00666 that he was in Nakuru at the time, and
15 he purports to give a first-hand account of -- of what happened and
16 that's of course in -- in contradistinction to his account in relation to
17 telephone calls concerning Kibera. But how -- how credible is this even?
18 Well, your Honour, a number of comments could be made, but they'll be
19 touched upon in more detail in the brief. But he talks about a local
20 politician that was involved in the violence, and he says the planning of
21 that violence took place in a hotel and in a mountain called the Menegai
22 crater. It's a big forest and caves. Your Honours -- and the reason for
23 that, he says, is -- is -- is to plan violence. Well, your Honours,
24 amongst everything else, perhaps that's a more believable account, if one
25 was engaged in a criminal plan, some out-of-the-way place than doing it

1 on the lawn of State House with a full panapoly of state around you.
2 But, your Honour, leaving that aside what the witness says very clearly
3 is in Nakuru there were administration police officers that were dressed
4 in civilian clothes. Well, your Honours, I really don't get this case
5 the Prosecution are putting forward. I mean, what kind of schizophrenia,
6 what kind of absurdity is going on, do the Prosecution say, that you have
7 police officers dressed as civilians and then Mungikis dressed as police
8 officers? What rationale do they come up with for this nonsense? We say
9 it is patent nonsense. It defies credulity. We say conjured up account
10 that any way you look at it is devoid of merit and devoid a scintilla of
11 truth. But what does the witness say? He says not much happened in
12 Nakuru. He says no people were killed. Mungikis, they don't kill
13 people. EVD-PT-OTP-00665, line 357 to 362.

14 No arson by Kikuyus. No arson. He says Kalenjins conduct arson.
15 Kikuyus loot. EVD-PT-OTP-00665 at 0396 line 384.

16 Your Honours, they don't attack women. They don't rape,
17 Witness 0012 would have you believe. EVD-PT-OTP-00665 at 0398.

18 And, your Honour, the witness's concern, the Prosecution
19 witness's concern is that the police didn't act strongly against the
20 Kalenjins. But, your Honours, the Prosecution really cannot have their
21 cake and eat it. They can't say this witness should be relied upon in
22 part and disbelieved in part. Your Honours, if you accept this witness
23 is telling the truth and there were meetings that were planned,
24 your Honours should accept that there were no crimes. He says no
25 killings, no arson, no rapes. And, your Honours, if you don't accept

1 that there's no crimes, and we say there's crimes. We brought witnesses,
2 Anthony Karioki (* phon), who is an arsonist. He explains in his
3 statement, your Honours, the brewing resentment, the rising tensions, and
4 how a spark brought communities at each other's throats. So we accept
5 that there are victims. We accept there was arson. We accept that there
6 were killings. But, your Honours, the Prosecution cannot have it both
7 ways, and if they accept there were no crimes, they must also accept
8 there were no meetings.

9 Your Honour, there's an awful lot that could be said, an awful
10 lot that could be said. An important concern that we had we raised at
11 the outset was the lack of specificity of the charges. And the
12 Prosecution said that in court on the 30th of December there were, in
13 fact, two meetings we thought. Suddenly for the first time they said
14 that there was a meeting between Kenyatta and Muthaura at the office of
15 Michuki. Now, we read and we turned these references inside and out. We
16 referred to that in the course of proceedings and we couldn't find any
17 basis for the assertion made by my learned counsel opposite that
18 Ambassador Muthaura was at such a meeting. And, your Honour, I'm glad to
19 say that there's some clarity, we hope, because when my learned friend
20 Ms. Alagendra questioned the Honourable Uhuru Kenyatta a few days ago,
21 Ms. Adeboyejo told the Court at page 93, lines 19 to 22, that those
22 references that she gave in support of that proposition only referred to
23 Kenyatta, not to Ambassador Muthaura. So we wanted to clarify that.
24 Your Honour, the 30th of December meeting -- their own witness,
25 Witness 0010, says that Ambassador Muthaura was not there, and yet they

1 would have you disregard that inconvenient truth. EVD-PT-OTP-00674 at
2 0551.

3 PRESIDING JUDGE TRENDAFILOVA: Mr. Khan, I'm very much sorry but
4 there are just six minutes of tape to inform you about -- about your
5 presentation. This is an organisational matter we have to respect.

6 MR. KHAN: Your Honour, I will finish in five minutes, I'm
7 grateful.

8 Your Honour, we touched upon Witness 0012 previously and that
9 Witness 0012 is referred to by the Prosecution and everything's redacted.
10 EVD-PT-OTP-0667 at 0427. So Witness 0012 cannot be relied upon in
11 relation to the meeting at State House on the 30th. What you have from
12 the State House is a video of Ambassador Muthaura being present. You
13 have numerous statements from so many individuals about what happened at
14 State House and no evidence at all that a criminal meeting took place.
15 What you have is Prosecution evidence from an anonymous Prosecution
16 witness that Ambassador Muthaura was not there, and despite that my
17 friends opposite say your Honours commit this case to trial.

18 Your Honour, then we're left with the 3rd of January meeting, and
19 Witness 0004 is an unbelievable witness. He tells what can only be
20 described as a tissue of lies. And, your Honours, my learned friend
21 Mr. Faal touched upon some of those. We will elaborate in our closing
22 brief. But simple examples. Original, he says it's the PA to the
23 president that makes the phone call that brings Ambassador Muthaura here,
24 and then later on he changes his story to implicate Ambassador Muthaura.
25 He's an incredible witness. He can't be believed. Our Defence Witness

1 D1237 that my learned friend Ms. Higgins referred to as the shadow, his
2 statement is really important. You have this witness who says he's
3 scared, asking to become a Facebook friend telling this Mungiki member,
4 former Mungiki member, that I miss you. Your Honour, his account does
5 not add up in the slightest. I would refer you carefully to all of that
6 evidence in due course.

7 Your Honours, you cannot are thoroughly satisfied that this case
8 should go to trial. The Prosecution would have you disbelief the phone
9 records that have been put forward. Your Honour, the burden is not on
10 us, but this is very important evidence and when they say that there's
11 ample time, your Honours, conjecture have they experienced the traffic of
12 Nairobi? And leaving that aside that there's no evidence of how long it
13 would take, their own evidence says -- firstly, the witness says the
14 meeting took place at 11.00. Then he changes to say it starts at 8.45.
15 Then he said breakfast took place for 15 minutes. That brings us to
16 9.00. We have Alfred Matua, the government spokesperson, saying he saw
17 Ambassador Muthaura at Harambee house at 9.00 a.m. Your Honours, I've
18 seen Star Trek on teleports and it's nonsense that the Prosecution are
19 expecting Ambassador Muthaura to have moved instantaneously from that
20 location of Nairobi Members Club to Harambee house at rush hour in that
21 manner. It's nonsense. They're clutching at straws, and it must be
22 disregarded. Your Honours, the Waki Commission came up with, and I will
23 conclude -- with important caveats. And I would refer you to
24 EVD-PT-OTP-0004 at 0391 and EVD-PT-OTP-0004 at 0828. And the commission
25 said that the information, the evidence gathered so far is not in our

1 assessment sufficient to meet the threshold of proof beyond reasonable
2 doubt. We believe, however, they continue, that the commission's
3 evidence forms a firm basis for further investigations of alleged
4 perpetrators, especially concerning those who bore the greatest of
5 responsibility to post-election violence.

6 Your Honours, they continued at page 454 that a flawed
7 investigative process is the very antithesis of a successful prosecution.
8 In other words the -- the quality of investigation affects the outcome of
9 both Prosecution and the adjudication of the matter.

10 Your Honours, the Prosecution have patently failed to
11 investigate. This really is a critical failure in the case. They have
12 not met their important and significant burden of showing sufficient
13 grounds to establish substantial grounds to believe that the charges are
14 made out. And your Honours it's our respectful submission and for
15 reasons that we will deal with in due course in our written brief that
16 this case compels but one conclusion and that is the charges should not
17 be confirmed. Your Honours, Ambassador Muthaura said in his opening
18 speech in his statement that, your Honour, he puts himself in your hands.
19 It is with great trust that he does that fully alive to your onerous
20 responsibility, but we are confident, your Honours that you will come to
21 that conclusion and not confirm the charges in this case. I'm most
22 grateful for your indulgence.

23 PRESIDING JUDGE TRENDABILOVA: Thank you, Mr. Khan, I hope the
24 tape is not over just to announce a break and we shall resume our session
25 at 11.30.

1 COURT USHER: All rise.

2 Recess taken at 10.58 a.m.

3 On resuming at 11.31 a.m.

4 (Open session)

5 COURT USHER: All rise.

6 PRESIDING JUDGE TRENDAFILOVA: Please be seated.

7 I was informed by the Court Officer that the Defence team of
8 Mr. Ali would like to raise an issue. Is this an issue that requires an
9 urgent resolution by the Chamber?

10 MR. KEHOE: Unfortunately, Madam President, it does. It's a --

11 PRESIDING JUDGE TRENDAFILOVA: And as far as I was told, you
12 wanted that it is discussed in private session.

13 MR. KEHOE: In a spirit of caution, Madam President. I thought
14 that it should be addressed to the Chamber in private session first --

15 PRESIDING JUDGE TRENDAFILOVA: Of course, of course.

16 MR. KEHOE: -- and then allow the Chamber to make any
17 pronouncements or comments about it.

18 PRESIDING JUDGE TRENDAFILOVA: Of course, Mr. Kehoe.
19 Court Officer, would you arrange for private session.

20 (Private session at 11.32 a.m.)

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10 (Open session at 11.38 a.m.)

11 COURT OFFICER: Madam President, your Honours, we're back in open
12 session. Thank you.

13 PRESIDING JUDGE TRENDABILOVA: The floor is over to you.

14 MR. KAY: Thank you, Your Honour.

15 Justice is a figure that stands blindfold with scales on either
16 side. All evidence that comes before you from the parties is treated
17 equally, and that is why justice is blindfolded, and that is why justice
18 balances in the scales the evidence that comes to justice.

19 This confirmation hearing is not something that we've ever said
20 should be a mini-trial, far from it. This confirmation hearing is an
21 opportunity for us to present before you for the first time evidence on
22 behalf of the suspects. Until we started these proceedings, the traffic
23 to you had all been one way, and that is so in any system. An
24 investigation may come about because of direct evidence, because of
25 suspicion, because of rumour, and an investigation thereafter start.

1 Summons issued, again without the people who receive those summons being
2 a party to the arguments concerning the validity of what is put before
3 you, the quality of what is put before you, the accuracy of what is put
4 before you.

5 It is not until our disclosure takes place and the proceedings
6 start that for the first time you as Judges get the opportunity to
7 receive evidence from the Defence, and that evidence has every right to
8 be considered in the same way as Prosecution evidence is considered,
9 fairly, dispassionately, analysed, its quality considered, whether
10 evidence is direct evidence, whether it's evidence based upon information
11 given by somebody else, whether it's hearsay, whether it needs
12 corroboration, how it fits into the pattern and situation revealed by
13 other forms of evidence, and a remark from the Prosecution this morning
14 really put this into context for the Defence when my learned friend said,
15 "We haven't had time to investigate the Defence alibi."

16 An investigation requires you to look at where your suspect was
17 and what he did. I would submit even more so in a case that has a
18 complexion behind it of a political conflict, of finger pointing, of
19 people expressing preferences for their own side above the other.

20 A cautious and reasonable prosecutor, in our submission, would
21 take such measures. This is, of course, a court with a great
22 responsibility to the international community. Its time is valuable.
23 The issues that come before it is, are in terms of criminal legal issues,
24 the largest on the planet, and you Judges preside over those issues.
25 Your responsibilities are not only to the direct participants but also to

1 the victims, as we know, to the international community that has put its
2 faith in the court and pledged support to the court and requires the
3 standards that you represent being executed. And we can see from this
4 confirmation hearing that that has exactly taken place, a very dignified
5 opportunity for both sides to put their best evidence, and that's a
6 phrase I remember from one of the decisions that I think the learned
7 Single Judge, Madam President, issued.

8 It hasn't been our objective to turn this into a mini-trial. Our
9 objective has been to turn it into an analysis of the evidence, an
10 analysis of the quality of the evidence, as well as an analysis of
11 materials that we say should have been put before you if the Prosecutor's
12 duty to investigate looking for inculpatory as well as exculpatory
13 evidence had been performed, because when you take a date such as the
14 3rd of January and you make that a significant date in terms of the plan
15 that you allege came into operation and the criminal plan was put into
16 effect through direct means, we would have expected any policeman, any
17 person prosecuting on behalf of state authorities, and not least any
18 Prosecution counsel, to have wanted that date analysed, examined
19 carefully, meticulously, to see what those alleged to have been planning
20 did, where they were, and what they did. All the more so, I would have
21 thought, if you have a witness, Witness number 0004, who has, let's be
22 frank, and I'm not going to go into the detail, given four very differing
23 accounts with changes of date, changes of place, et cetera.

24 I was astonished to hear for the materials that are before us
25 that he was interviewed for nine days. As a Defence counsel, even as a

1 Prosecution counsel, that would have sent alarm bells ringing in my head
2 as to what was going on in those nine days.

3 But there it is. We have his statements. We have them there for
4 your consideration. But the detail of what he said has never been
5 investigated by the party opposite, and that surely must be a systemic
6 failure in the process with which we are dealing with today.

7 Other dates such as the 26th of November at State House, have
8 official records, film, photographs, as well as a large number of
9 witnesses who were present, who took part in events with President Kibaki
10 on that day. It is not enough to come here, given inconsistencies and
11 problems within the content of the statement, and to have failed to have
12 examined the detail by the party seeking to use evidence in support. For
13 such important evidence that goes to the very heart of the validity of
14 this case, at this stage, by the time we come to confirmation, it would
15 have been a reasonable expectation for you, the Judges, to have been put
16 into possession of information going beyond that which you had for the
17 issuance of the summons or the request for an investigation.

18 I don't know whether you had Witness 0004's statement or not.
19 Looking now at your decisions, I think you did, because I can see the
20 content of the material being reflected, and so my guess is that you did.

21 But a Judge would have reasonably expected that Witness 0004,
22 having moved through the evidential chain up into the process where
23 confirmation is sought, and it is a challenged confirmation hearing, that
24 then Witness 0004 is given a solidity upon which you can rely,
25 particularly given the very public nature of the places and the events

1 with which he had inserted himself.

2 It would not have been too much to have expected a diligent
3 prosecutor to have started to provide you with further evidence to then
4 support the case theory that had been advanced in the separate stages
5 that you have so far considered. That didn't happen. What we had, in
6 fact, was some other statements. I'm not going to go into the issue of
7 anonymous witnesses, summaries, et cetera, but we know from the
8 Prosecution presentation, which is as good a yardstick as any, that it's
9 really Witnesses 0011 and 0012 that are their so-called important trump
10 cards for the confirmation hearing. Otherwise, they wouldn't have been
11 disclosed so late to us. That's the issue as well. But they were
12 disclosed, and we only had 15 days to deal with all three of those
13 witnesses.

14 In fact, you would have expected that in the time preceding, that
15 Witnesses 0011 and 0012, who make very important critical statements to
16 the Prosecution case concerning plan, execution of plan, facilitation of
17 the plan, support for the plan, that their stories would have also been
18 accounts that the Prosecutor would have sought to have bolstered with
19 external evidence to show the validity of what they say.

20 And let's be frank about it. We're not dealing with saints here
21 in relation to Witnesses 0011 and 0012. As a young lawyer when I
22 prosecuted at the English bar, one of the rules if you were calling a
23 criminal as a witness and you were prosecuting, was that you sought
24 external evidence to corroborate what this person was going to say,
25 because credibility is important.

1 Prosecution have sought to make credibility an issue in this case
2 with the Defence witnesses, so one fails to understand quite why they try
3 to take credibility out of the process that you have to undergo at this
4 stage.

5 And the reason why credibility is important is because you have
6 to have substantial grounds to believe, and you can't have substantial
7 grounds to believe if evidence comes before you that shows a witness is
8 unbelievable. All professional Judges, as you are, are used to making
9 these determinations as part of your judicial office, and that is why
10 credibility is important. Particularly if as with Witness 0011 and 0012,
11 you are calling evidence from, by all accounts, people who are serious
12 criminals, high-level criminals, and criminals and dishonest people often
13 seek to manipulate others. That's what they do. They seek to steal from
14 them. They may seek to cause harm. They're untrustworthy. Their
15 perspective of life is not the same as the men and women in this
16 courtroom and those in the public gallery. They have different
17 motivations, and their lack of honesty and their resort to dishonesty
18 makes it prudent for a Prosecutor in any court in any nation or state to
19 check the story.

20 Given that that didn't happen with the Prosecutor here, what then
21 did happen?

22 We checked the story, because it dawned on us that 0011 and 0012
23 were people who'd had dealings with us, and quite rightly, we did
24 commission Mr. Summers to investigate this matter, because as lead
25 counsel, I was very worried and concerned as to protected witnesses, and

1 people in my team I did not want investigating themselves or each other.
2 I took the step of having Mr. Summers instructed, have access to all data
3 and to provide a report for the Court.

4 We didn't know whether we were right or wrong about Witness 0011
5 or 0012. We were pretty sure we were right, and it was useful to have an
6 external person come and just check that our theory was right, because we
7 were working under great pressure in those 15 days. As the Court knows,
8 there is a lot to do in getting this case into this room with a number of
9 different parties all performing various tasks. The last task that I
10 needed was as lead counsel to go through everything myself. It would
11 have been impossible. And you can see the work that Mr. Summers did.

12 That work was very important, because not only did he access
13 materials from phones, e-mails, it provided, actually, incontrovertible
14 truth that 0011 and 0012 were up to their tricks on Defence counsel
15 instructed in a case before the ICC, the sort of tricks they may play on
16 street with *matatu* owners and other people that they had instinctively
17 sought to try and gain some advantage for themselves, and it came down to
18 month, and it came down to reflecting in genuine words from them, words
19 not written by us, to show exactly the levels to which they would stoop.

20 But this didn't stop there. The voracious dishonesty of these
21 people goes further. Our witness Mr. Nguyai called before you who had
22 been the introduction because we wanted to learn about Mungikis, and he
23 happened to know a couple of Mungikis who were around in the January and
24 February of 2007/2008, but he also, given his interaction with them, had
25 also become the victim of extortion and attempts to blackmail. And

1 others as well. Goodness knows how many more a diligent prosecutor would
2 turn up in the course of investigating their conduct.

3 Has any of that been done now? Have we been given any evidence
4 that shows a diligent prosecutor investigating these matters? No.
5 Instead, we get the assertion that they are credible.

6 In our submission, no one watching these proceedings, no one
7 being involved in these proceedings other than the advocate of that cause
8 could reasonably come to such a conclusion.

9 Again, plucking dates from the air as these people do, because
10 they're not actually involved in these events. They take a date, 30th of
11 December, a date in January, 27th of January, and fix themselves in an
12 event involving the suspects, and that date is meant to then give the
13 credibility in the courtroom about what they say.

14 When they give these stories, they're not really thinking about
15 who's going to come along later and look at it, and, of course, that's
16 what we've all done here, and in your own different ways assembled
17 evidence that shows what they are saying is simply not true by date or
18 fact or even possibility.

19 The image of the president's swearing-in ceremony, which we've
20 seen here, and the day the money is handed over to these people,
21 30 million shillings, is an event and an issue that any policeman, I
22 would have thought, would have had the inclination and the sense to then
23 start looking for evidence of withdrawals of 30 million shillings and
24 what that would represent and how it would get from the banks into the
25 hands of Mr. Kenyatta. Three or four suitcases, I think, was the figure

1 given in terms of how one carries this around. Carrying this into
2 State House on the 30th of December. President Kibaki may have thought
3 he was going to move in and stay at State House rather than coming in for
4 his swearing-in ceremony, because it is a rather ridiculous image.

5 And why it is ridiculous is and why we can say that is it simply
6 does not fit the context of the evidence of what was really happening.
7 And that goes the same for Witness 0004 and the 26th of November at
8 State House.

9 Prosecution raised the 26th of November and the Defence alibi on
10 that issue today. If they had done their work, they would have seen he
11 was at the KICC on the 26th of November. And bar going up the steps,
12 going through the building and out the back door to go round to
13 State House, which is an incredulous account, to be frank, and no reason
14 why he should do that, which seems to be the proposition that was being
15 put forward, the fact of the matter is it was President Kibaki who was
16 holding the meeting with the youth on that day, and it was he who had his
17 rally the day before with the youth. An important document, the charter,
18 had not been given to him, and so they had their special meeting with the
19 president the next day. Absolutely nothing to do with Uhuru Kenyatta.

20 And if you look at the evidence, you'll see from my opening - I
21 referred you to it - that President Kibaki had been scheduled to go to
22 the KICC meeting, but he skipped it, and that's the headline in the
23 newspaper. He skipped the meeting. And he went to the lunch later on at
24 the Intercontinental.

25 So the evidence clearly demonstrates, and Mr. Kenyatta gave you

1 the time, to show that he and President Kibaki were not at State House
2 that day, because Mr. Kenyatta went to the KICC, Mr. Kibaki skipped it,
3 then Mr. Kibaki went to the lunch.

4 If you're going to try and pick holes in things like that as a
5 prosecutor, I suggest you come with a time-line, you come with evidence,
6 and you come armed to a courtroom having investigated and researched, and
7 you stand on a firm base with a firmly projected case as to what happened
8 on a particular date.

9 And these are not throw-away proceedings in the lives of these
10 people. This case has great significance. The Court knows that. The
11 whole of Kenya knows that. This case carries with it a significance that
12 goes beyond the charges here, and that is why we have asked for a very
13 careful and rigorous examination, because in our submission, what has
14 been put before you is not well-researched and investigated by the
15 Prosecutor and doesn't deserve the status of being confirmed, and you as
16 Judges will be aware, as I know, of your responsibilities in relation to
17 that.

18 These proceedings have been an opportunity for us as well to
19 present direct evidence. Mr. Kenyatta took the first opportunity to give
20 evidence before you. He gave his account and then he was available for
21 cross-examination. This moved this case beyond -- they're not
22 testimonies that you've been given by the Prosecutor. They are
23 statements. They are not testimonies. They are statements. They are
24 reports. They are documents. They contain many accounts. This moved
25 this case into the realm of directly being able to establish the case

1 that you have.

2 In the cross-examination of the Mr. Kenyatta, what smoking guns
3 were put before this Court concerning his alleged acts and conduct? What
4 was put to him concerning the 3rd of January and the Nairobi Members
5 Club? What evidence was there that the Prosecutor was able to put?

6 And I'll tell you why the big issues in this case were not
7 grappled with and grasped with in that one hour, and the big issues are
8 fundraising, money, meetings with Mungiki, commanding the Mungiki,
9 et cetera. And it often happens in a trial, and it often happens in
10 these sorts of proceedings where you look to see if there's going to be a
11 trial, what happened was we had reached the stage in the proceedings
12 where the Prosecution case was visibly an utter failure. That hour that
13 we watched, that hour that he was available for questioning, was a
14 demonstrable hour to show what you had, why you had it, and what you
15 could do with it.

16 We were prepared to face that hour. You will have seen I've
17 never objected concerning time or issues such as that in this case. If
18 Prosecution had wanted to go on, they could have. In fact, they went
19 short. They couldn't even fill that hour.

20 It was an empty hour. It was an hour that had every opportunity
21 to put this case and to establish if there was substantial grounds to
22 believe, but that hour failed.

23 Likewise when we turn to Mr. Lewis Nguyai, and he gave his
24 evidence. He wasn't challenged about Witness 0011 and 0012 not hanging
25 around the Jacaranda. He wasn't challenged that they were looking for

1 money and didn't even have the money for a bus fare or to top up a phone.
2 He wasn't challenged when he said they wanted to be involved with
3 Naivasha and said it hadn't been a clean job, they would have done a
4 better job. This is direct evidence about key witnesses as to what they
5 said and did.

6 And again, the reason why that challenge didn't take place and
7 that evidence put before Mr. Nguyai to show he was wrong about whom he'd
8 identified, who'd been at the Jacaranda and what they had said and did,
9 was because the evidence failed the test that it was being given, and
10 that was the purpose of calling that witness, to give the Prosecution the
11 opportunity or not to establish the substantial grounds for their case
12 and their allegations.

13 It failed. It obviously failed. It was visible to all. It --
14 it was even rather -- I won't say humorous, but it was even rather
15 light-hearted at the end when I asked, "Did they look like men who had
16 30 million shillings?" "No. Even 10 per cent." And then he said they
17 didn't look as though they had 3.000 or whatever. And those moments in
18 any criminal proceedings are telling moments as to whether there is a
19 case or not.

20 I understand why the Court have limited the number of viva voce
21 witnesses. We get that point, and you take your opportunity to call your
22 best evidence. In this case, obviously the client, Uhuru Kenyatta,
23 because he can answer questions anyone wants to put to him, and then
24 Lewis Nguyai, who unbeknownst to him at the time, was able to provide the
25 link to Witnesses 0011 and 0012 and what they were actually saying and

1 doing.

2 It's all very well standing up today and really putting your case
3 as you did on the first day except without the legal context and making a
4 very spirited fight for it, but anyone listening would have thought the
5 evidence is being ignored here, and what has taken place in the last
6 couple of weeks was as if it never happened.

7 It did happen, and it happens now that for the first time you are
8 in possession of it and you get that opportunity to consider it and put
9 it into the scales.

10 In our submission, eyewitness evidence and people who take part
11 in events, who give statements, is important evidence to take into
12 account, and we've attempted to do that for you.

13 I'm not going to recite that now. I'm just going to look at a
14 couple of matters - and I think I only have a few minutes, looking at the
15 clock - just to make points and I'll confine it to one. It is the use of
16 the Professor Kagwanja articles 2003, 2005.

17 What's important to remember was that he was from the other
18 political side to Mr. Kenyatta's. He was -- Mr. Kenyatta KANU, this man
19 was in the NARC party. And you will see evidence within the statements
20 we filed with you, particularly from one witness who was a part of it
21 because he was in NARC at that time as a young man, of how there was a
22 plan and policy to link Mr. Kenyatta with the Mungiki so that his
23 electoral chances were spoiled. If ever there's a vote loser, it must be
24 the Mungiki, I would have thought. And that's what was happening. And
25 this man, professor -- I don't know what he is a professor of. It may be

1 a propaganda. But he is the Dick Morris equivalent that we saw in our
2 ODM press conference film on the first day.

3 A strategist, as you heard, is someone who tries to influence
4 outcomes in relation to politics. And his article, when put to
5 Mr. Kenyatta as the link that was being put to him concerning the
6 Mungiki, was in fact not represented, and I'll say this, carefully by the
7 questioner.

8 He referred to page 63 of the Kagwanja article, EVD-PT-OTP-00158:

9 "Uhuru Kenyatta himself swung between publicly distancing his
10 campaign from Mungiki's acts of terror and covertly soliciting Mungiki's
11 support, arguing that anybody had the freedom to support whoever he
12 wanted."

13 And the professor cites the "Daily Nation" of the 23rd of August,
14 2002, which we've actually submitted to you, because it shows the
15 opposite. EVD-PT-D13-00335.

16 "Cabinet Minister Uhuru Kenyatta has denounced the Mungiki sect,
17 saying that the members did not win his favour by holding a demonstration
18 in the city streets on Tuesday. In an angry response to questions about
19 his relationship with the outlawed group, Mr. Kenyatta said his hopes to
20 ascend to the country's presidency lay with the registered voters and not
21 the snuff-taking members of the outlawed group. He denied having any
22 links with the Mungiki, saying he had no control over any group that
23 decided to demonstrate in his support. 'How many people run up and down
24 the Nairobi streets shouting support for A, B, or C,' he asked? And as
25 proof that there was no love lost between him and the group, Mr. Kenyatta

1 cited an incident two years ago when the group burnt his effigy 'just
2 outside my father's mausoleum,'" is how the piece ends.

3 Well, there we have it. A proposition that was put, not founded
4 on accuracy either from the source and indeed what was actually put to
5 Mr. Kenyatta when you go and look at the transcript.

6 So there we are. That is the kind of material we are facing
7 here. Is it good enough? In our submission to this Court, it's not good
8 enough, and any reasonable party observing these proceedings will have
9 been conscious of that, and this case, now in your hands for the first
10 time with Defence evidence, is able to be stopped, charges not confirmed
11 in view of the evidence that you have received from all the parties.

12 I thank the Court.

13 PRESIDING JUDGE TRENDABILOVA: Thank you, very much,
14 Lead Counsel Kay.

15 Now it's finally the turn of the Defence team of Mr. Ali.

16 MR. KEHOE: Thank you, Madam President. If I just could --

17 PRESIDING JUDGE TRENDABILOVA: It will be you, Mr. Kehoe?

18 MR. KEHOE: Yes, your Honour, and some brief comments by my
19 colleague Mr. Monari at the end. But if I could just take, with the
20 Court's leave, the podium here.

21 PRESIDING JUDGE TRENDABILOVA: Yes, of course, please.

22 MR. KEHOE: Madam President, might I proceed?

23 PRESIDING JUDGE TRENDABILOVA: Yes, of course.

24 MR. KEHOE: Madam President, your Honours, respected members of
25 the bar on both side as well, good afternoon. And thank you for giving

1 us this opportunity to speak on behalf of our client, General Ali.

2 During our opening statement, and I even mentioned it during our
3 presentation, I asked that question as to why when you review everything
4 that's happened here, why General Ali is here in this courtroom accused
5 by an individual that he doesn't know, accused by that same individual
6 that he's never met, and brought here in the face of overwhelming
7 documentary evidence that demonstrates what he did along with the Kenyan
8 police force on a daily basis to bring about law and order in this
9 violent, ravaged country where violence was emanating in virtually every
10 town and area throughout the country.

11 It's reminiscent of a -- of a book that many of us have read
12 during our university days, certainly I had. It was Franz Kafka's trial,
13 and if you recall, Madam President, your Honours, that the protagonist is
14 dragged into the courtroom, unaware of the charges, told who was -- his
15 accuser is, doesn't know his accuser, unfamiliar with the circumstances,
16 completely confused as to what is happening, that they must have the
17 wrong story, they must have the wrong facts, there must be a mistake. I
18 can't help but as I sat here this morning think back at those years when
19 I read that, a scene that has stayed with me these many, many years,
20 because as I sat here and listened to the argument this morning by the
21 Prosecution, what I heard was a defence of the undefensible in the terms
22 of Witness 0004 and the total disregard of the documentary evidence.

23 This morning, we heard no discussion whatsoever of the
24 overwhelming documentary evidence that has been presented to this
25 Chamber. Now, one cannot say that that documentary evidence could not be

1 reviewed, and one cannot say that that -- that the Prosecutor didn't have
2 the opportunity to absorb that information. The information that was
3 presented to this Chamber in terms of NSIS reports, situation reports
4 coming from the Kenyan police all emanated from the Office of the
5 Prosecutor. So how in light of all of that overwhelming evidence, which,
6 frankly, its story didn't change from the date it was created until now,
7 how do we find ourselves here?

8 Suffice it to say, this Defence team on behalf of General Ali has
9 established quite clearly the three prongs that we set out to discuss at
10 the outset that, there was no phone call and no instruction from
11 Ambassador Muthaura to General Ali to allow the Mungiki to go to the
12 Central -- to the Rift Valley and thereby create some free zone, that
13 there was no implemented -- no implementation of any such instructions by
14 General Ali. There is no evidence, documentary evidence, to substantiate
15 such an allegation by the Prosecution, and there's no evidence that the
16 brave men and women who were part of the Kenyan police force failed to do
17 their utmost to save people's lives, to bring them to safety, and to
18 bring about safety, tranquility and peace in, in this instance, Nakuru
19 and Naivasha. There is none.

20 The phone call, this phone call that we have heard so much about
21 that the Prosecution yet attempts to defend through Witness 0004, this
22 phone call on 3 January 2008, this phone call that never occurred, comes
23 from the person that -- the person, Witness 0004, and he in large part is
24 the reason we are here.

25 Now, the Prosecution says yes, there were minor errors in the

1 statements that were given by Witness 0004, and he was given the
2 opportunity to address those, and counsel for General Ali never -- never
3 highlighted those sections of the OTP statements where he corrected
4 those.

5 Oh, I beg to differ. I read those statements quite clearly. I
6 read those statements many times. And if we go back to the transcript,
7 we will see and I will cite it in our brief the exact portion of that
8 transcript where I did, in fact, point to where Witness 0004 attempted to
9 correct his various and sundry stories. The issue is he didn't correct
10 them all. He didn't correct those aspects of the stories that most
11 directly affect General Ali, and, to a lesser degree,
12 Ambassador Muthaura.

13 Let us go back, and I may bring the Court back to the discussion
14 that we had on Monday, those three crucial statements, the first one
15 being 27 January 2008. Three weeks after this alleged meeting, he tells
16 the -- he says the Kenyan Human Rights Commission about a meeting in the
17 State House, and he doesn't say he's there, and that his other buddies
18 told him about some meeting called by Ambassador Muthaura to send people
19 up to the Rift Valley. In both of those instances, it is clear from that
20 statement that he is not present. He is not present at either one.
21 There is no discussion of Mr. Kenyatta. There's no discussion of
22 General Ali. There's nothing.

23 Now, that statement was given by the Prosecution to Witness 0004
24 to correct. It is that statement that was referred to this morning when
25 the Prosecution said with regard to the State House meeting in November

1 of 2007, three weeks or so before the election, "I was in fact at that
2 meeting, but I didn't want -- let anybody know that I was a Mungiki at
3 that point." He doesn't correct the next two sentences in that statement
4 where he alleges that there was some meeting called by
5 Ambassador Muthaura where he clearly is not present, where his friends or
6 participants in that meeting tell him that the -- that the Mungiki or
7 other individuals are going to be sent up to the Rift Valley. He never
8 corrects that.

9 Let us go to the next statement. That is the statement to the
10 committee -- commission investigating post-election violence.
11 September of 2008, approximately eight months after his first statement.
12 In that statement, he can't even recall where this meeting was supposed
13 to take place. This -- this monumental meeting where all of these high
14 governmental officials are planning the complicity of the Kenyan
15 government with the Mungiki, and he can't remember where it took place,
16 because in that statement we're at the Safari Club. Put aside that he
17 says in that statement that Mr. Muthaura -- Ambassador Muthaura is at
18 that meeting at 11.00 in the morning, and of course we know that he is at
19 a National Security Advisory Council meeting. So that's physically
20 impossible.

21 But suffice it to say as we move on, that meeting goes to yet
22 another location. First one's at the Members Club. The second one is at
23 the Safari Club. Incredible.

24 And again as I said during my presentation on Monday one of the
25 most significant political figures in Kenya whose father was the founder

1 of the country, Mr. Kenyatta, is absent from that meeting. Now, does he
2 correct any of those details when he is interviewed by the Office of the
3 Prosecutor? One. The one detail he corrects is, "Oh, I made a mistake.
4 That meeting was in fact at the Nairobi Members Club and not at the
5 Safari Club." What does he not correct? He doesn't correct this
6 telephone call which allegedly now takes place and not by
7 Ambassador Muthaura, but by George Thuo who he says is the president's
8 personal assistant, who allegedly makes a phone call to Ambassador Ali on
9 the 3rd of January, in the midst, of course, the difficulties in the
10 North Rift and asks one simple question: "Commissioner Ali, what is
11 going on in the Rift Valley?" That's it.

12 Now, the Prosecution -- of course, that doesn't fit in with the
13 plan here. That don't fit in with their side of the story. So they give
14 this statement to Witness 0004, and what does Witness 0004 say about all
15 that? Oh, that -- that 13-page single-spaced statement where I relayed
16 this conversation between not Ambassador Muthaura but Mr. Thuo concerning
17 a status of matters in the Rift. That statement, "Well, I really didn't
18 have time to read it, even though I initialed every page."

19 I submit to your Honours take look at that statement. The last
20 page with the signature, it is written and typed across, "I have written
21 this statement, and I agree with the contents of this statement."

22 Did he not read that, too, that one line right above his
23 signature? And better still, is there any explanation where we have this
24 disparity of stories that there is no attempt by the Office of the
25 Prosecutor to talk to this investigator to resolve this account.

1 And we move to the last story. The last story is the story on
2 the 3rd of January where he concocts this story concerning General Ali.
3 Now, why does he do this? Does he have some difficulty or axe to grind
4 with the police? I don't think there's any question about that.

5 I said during the outset of my statement on Monday that this
6 gentleman said that he didn't consider them to be human, and my colleague
7 across the well this morning attempted to try to put that in context and
8 try to downplay it. And I suggest to your Honours that it is never, ever
9 appropriate to describe the brave men and women of the Kenyan police
10 department as not human.

11 Do we put the gentleman that sat here before you and testified
12 passionately yesterday in that same category as someone who is not human,
13 who told you that, "Would I just as soon hang myself from the ceiling as
14 being complicitous with the Mungiki?" Does he likewise fall into that
15 category? Of course not.

16 We are asked to judge the credit of this person. We are told the
17 reasons for that credibility should not be addressed because of
18 anonymity, et cetera. This witness is not anonymous. Witness 0004 is
19 not anonymous. The Prosecution had the option to bring this witness
20 before this Chamber to talk about this incongruous dichotomies that run
21 right through his statement and they chose not to. They chose not to.
22 And why? Because the story that the man has told for whatever reason are
23 irreconcilable, and yet with these irreconcilable statements that fly in
24 the face of the documentary evidence presented by this court, the
25 Prosecution wants this Chamber to blindly rely on this man.

1 As I said on Monday, they blinked when they looked at this man.
2 They blinked once, they blinked twice, and they -- I submit to
3 your Honours they just don't see him any more. They just don't see the
4 story that he's told and how he has unjustly put together a series of
5 meetings and events that are constantly changing with different times,
6 different places, different people to engulf these three men.

7 And to put a different context on this particular meeting, this
8 crucial meeting to the Prosecution's case, 3 January 2008, with this
9 complicitous cabal came together to join forces with the Mungiki, is
10 followed literally the next day, literally the next day, by the exhibit
11 that we are about to see on the screen which is the series of NSIS
12 reports as well as the sitreps coming from General Ali that we discussed
13 on Monday.

14 The first one, as we can see at -- and if we can just go to the
15 screens just briefly -- and I understand, Madam President, with the time
16 I am not going to go through all the sitreps, but this is just a
17 sampling.

18 This is on 4/1/2008 the day after this meeting -- excuse me, 324:

19 "About 100 Mungiki sect members are planning to attack members of
20 the Luo, Luhya residing within Karawange (* phon) and Kibera areas to
21 avenge the killing of their kinsmen," et cetera.

22 Moving down, the last highlighted sentence:

23 "Meantime some sect members are assembling in the undisclosed
24 location in Nairobi with a view to carrying out revenge attacks on Luos
25 and Kalenjins travel along the Nairobi-Naivasha road on an undisclosed

1 date."

2 That day, that day, if we can go to the next slide, General Ali
3 sends this report out for the field:

4 "Meanwhile so many sect members are assembling in an undisclosed
5 locations in Nairobi with a view to carrying revenge attacks on Luo and
6 Kalenjin travelling along the Nairobi-Naivasha highway on an undisclosed
7 date."

8 "Action," last sentence that's under lined, "Crackdown on the
9 sect members -- crackdown on the sect members must be sustained." Must
10 be sustained. What does that indicate? Does that have any indication
11 that this crackdown has stopped or that he is telling these soldiers, or,
12 excuse me, these -- my apologies that he's telling these police men that
13 this crackdown should not continue? Of course not. "The PPO of
14 Rift Valley to intensify patrols along the Naivasha-Nairobi highway to
15 avoid the intended attacks."

16 Let us go briefly to the other corroboration that was presented
17 by the Prosecution that we didn't even hear about this morning and that
18 come from the two extortionists Witness 0011 and 0012. Witness 0012
19 gives some -- relates some information about some telephone call that he
20 was never present when it took place, and Witness 0011 doesn't even have
21 any information about a phone call. He says he believes it took place
22 and doesn't know it took place. But Witness 0012 clearly is another
23 fabricator of stories because even the investigator when he began talking
24 about this astonishing call was shocked at what this person was saying
25 because he had never said it in the process. He had never said it in the

1 interview process before.

2 And how about these allegations concerning instructions from
3 Ambassador Muthaura? Clearly there are no instructions coming from
4 Ambassador Muthaura. There's no either *de jure* or *de facto* authority by
5 Ambassador Muthaura over General Ali nor over the Chief of Staff of the
6 army, nor the Attorney General of Kenyan nor the NSIS chief, nor the
7 Ministry of Finance and everybody else that is on that. There is no
8 *de jure* authority.

9 Is there any *de facto* authority? Is there some pattern of
10 conduct that the Prosecutor has pointed us to to show that there are some
11 *de facto* authority? Surely, surely if there was *de facto* authority, if
12 not on a daily basis, a weekly or monthly basis, over the years, the
13 Prosecution would be able to point us to indicators that there shows that
14 there was such authority.

15 What are we received in that regard? Nothing. Nothing. What we
16 have received is General Ali's comments to the Waki Commission talking
17 about reporting to the commissioner, talking about reporting to other
18 entities including Ambassador Muthaura in the context of consultation as
19 every government does. No government in the world operates without its
20 various entities consulting, but when asked in that same series of
21 questions whether or not he takes order from other entities, for instance
22 on operational issues, General Ali said no. So there were no
23 instructions coming from him and no instructions telling him General Ali
24 coming from Ambassador Muthaura to do anything.

25 What instructions did they receive, and what instructions were

1 passed down the line? Instructions that were passed on down the line
2 quite clearly were to go after crime, prosecute crime, and go after the
3 Mungiki. That is what you'll see through the series of sitreps that we
4 have presented and the others that have been received in evidence. Was
5 there any signal or message passed down the line from headquarters to
6 anybody in the field not to pursue crime, to look some other way from
7 some ethnic or political group? No. My colleague Mr. Otachi presented
8 to you the officer at the signal station in the Rift Valley who said that
9 they had never received such a signal.

10 Not only with regard to that particular officer, but no officer
11 had received any signal or message or order from General Ali not to
12 prosecute crime or to look the other way. To the contrary. To the
13 contrary. The orders were consistent. The orders were steady. They
14 were throughout this horrific time period trying to get law and order
15 under control. And we saw that document that -- just in the small series
16 of sitreps that we saw before you.

17 We likewise through Mr. Amin yesterday actually saw that sitrep
18 in action. Let's just go through this very briefly. We go to the
19 10th of January, 2010. This is a NSIS report at 299:

20 "Mungiki elements are reported meeting, assembling at Stem Hotel,
21 Nakuru, with a view to attacking ODM supporters in Eldoret, Kisumu,
22 Kamenga, Kerigeko -- excuse me, Kericho, and Nakuru effective
23 10 January 2008. They will impersonate policemen as they unleash their
24 victims."

25 That day, the same day, let's go to the next slide. General Ali

1 sends out this order for action ensure that extensive security and
2 patrols is maintained to storm the Stem Hotel in Nakuru with a view of
3 making as many arrests as possible. The ODM supporters said they want to
4 maintain law and control. The same day as the order comes from -- excuse
5 me, the information comes from NSIS it's passed down the line to
6 General Ali and what happens? We heard yesterday on cross-examination,
7 not on direct, on cross-examination by the Prosecutor from Mr. Amin that
8 that directive was put into effect. They went to the Stem Hotel to see
9 if the Mungiki were, in fact, meeting there and getting involved in some
10 type of complicitous event which could lead to crime. So what do we know
11 from that? This man who allegedly is, according to the Prosecution's
12 case, is complicitous in this criminal activity with Mungiki is, in fact,
13 sending his people out based on NSIS reports to go make sure that they're
14 not getting ready to commit crimes in the area.

15 What has the ring of truth, some uncorroborated witness that has
16 told us any number of stories or the documentary evidence which over the
17 years has not changed. I think the answer is clear. The records that we
18 have as we go through show a series of cautionary orders coming from
19 ambassador -- from Commissioner Ali to 24-hour surveillance, maintain law
20 and order, prosecute sect members throughout. The most glaring omission
21 by the Prosecution, I would suspect, is the 21 January 2008 order which
22 notes that, well, they overlooked that or ignored information that the
23 Kikuyu were going to gather on the Naivasha-Nakuru road. We heard about
24 that. Well, ignored? The next day. The next day that information is
25 passed out by General Ali to the people in the field. Hardly ignored.

1 I invite the Chamber to go through these and we didn't go through
2 all of them. In the interests of time, we can't do it today and we're
3 and we're not going to do it Monday, but they linked together with
4 information that was passed down from NSIS from General Ali and not just
5 for Nakuru and Naivasha but for all over the country.

6 After all of these orders, after all of these sequences of
7 events, after all this combination of governmental entities trying to
8 bring law and order to the area, can the Prosecution rationally argue to
9 this Chamber that there was some free zone given to the Mungiki to drive
10 up from the State House in army trucks to wreak havoc on Naivasha and
11 Nakuru? Of course not. Of course not.

12 And what did the police do? Let us talk briefly about the last
13 prong. What in fact did the police do? I mean you heard, I think you
14 read statements and you'll see evidence as we have presented. I think
15 the most fulsome and explanatory discuss came yesterday from Mr. Amin.
16 He told you what they did on a daily basis to try to bring -- bring law
17 and order about. He told you about what the police did. He told you
18 about prosecutions, arrests, bringing people to justice.

19 With regard to sex crimes, what did he tell you about? He told
20 you that -- that -- that Commissioner Ali, General Ali set up a task
21 force of over 30 women to do just that, investigate sex-related offences.

22 We have Mr. Otieno, this modest man from Naivasha that came
23 before the Court. What did he tell you? He's a Luo. He told you the --
24 the efforts that the police took to bring people to the police stations
25 to save them and not just one, not just two. There were thousands,

1 thousands of IDPs, internally displaced people from those areas being
2 brought to the police stations. And if I may correct something that my
3 learned friend for the victim witness counsel noted, that most of the
4 IDPs in Naivasha, and there were IDPs that were Kikuyu, IDP areas that
5 had come down to the area and there were IDPs locally, most of the
6 victims in those areas were in fact Kikuyu, and the police were helping
7 them all on both sides of the equation which of course is the reason why,
8 as Mr. Amin talked about, where the police were being criticised by
9 various ethnic groups.

10 What were they doing? Is this a series of facts and
11 circumstances which indicate that the police were doing anything but
12 trying to bring law and order and to protect the civilian population in
13 these areas? It is not.

14 I suppose the question that we raise at this juncture is,
15 Madam President and your Honours, is not did the police do nothing, but
16 truly how many lives did they save? How many people did they bring
17 within the safety of the police headquarters and stations and posts
18 throughout the Rift Valley to ensure that they were no longer harmed, to
19 ensure that they were taken out of the breadth of violence that was
20 engulfing the area? That's the question, not that they did nothing, not
21 that did they receive an instructions from General Ali not to do
22 anything, but in fact, how much positive, how much great did they do? So
23 let us turn to an examination of the Prosecution's case.

24 Is there substantial grounds, substantial grounds to believe, to
25 conclude as the Court sits here that General Ali is remotely guilty of

1 these crimes let alone involved in any way? Suffice it to say that the
2 internal records from the government of Kenya, the consistent internal
3 records of the government of Kenya show something quite to the contrary,
4 and what they do show quite consistently was an effort to bring about law
5 and order, and with time and with consultation of the various warring
6 parties that ultimately took place. But as my colleague Mr. Otachi said,
7 during this dark moment of madness, who was it that held the line to
8 allow this country to come and stay together? Who was it, according to
9 Mr. Amin, that saved the country of Kenya from complete anarchy? The
10 "who" was the Kenya police department with ambassador -- with
11 Commissioner Ali at the helm, and all the facts and details and records
12 before you substantiate that.

13 You know, oftentimes, Madam President, your Honours, we forget our
14 history. We forget difficulties in our own past. Clearly, clearly the
15 horrific events at that took place in the post-election violence are
16 matters that are not soon forgotten in Kenya and still ripple through the
17 Kenyan community today, putting aside the trials we have before this
18 court. But in my country we, too, had problems, difficulties, wars that
19 almost tore our country apart. Thank heavens hopefully we've gotten past
20 that.

21 In the mid-19th century, of course as we all know that the
22 Civil War almost ripped the United States apart, but periodically there
23 are words that resonated through that period of time which I think
24 resonate here today that have quite bearing under -- on what's under
25 consideration before this Chamber, and that is through a determination by

1 this Chamber as what the right thing to do is under the facts and
2 circumstances presented to the Chamber.

3 In the fall of 1860 Abraham Lincoln was giving a speech in a
4 school in lower Manhattan called the Cooper Union and this was right on
5 the eve of his election but also right on the eve of the entire
6 United States breaking apart, and of course the question of slavery was
7 the issue that was tearing the country apart. And his efforts to
8 reconcile the matter, he ended the speech with this phrase, and what he
9 said is:

10 "And so let us have faith that right makes might, and in that
11 faith, let us dare to do our duty as we understand it."

12 The right thing based on all of the evidence and circumstances as
13 to what Commissioner Ali and his men and women did was to save this
14 country from anarchy and nothing that has been presented to this Chamber
15 undercuts that.

16 Madam President, your Honours, I thank you for your attention.

17 I would like to turn just briefly to my colleague, Mr. Monari,
18 for some concluding comments.

19 PRESIDING JUDGE TRENDAFILOVA: Thank you, Mr. Kehoe.

20 Mr. Monari, you have the floor.

21 MR. MONARI: Madam President, I don't know whether -- excuse
22 me -- whether we have enough time, but this is just a continuation of the
23 conclusion that my learned colleague was presenting to you.

24 We have spoken to this Chamber for more than two weeks trying to
25 beseech you, trying to tell you and show you by way of evidence that what

1 happened in Kenya is something that we all regret as Kenyans who come
2 before you. We regret the deaths. We regret the injuries. We regret
3 the displacement of people. We regret the fact that up-to-date not all
4 people have returned to their homes. But something is not lost in our
5 sight. We cherish the fact that we still have our country together. We
6 cherish the fact that the people of Kenya still speak to each other. We
7 cherish the fact that despite of the law, Kikuyu, Kalenjin, for instance,
8 you had in this courtroom, the people of Kenya are still able to live
9 together harmoniously. We do that in the distinct belief that there are
10 men and women who put this country through the unimaginable events of
11 2007/2008.

12 One of those persons is General Mohammed Hussein Ali. When he
13 was named by the Prosecutor and when the summons were issued, General Ali
14 respectively brought himself all the way to this court believing in the
15 justice of this court. He has sat, listened, and he believes that
16 your Honours as people of the law, people who respect justice, will not
17 only deliver justice to him but will be able to deliver justice to the
18 people of Kenya.

19 We believe that we have given you enough material to ensure that
20 there is no mistake that turns General Ali or any of the suspects to a
21 long trial, a long trial that is most likely not to fulfil the desires
22 and the wants of the victims that General Ali represents. We would not
23 for a moment, Madam President, your Honours, lose sight of the fact that
24 we need to recollect ourselves as a nation, stay together and believe in
25 ourselves. We do not for a moment imagine that we will leave from this

1 court empty-handed. As the curtains fall on this process of the
2 confirmation hearings, we urge you to do only three things. The first
3 one is not to confirm these charges. The second one is not to confirm
4 these charges. And the third one is not to confirm these charges.

5 And we're not saying that because we believe that there will be a
6 form of insecurity or some sort of indignation among the Kenyan people.
7 It is the just thing to do having listened to the evidence. It is the
8 only thing that can be done to restore trust, to restore confidence in
9 international criminal justice.

10 Kenya is a signatory to the Rome Statute. Kenya as a government
11 has indicated that it wants to continue to with -- to respect its
12 obligations under the Statute. Kenya will only do this if the justice of
13 the ICC court is brought not only to the suspects that come before it but
14 to the victims, to the witnesses, and to everybody that cares to listen
15 to the ICC.

16 Thank you, Madam President, your Honours.

17 PRESIDING JUDGE TRENDABILOVA: Thank you, Mr. Monari.

18 This brings us to the end of the last session of the confirmation
19 hearing. On behalf the Chamber, I have to inform you on the following
20 issues: First, as previously announced by this Chamber, the parties and
21 the legal representatives will be given the opportunity to submit to the
22 Chamber, if they wish to do so, written observations. In this regard, I
23 must emphasise that in their written observations, the parties and the
24 Legal Representative for Victims are expected to address only issues
25 relevant to the case and discussed during the course of the confirmation

1 hearing. No new issues could be raised by way of the said written
2 submissions. If regardless this guidance such issues will be
3 contemplated, they will not be taken into consideration by the Chamber in
4 its final decision on the charges.

5 Second, with respect to the challenges to the jurisdiction of the
6 Court and the admissibility of the case, the Chamber has granted the
7 Prosecutor and the Legal Representative of Victims to submit observations
8 should they wish to do so by 14th October 2011.

9 Regarding the responses by the Defence, the Chamber decided
10 during the first day of the hearing that if the Defence teams wish to
11 submit observations on the observations of the Prosecutor's Office and
12 the Legal Representative for Victims, this shall be included in their
13 overall final written observations.

14 Third, as far as the final written observations are concerned,
15 the Chamber decides to grant the Prosecutor and the Legal Representative
16 for Victims to submit their written observations, if they wish to do so,
17 by 28 October 2011, at 1600 hours. For the Defence, which has always the
18 last word, the final date to file their written observations is
19 21st November 2011, at 1600 hours.

20 Fourth, the Chamber has also considered the page limit, which
21 according to Regulation 37(1) of the Regulations of the Court shall not
22 exceed 20 pages. The Bench has, however, decided to extend the page
23 limit to 50 pages for the Prosecutor, 50 pages for each Defence team, and
24 30 pages for the Legal Representative of victims.

25 Next I would like to remind the suspects to fully comply with the

1 conditions imposed on them in the summonses to appear and to refrain from
2 engaging in activities directly or indirectly related to the proceedings
3 before the International Criminal Court that are likely to trigger or
4 exacerbate tension and violence in Kenya.

5 At this instance, the Bench would like to address the citizens of
6 Kenya, asking them to respect the life, security, and property of victims
7 and witnesses in the two Kenya cases and to be mindful of the fact that
8 witnesses in these two cases have performed their civil duty to appear
9 before this Court in order to make their contribution to the task
10 assigned to us by law.

11 I want to assure the people of Kenya, lastly, that the Judges of
12 this Chamber, Judge Hans-Peter Kaul, Judge Cuno Tarfusser, and myself,
13 Ekaterina Trendafilova, will take their decision independently and
14 impartially and only after having carefully examined all pieces of
15 evidence presented by both parties so that justice will be served to
16 everyone concerned.

17 With this, the Chamber concludes the sessions of the confirmation
18 hearing in the case of the Prosecutor v. Francis Kirimi Muthaura,
19 Uhuru Muigai Kenyatta, and Mohammed Hussein Ali.

20 On behalf of the Bench, I would like to thank the Office of the
21 Prosecutor; the Defence teams of Mr. Muthaura, Mr. Kenyatta, and Mr. Ali;
22 the Legal Representative of victims, Mr. Anyah; the legal support staff
23 of the Chamber; the interpreters; stenographers; court reporters;
24 court officers; and security officers for making their contribution to
25 the confirmation hearing, as well as the public for following these

1 proceedings before the International Criminal Court.

2 I express also our appreciation to the Registrar and her office

3 for the support provided throughout the entire period of the hearings in

4 the two cases.

5 At this point, I pronounce the confirmation hearing closed.

6 COURT USHER: All rise.

7 The hearing ends at 1.14 p.m.

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