

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 Thursday, 22 September 2011
10 The hearing starts at 2.30 p.m.
11 (Open session)
12 COURT USHER: All rise. The International Criminal Court is now
13 in session.
14 PRESIDING JUDGE TRENDAFILOVA: Please be seated.
15 Good afternoon, everyone. The confirmation hearing is now in
16 session. I welcome everyone in the courtroom and in the public gallery
17 today, and I would ask the Court Officer to please call the case.
18 COURT OFFICER: Good afternoon, 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: Thank you, Court Officer.
24 First, I would like to ask are there some new faces in the
25 Defence teams, in the Prosecutor's team? Would you tell us who is

1 again -- who is new with you today, Ms. Adeboyejo.

2 MS. ADEBOYEJO: Thank you, Madam President, your Honours. The
3 new faces we have with us today are Ms. Nawamaka Enjebe and
4 Mr. Arthur Siribu. Thank you, your Honours.

5 PRESIDING JUDGE TRENDAFILOVA: Thank you, Ms. Adeboyejo.
6 On behalf of the Defence?

7 MR. KHAN: Madam President, your Honours, good afternoon. I'm
8 delighted to introduce to the Court co-counsel, Venkateswari Alagenda
9 sitting behind me.

10 PRESIDING JUDGE TRENDAFILOVA: Thank you.

11 MR. KAY: No new faces.

12 PRESIDING JUDGE TRENDAFILOVA: Thank you, Mr. Kay.

13 And, Mr. Monari.

14 MR. MONARI: Madam President, your Honours, we have Thomas Labath
15 (* phon), who is our case manager and is sitting right here.

16 PRESIDING JUDGE TRENDAFILOVA: Thank you. And on behalf the
17 Chamber, we have -- oh, I'm sorry. Mr. Anyah.

18 MR. ANYAH: Good afternoon, Madam President. There are no
19 changes on our side.

20 PRESIDING JUDGE TRENDAFILOVA: Thank you very much. On behalf of
21 the Chamber we have with us Ms. Jennifer Boger, who is an intern with the
22 Chamber.

23 I received a note here that -- from the Court Officer that
24 Mr. Khan would like to discuss some procedural issues. Mr. Khan, we have
25 received your submission by the three Defence teams. Everything is

1 settled, and we are working since the morning hours, in the afternoon,
2 during the breaks, hopefully to come with a decision by the end of the
3 day.

4 MR. KHAN: Madam President, I'm most grateful. It's a discrete
5 issue through your Honours' leave relating to yesterday's disclosure. I
6 had an opportunity overnight with the team to go through it. As
7 mentioned yesterday, we asked for the diary that we say was shown to
8 Witness 0012. Now, the Prosecution yesterday said that they've given us
9 material apparently as a courtesy, but they say that material are not
10 subject to Rule 77 or Article 67(2). What I have here is yesterday's
11 disclosure which is disclosure, the Prosecution say, pursuant to Rule 77.
12 I don't know if this is the same information that I requested. I would
13 like clarification, and perhaps through your Honours' leave the
14 Prosecution could answer it. Is this the diary of Witness 0012, because
15 it's not apparent on the face that it is what I asked for. That's the
16 first issue.

17 And, your Honours, if there's an answer to that, there's a very
18 brief second issue. I'm grateful.

19 PRESIDING JUDGE TRENDAFILOVA: Thank you, Mr. Khan. Of course
20 I'm going to ask Ms. Adeboyejo to address this issue as well but this
21 should be the case because there was an urgent filing coming from the
22 Prosecutor's Office, we quite urgently in one day dealt with it and I
23 think that yesterday the filing to you should be the one you were
24 requesting, but let us give the floor to Ms. Adeboyejo.

25 MS. ADEBOYEJO: I will not belabour the point, Madam President,

1 your Honours. That is exactly the issue as you have stated it. We have
2 made the filing in that regard.

3 PRESIDING JUDGE TRENDAFILOVA: Thank you, Ms. Adeboyejo. That is
4 the answer to your first question, Mr. Khan.

5 MR. KHAN: I'm grateful. I said it, your Honour, because
6 Mr. Adeniran said that this is not Rule 77. This filing says Rule 77,
7 and there's nothing on the face of this linking it in to Witness 0012, so
8 of course I needed clarification.

9 Your Honour, the second is we asked for the diary. What I have
10 is a transcript of the diary. Now, it's -- it's important that I have
11 the actual diary. It can be redacted, but I want to compare the
12 handwriting, because what I have, of course, from the witness that I
13 mentioned was subject to a videotaped interview, are handwritten
14 documents purporting to come from -- well, that we suspect to come from
15 either Witness 0012 or Witness 0011 or both of them, so I would like to
16 see the diary so that they can be compared. Your Honours, that's the
17 very short matter that I wished to raise. I'm most grateful.

18 PRESIDING JUDGE TRENDAFILOVA: Mr. Khan, actually what you would
19 like is to reconsider the decision that was taken on behalf of the
20 Chamber. The Prosecutor -- the Prosecutor proceeded with its filing
21 following the decision taken by the Chamber and the decision was to
22 provide you with the transcript and not with the diary itself. So as you
23 know, the Chamber is not going to reconsider its decision. That is
24 answer on behalf of the Chamber.

25 MR. KHAN: I'm most grateful.

1 PRESIDING JUDGE TRENDAFILOVA: What is your second issue,
2 Mr. Khan? You wanted to address another procedural matter.

3 MR. KHAN: Madam President, you'll be happy to note I have no
4 second issue. That was it.

5 PRESIDING JUDGE TRENDAFILOVA: Thank you. Thank you, Mr. Khan.

6 Now, let us proceed with the schedule. Before, however, I give
7 the floor to the team of the Prosecutor, I would like very shortly on
8 behalf of the Chamber to make some clarifications.

9 We have approached the most important part of the confirmation
10 hearing, the presentation of the case on behalf of the Prosecutor,
11 thereafter on behalf of the three Defence teams. At this point, I would
12 like to remind the parties that when they are referring to evidence, they
13 have to give the EVD number and the last four digits of their document ID
14 number or at a minimum the page or paragraph number.

15 Next, when they're referring to evidence, the parties must
16 indicate the level of confidentiality of the evidence and whether a
17 closed session is necessary.

18 Next, the Chamber reminds equally that the parties should not use
19 anonymous witnesses and victims' names. Rather, they have to refer to
20 them by their respective numbers.

21 The parties are further supposed to provide at the end of each
22 day a list of evidence that they intend to use for the next day, and if
23 they have a presentation in writing to provide it the previous day to the
24 interpreters so that we put the interpreters at ease with regard to their
25 work.

1 At this instance, the Bench wishes to recall the text of Rule 69
2 of the Rules of Procedure and Evidence pursuant to which the parties may
3 agree that an alleged fact which is contained in the charges, the
4 contents of a document, the expected testimony of a witness or other
5 evidence is not contested so that the Chamber could proceed without
6 spending time on the said piece of evidence on which parties do not
7 dispute if this is the case.

8 And finally, the Bench invites the parties to make efforts to
9 avoid repetitive arguments and repetitive analysis.

10 Before I invite the Office of the Prosecutor to proceed with the
11 presentation of its case, the Bench would like to address orally the
12 issue of the admissibility of witness statements from the Waki Commission
13 and the Kenya National Commission on Human Rights by the Defence of
14 Mr. Muthaura. In light of the provisions of Article 69(4) and
15 Rule 63(2), the Chamber decides that it will deal with all issues raised
16 regarding evidence to be presented during the hearing and in particular
17 the relevance, the admissibility, and probative value in its final
18 decision on the charges of the Prosecutor in the present case. So by
19 this, having said this, I give the floor to Ms. Adeboyejo, or according
20 to the distribution of tasks in your team, today, it's your day --

21 MS. ADEBOYEJO: Yes, your Honour.

22 PRESIDING JUDGE TRENDAFILOVA: -- and tomorrow to proceed with
23 the presentation of your case.

24 Thank you, Ms. Adeboyejo.

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

1 I will be addressing you and presenting the evidence of the
2 Prosecution on the contextual element of the existence of an organisation
3 or policy.

4 The fact that there were crimes committed in Kenya, including in
5 Nakuru and Naivasha in January 2008 is not in dispute. There is a wealth
6 of evidence in different documents, including from the Kenyan government
7 showing the involvement of Mungiki leaders and members of the PNU. This
8 is consistent with the fact that the victims were perceived ODM
9 supporters and that the crimes were in retaliation of crimes committed by
10 ODM members.

11 The issue before this Court is who are the persons responsible
12 for the organisation of these acts of violence? What was the role of the
13 prominent leaders of the PNU? The Prosecution will present linkage
14 evidence showing the responsibility of Mr. Muthaura, Mr. Kenyatta, and
15 Mr. Ali for the post-election violence in Nakuru and Naivasha in
16 January 2008.

17 To establish its case, the Prosecution will rely on the testimony
18 of several witnesses it has interviewed, which are corroborated by
19 official Kenyan government documents, reports from independent human
20 rights organisations, as well as other independent public reports.

21 Let me talk for a few minutes about the evidence that the
22 Prosecution is offering here to show about the responsibility of the
23 three suspects.

24 To be clear, the Prosecution has complete confidence in the
25 credibility of all the witnesses we have put before this Court, and here

1 we're not just talking about any witnesses but about all of our
2 witnesses. If we didn't, we wouldn't present them. It's that simple.
3 The Prosecution takes any and all allegations made against its witnesses
4 very seriously, including any allegations that might come from the
5 Defence. The Prosecution in exercise of its obligation investigates such
6 allegations diligently and carefully.

7 Because we are now at the confirmation stage, which relies
8 primarily on written submissions and because of our very real security
9 concerns existing presently in Kenya, the Prosecution has not been
10 required at this stage to disclose the identities or full background
11 information about its witnesses. Any allegations about the credibility
12 of Prosecution witnesses could only be assessed if all of the information
13 about the witnesses could be considered.

14 The Prosecution also has information casting doubt on the
15 credibility of witnesses offered by the Defence, but this is neither the
16 time nor place to get into those evaluations. This is not what this
17 process is for. The process does not contemplate having all of the
18 Prosecution witnesses testify, having their full stories aired and having
19 all questions about their knowledge and credibility tested. That can
20 only happen at trial. The Chamber cannot now attempt to engage in a
21 partial credibility assessment based on only some of the evidence. Such
22 an assessment will require all of the evidence, and that is simply not
23 what happens at confirmation hearing. So, Madam President, your Honours,
24 as a road map for our presentation, the Prosecution would discuss the
25 statutory requirement on organisational policy. We will discuss Kenyatta

1 and Muthaura's control over the Mungiki, Muthaura's control over the
2 Kenyan police, the nature and function of the ad hoc organisation and
3 then we will conclude our presentation.

4 Your Honours, the Statute's requirement of an organisational
5 policy involves three main questions.

6 First, did an implicit or explicit policy to attack a civilian
7 population exist?

8 Second, did the organisation in question have the capacity to
9 perform acts which infringe on basic human values?

10 Third, did the organisation in question conduct the attack
11 pursuant to or in furtherance of its policy to attack a civilian
12 population?

13 Your Honours, the remaining factors such as the hierarchical or
14 flat decision-making structure or the way to perform the different
15 functions in an organisation need to be assessed on the circumstances of
16 the case. This has been confirmed by the Pre-Trial Chamber and the
17 Appeals Chamber, which have retained the case by case determination of
18 whether a given group qualifies as an organisation under the Statute.

19 I will address these three main questions.

20 First, the evidence will show that in response to the attacks by
21 ODM supporters against perceived PNU supporters, Mr. Muthaura and
22 Mr. Kenyatta along with others created a common plan and policy to
23 retaliate against perceived ODM supporters and keep the PNU in power
24 through every means necessary, including the commission of crimes.

25 Second, to carry out their plan and policy, Mr. Muthaura and

1 Mr. Kenyatta joined the forces of two existing structures to create a
2 single ad hoc organisation. The first structure underlying this ad hoc
3 organisation was the Mungiki. It's an organised gang in Kenya. It's
4 notorious for its use of violence, and it's notorious for its widespread
5 power and influence.

6 The second structure was the Kenyan police. Mr. Kenyatta had
7 close and powerful ties with the Mungiki, ties that went back many years.
8 And Mr. Muthaura, as Secretary of the Cabinet Security Committee and
9 chairman of the National Security Advisory Committee, oversaw and
10 exercised *de facto* powers over the Kenyan police. By the time of the
11 post-election violence, Mr. Muthaura had also developed close links with
12 the Mungiki through its leaders. Mr. Muthaura and Mr. Kenyatta provided
13 to the ad hoc organisation access to substantial state and private
14 resources and therefore the means to be able to carry out the attacks on
15 the civilian population.

16 Your Honours, we should note that there's nothing extraordinary
17 about crimes against humanity being committed by an ad hoc organisation
18 formed by different structures coming together in a co-ordinated fashion
19 for a single purpose. Mass atrocity is typically committed not by single
20 pre-existing organisations but, in fact, by ad hoc organisations that
21 join forces and resources of different groups whether they be state
22 entities or non-state organisations. That, for instance, is what
23 happened in Darfur. Janjaweed militias were integrated with the Sudanese
24 army. That is just an example. There are so many examples from other
25 conflicts.

1 So, your Honours, thirdly, our evidence will show that
2 Mr. Muthaura and Mr. Kenyatta used this ad hoc organisation to carry out
3 and implement their policy. In Nakuru and Naivasha the organisation
4 penalised perceived ODM supporters and consolidated PNU's power through
5 murder, rape, forced evictions, physical assaults, forced circumcision,
6 looting, burning of property and persecution. These attacks, we submit,
7 are not spontaneous. They are not isolated acts of violence.
8 Mr. Muthaura and Mr. Kenyatta planned, organised, and directed the forces
9 which were then unleashed to carry out these attacks.

10 In addition, the evidence will show that Mr. Ali contributed to
11 the enactment of the organisational policy by implementing Mr. Muthaura's
12 directive not to interfere, thereby creating a free zone for the attacks
13 to occur.

14 In this case, the evidence shows that Mr. Kenyatta and
15 Mr. Muthaura created an explicit organisational policy to commit the
16 attacks in Nakuru and Naivasha.

17 The background for this policy is found in the Kenyan
18 presidential election held on 27 December 2007. On 30 December 2007,
19 after Mwai Kibaki, the presidential candidate for the PNU was declared to
20 have won the election, we all know that violence broke out in various
21 parts of Kenya. And thousands of members of a network of perpetrators
22 organised and directed by Mr. Ruto, Mr. Kosgey, and Mr. Sang, according
23 to the Prosecution's case, began to execute their plan by attacking PNU
24 supporters. They burnt homes, businesses of PNU supporters. They killed
25 civilians, and they systematically drove them from their homes.

1 But in response to these attacks by Mr. Ruto and his network,
2 Mr. Kenyatta and Mr. Muthaura adopted an organisational policy to
3 retaliate against perceived ODM supporters and keep the PNU in power by
4 all means necessary, including through these criminal acts in Nakuru and
5 Naivasha.

6 I will turn now to the first question that I posed: Did an
7 explicit or implicit policy to attack a civilian population exist? The
8 answer, I humbly submit to your Honours is yes. Mr. Kenyatta and
9 Mr. Muthaura explicitly revealed their organisational policy at two
10 planning meetings to rally support and resources for the attacks. The
11 first meeting was at the Kenya State House in Nairobi on
12 December 30 2007.

13 Prosecution Witness 0011 explains, and I quote:

14 "This meeting was kind of an urgent meeting, because at that time
15 the word was going around that it's very possible that Raila," referring,
16 of course, to Raila Odinga, the ODM presidential candidate, "would have
17 won the election. So a message went round to different Kikuyu MPs that
18 they should meet in State House ... they were trying to strategise, what
19 do we do next?"

20 MR. KHAN: Madam President, I do apologise for interrupting.
21 Perhaps so we can follow, if my learned friend can give references to the
22 evidence that she's referring to then we can follow the presentation. I
23 would be very grateful for an EVD number of what she says at line -- page
24 12, line 1.

25 PRESIDING JUDGE TRENDAFILOVA: Mr. Khan, of course we shall ask

1 now the view of the representative of the Prosecutor, but my understand
2 is that now Ms. Adeboyejo is presenting a principle approach to the
3 existence of a policy, and thereafter she said they're going to develop
4 and by referral to the specific piece of evidence that they approach to
5 the policy element.

6 MR. KHAN: Madam President, I'm in your hands. It would just be
7 useful for all parties that when assertion are being made the reference
8 is given so we can follow the evidence properly. It's not the opening
9 speech, your Honour, it's presentation of evidence. I'm grateful.

10 PRESIDING JUDGE TRENDAFILOVA: I understand. I understand.
11 However, I'm seeking your view whether this is the case.

12 MS. ADEBOYEJO: Madam President, your Honours, we are quite aware
13 of that. We are going to refer to the EVD numbers. Every time I make an
14 assertion, I will refer to the particular piece of evidence and the EVD
15 numbers.

16 PRESIDING JUDGE TRENDAFILOVA: Yes, please do then so that we are
17 going to be helpful --

18 MS. ADEBOYEJO: Absolutely, your Honours. That's exactly
19 (* overlapping speakers).

20 PRESIDING JUDGE TRENDAFILOVA: (* overlapping speakers) yes, to
21 the Defence for the purpose of their objecting to the charges thereafter.

22 MS. ADEBOYEJO: Yes, your Honour.

23 I was referencing Prosecution Witness 0011, found at
24 EVD-PT-OTP-00322, at 1514, and I said this Prosecution witness indicated
25 that a message went round, and I'm quoting the witness, "to different

1 Kikuyu MPs that they should meet in State House. They were trying to
2 strategise, what do we do next? Then at one time Uhuru Kenyatta came in
3 to where they were and he was a bit angry. He looked angry because he
4 was trying to say that they were not ready to hand over power, and he has
5 the capability of organising his people and mobilising them for any
6 eventuality. Uhuru Kenyatta gave the money to those whom he thought
7 would co-ordinate the activity he wanted to be co-ordinated. And I am
8 saying the MPs and the Mungiki co-ordinators whom he felt would
9 co-ordinate what he wanted to be co-ordinated. He gave them 3.3 million
10 Kenyan shillings each."

11 Prosecution Witness 0006 independently corroborates the purpose
12 of the meeting and Kenyatta's presence. I'm going to refer to
13 EVD-PT-00570 at 0019. He states, and I quote:

14 "Mungiki was summoned to the State House to discuss how to
15 protect members of the Kikuyu community who were being evicted. They
16 needed to retaliate during the post-election violence which seemed waged
17 by opposition members in Rift Valley. According to the source close to
18 Mungiki, Uhuru Kenyatta was present at this second meeting at the
19 State House."

20 Prosecution Witness 0004, who is also a former Mungiki member,
21 describes the second meeting which took place on 3rd January, 2008, at
22 the Nairobi Members' Club in Nairobi. EVD-PT-OTP-00248 at 0039.

23 The witness was present at this meeting along with Mungiki
24 leaders, PNU supporters and Kenyatta and Muthaura. Muthaura did most of
25 the talking for the government side. Prosecution Witness 0004 explains,

1 and I'm quoting the witness:

2 "After breakfast, Francis Muthaura shouted from the corner of
3 the room to us. He told us in Kikuyu something like: The youth come
4 here. When we joined them, he said, it's good that the youth have come.
5 Then he said that our community in the Rift Valley was being finished and
6 that we needed to revenge or retaliate. He said that we could not stay
7 quiet while our people are being killed. I could see that he was very
8 emotional and angry. He made us feel like there was a sense of
9 emergency."

10 Prosecution Witness 0004 explains that then Kenyatta asked
11 Maina Diambo, a leader of the Mungiki military wing, what his thoughts
12 were on the issue. Prosecution Witness 0004 states, and I have referred
13 previously to the EVD number, EVD-PT-OTP-0024 at 0039.

14 He says and I quote:

15 "Kenyatta asked him if he had any plans," talking now about
16 Maina Diambo, "I think that he addressed Maina Diambo because he was like
17 our leader there. I think they addressed him because he's part of the
18 militants, the military wing of the Mungiki. Maina Diambo was the one
19 who had control over the militants on the ground. Maina Diambo answered
20 by saying that the youth were ready. He said that everything just
21 depended on their side, that is, the side of the government officials.
22 He meant that our youth were ready and just waiting for them. Whenever
23 they mentioned the youth, I believed they were referring to the Mungiki.
24 It was obvious that they knew we were the Mungiki. I believe that when
25 Diambo said that the youth were ready, he meant that the youth were ready

1 to revenge the killings of the Kikuyus in the Rift Valley. He was just
2 responding to what Francis Muthaura had said earlier."

3 This witness goes further, and I will quote:

4 "Diambo asked if the police would interfere with the youth.
5 Francis Muthaura stood up immediately and said, 'The police will not
6 interfere with your work.' It was an emotional reaction. That's why he
7 stood up. At this point he said in Kikuyu language, 'Let me call the
8 commissioner.' We knew he meant the commissioner of police because we
9 had just been talking about the police. He took out his cell phone, made
10 the call and spoke in Kiswahili. He said something to the effect of:
11 How is your news Ali? Then Muthaura said: Our youth will be going to
12 the Rift Valley and we do not want them to be disturbed. The police
13 commissioner's full name is Major-General Hussein Ali ."

14 At these two meetings, therefore, Kenyatta and Muthaura
15 explicitly stated their policy and their intentions. To be clear, this
16 policy was not just about retaliation. It was to ensure that PNU's hold
17 on power could be consolidated. We saw, your Honours, from the
18 presentation of the Defence yesterday, the atmosphere in the immediate
19 aftermath of the announcement of the election results. It was charged.
20 It was electric. The ODM was calling for a million-man march on that
21 same 3rd of January, 2008, when this meeting took place. They were
22 challenging the PNU hold on power. That is what Kenyatta and Muthaura
23 were responding to.

24 An attack on perceived ODM supporters in Nakuru and Naivasha
25 would send a powerful signal that PNU power will be retained in the whole

1 of Kenya. The principal perpetrators had alliances and a wealth of
2 resources in the Rift Valley to do this, and Nakuru and Naivasha were
3 important seats of economic and political power. According to the
4 Kenya National Commission on Human Rights, Nakuru town, and I will quote
5 "was strongly associated with the presence of Mungiki adherents." This
6 evidence is in EVD-PT-OTP-0001 at 0013, 0088, 0092.

7 Your Honours, the Prosecution will now show a slide of the
8 organisation I intend to deal with, and I will describe how the
9 creation -- the creation of an organisation capable of carrying out the
10 crimes.

11 In its prior decisions, this Chamber has set out a non-exhaustive
12 list of factors that the Chamber can consider when determining whether a
13 group qualifies as an organisation under Article 7(2)(a) of the Statute.
14 As the Chamber made clear, these are just factors, not requirements. The
15 core question to answer is: Does the group have the capability to
16 perform acts which infringe on basic human values?

17 I have already answered, and I will say it again, it's yes.

18 Mr. Muthaura and Mr. Kenyatta created such an organisation,
19 your Honours, and not only was that organisation capable of performing
20 acts which infringe on basic human values, that is exactly what it did.
21 By combining the powers and authority of the Mungiki and the Kenyan
22 police, the suspects in this case created an organisation with both
23 government and private resources and the capacity, an enormous capacity,
24 to commit violence.

25 Mr. Muthaura brought with him the Kenyan police over whom he

1 exercised *de facto* authority, and Mr. Kenyatta brought with him the
2 Mungiki that followed his plan. Mr. Muthaura and Mr. Kenyatta combined
3 these forces and together exercised command over this ad hoc criminal
4 organisation.

5 I will now discuss Kenyatta and Muthaura's control over the
6 Mungiki.

7 First, let's look at Mr. Kenyatta's ability to exercise control
8 over the Mungiki based on a long history of association with them and the
9 resources available to Mr. Kenyatta.

10 Prosecution Witness 0001 states that as early as the 1990s, a
11 number of Kikuyu politicians took the Mungiki oath in order to secure
12 votes and enhance their reputation and that Uhuru Kenyatta was one such
13 politician. EVD-PT-OTP-00572 at 0026.

14 On 3rd March, 2002, a Mungiki fundraising function in Nyahururu,
15 Laikipia district turned into a campaign for the young Uhuru Kenyatta and
16 10.000 Mungiki members pledged to support him. This evidence is from
17 Peter Kagwanja, a scholar on Kenyan history and can be found in a public
18 source at EVD-PT-OTP-00183 at 0458.

19 Both Prosecution Witness 0012 and Witness 0011 say that Kenyatta
20 is a Mungiki member and that he provided them with money and support.
21 This evidence is at EVD-PT-OTP-00314 at 1385 and EVD-PT-OTP-00322.
22 Confidential.

23 Prosecution Witness 0010 corroborates this evidence and confirms
24 that Kenyatta has a long history with the Mungiki and that Kenyatta and
25 other politicians used the Mungiki during the election period in

1 December 2007. EVD-PT-OTP-00674 at 0550.

2 Prosecution Witness 0012 explains that as an scion of the
3 Kenyatta family, Uhuru Kenyatta had the backing after former president
4 who had mandated the Mungiki to help Kenyatta in his political
5 aspirations. This evidence is at EVD-PT-OTP-00314, confidential.

6 Kenyatta could influence and rely on the Mungiki because as an
7 organisation, the Mungiki were well-organised into local and regional
8 branches. The leaders of these local and regional branches were directly
9 below the national co-ordinating committee in the Mungiki structure.

10 Prosecution Witness 0001 talks about the structure at EVD-PT-OTP-00572 at
11 0026. The Mungiki rely on strict discipline. According to Prosecution
12 Witness 0004, and I quote his evidence:

13 "The Mungiki do not tolerate dissidence. People who disobeyed
14 the Mungiki and the chairman would disappear. It is even worse for
15 members. If a member disobeys, they would cut that member's head off and
16 put the head in public view at the place where they had a problem with
17 the member. I know this from the inside stories I heard as a member of
18 the organisation. I recall that on one occasion, when I was speaking
19 with the Kuria wa Gikonyo, the Mathare Mungiki chairman, he told me what
20 they did to people who disobeyed them. The militants are in charge of
21 killing the traitors and those who disobey. In each region there are
22 militants. For instance, in Kosovo there are about ten militants but I
23 do not know the names. They were in charge of killing people."

24 This evidence is at EVD-PT-OTP-00248 at 0018.

25 Up until the end of 2007, the Mungiki controlled the public

1 transport system. They provided water through illegal electricity
2 power -- sorry, through illegal electricity connections, they demanded a
3 fee for accessing public toilets and sold water to residents in the
4 poorest parts of Central Province and Nairobi. EVD-PT-OTP-00004 at 0568.

5 I refer your Honours to a report from CIPEV corroborated by other
6 reports from Human Rights Watch on the extensive power exercised by the
7 Mungiki.

8 Your Honours, I will now turn to Muthaura's control over the
9 Kenyan police.

10 As regards Mr. Muthaura, he was able to provide a free zone to
11 commit the crimes, precisely because he was the chairman of the
12 National Security Advisory Committee. He was the secretary to the
13 cabinet secretary committee. It's the highest decision-making body of
14 the Kenyan security and intelligence machinery. All of the intelligence
15 from the ground upwards flows to the Cabinet Security Committee.
16 Muthaura exercised both *de jure* and *de facto* authority over the various
17 Kenyan security agencies including the Kenyan police, administration
18 police, and the national security and intelligence service.

19 Indeed, Mr. Ali, himself, in testifying before the CIPEV, said he
20 reported to the head of public service, Mr. Muthaura. EVD-PT-OTP-00338,
21 confidential, at 1980.

22 So Mr. Ali already said who had control over him and who could
23 give him instructions and orders.

24 This evidence is corroborated by other evidence that has been
25 presented by the Prosecution.

1 Muthaura also showed his ability to protect the Mungiki. As
2 early as 27 -- no, 24th November 2007, a large Mungiki meeting was held
3 at Muranga and Nyeri which led to the arrest of some of the Mungiki
4 leaders at the meeting. Muthaura intervened with the police to secure
5 the release of the said Mungiki members. EVD-PT-OTP-00661 at 0307-0310.

6 Muthaura's authority over the Kenyan police was used to give
7 instructions not to intervene in Mungiki attacks in both Nakuru and
8 Naivasha in the Rift Valley Province.

9 Your Honours, the Kenyan police service functioned under a strict
10 and centralised hierarchy. Each province was headed by a provincial
11 police officer, and each province was further divided into police
12 divisions headed by an officer commanding the police division, and each
13 police decision was divided into police stations headed by officer
14 commanding the police station. We will reference the structure in our
15 later presentation.

16 The commissioner of police, Mr. Ali, reported directly then to
17 Mr. Muthaura.

18 What was the nature of this ad hoc organisation we've been
19 talking about?

20 Prosecution Witness 0011 explained that Kenyatta and Muthaura
21 worked together and co-ordinated the attacks, exercising control over the
22 ad hoc organisation through their respective contributions to the common
23 plan. Specifically, Kenyatta had control over the finances and the
24 Mungiki. Muthaura as head of public service and the state's security
25 machinery was highly politically connected, and he had control over the

1 governmental structure. This evidence is at EVD-PT-OTP-00319 at
2 1464-1466.

3 These two structures, the Kenyan police and the Mungiki, became a
4 single ad hoc organisation for the purpose of implementing the
5 organisational policy of Mr. Kenyatta and Mr. Muthaura. Under the
6 direction of Mr. Muthaura and Mr. Kenyatta, and with the assistance of
7 Mr. Ali, these two structures co-ordinated their actions and worked
8 together towards the goal of retaliating against perceived ODM supporters
9 and insuring that the PNU would hold on to power. They guided the ad hoc
10 organisation through a series of preparatory meetings that I will
11 describe in the next section of this presentation.

12 Mr. Kenyatta and Mr. Muthaura were able to bring together the
13 forces of the police and the Mungiki towards a common goal despite the
14 public antagonism between those two groups.

15 In the run-up to the presidential elections, Muthaura and Kenya
16 organised a series of meetings to obtain a cease-fire between the Mungiki
17 and the PNU government. The most important of these meetings took place
18 on the 26th of November, 2007, at the State House in Nairobi. The
19 objective of the meeting was to discuss Mungiki support for the PNU's
20 presidential campaign in exchange for Mungiki demands.

21 Prosecution Witness 0004 explains that during the meeting, the
22 Mungiki offered a list of demands that included the government halting
23 all extra-judicial killings of Mungiki members. According to Prosecution
24 Witness 0004, the Mungiki demand was met and the extrajudicial killings
25 of Mungiki members temporarily stopped. EVD-PT-OTP-00248 at 0031-0036.

1 I also will rely on EVD-PT-OTP-00302 at 1055.

2 Your Honours, this meeting redefined the Mungiki relationship
3 with the government, if only for a time. Prosecution Witness 0011
4 explains that the result of the meeting was that the Mungiki did not face
5 any problems as long as they supported the government. As Witness 0011
6 puts it, the message to the Mungiki was, and I quote:

7 "Continue, no problem. Continue working with whoever you are
8 working with so long as the interest is one."

9 EVD-PT-OTP-00322 at 1519.

10 Your Honours, there is additional corroboration in a report of
11 the National Security Intelligence Service, dated 28th November 2007.
12 According to this report, and I quote:

13 "Some Mungiki national officials have resolved to campaign for
14 the president."

15 EVD-PT-OTP-00013 at 0088.

16 Prosecution Witness 0011 also made it clear that the Mungiki
17 adopted a name change in order to campaign for the PNU. EVD-PT-OTP-00307
18 at 1288.

19 This information, your Honours, is independently corroborated by
20 a policy report entitled "The Challenges of National Cohesion and
21 Integration: Mungiki Menace in Central Kenya Region." EVD-PT-OTP-00178
22 at 0342.

23 So how then did this ad hoc organisation function?

24 Kenyatta and Muthaura collaborated with Ali and a group of
25 mid-level perpetrators and lower-level perpetrators to carry out their

1 organisational policy. The mid-level perpetrators were necessary to
2 co-ordinate and finance the activities on the ground, and the lower-level
3 perpetrators, the Mungiki members and the PNU youth, were the ones who
4 actually carried out the attacks.

5 Your Honours, I will review some of the evidence we have
6 regarding these mid-level perpetrators, but by no means-- it will not be
7 all of the evidence that we have.

8 At this junction, your Honours, I will be requesting for a
9 private session, because I will be making reference to very sensitive
10 information.

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

12 Court Officer, would you arrange for a private session.

13 (Private session at 3.20 p.m.)

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19 (Open session at 3.37 p.m.)

20 COURT OFFICER: Madam President and your Honours, we're back in

21 open session. Thank you.

22 PRESIDING JUDGE TRENDAFILOVA: Again the floor is over to you.

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

24 With respect to the police, Mr. Ali kept close control of his

25 subordinates and was in constant communication with them. Prosecution

1 Witnesses 0005 and 0008 described how Ali micromanaged the Kenyan police
2 leaving little or no room for decision-making by senior police officers.

3 Prosecution Witness 0008 states, and I quote:

4 "The policing culture and decision-making changed significantly
5 when Commissioner Ali took over, introducing a more militaristic
6 approach. Ali implemented a more centralised system, taking away
7 decision-making from lower levels."

8 EVD-PT-OTP-00219 at 0218.

9 Prosecution Witness 0005 explained that the focus appeared to be
10 more of "directing" his staff, instead of "allowing communication."

11 EVD-PT-OTP-00571 at 0024.

12 Indeed, the provincial police officer for Rift Valley Province in
13 early January 2008 testified before CIPEV that the commissioner of police
14 communicated with him every day during the post-election violence.

15 EVD-PT-OTP-00337 at 1945.

16 The evidence, therefore, establishes that although Ali and his
17 subordinates had knowledge of the activities of the Mungiki and pro-PNU
18 youths, Ali actively used his subordinates to ensure that the deliberate
19 policy of police inaction was implemented. This aspect of the case will
20 be covered in greater detail tomorrow by my colleague Ms. Desiree Lurf.

21 As a sidenote, your Honours, there have been questions about why
22 the Prosecution did not interview more police officers with regards to
23 Mr. Ali's role. The Prosecution sent eight requests for assistance to
24 the government of Kenya to interview five provincial police officers and
25 five provincial commissioners, heads of the provincial security committee

1 but was blocked at every turn. To overcome to obstacles, the

2 Prosecution --

3 MR. MONARI: Excuse me. Excuse me, Madam President.

4 PRESIDING JUDGE TRENDAFILOVA: Yes, Mr. Monari.

5 MR. MONARI: I am sorry to interrupt the learned Prosecutor. The
6 learned Prosecutor was in Nairobi when this matter was in court.

7 PRESIDING JUDGE TRENDAFILOVA: Mr. Monari, would you give these
8 explanations and object to these statements when you are going to have
9 the floor.

10 MR. MONARI: But at this point a falsehood is being perpetrated
11 by the Prosecutor had a the government blocked the examination of the
12 provincial police officers and the provincial commissioners. She's aware
13 that this matter was in court. She was in Nairobi herself in person, and
14 there is a court order that stopped it. It is not the government of
15 Kenya that stopped it.

16 PRESIDING JUDGE TRENDAFILOVA: Mr. Monari. Mr. Monari, I'm very
17 much sorry. As Mr. Kay highlighted, all of you who are on the list of
18 counsels are experienced counsels appearing before the
19 International Criminal Court and other international ad hoc tribunals, so
20 this is not a dialogue. The Chamber has decided that now is the
21 Prosecutor to present his case.

22 MR. MONARI: (* overlapping speakers)

23 PRESIDING JUDGE TRENDAFILOVA: Please take notes, and thereafter
24 when you have the floor you are going to proceed with any objections that
25 you may raise.

1 MR. MONARI: I appreciate it.

2 PRESIDING JUDGE TRENDAFILOVA: Ms. Adeboyejo, go -- and I would
3 ask very much unless it is urgent and extremely important to prevent some
4 mistakes that --

5 MR. MONARI: (* overlapping speakers)

6 PRESIDING JUDGE TRENDAFILOVA: -- only then you interrupt the
7 opposite party.

8 MS. ADEBOYEJO: Thank you, Madam President, your Honours. For
9 purposes of clarity, we never said the government of Kenya blocked it.
10 We said it was just blocked, and I'm getting there in my presentation.
11 To overcome the obstacles, the Prosecution conducted at least eight
12 missions to Nairobi. My learned friend Mr. Monari who represents
13 Madam President Ali, was also representing some of those police officers.
14 It is true that there was then a court order that prevented any further
15 steps by the Office of the Prosecutor to interview these police officers.
16 We will provide more details about this office -- these efforts at a
17 later time.

18 In sum, your Honours, this evidence clearly describes the
19 creation of an ad hoc organisation under the control of Muthaura and
20 Kenyatta with the capacity and the capability to perform acts which
21 infringe on basic human values. Mr. Muthaura and Mr. Kenyatta combined
22 the Kenyan police and the Mungiki into an ad hoc organisation to pursue
23 these ends.

24 Finally, your Honours, turning to our third and final submission
25 on this aspect of the presentation, the Prosecution submits that the

1 organisation created by Kenyatta and Muthaura carried out attacks
2 pursuant to or in furtherance of this organisational policy.

3 Four sets of activities demonstrate that this was the case.

4 Firstly, there were preparatory meetings held at the central and
5 local levels prior to the attack.

6 Secondly, other preparatory actions including recruitment,
7 purchasing and distribution of weapons and uniforms and transportation of
8 direct perpetrators took place.

9 Third, the organisation granted impunity to the main perpetrators
10 of the attack.

11 And finally, the organisation orchestrated the killing of Mungiki
12 leaders directly involved in the post-election violence to silence them
13 and cover up the crimes.

14 I will go through each of these four activities individually
15 starting first with the preparatory meetings. To assist your Honours, I
16 have a slide show and a time-line of all these other preparatory
17 meetings.

18 Starting in late December 2007, Muthaura and Kenyatta together
19 with Mungiki leaders and PNU supporters had no less than eight
20 preparatory meetings to plant the attacks on Nakuru and Naivasha. As the
21 Prosecution's evidence will show, these meetings were not intended to
22 raise funds to assist internally displace persons, nor were they about
23 organising people to simply defend Kikuyu people under attack.

24 The words uttered by Kenyatta and Muthaura at these meetings, the
25 instructions that they gave, and the actions that they and their

1 subordinates took demonstrate that these meetings were about planning
2 violent retaliatory action.

3 Your Honours, during these meetings, Muthaura and Kenyatta and
4 their subordinates formulated their plans to retaliate against ODM
5 supporters. They meetings were an opportunity to bring the full force of
6 their resources to bear to maintain PNU power in the Rift Valley. During
7 these preparatory meetings, they incited PNU supporters, they raised and
8 distributed funds for the attacks, they co-ordinated attacks, made
9 logistical arrangements, and distributed leaflets.

10 The first set of these meetings were crucial. They occurred in
11 Nairobi and Kenyatta and Muthaura were present. As Prosecution Witness
12 explains, the attacks were, "planned in Nairobi." So the Nairobi
13 meetings laid the groundwork for the further meetings. EVD-PT-OTP-00666
14 at 0408.

15 The second set of meetings were at the local level and were
16 attended mostly by the mid-level perpetrators to whom I previously
17 referred.

18 Prosecution Witness 0001 explains, and I quote the evidence:

19 "There were meetings that took place between the Mungiki and
20 government representatives whereby prior to the elections the Mungiki
21 were recruited to support the PNU."

22 After the breakout of violence, Prosecution Witness 0001 alleges
23 that the Mungiki were recruited to retaliate against perceived ODM
24 supporters in the Rift Valley. He alleges that both Uhuru Kenyatta and
25 Francis Muthaura were involved in these meetings. EVD-PT-OTP-00572 at

1 0026.

2 The existence of these meetings was independently corroborated by
3 Prosecution Witness 0004, who explains, and I quote the evidence:

4 "Uhuru Kenyatta then said that there were plans being prepared
5 and that there would be another meeting the same day to arrange or
6 facilitate things."

7 EVD-PT-OTP-00248 at 0040.

8 The same witness refers to another meeting when he states, and I
9 quote:

10 "After Muthaura's conversation, Uhuru Kenyatta spoke about
11 another meeting at the Blue Springs Hotel. He said that the landlords
12 and the business people would meet there to discuss the logistics and how
13 things should be done in order to send our people to the Rift Valley. I
14 am assuming he was referring to Kikuyu landlords and businessmen, because
15 this was an issue that affected the Kikuyus. I think he referred to
16 them, because they were supposed to bring money to the meeting at
17 Blue Springs Hotel to pay for the logistical arrangements."

18 EVD-PT-OTP-00248 at 0040.

19 The existence of these preparatory meetings and Kenyatta's
20 presence at them is also further corroborated by the 'Report on
21 Post-Election Violence: A Journalist's Perspective,'" which states and I
22 quote:

23 "A number of meetings were held in Nairobi where the plight of
24 IDPs was discussed. But sadly these meetings started taking a sinister
25 turn when retaliation was discussed and organised. A number of these

1 meetings were held during the months of January and February and
2 March 2008."

3 EVD-PT-OTP-00212 at 0105-0106.

4 Further corroboration exists in the National Security and
5 Intelligence Service reports, and I quote the evidence:

6 "This agency was collecting information on the planning of
7 violence in Naivasha by Mungiki members and politicians at both local and
8 national level. As early as 3 January 2008, National Security
9 Intelligence Service had information that two former MPs of the Kikuyu
10 community were said to be negotiating with the outlawed Mungiki with a
11 view to having sect members assist the community to counter their
12 attackers."

13 And that Mungiki members were meeting "in an undisclosed location
14 in Nairobi with a view to carrying out revenge attacks on Luos and
15 Kalenjins travelling along Nairobi-Naivasha highway on an undisclosed
16 date."

17 EVD-PT-OTP-00004 at 0495-0496.

18 Prosecution Witness 0012 explains that on or around
19 30 December 2007, Muthaura held a meeting in the office of John Michuki
20 in Nairobi on the deployment of the Mungiki to Kibera. At the time
21 John Michuki was the minister of state for provincial administration and
22 internal security. While this case in front of your Honours does not
23 focus on the crimes committed in Kibera, the planning of those attacks
24 illustrates the co-ordination level of the organisation that attacked
25 Nakuru and Naivasha. Kenyatta was present in this meeting along with

1 other PNU officials and Mungiki members. EVD-PT-OTP-00652 at 0120-0122,
2 EVD-PT-OTP-00661 at 0315-0320, and also at EVD-PT-OTP-00662 at 0329-0330.

3 Prosecution Witness 0012 also explains that in mid-January 2008,
4 there was a second meeting at the office of John Michuki during which
5 Muthaura reminded Hussein Ali that the Mungiki were working with them.
6 At John Michuki's request, Muthaura called Mr. Ali to instruct him "not
7 to interfere in our work." This evidence is at EVD-PT-OTP-00661 at
8 0321-0324 and EVD-PT-OTP-00662 at 0326-0327.

9 Two other Prosecution witnesses, Witness 0012 and Witness 0006,
10 corroborate the retaliatory planning purpose of this meeting. This
11 evidence is at EVD-PT-OTP-00322 at 1514, EVD-PT-OTP-00570 at 0019,
12 EVD-PT-OTP-00666 at 0408, and EVD-PT-OTP-00667 at 0427.

13 As previously noted, Prosecution Witness 0004 explains that on
14 3 January 2008, Muthaura and Kenyatta organised another meeting at the
15 Nairobi Members' Club which was attended by other political leaders and
16 three Mungiki leaders. During this meeting, Muthaura and Kenyatta
17 enlisted the services of the Mungiki and pro-PNU youth and concluded the
18 plans for the launching of retaliatory attacks against ODM supporters in
19 the Rift Valley. At this meeting, Muthaura called Ali and instructed him
20 that the police should not intervene. EVD-PT-OTP-00248 at 0038-0042.

21 Following this Nairobi Members' Club meeting,
22 Prosecution Witness 0004 explains that Kenyatta directed the Mungiki
23 leaders to attend another meeting taking place that same day at
24 Blue Springs Hotel in Nairobi to discuss the finances and other
25 logistical details of the operations. EVD-PT-OTP-00248 at 0040.

1 According to security situation reports, on or about
2 10 January 2008, Mungiki members met at the Stem Hotel in Nakuru to plan
3 attacks against perceived ODM supporters in various locations including
4 Nakuru. EVD-PT-OTP-00013 at 0064.

5 Again, your Honours, Mungiki leaders met and the 23rd and 26th of
6 January, 2008. According to the final report from CIPEV, and I quote:

7 "Local politicians received support from Kikuyu elite from
8 outside Naivasha to mobilise local jobless youth who were bolstered by
9 Mungiki followers from Nairobi and Central Province. KNCHR had evidence
10 of two planning meetings held on 23rd and 26th January at a local hotel
11 where influential Naivasha business people plotted the violence and paid
12 between 100 to 200 Kenya shillings to the youth who would participate in
13 the attacks targeting mainly members of the Luo community. Information
14 of these planning meetings and participants -- and participants was
15 corroborated by individual witnesses including two Naivasha social
16 workers and activists. According to witnesses, evidence that Mungiki
17 were involved in violence in Naivasha included a high level of
18 co-ordination of the attackers many of whom were not Naivasha residents,
19 as well as inside intelligence obtained from Mungiki members involved in
20 the violence."

21 EVD-PT-OTP-00004 at 0497. Your Honours, this evidence is public.

22 These meetings on the 23rd and the 26th of January were also
23 reported by Human Rights Watch in their report "Ballots to Bullets."
24 It's a public evidence. It's at EVD-PT-OTP-00002 at 0295.

25 Prosecution Witness 0011 explains that on or about the 26th or

1 27th of January, Kenyatta attended a meeting at the Blue Post Hotel in
2 Thika where Kenyatta directly provided funds to mid-level Mungiki
3 perpetrators for the attacks against the perceived ODM supporters in
4 Nakuru and Naivasha. Prosecution Witness 0012 confirms this meeting and
5 a transfer of funds from Kenyatta to a mid-level perpetrator took place.
6 EVD-PT-OTP-00309 at 1308-1310, and EVD-PT-OTP-00666 at 0410.

7 Your Honours, I see that we are approaching 4.00. This is a good
8 time for me to -- to stop.

9 PRESIDING JUDGE TRENDAFILOVA: Yes. This was about -- just to
10 make a suggestion on behalf of the Chamber --

11 MS. ADEBOYEJO: Yes.

12 PRESIDING JUDGE TRENDAFILOVA: -- that we suspend now the hearing
13 and proceed at 4.30 further on with your presentation.

14 MS. ADEBOYEJO: Thank you, Madam President.

15 PRESIDING JUDGE TRENDAFILOVA: So the hearing is suspended.

16 COURT USHER: All rise.

17 Recess taken at 3.59 p.m.

18 On resuming at 4.30 p.m.

19 (Open session)

20 COURT USHER: All rise.

21 PRESIDING JUDGE TRENDAFILOVA: Please be seated.

22 We resume our session, the second session of today's hearing.

23 Ms. Adeboyejo, the floor is again over to you.

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

25 Your Honours, before I continue, just to make two quick points of

1 correction. I had referred to the fact that we had sent eight RFAs or
2 requests for assistance to Kenya. We had actually sent one, but we had
3 sent eight follow-up letters to those requests for certain documents.

4 I also wanted to mention to your Honours that all the evidence we
5 have referred to is confidential, unless we indicate that it's public.

6 Prosecution Witness 0012 and 0002 say that there were meetings in
7 middle and late January in the Belle Inn Hotel in Naivasha to plan the
8 revenge attacks in Naivasha and raise funds for the attack.
9 EVD-PT-OTP-00652 at 0118-0119, EVD-PT-OTP-00667 at 0448, EVD-PT-OTP-00236
10 at 0011, EVD-PT-OTP-00245 at 0365-0369.

11 The existence of these particular planning meetings is
12 corroborated by the KNCHR report which refers to "several other meetings
13 held at the La Belle Inn ... the *matatu* proprietors also organised for
14 the transportation of Kikuyu youths from the neighbouring central
15 province." This evidence is public, EVD-PT-OTP-00001 at 0099.

16 In addition to these preparatory meetings, the pursuance of the
17 organisational policy can also be seen in the recruitment of direct
18 perpetrators. The National Security Intelligence Services Situation
19 Report for January 1 states that:

20 "Mungiki sect has directed sect co-ordinators to carry out
21 recruitment and oathing ceremonies, joining the current skirmishes in
22 some parts of the country. Separately, sect members have intensified the
23 acquisition of weapons with which they plan to execute the machinations.
24 Mungiki members have been deployed in Nairobi, Nakuru, and Eldoret for
25 revenge missions. Elsewhere, Mungiki leaders have incited Kikuyu youth

1 in Ngong, Kiserian and Ongata Rongai to come out and defend their kinsmen
2 from being evicted from other parts of the country."

3 EVD-PT-OTP-00103 at 0415-0416. Government report.

4 Prosecution Witness 0009 also explains that some of the
5 recruitment, mobilisation and payment of pro-PNU youth to participate in
6 the retaliatory attacks in Naivasha and Nakuru were carried out in
7 offices belonging to KANU. KANU, your Honours, is the political party
8 headed by Uhuru Kenyatta. EVD-PT-OTP-00640 at 0188-0189.

9 The pursuance of the organisational policy can also be seen in
10 the purchasing and distribution of weapons and uniforms.

11 According to a 2nd January 2008 National Security Intelligence
12 Services Case Report:

13 "Former MP ... is said to have distributed about 200 *pangas* to
14 Kikuyu youth at Shabab area within Nakuru town on 1st January 2008 during
15 which he incited them to attack ODM supporters at Langa Langa, Rhonda,
16 and Shabab estates within the town."

17 EVD-PT-OTP-00013 at 0077.

18 Prosecution Witness 0011 also explains that a Mungiki leader, and
19 I quote:

20 "Got those uniforms from a senior government official
21 personally."

22 The witness states further concerning the uniforms, and I quote:

23 "Definitely they were used because the purpose of taking those
24 uniforms to Thika was to be used by the Thika team in preparation of what
25 was meant to be done in Naivasha."

1 EVD-PT-OTP-00323 at 1535.

2 The pursuance of the organisational policy can also be seen in
3 the organisation of transportation of direct perpetrators to Nakuru and
4 Naivasha.

5 Prosecution Witness 0010, a former Mungiki member, was
6 transferred from Nairobi to Naivasha to commit the attacks. The witness
7 explains that in mid- or late January 2008, and I quote the evidence:

8 "I received a text message -- the witness received a text
9 message on his non-personal cellular phone which was the one he used to
10 receive orders from and communicate with the Mungiki. This text message
11 requested the witness to go to a specific bus-stop in Nairobi on that
12 same morning. There, he was picked up by City Hoppa bus full of
13 approximately 40 young and middle-aged Mungiki members. This bus company
14 was owned by PNU Member of Parliament ... when encountering the police,
15 they were not stopped despite the chaos in the city at that time. The
16 bus took them to Nairobi's State House compound. This was an organised
17 gathering, and there were approximately 100 Mungiki members in total."

18 At the meeting, the Mungiki were rallied by their leaders and
19 told that the government of Kenya was with them. After the meeting, the
20 group was taken to Naivasha where they attacked the civilian population.

21 EVD-PT-OTP-00674 at 0551-0552.

22 Additionally, the KNCHR reports, and I quote:

23 "On the night of 26 January 2008, lorries were spotted in town
24 and in the estates ferrying youths believed to be Mungiki members. They
25 were taken to Karagita and Mirera where the majority of the Luo community

1 employed in the flower industry reside."

2 This evidence is public, your Honours at EVD-PT-OTP-00001 at
3 0094.

4 The Prosecution would like to emphasise that this evidence just a
5 sample of the countless accounts of these events contained in the
6 Prosecution's list of evidence and in-depth analysis chart. Proof of the
7 preparatory meetings and activities organised and conducted by Muthaura,
8 Kenyatta, and their subordinates is well-documented and supported by a
9 number of different sources.

10 The pursuance of the organisational policy can also be seen in
11 the granting of impunity by Muthaura and Ali to the main perpetrators of
12 the attacks. Mr. Ali contributed to the organisational policy created
13 and pursued by Mr. Muthaura and Mr. Kenyatta by deliberately failing to
14 have the police intervene to stop the attacks in Naivasha and Nakuru. In
15 this respect, Mr. Ali, under the direction of Mr. Muthaura, created a
16 free zone in which the crimes could occur. In our submission, Mr. Ali
17 furthered the organisational plan through affirmative steps. He actively
18 and deliberately caused the Kenyan police to stand down and provide the
19 Mungiki and pro-PNU youth space to commit the crimes and safe passage to
20 the locations for the attacks.

21 The Elements of Crimes requires that the state or organisation
22 actively promote or encourage such an attack, but it also explicitly
23 provides that such a policy may, in exceptional circumstances, be
24 implemented by deliberate failure to take action which is consciously
25 aimed at encouraging such attack.

1 The inclusion of inactions is a method of implementing policy was
2 a deliberate and careful choice made by the drafters of the Rome Statute.
3 In international law, such as the Convention Against Torture, crimes
4 against humanity could be committed in pursuit of a State policy with
5 simply the consent, consent, or acquiescence of state actors. In other
6 words, inaction was already recognised as a method of committing crimes
7 against humanity in international law.

8 So as we've stated, in our view, Mr. Ali went beyond the
9 threshold of inaction and actively pursued a policy of deliberately
10 ensuring the execution of the common plan.

11 As commissioner of police during the post-election violence, Ali
12 had responsibility over Kenya police operations, and he deliberately
13 caused the Kenyan police not to intervene during one of the most violent
14 periods in Kenyan history.

15 My colleague Ms. Lurf will deal with this in more detail when she
16 discusses the mode of liability of Mr. Ali.

17 In conclusion, your Honours, the Prosecution submits that the
18 totality of its evidence establishes substantial grounds to believe that
19 Mr. Muthaura, Mr. Kenyatta, and Mr. Ali carried out the attacks against
20 the ODM supporters in pursuance of their organisational policy to keep
21 the PNU in power through every means necessary, including the attacks
22 described.

23 I am grateful to Madam President and your Honours for your
24 attention. Barring any questions, I will proceed now to the second leg
25 on contextual element of the widespread and systematic nature of the

1 attacks.

2 Madam President, may I proceed?

3 PRESIDING JUDGE TRENDAFILOVA: Yes, of course. The floor is over
4 to you.

5 MS. ADEBOYEJO: Thank you.

6 PRESIDING JUDGE TRENDAFILOVA: It is up to you how you would like
7 to present your case.

8 MS. ADEBOYEJO: Thank you, Madam President.

9 I will now address the contextual elements which are charged as
10 crimes against humanity in the Prosecution's amended DCC.

11 Again, I reiterate that all our evidence is confidential until
12 otherwise stated.

13 To establish the contextual Elements of the Crimes charged, the
14 Prosecution must establish first that the criminal conduct was part of a
15 widespread or systematic attack directed against a civilian population,
16 and second, that the perpetrators knew that the conduct was part of, or
17 intended the conduct to be part of such an attack.

18 I will first address how the evidence establishes that the crimes
19 were committed as part of an attack against a civilian population.

20 Article 7(3) of the Elements of Crimes defines an attack directed
21 against any civilian population as a course of conduct involving the
22 commission of acts referred to in paragraph 1 against any civilian
23 population, pursuant to or in furtherance of a state or organisational
24 policy to commit such an attack.

25 This element is composed of two parts. First, that the attack

1 was committed against a civilian population; and second, that the attack
2 was committed pursuant to or in furtherance of a state or organisational
3 policy. In this presentation, the Prosecution will address that the
4 attack was directed against a civilian population.

5 The Prosecution submits that the evidence establishes reasonable
6 grounds to believe that the suspects were responsible for co-ordinated
7 attacks against the civilian population of Kenya directly perpetrated by
8 the Mungiki and PNU youth and encouraged and abetted by the failure of
9 the Kenyan police to intervene.

10 It is the Prosecution's case that from 24th to 28th January 2008,
11 the Mungiki and pro-PNU youth specifically targeted and attacked the
12 perceived pro-ODM civilian population in the Nakuru and Naivasha areas of
13 Central Province. The fact that crimes were committed against civilians
14 in Nakuru and Naivasha is not in dispute.

15 These attacks were carried out in an organised and systematic
16 manner in various areas in and around Nakuru town including Kaptembwa,
17 Kwahorda, Mwariki, Free Area, Kiti, Sewage, Ponda Mali, Barut, Kapkures
18 and so many others. In Naivasha, attacks were launched against civilians
19 in and around Naivasha town, including in estates such as Kihoto, Kabati,
20 Site, Council Kanjo, and Karagita.

21 These attacks which were specifically directed answer pro-ODM
22 supporters in Nakuru and Naivasha were conducted through the use of lists
23 and house-to-house searches to identify the specified targets who were
24 unarmed civilians. Some evidence suggests that some of the victims took
25 arms to defend themselves or were defended by armed persons from other

1 parts of Central Province. But, your Honours, the preponderance of the
2 evidence will establish that most victims could not and did not fight
3 back because they were unable to protect themselves. They were unarmed
4 and helpless civilians.

5 A series of reports after the post-election violence, such as the
6 CIPEV report, EVD-PT-OTP-0004, which is public; Human Rights Watch
7 report, "Ballots to Bullets," EVD-PT-OTP- 0002, which is public; as well
8 as the report of Kenyan National Commission on Human Rights,
9 EVD-PT-OTP-0001, public, agree on the fact that Mungiki and pro-PNU youth
10 specifically targeted local communities of Luos, Luhyas, and Kalenjins
11 who were seen as being associated with the ODM. The attackers used
12 various means to identify their targets, physical attributes. They
13 stopped them at roadblocks and asked them to speak the language. They
14 even took direction from local Mungiki members. The victims were mostly
15 targeted in their homes or businesses or while they were going about
16 their daily lives.

17 Your Honours, I would now address the concept of it being
18 widespread.

19 The evidence establishes that there are reasonable grounds to
20 believe that the crimes were widespread. Various Chambers of this court,
21 including this Chamber, have established criteria for determining whether
22 an attack is widespread. An attack is widespread where it is massive, it
23 is frequent, carried out collectively with considerable seriousness and
24 directed against a multiplicity of victims. It entails an attack carried
25 out over a large geographical area or an attack in a small geographical

1 area directed against a large number of civilians.

2 The Prosecution will provide a sample of the attacks carried out
3 in various parts of Nakuru and Naivasha to buttress its submissions.
4 These are two cities in Central Province which are approximately
5 60 kilometres away from each other.

6 Your Honours, I would direct your attention to the screen. It is
7 a flash presentation showing the map of Kenya and the hot spots of
8 violence perpetrated by the Mungiki and pro-PNU youth.

9 The first slide shows the hot spots in Naivasha town and
10 especially the clashes in estates such as Kihoto, Kabati, Site,
11 Council Kanjo, and Karagita.

12 Your Honours, although consistent figures are not available due
13 to the challenge of record-keeping during the period of the violence, the
14 Ministry of Medical Services, through the district medical officer of
15 health, provided the following figures to CIPEV: EVD-PT-OTP-0004,
16 public, at 0494. Fifty deaths were recorded alone between 27 January and
17 31st January. Post-mortems carried out at the Naivasha district hospital
18 showed the causes of the deaths to be burns, sharp object injuries and
19 gunshot injuries. Of the 50 deaths, 11 were female and 32 were Luos, an
20 indication that the members of the Luo community were particularly
21 targeted. EVD-PT-OTP-0002, public, at 0298.

22 Furthermore, Human Rights Watch indicates that over 300 houses
23 were burned and thousands of persons displaced in Naivasha alone.
24 Indeed, by the 3rd of February, 2008, the number of internally displaced
25 persons, IDPs seeking refuge at the Naivasha prison had risen to 10.000.

1 EVD-PT-OTP-0002, public, at 0298.

2 Your Honours, I will now turn to Nakuru and show from the slide
3 again the violence perpetrated in the locations I described in Nakuru.

4 Throughout the post-election violence, between 161 and 213 people
5 were killed in Nakuru including 48 killed during the night of 26 January
6 alone. At least 359 people were injured, 29 people were raped, 6 men
7 forcibly circumcised and thousands of people displaced. Based on a list
8 of reported deaths compiled by the CIPEV, at least 90 perceived ODM
9 supporters out of approximately 112 people were killed in Nakuru town
10 between 24 and 27 January 2007. EVD-PT-OTP-0004, public, at 0482, 0484,
11 0476, 0707; EVD-PT-OTP-00001, public, at 0101; EVD-PT-OTP-00228 at 0681
12 to 0690. And EVD-PT-OTP-00004, public, at 0481.

13 The considerable numbers of civilian victims, the large number of
14 internally displaced people, and the fact that they occurred over a large
15 geographical area clearly establish that the attacks were widespread.

16 I will now address the systematic nature of the attacks.

17 The evidence establishes that the crimes charged in counts 1 to
18 10 of the amended DCC of the Prosecution were systematic. The evidence
19 establishes that the Mungiki and pro-PNU youth who were the direct
20 perpetrators systematically implemented the common plan of Kenyatta and
21 Muthaura with the support of Ali and perpetrated acts of violence against
22 perceived ODM supporters in the Rift Valley Province.

23 This Chamber has defined "systematic" to mean the "organised
24 nature of the acts of violence and the improbability of their random
25 occurrence." This Chamber has also held that the attack's systematic

1 nature can be expressed "through patterns of crimes in the sense of
2 non-accidental repetition of similar criminal conduct on a regular
3 basis."

4 I will now refer to a slide of the map of Rift Valley with Nakuru
5 and Naivasha and showing the connection between the two towns.

6 The violence in Nakuru and Naivasha towns were organised.
7 Your Honours, I already presented earlier today that they were neither
8 random nor spontaneous. The main target of the attacks among the pro-ODM
9 supporters was the Luo community. This was made obvious by the
10 attackers. They used slogans like, "All Luos should go back to Nyanza."
11 "Luos should leave Naivasha." "We will finish the Luos."
12 EVD-PT-OTP-00237 at 0034, 0035, lines 117 to 173.

13 The Prosecution will submit that as part of plans to implement
14 the common plan formulated by the principal perpetrators with the support
15 of Mr. Ali, Mungiki and pro-PNU youth were paid and transported into the
16 towns in order to attack the pro-ODM supporters. Meetings and briefings
17 for the fighters before the deployment defined the strategy of the
18 attacks and identified the targets, namely the pro-ODM supporters.
19 Muthaura and Kenyatta, as you've heard, were integral to the planning
20 meetings in Nairobi, including at the State House where the plan to carry
21 out retaliatory attacks was expressed and implemented. Kenyatta provided
22 the funds for Mungiki leaders to carry out the attacks in Nakuru and
23 Naivasha. Kenyatta also held co-ordinating meetings at the local level
24 where he provided funding for the attacks conducted by the perpetrators.

25 The systematic nature of the attacks is also evidenced in how the

1 attacks were carried out. The attackers were provided with funds as an
2 incentive and as a reward for carrying out the attacks. They were
3 transported to the location of the attacks. They were equipped with
4 machetes or *pangas*. The perpetrators usually attacked in groups of ten,
5 and they were guided by local Kikuyus. They sometimes used list to
6 identify their targets, and after attacking the victims they set fire to
7 the victims' premises burning their victims. Most of the victims in
8 Nakuru and Naivasha showed injuries resulting from machete cuts or burns.

9 Witnesses who attended planning meetings were told "only Luo
10 houses should be burnt." EVD-PT-OTP-00002 at 0296, public.

11 Another witness states:

12 "I saw a Kikuyu mob led by one well-dressed man whom she did not
13 know -- recognise come to her building with a list of three Luo names.
14 They wanted to know which of the apartments belonged to the Luos."

15 EVD-PT-OTP-00002, public, at 0298.

16 Prosecution Witness 0010 states at EVD-PT-OTP-00674, at 0553,
17 that he saw four unarmed Luo men attacked, chased and cut with machetes.
18 The witness states that the Luo men were praying and crying and asking
19 not to be killed. The attackers were chanting, "Bring out the Luos.
20 Where are they? Where are they?"

21 Witness 0014 states at EVD-PT-OTP-00248 at 0051, paragraph 258:

22 "When the Kikuyu youths and Mungiki went to Nakuru and Naivasha,
23 they selected people and looked for them. They specifically targeted the
24 Luos, so I don't think one can call that self-defence. It was planned
25 and targeted violence."

1 Similarly, the Human Rights Watch report quotes a witness at
2 EVD-PT-OTP-00002, public, at 0295 and 0296, saying that there had been a
3 meeting on Wednesday, January 23, in a local hotel. The witness states:

4 "This was not done by ordinary citizens. It was arranged by
5 people with money. They bought the jobless like me. We need something
6 to eat each day. The big people at the [bus] stage, the ones who run the
7 *matatu* business, they called us to a meeting at around 2.00 p.m. They
8 said there was plan to push out the Luos because they were planning to
9 attack us they said we should be ready on Saturday. I recognised the
10 leaders. They were the owners of businesses in town. They did not hide
11 their faces. We were paid 200 shillings for going to the meeting, and we
12 were told we would get the rest after the job. It was like a business."

13 The report also states at 0298 that out of town, in the
14 settlements where the Luo migrant workers from the large commercial
15 flower farms reside, the pattern was distressingly familiar with mobs
16 burning houses, killing men, and, in one case, throwing an old man into a
17 burning building.

18 Equally, the CIPEV report states at EVD-PT-OTP-00004, public, at
19 0491, 0492, that:

20 "Consistent witness testimony and evidence tendered to the
21 commission suggest that the attacks on members of the Luo, Kalenjin, and
22 Luhya communities that started on 27 January 2008 were executed in an
23 orderly and well-planned manner by a co-ordinated group."

24 It further states at 0497 that:

25 "On 21 January, the National Security Intelligence Services

1 received precise information on part of the planned operation of violence
2 in Naivasha to the effect that Kikuyu youth in Naivasha 'plan to block
3 Nakuru-Naivasha and Gilgil-Mai-Mahiu roads and to block/intercept
4 vehicles from Western and Nyanza region to fish out the targeted
5 communities.'"

6 Madam President, your Honours, this information was corroborated
7 because it exactly happened on 27 January 2008.

8 This same pattern was used in the attacks Nakuru and Naivasha,
9 corroborating the central planning and organisation of the attacks and
10 demonstrating their systematic nature. EVD-PT-OTP-00004, public, at
11 0477; EVD-PT-OTP-00001, public, at 0092, 0093; and EVD-PT-OTP-00112,
12 confidential, at 0499.

13 Finally, your Honours, the evidence establishes that Kenyatta,
14 Muthaura, and Ali knew that their conduct was part of a widespread and
15 systematic attack against the civilian ODM supporters in the
16 Rift Valley Province.

17 First, Kenyatta, Muthaura, and Ali had knowledge and were on
18 notice about the widespread and systematic nature of the attacks against
19 civilian ODM supporters because the suspects themselves planned for the
20 attacks to be widespread and systematic.

21 As will be elaborated in the presentations on the mode of
22 liability of the suspects, it was the principal perpetrators who
23 formulated and developed the common plan to attack the pro-ODM
24 supporters. Through the consistent intelligence reports made available
25 to the suspects through the NSIS, the National Security and Intelligence

1 Services; the DSIC, the District Security Intelligence Committee; the
2 PSIC, the Provincial Security Intelligence Committee, the principal
3 perpetrators were aware and knew of the widespread and systematic nature
4 of the attacks, and rather than take steps to stop the attacks, they
5 fuelled it and saw to the execution of retaliatory attacks.

6 In conclusion, your Honours, the evidence establishes substantial
7 grounds to believe that the crimes planned and directed by Kenyatta,
8 Muthaura, and Ali were part of a widespread and systematic attack against
9 the civilian population of perceived ODM supporters in the
10 Rift Valley Province. It establishes that Muthaura, Kenyatta, and Ali
11 knew that the crimes committed by Mungiki and pro-PNU youth were part of
12 such an attack.

13 Madam President, your Honours, this concludes the Prosecution's
14 presentation on the contextual element of widespread and systematic.
15 Subject to any questions from your Honours, my friend Ms. Desiree Lurf
16 will now address you on the crimes.

17 PRESIDING JUDGE TRENDAFILOVA: Thank you, Ms. Adeboyejo. Let the
18 member of your team proceed further on.

19 MS. LURF: (* microphone not activated)... excuse me. Good
20 afternoon. On behalf of the Prosecution, I will address counts 1 and 2
21 concerning the crime of murder as a crime against humanity pursuant to
22 Article 7(1)(a) of the Rome Statute.

23 There are three elements to the crime of murder. The first is a
24 specific element and, two, are contextual elements. As my colleague
25 Ms. Adeboyejo has already presented the contextual elements, the

1 Prosecution's submission now will address only the specific elements.

2 Your Honours, the first element is the perpetrator killed one or
3 more persons.

4 The Prosecution's evidence demonstrates that the suspects acted
5 with intent and knowledge as required under Article 30. They either
6 intended death or were aware that death would occur in the ordinary
7 course of events.

8 Your Honours, according to the CIPEV final report, the total
9 number of deaths during the post-election violence in Kenya amounted to
10 1.133, of which close to two-thirds were killed in the Rift Valley. More
11 than half of those killed, amounting to almost 600, were from the
12 Kalenjin, Luhya, and Luo communities. I refer your Honours to
13 EVD-PT-OTP-00004 at 0715 to 0718. This document is public.

14 Your Honours, members of the Kalenjin, Luhya, and Luo communities
15 were targeted because they were perceived to be ODM supporters. They
16 were targeted because it was the suspects' defined goal to revenge
17 earlier attacks committed against the Kikuyu and to remain in power by
18 any means. The towns of Nakuru and Naivasha were of particular interest
19 to the suspects, because they are located on a major transit route
20 between Nairobi and Uganda and have various industries and generate a
21 strong economic revenue. Furthermore, both Nakuru and Naivasha towns are
22 ethnically dominated by Kikuyu, and thus constitute a PNU stronghold. I
23 refer your Honours to EVD-PT-OTP-00004 at 0487 to 0489.

24 Therefore, your Honours, in our submission, Nakuru and Naivasha
25 were important targets for Mr. Kenyatta, Mr. Muthaura, and Mr. Ali to

1 retain power by any means and they thus became specific targets in the
2 common plan.

3 Your Honours, let me first turn to Nakuru. In order to depict
4 the events that unfolded in Nakuru, I will quote from the final CIPEV
5 report:

6 "The wave of violence which started on 24 January, 2008, was
7 considered as the most serious. This wave took a more planned and
8 systematic nature."

9 EVD-PT-OTP-00004 at 0473. This is public.

10 The second wave of violence from 24 to 27 January 2008
11 constituted organised retaliatory attacks carried out by gangs of Mungiki
12 and PNU youths against perceived ODM supporters such as the Kalenjin, Luo
13 and Luhya. The attackers carried crude weapons such as machetes also
14 referred to as *panga*, and wooden clubs called *rungus*.

15 As Human Rights Watch reports, and I quote:

16 "On January 25, large numbers of armed Kikuyu man carrying
17 *pangas*, knives, and petrol bombs attacked non-Kikuyu homes in several
18 different areas of Nakuru town."

19 EVD-PT-OTP-00002 at 0300. And this is corroborated by the KNCHR
20 report, EVD-PT-OTP-00001 at 0093, and the CIPEV report at
21 EVD-PT-OTP-00004 at 0476. All these reports are public, your Honours.

22 The violence resulted in many killings. The numbers have just
23 been presented by my colleague Ms. Adeboyejo, and I will therefore
24 state -- I will refrain from repeating the numbers, but it suffices to
25 say that CIPEV reports that out 112 deaths, approximately 90 were

1 perceived ODM supporters.

2 Your Honours, witnesses describe the killings in detail. One
3 CIPEV witness, a Kikuyu youth, who was called to fight in Nakuru, he
4 explains how his group encountered a Kalenjin youth:

5 "We cornered one of them. He confessed and said, 'Actually, I
6 was just pushed and paid to fight.' He was asking for forgiveness.
7 Although in fact we just killed him anyway. He said he was a standard
8 eight pupil. This year he was supposed to go to form one, the first year
9 of secondary school."

10 I quote from EVD-PT-OTP-00002 at 0301 to 0302. This is public.

11 Another witness interviewed by Human Rights Watch explained how
12 he watched a man being brutally killed:

13 "The man was 50 or 60 years old. They saw him on the road and
14 started yelling 'Luo, Luo.' They seized him and first removed all his
15 clothes. Then several people lifted him up and one grabbed his penis and
16 another one circumcised him with his *panga*. They then dropped the old
17 man on the ground and started hacking him and then cut his head off.
18 Nobody dared to help him."

19 EVD-PT-OTP-00002 at 0300 to 0301. It's public.

20 Your Honours, we now turn to Naivasha.

21 On the morning of January 27 2008, Naivasha was burning.
22 Violence broke out all over town in an orderly and well-planned manner.
23 Once the people were freed of police reinforcements in the form of prison
24 guards, large groups of Kikuyu demonstrators deployed simultaneously in
25 different places of town. They set up barricades and check-points and

1 targeted perceived ODM supporters. EVD-PT-OTP-00004 at 0492 to 0493.
2 This is public. Once they could identify the Luos, Luhyas or Kalenjins,
3 they killed them.

4 Your Honours, at the same time additional Mungiki forces arrived
5 in Naivasha to carry out the attack. Witness 0010 was part of such a
6 Mungiki reinforcement. He describes how he was among those Mungiki that
7 attacked Naivasha. He was transported from the Nairobi State House in a
8 military truck together with 30 to 40 other Mungiki and bags of brand new
9 machetes as well as wooden clubs and other weapons. In Naivasha, they
10 were separated into groups of 10 and instructed to mix with the local
11 Kikuyu. The locals helped identify the Luo and the group attacked them
12 with machetes. To the witness, this appeared to be an organised
13 massacre.

14 The witness group attacked four unarmed Luo men and struck them
15 with machetes while chanting "Bring the Luos out." EVD-PT-OTP-00674 at
16 0552, 0553. This is confidential.

17 Witness 0012 saw groups of people varying from 50 to 200 setting
18 up roadblocks in Naivasha town. He identified those people barricading
19 roadblocks as Mungiki members or Kikuyu, Embu and Meru who were armed
20 with crude weapons such as *rungus*, *pangas*, metal bars or stones. He saw
21 how these people concentrated on the roads, checked vehicles for Luos, or
22 Kalenjins, and if they found them they would kick them out of the car,
23 clobber and kill them. EVD-PT-OTP-00672 at 0514 to 0519. This is
24 confidential.

25 On 27 of January in Naivasha, Witness 0002 received a phone call

1 from a friend who had just witnessed a man being killed on a roadblock.

2 Your Honours, the slide depicts a photograph taken from the
3 witness's friend and this can be found at EVD-PT-OTP-00142 at 0020.

4 Witness 0002 states:

5 "And he told me that he was at Nairobi-Naivasha highway and he
6 told me things were very bad. People, *matatus*," those are the buses,
7 "were being flagged down and people made to identify themselves, and he
8 told me right now a man, a man had been murdered there. Even when
9 talking to him, he sounded shaken."

10 EVD-PT-OTP-00236 at 0026. This is confidential.

11 Further, Witness 0002 explains:

12 "The man was travelling to Nairobi -- the man was travelling to
13 Nairobi on the Nairobi-Nakuru highway when the public vehicle was stopped
14 by the killer mob. He was forced to identify himself, and when the mob
15 realised that he was from the wrong tribe, they set on him."

16 The next photo depicts what happened to him afterwards, and the
17 witness states:

18 "A few minutes later he lay on the highway, murdered."

19 EVD-PT-OTP-00142, 0020 to 0021. This is confidential.

20 Witness 0002 also witnessed a Luo fleeing to the police station
21 and being killed by Kikuyu on the street. I quote:

22 "I saw a crowd of people going on that direction, so I got
23 curious and decided to follow. When I reached there, people were running
24 after a Luo. So when I got to where the other were, the man had already
25 been felled down, and he was bleeding from his neck. People were saying,

1 'Luos, all Luos must go. We don't want to have any Luos or Kalenjins
2 here.' So the others who went -- the others who went there first felled
3 him and cut his throat. So we just went there and looked at him. He had
4 not died. It took -- it took some time for him to die."

5 EVD-PT-OTP-00237, 0034 to 0035. This is confidential.

6 A CIPEV witness described how she found her brother, and I quote:

7 "On arriving there I found a crowd of people, including policemen
8 who were standing nearby but at a distance. They did not look bothered.
9 I found that his, my brother's, penis had been cut and placed in his
10 mouth. His testes were chopped off and placed in his hand. I found
11 blood was still pouring out of his body and he was kicking as he was
12 dying."

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

14 Witness 0002 also provides direct evidence on a particular tragic
15 incident that occurred in Naivasha on 27 January 2008. It was widely
16 reported because it killed 19 women and children who were burnt to death
17 in a house in Kabati estate, Naivasha, in which they had sought refuge.
18 In the slides, your Honours can see an image of the house. It is a still
19 taken from a video with the EVD number EVD-PT-OTP-00155, at time-stamp
20 12:41.

21 The Mungiki mob that attacked these people, poured petrol on the
22 house, set it on fire and completely destroyed it. Six women were burnt
23 to death together with 13 children. One of the mothers was eight-months
24 pregnant. EVD-PT-OTP-00242 at 0237-0238. It is confidential. And
25 EVD-PT-OTP-00239 at 0082. It's equally confidential.

1 The second picture is an image of the charcoaled bodies you can
2 see, and that is a still taken from the same video I had mentioned
3 earlier at time-stamp 12:34. This has been widely reported and
4 corroborated by the accounts of the father and the husband of two wives
5 and eight children that were burnt that day. He gave his testimony and
6 it can be found at EVD-PT-OTP-00218 at 1337 to 1339. It is confidential.
7 As well as the account of the mother who had lost her three children in
8 the same incident. That is EVD-PT-OTP-00218 at 1343. This is also
9 confidential. Both testified as CIPEV witnesses.

10 Your Honours, the statistics of those who died in Naivasha had
11 been presented by my colleague Ms. Adeboyejo. Out of approximately
12 50 dead, 32 were presumed to be ODM supporters.

13 The post-mortems carried out at the Naivasha District Hospital
14 showed that the main causes of death were burns, 22 people; and
15 sharp-object injuries, 19.

16 Witness 0002 provides evidence of the nature of the fatal
17 injuries of 45 bodies which witness inspected in a morgue in Naivasha. I
18 refer your Honours to EVD-PT-OTP-00239 at 0083 to 0084. This is
19 confidential.

20 Your Honours, these attacks were by no means random occurrences,
21 but instead they constitute the implementation of the common plan adopted
22 by Mr. Muthaura and Mr. Kenyatta with the contribution of Mr. Ali. This
23 shows the knowledge and intent of the suspects. It is only a logical
24 consequence for the suspects to have foreseen that death would occur in
25 the ordinary course of events.

1 Your Honours, all of this evidence, when viewed together as a
2 whole, establishes that the principal perpetrators together with Ali
3 anticipated that perceived ODM supporters would be killed in the
4 execution of the common plan, and equipped perpetrators mentally and
5 physically to do this.

6 Your Honours, the select evidence I have just referred are
7 illustrative examples of a wide phenomenon of killings committed by the
8 principal perpetrators and Ali in Naivasha and Nakuru. It is the
9 Prosecution's submission, your Honours, that the evidence included in the
10 Prosecution's amended list of evidence and in-depth analysis chart
11 establishes substantial grounds to believe that the principal
12 perpetrators, Francis Muthaura and Uhuru Kenyatta, together with
13 Mohammed Hussein Ali, acting with a common purpose killed one or more
14 persons.

15 Thank you, Madam President, your Honours, this concludes my
16 presentation on murder.

17 PRESIDING JUDGE TRENDAFILOVA: Thank you.

18 Who will proceed, Ms. Adeboyejo? Ms. Lurf still? Go ahead.

19 MS. LURF: With your leave, Madam President, I will continue with
20 the next presentation, and I forgot to point out earlier that the
21 presentations are accompanied by slide shows so that if somebody wants to
22 change the screen setting, they should please do so.

23 I will now address --

24 COURT OFFICER: Excuse me, counsel. Just for the record, I would
25 like to indicate that to continue reading the slides, I would advise that

1 you remain on channel "PC 1." Thank you.

2 MS. LURF: Thank you. I will now address counts 3 and 4 of the
3 Prosecution's charges on the crime of forcible transfer of population
4 under Article 7(1)(d) of the Rome Statute. For ease of reference, I will
5 refer to the crime as forcible displacement throughout my presentation.

6 Your Honours, the crime forcible displacement has five elements
7 as are now depicted on the screen. I will be addressing only the first
8 three since my colleague Ms. Adeboyejo has already dealt with the
9 contextual elements.

10 Madam President, your Honours, the Prosecution will establish
11 substantial grounds to believe that Mr. Kenyatta and Mr. Muthaura, with
12 the help of Mr. Ali, adopted an organisational policy to retain power by
13 any means, including by forcibly displacing perceived ODM supporters.

14 The first element of the crime of forcible displacement is that
15 the perpetrator forcibly transferred, without grounds permitted under
16 international law, one or more persons to another State or location by
17 expulsion or other coercive acts.

18 The Elements of Crimes state that the term "forcibly" is not
19 restricted to physical force but may include threat of force or coercion
20 caused by fear of violence.

21 Your Honours, forcible displacement is the crime with the highest
22 number of victims as a result of the 2008 post-election violence in
23 Kenya.

24 MR. KHAN: I do apologise. I do apologise. Madam President, I
25 know my learned friend says that for sake of convenience she's going to

1 refer to forcible transfer as forcible displacement, now, your Honour, I
2 don't think it's any easier to refer to it like that. What I'd ask for,
3 given that it's a clearly enumerated offence in the Statute, that the
4 statutory offence is referred to, not another one, the scope of which is
5 unknown. I don't think it's shorthand. It's just as easy to say
6 forcible transfer as forcible displacement. In fact, it's even shorter.
7 So I think specificities and accuracy is the order of the day. That's my
8 application, your Honour.

9 PRESIDING JUDGE TRENDAFILOVA: Actually, your suggestion is that
10 the language of the law is used.

11 MR. KHAN: Indeed. Indeed.

12 PRESIDING JUDGE TRENDAFILOVA: Yes. It's a valid proposal.

13 MR. KHAN: Indeed. I'm grateful.

14 PRESIDING JUDGE TRENDAFILOVA: Would you adhere to the language
15 of the law.

16 MS. LURF: Yes, your Honour.

17 PRESIDING JUDGE TRENDAFILOVA: The wording.

18 MS. LURF: I would like to state that it is actually the Elements
19 of Crimes in the footnote that suggests that the term "deported" or
20 "forcible displacement" is interchangeable with the "forcibly displaced."

21 PRESIDING JUDGE TRENDAFILOVA: Yes, yes, this is true, but if
22 this is the preference of the Defence. You can use the wording of the
23 Rome Statute.

24 MS. LURF: If that is the wish of the Court, I will -- I will
25 address the crime as forcible transfer, your Honours.

1 PRESIDING JUDGE TRENDAFILOVA: The Court doesn't have a problem
2 that you use the wording of the law, the Rome Statute, and the
3 Elements of Crime.

4 MS. LURF: The first element, I have just addressed it, and also
5 the definition of "forcible," which concludes that the force or coercion
6 may be caused by fear of violence.

7 Your Honours, forcible displacement, as I mentioned, is the
8 crime -- excuse me, forcible transfer is the crime with the highest
9 number of victims as a result of the 2008 post-election violence in
10 Kenya. I refer to EVD-PT-OTP-00002 at 0252.

11 The large majority of those internally displaced came from the
12 Rift Valley. EVD-PT-OTP-00256 at 0245. These are both public documents.

13 At Naivasha, the Mungiki and PNU youth displaced more than 9.000
14 perceived ODM supporters during the attacks in the last week of January
15 alone. EVD-PT-OTP-00238 at 0065 to 0066. This is a confidential
16 document.

17 Your Honours, the attacks were no sporadic incidents. They were
18 planned and organised. They were orchestrated to create a state of fear
19 and coercion amongst the perceived ODM supporters who were left with no
20 choice but to flee.

21 Witness 0002 describes the situation in Naivasha on the morning
22 of 27 January 2008, and I quote:

23 "I thought that it was something that was organised, because
24 things happened very fast, all at the same time, because immediately the
25 Do left here, people started burning these things. Kabati, we started

1 seeing fire, and people are being killed on the highway. So it just felt
2 that things were happening at the same time. Naivasha started burning.
3 All the fires were burning at the same time."

4 EVD-PT-OTP-00236 at 00237, confidential.

5 The witnesses clarified that houses belonging -- excuse me. This
6 witness clarified that houses belonging to Kikuyu were spared since Luo
7 were targeted and their belongings burnt. For instance, the plot at
8 Kabati estate to which I referred earlier where 19 people were killed
9 according to the witness was owned by * a Kisii boy, who was thought
10 to be a Luo. EVD-PT-OTP-00242 at 0237, 0241. This is confidential.

11 * A Kisii boy in elementary school whose home was burnt by
12 mistake explains, and I quote:

13 "Their plan was to destroy. They were looking for Luo houses,
14 only Luo. They just asked people who was living in each house. They had
15 some local boys who knew which houses to burn."

16 EVD-PT-OTP-00002 at 0297. This is public.

17 Witness 0010, a Mungiki, who himself participated in the Naivasha
18 attacks, described the atmosphere during the attacks:

19 "There were riots everywhere. The Kikuyu and the Mungiki wanted
20 to make people afraid."

21 EVD-PT-OTP-00674 at 0552, confidential.

22 Another witness present during the violence in Naivasha, explains
23 how that fear was triggered through violence and I quote from the
24 summary:

25 "Groups of youth armed with weapons like *panga*, *rungu*, and metal

1 bars went around the estates looking for Luo and Kalenjin. These youth
2 were destroying property belonging to these ethnic groups. The members
3 of these groups were forced to flee their homes."

4 EVD-PT-OTP-00607 at 0221. This is confidential.

5 Your Honours, a photograph that is currently depicted on the
6 slide is provided by Witness 0002 and it shows an angry mob wielding
7 sticks. The reference is EVD-PT-OTP-00672 at 0046.

8 Madam President, your Honours, there can be no doubt that these
9 attacks instilled fear within the target community. Witness 0002
10 describes how the Luo and Kalenjin were evicted from their homes, and I
11 quote:

12 "A group of people, like about 200 people, were coming, shouting,
13 'Get out, get out, get out,' and that's when they would get out. And
14 then after they got out, these other people started chasing them. The
15 Kikuyus now would start chasing them. So whoever was not fast enough was
16 felled down."

17 EVD-PT-OTP-00242 at 0242, confidential.

18 Your Honours, all these examples shown the magnitude of the
19 attacks aimed at perceived ODM supporters. The Luo, Luhya, and Kalenjin
20 had to fear not only for their property but for their lives. It was this
21 state of fear and coercion that forced them to flee and displaced them.

22 Some of the conscious acts to instill fear in the population were
23 set weeks before the attacks, and I quote from a situation report -- no,
24 excuse me. I -- I quote from the statement of a witness:

25 "After the election, members of the community received leaflets

1 asking Luos to leave Naivasha and return to Luo land. This is explained
2 by a witness who when the violence started in Naivasha on 27th January,
3 2008, received information that the Kikuyu had started killing Luo in
4 Kabati and were on their way to Kyoto. As a result, the witness feared
5 for the safety of his family and made arrangements for them to go to the
6 Naivasha Policed Station. Around midday a group of Kikuyu youth armed
7 with machetes started moving from house to house looking for Luos. The
8 witness managed to escape and sought refuge in the
9 Naivasha Policed Station. EVD-PT-OTP-00593 at 0152. This is
10 confidential.

11 In a similar account, a witness was informed by a neighbour that
12 five Luo were killed in Kabati. The witness then sent his family away as
13 he feared for their safety. EVD-PT-OTP-00578, 0042. This is
14 confidential.

15 Your Honours, those that were forced to flee -- excuse me. Those
16 that were forced to flee their homes in fear of violence gathered at the
17 central police station in Naivasha or the prison together with thousands
18 of other internally displaced persons. These first places were
19 inadequately equipped and provided no sanitary facilities. A
20 displacement camp, the Kedong IDP camp, was later set up to accommodate
21 the displaced Luo, Luhya, and Kalenjins from Naivasha. And I refer your
22 Honours to the CIPEV final report at EVD-PT-OTP-00004 at 0651. It's
23 public. And EVD-PT-OTP-00604, which is confidential.

24 Your Honours, the displaced fled to the police station and the
25 prison compound because these were places that under normal circumstances

1 they considered to be safe just like churches. However, persons staying
2 at the police station Naivasha report that they were staying there under
3 terrible conditions and a constant threat of being attacked.

4 EVD-PT-OTP-00593. This is confidential.

5 CIPEV reports, and I quote:

6 "The central police station Naivasha was not equipped withstand
7 station facilities to handle some estimated 8.000 IDPs. And the number
8 of non-Kikuyu IDPs seeking refuge at the Naivasha prison eventually rose
9 to 10.000 by the 3rd of February, 2008 ."

10 EVD-PT-OTP-00004 at 0494. It is public.

11 The number corroborate -- the corroboration for the number of
12 IDPs at Naivasha is also found in EVD-PT-OTP-00333 at 1776 and 1777. And
13 the information on the living conditions and the number of displaced
14 persons in the police station is also corroborated by Witness 0002 at
15 EVD-PT-OTP-00238 at 0065 to 0066. It's confidential.

16 Your Honours, the crime of forcible displacement is completed as
17 soon as the person is expelled or driven out from their home. Although
18 the suspects' ultimate goal was to displace perceived ODM supports
19 including members of the Luo, Luhya, and Kalenjin communities beyond
20 Rift Valley, the fact that the IDM -- IDPs were temporarily gathered in
21 IDP camps in Naivasha does not render this displacement moot.

22 Madam President, your Honours. Let me now turn to Nakuru.

23 According to the CIPEV report, the attacks in Nakuru were
24 launched during the night of 24 January and lasted until
25 27th January 2008. They were launched by the Mungiki and PNU youths to

1 evict perceived ODM supporters, including members of the Luo, Luhya, and
2 Kalenjin ethnic groups. EVD-PT-OTP-0004 at 0476. This is public.

3 As described by the Office of the High Commissioner for Human
4 Rights and, I quote:

5 "The attacks in Nakuru mirrored those in Naivasha town and seems
6 to have involved the same group of alleged Mungiki militiamen. Two
7 Kikuyu leaders from Naivasha reported that a regional political figure
8 from their community had sent some recruiting agents among the youths
9 allegedly to avenge the Kikuyu community through targeted attacks against
10 the Luo in Naivasha. Some of the young men who participated in the
11 Nakuru and Naivasha attacks had been assisted by Mungiki who allegedly
12 came from Nairobi. They also stated that a co-ordination meeting had
13 been organised before the attacks with wealthy individuals of Nakuru's
14 Kikuyu community. I refer your Honours to EVD-PT-OTP-00008 at 1066.
15 This is public.

16 Similarly as in Naivasha, in Nakuru the suspects, together with
17 local PNU politicians and Mungiki leaders were responsible for planning
18 and co-ordinating the attacks. EVD-PT-OTP-00248 at 0040 to 0041.
19 Confidential.

20 Your Honours have heard details about the organisation and the
21 policy in the earlier presentation. You have heard details about the
22 hierarchical structure within the Kenyan National Security Intelligence
23 Services which include regular reporting to Ali, Mr. Ali, and
24 Mr. Muthaura of situation reports. One example of such information
25 received weeks prior to the Nakuru attacks on 9 January 2008 details the

1 fear of imminent attacked perceived by communities of ODM supporters, and

2 I quote:

3 "Tension is hastening among the Kalenjin, Luhya and Luo
4 communities residing in Shabab and Langa Langa estates in Nakuru town
5 following speculation that Mungiki members would attack them between 9
6 and 11th of January 2008. The situation has been made worse by SMS
7 messages warning members of the communities of an impending attack by
8 Mungiki dressed in police gear."

9 This is EVD-PT-OTP-00013 at 0065. It is confidential.

10 Your Honours, these attacks occurred. EVD-PT-OTP-00013 at 0043,
11 also confidential.

12 The suspects knew of these attacks since they had planned them
13 further to their own policies. The security reports gave them further
14 notice of what was actually happening, yet in response to these security
15 reports, instead of alleviating the fear of certain communities and
16 reinforcing police, the suspects used their authority to ensure that the
17 police would not intervene and knowingly created a free zone where crimes
18 against humanity could be perpetrated.

19 A witness describes the circumstances of her forcible
20 displacement in Nakuru, and I quote from a summary:

21 "Luos were asked to leave Nakuru. After results of the
22 presidential election were announced, people were fighting and looting.
23 Mungiki were walking around telling people that non-Kikuyus must go."

24 The witness was later raped by armed people who broke into her
25 house and looted her property. The witness was displaced from her home.

1 EVD-PT-OTP-00596. This is confidential.

2 A similar account is provided by another witness, and I refer
3 your Honours to EVD-PT-OTP-00610, which is also confidential.

4 Your Honours will hear further examples and further accounts of
5 female rape victims who were displaced from their homes which my
6 colleague Ms. Adeboyejo will address in her presentation on rape. These
7 victims were displaced due to the violence they suffered, sometimes also
8 due to the stigmatisation by their communities.

9 According to the CIPEV final report, those displaced in Nakuru
10 town were initially taken to the police quarters at Kasarani and the
11 central police station and thereafter relocated. Depending on their
12 ethnicity, the Luos, Luhyas, Kisiis, and a few Kalenjin were accommodated
13 at the Afraha stadium IDP camp while the mostly Kikuyu IDPs stayed at the
14 Nakuru ASK show grounds.

15 The forcible displacement of perceived ODM supporters was not
16 merely a consequence of the attacks. Rather, the forceable displacement
17 was a specific goal of Mr. Kenyatta, Mr. Muthaura, and Ali. The ultimate
18 goal was for the Luo to be displaced. Attackers were heard saying, and
19 in this case while stabbing and beating a Luo to death, and I quote from
20 Witness's 0002's account:

21 "The Luos must go. The Luo and Kalenjin must go. Yeah. And
22 they must make sure that no Luo or Kalenjin lives again in Naivasha."

23 I refer your Honours to EVD-PT-OTP-0023 at 0037 to 0038. It is
24 confidential.

25 The suspects not only knew that the displacement would take

1 place, they intended it. It was the suspects' recognised policy to
2 penalise perceived ODM supporters in Nakuru and Naivasha through
3 retaliatory attacks to maintain the PNU and Kikuyu influence in this
4 economically important part of the Rift Valley.

5 I will now move to the second and the third elements of the crime
6 of deportation or forcible displacement.

7 PRESIDING JUDGE TRENDAFILOVA: Ms. Lurf, I'm looking at the
8 clock. How much time do you need to finalise the element or you can
9 resume after the break.

10 MS. LURF: I would need about seven to eight more minutes,
11 your Honour. So I --

12 PRESIDING JUDGE TRENDAFILOVA: Let us suspend the hearing, make a
13 break, and thereafter we shall resume at --

14 MS. LURF: It's a good time to stop. Thank you.

15 PRESIDING JUDGE TRENDAFILOVA: -- 6.30.

16 COURT USHER: All rise.

17 Recess taken at 5.59 a.m.

18 On resuming at 6.30 p.m.

19 (Open session)

20 COURT USHER: All rise.

21 PRESIDING JUDGE TRENDAFILOVA: Please be seated.

22 Ms. Lurf, please proceed with your presentation.

23 MS. LURF: Your Honour, I've finished with the first Elements of
24 the Crimes, namely that the perpetrator forcibly transferred without
25 grounds permitted under international law one or more persons by

1 expulsion or other coercive acts.

2 With your leave, I will now turn to the elements 2 and 3, which
3 are depicted on the slide currently. These elements are second, that
4 such person or persons were lawfully present in the area from which they
5 were so deported or transferred, and third, that the perpetrator was
6 aware of the factual circumstances that established the lawfulness of
7 such presence.

8 Madam President, your Honours, because of the factual overlap of
9 these elements, I shall address them together.

10 The Prosecution submits that the evidence establishes that
11 perceived ODM supporters who were driven from their homes were lawfully
12 present and that the direct perpetrators, as well as Mr. Kenyatta,
13 Mr. Muthaura, and Mr. Ali knew this fact. The displaced persons were
14 legally present and had been living on their plots of land, in their
15 houses and their rental units, oftentimes for many years. Witness 0002
16 and other witnesses provide evidence that some of the now displaced Luos
17 had been living in Naivasha for many years. I refer your Honours to
18 EVD-PT-OTP-00241 at 0211 and to EVD-PT-OTP-00599 at 0164. Both are
19 confidential.

20 Witness 0010 also explains how, and I quote:

21 "Many Luos were renting apartments in Naivasha since they were
22 living there as hired-help workers in the flower farms."

23 EVD-PT-OTP-00674 at page 0552. This is confidential.

24 Your Honours the evidence shows that some Kikuyu landlords took
25 advantage of the violence at that occurred to evict their Luo tenants.

1 Others were instigated by local politicians to do so. EVD-PT-OTP-00001
2 at 0234. This is a public document.

3 And some evicted the Luo anticipating that the Mungiki would wage
4 violence and destructive attacks against their property.

5 EVD-PT-OTP-00004 at 0590. This is public.

6 Witness 0002 describes such an incident:

7 "I met some Kikuyu neighbours who told me to call the Luo
8 neighbour. They told me call you little friend and tell him to remove
9 his family from his flat because he will put everybody at risk."

10 EVD-PT-OTP-00237. This is confidential. At 0032.

11 Another Witness stated that, and I quote:

12 "Kikuyu landlords sent agents to evict Luos from their houses
13 because it was rumoured that houses hosting Luos would be burnt."

14 EVD-PT-OTP-00600, and this is confidential.

15 Your Honours, the Prosecution submits that the evidence shows
16 that the perceived ODM supporters were driven out of their homes which
17 they legally occupied. The evidence further establishes that the
18 suspects, together with local PNU politicians, the Mungiki, and PNU
19 youths specifically targeted the properties believed to be owned by Luo
20 and ODM supporters including the Luo and Kalenjin with the ultimate goal
21 to drive them out of Naivasha and Nakuru.

22 To identify their targets, the perpetrators engaged the help of
23 local Kikuyu who knew not only the ethnic origin of their neighbours,
24 their business partners, or their tenants, but they also knew of the
25 lawfulness of their presence. A witness who lived in Naivasha during the

1 PEV stated:

2 "The Kikuyu were identifying houses belonging to the Luo. They
3 had a list of the door numbers of plots where Luos lived."

4 EVD-PT-OTP-00600. This is confidential.

5 The Prosecution submits that the evidence establishes that
6 perceived ODM supporters including the Luo, Luhya, and Kalenjin had been
7 lawfully been present from where they were evicted and that Mr. Kenyatta,
8 Mr. Muthaura, and Mr. Ali knew this fact.

9 Nonetheless, it was the perpetrators' common plan to displace the
10 Luo, Luhya, and Kalenjin, to retaliate and to maintain influence over the
11 region by any means.

12 Your Honours, Madam President, the Prosecution submits that this
13 satisfies elements two and three. Together with the evidence presented
14 on the *actus reus* of the crime of forcible displacement, the Prosecution
15 submits that there are substantial grounds to believe that Mr. Kenyatta,
16 Mr. Muthaura together with Mr. Ali and others forcibly displaced one or
17 more persons. Additionally, the evidence establishes that the subjective
18 element which requires both intent and knowledge under Article 30 of the
19 Rome Statute was present for all suspects. The modes of liability
20 underpinning the criminal responsibility of the suspects will be covered
21 by my colleagues in later submissions.

22 Your Honours, this concludes the Prosecution's submission on the
23 charges of forcible transfer of population. Thank you very much.

24 PRESIDING JUDGE TRENDAFILOVA: Thank you very much indeed,
25 Ms. Lurf.

1 We shall proceed with the rest of the counts. Before the Chamber
2 was to enter the courtroom, we were told that Mr. Khan has a procedural
3 issues.

4 Mr. Khan, with all our sympathy and respect for you, I would like
5 to say that the Judges agree that yesterday you had the ample opportunity
6 to address procedural issues and we wouldn't like constantly to interrupt
7 the Prosecutor's team with procedural issues unless it is an urgent
8 matter that needs an immediate solution by the Chamber.

9 MR. KHAN: Madam President, I'm of course alive to your
10 injunction. It's raised now really out of assistance to the Prosecution.
11 It arises out of yesterday. The Prosecution mentioned that they would
12 like the opportunity to ask questions to Ambassador Muthaura, and
13 your Honours made a ruling on that issue. Your Honours, I'm putting
14 forward an application now.

15 Your Honours, under the schedule bearing in mind the competing
16 concerns that were articulated, the right to an expeditious trial and
17 others, allocated a schedule and we were given 30 minutes to re-examine
18 our two witnesses. Your Honours, I've spoken to the other suspects in
19 this case and their legal representatives regarding their right to an
20 expeditious trial, and I'm putting forward a proposal that will not
21 hopefully necessitate any additional time to this confirmation
22 proceedings, but it is a proposal that in my respectful submission will
23 assist your Honours to get to the truth in this matter, and it's one that
24 I'm sure my learned friends will support because it arose spontaneously
25 out of their own request.

1 What I'm suggesting is that we will limit ourselves to a maximum
2 of 15 minutes re-examination in relation to the two witnesses we're
3 calling. The half an hour saving I give to the Prosecution. They can,
4 of course, with your leave give additional time. They can save from
5 their presentation tomorrow and on Monday so they have time to prepare or
6 tomorrow if they wish to cross-examine, but if they wish time to prepare
7 on Monday, I'm proposing that Ambassador Muthaura be called, tendered. I
8 will ask no questions. I will ask no questions. Just tender him for
9 cross-examination. He can adopt his unsworn statement and let the
10 Prosecution ask questions that they failed to put to him when he was in
11 Nairobi and when they were investigating.

12 Your Honours, the ultimate purpose of this hearing is not a rush
13 to the finish line. It is to assess the evidence, and the Prosecution
14 themselves have raised the issue of asking questions to
15 Ambassador Muthaura. We did not balk or back off that request.
16 Immediately we offered that he could be cross-examined. The proposal now
17 out of our own time, out of our own time that has been given to us, we
18 are offering to give it to the Prosecution, so your Honours can see
19 without preparation how Ambassador Muthaura fares. And so your Honours
20 can best determine, which is the ultimate obligation, can best determine
21 the truth. That's my application, your Honour. And I raise it now
22 simply so the Prosecution have time to prepare.

23 PRESIDING JUDGE TRENDAFILOVA: Mr. Khan, I have to say that I'm
24 very much astonished about the moment that you're choosing to make your
25 application. We are in the middle of the Prosecutor presenting his case,

1 and I think that this request could have been done at the end of the
2 third session today. I wouldn't like that we constantly interrupt the
3 Office of the Prosecutor when they're presenting their case, and second,
4 it is not up to your agreement that Ambassador Muthaura, as you say, is
5 cross-examined by the Prosecutor. It is the principal approach of this
6 Chamber that when a suspect or an accused enjoys the right pursuant to
7 Article 67(1)(h) to make an unsworn statement in his defence the person
8 is not going to be cross-examined. If suspect Muthaura would like to
9 further on make a testimony, it's another question. We're going to
10 proceed accordingly.

11 So I do not find this to be such an urgent procedural matter that
12 needed an immediate resolution, and I would like to give the floor to
13 Ms. Adeboyejo.

14 And please, only if an issue that cannot be resolved immediately,
15 let us be patient. Let us be polite to the opposite party as I'm going
16 to request them to equally respect all the Defence teams.

17 MR. KHAN: Madam President, I of course will conduct myself
18 accordingly, but it's only fair. The reason I raised this issue, I did
19 ask the Court Officer that I would raise it after the Prosecution had
20 finished that component of the presentation, and the -- your Honour, I
21 must be allowed to finish with the greatest of respect. The reason I
22 raise it at that point was so -- I see the Prosecutor is not in court, it
23 would give the Prosecution time to take instructions on the matter and so
24 that tomorrow they can also conduct themselves appropriately if they
25 needed to have more time to cross-examine the ambassador. That's the

1 reason I raise it at the moment.

2 The second is, your Honour, I'm not seeking for the ambassador to
3 be cross-examined on an unsworn statement. What I was proposing, because
4 there is no magic in two witnesses -- what I was proposing is out of my
5 time that's been given to me to best present my case, and your Honour in
6 her decision said we know as professional lawyers of experience how to
7 present our case, I'm giving that time up to the Prosecution and I will
8 tender him as a witness under oath for cross-examination. Your Honours,
9 that was the application.

10 PRESIDING JUDGE TRENDAFILOVA: Mr. Khan --

11 MR. KHAN: No discourtesy was intended at all.

12 PRESIDING JUDGE TRENDAFILOVA: I think that we have already ruled
13 on this, and let us proceed with the presentation of Ms. Adeboyejo.

14 MR. KHAN: Your Honour, so be it.

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

16 The Prosecution's submission is on rape and other forms of sexual
17 violence as a crime against humanity, counts 5 and 6 in our Amended
18 Document Containing the Charges.

19 During this presentation, your Honours, I will lead you through a
20 selection of the Prosecution's core evidence on this crime. The evidence
21 will establish that the crimes of rape and other forms of sexual violence
22 were a tool used to retaliate and expel perceived ODM supporters from the
23 Rift Valley Province. The evidence will show that rapes were carried out
24 in homes, in the streets, in the open and public arenas by means of
25 violence or the threats of violence.

1 The Prosecution wishes to highlight the gender dimension of this
2 disaster. Sexual violence is aimed at creating a specific impact by
3 destroying both individuals and an entire community's social structure.
4 In committing rape and mutilation of genital organs, individuals are
5 assaulted and wounded in ways that are socially gendered, in their
6 identities as women and men as such, and in the social roles that they
7 occupy, identify with, and anticipate filling as gendered members of
8 their communities. Women who were gang-raped were violated, humiliated,
9 desecrated so as to lower their status and deprive them of their dignity
10 and equality as human beings and, for some of them, to reduce their value
11 as wives or potential wives.

12 Men who were castrated were deprived of their manhood and debased
13 in front of their families.

14 Your Honours, the victims were objectified. They were called
15 derogatory names even as their bodies were penetrated. These invasions
16 of their bodies were committed using force or threats of force or
17 coercion and in some cases resulted in the victim becoming pregnant
18 and/or HIV infected.

19 Your Honours, I will start with the witness who was gang-raped in
20 Naivasha. I will rely on a slide of a map of Naivasha. My colleague
21 will assist me.

22 This witness recounts her traumatic experience as follows, and I
23 quote:

24 "They threw me to the ground and tore off my clothes. The one
25 who reached me first raped me first, and another started, and then

1 another. And one of them told me in Kikuyu: You dog, go. But then she
2 said -- but then said she was good, she was polite. Let's not kill this
3 one. So you go, you dog. They were chasing me as I went. There were
4 five of them. I walked slowly to my home. I didn't know what to do.
5 The way my body was feeling, I felt that I lost my mind."

6 EVD-PT-OTP-00300.

7 Your Honours, her account is corroborated by the Federation of
8 Women Lawyers Association Kenya branch report which took testimonies
9 covering numerous cases of rape in Nakuru and Naivasha. It's a public
10 document, EVD-PT-OTP-00011.

11 In presenting the accounts of rape in Nakuru, I will start with
12 an overview witness, Prosecution Witness 0007, referred to in
13 EVD-PT-OTP-00341. She worked extensively in the field of women's rights
14 and has focused on the issue of sexual and gender-based violence. In her
15 testimony to the Prosecution, she describes her work with victims of rape
16 and sexual violence.

17 She describes particularly a victim from Nakuru who was
18 gang-raped while in a home in January 2008. They killed her husband in
19 front of her, she says, and then during the rape they cut her vagina.
20 The victim was diagnosed with HIV as a consequence of the rape.
21 EVD-PT-OTP-00341, confidential, at 2177, 2179, and 2180.

22 Furthermore, Prosecution Witness 0007 describes how a witness she
23 interviewed told her that she saw men armed with machetes and *rungus*
24 which are traditional clubs, shouting that every Luo, Luhya, and Kalenjin
25 in the area should vacate their houses. She reported how she was

1 gang-raped by a group of men who dragged her out of her house and took
2 turns to rape her until she lost consciousness. The witness was then
3 forcibly displaced and she lost her business and her property during the
4 violence.

5 The second sample is in EVD-PT-OTP-00596, confidential. The
6 witness explained that she knew about threats issued against opposition
7 supporters in the area. Luos were asked to leave Nakuru. The Mungiki
8 were walking around telling people that non-Kikuyus must go. The witness
9 was raped by armed men who broke into her house, and she was also
10 displaced from her home.

11 Madam President, your Honours, because of the stigmatisation and
12 trauma attributed to the crime of rape, the actual statistics of rape
13 cases that occurred in Nakuru and Naivasha is still not known, but there
14 are figures available from the Nairobi women's hospital which indicates
15 that at least 900 individuals were treated during the period of the
16 violence. As the hospital medical director testified before CIPEV, and I
17 quote, "This was just the tip of the iceberg." EVD-PT-OTP-00004, public,
18 at 0622.

19 Your Honours have before you showing a slide of the statistics I
20 referred to.

21 Many more victims of sexual violence could not get to his
22 hospital or other hospitals to obtain treatment given the lack of
23 security and means of transport when law and order broke down. For those
24 on whom the medical director had collected data, the statistic he -- the
25 statistics he provides indicates, and I quote:

1 "524 or 80 per cent had been raped. Of the patients coming to
2 the Nairobi Women's Hospital, 58 per cent were from Nairobi, but there
3 were others coming from other cities, including Nakuru and Naivasha."
4 EVD-PT-OTP-00004, public, at 0622.

5 Again, the director of Nairobi Women's Hospital at
6 EVD-PT-OTP-00013, confidential, at 0148, indicates that 22 men and 37
7 boys received treatment at the hospital for violence such as rape or
8 defilement, which targeted the victims' gendered identities as males
9 within their society. However, he stated, and I quote:

10 "Given the shame and stigma associated with sexual violence
11 against men, it is possible that many more cases of violence went
12 unreported."

13 The Prosecution submits that the totality of this sample
14 evidence, including the report of the medical director of the women's
15 hospital and the fact that women became pregnant and contracted HIV as a
16 result of the rape demonstrates that there was an invasion of the body of
17 the victims by conduct resulting in penetration.

18 The Prosecution will now submit that the general term "sexual
19 violence" covers various acts of a sexual nature if committed under
20 coercive circumstances. Indeed, in the drafting history of the crimes of
21 sexual violence, delegates decide not only to simply reproduce the
22 references to sexual violence crimes found in the Geneva Conventions, but
23 to use the term any other form of sexual violence as a basket clause to
24 criminalise acts such as forced nudity, sexual mutilation, and any other
25 similarly degrading acts which could be invented by future perpetrators.

1 The Prosecution submits that other forms of sexual violence are
2 different from other inhumane acts due to the sexual nature of the
3 specific acts. An illustrative example is the 2005 decision of the
4 Special Court for Sierra Leone in Prosecutor against Norman, Fofana,
5 Kondewa, case number SCSL-04-14-PT.

6 Madam President, your Honours, the Prosecution will now provide a
7 sample of individual accounts and reports of acts of sexual violence that
8 were committed in Nakuru.

9 The Prosecution submits that within the context of Kenya and, in
10 particular, Nakuru and Naivasha, sexual violence was characterised by
11 acts of forced or traumatic circumcision, forced nudity, sexual
12 mutilation, and penile amputation. The Prosecution submits that these
13 weren't just attacks on men's sexual organs as such but were intended as
14 attacks on men's identities as men within their society and were designed
15 to destroy their masculinity.

16 These crimes of sexual violence were committed in coercive
17 circumstances; the perpetrators used force and the victims were violated
18 both in their private space, such as their homes, as well as in public
19 places.

20 My first sample, your Honours, is from a witness who recounts as
21 follows:

22 "The Kikuyu militias were forcibly circumcising Luo men. One
23 Luhya witness was spared because he was already circumcised, but he was
24 forced to accompany the group. Our group was about 50 people spread
25 along the road. The Kikuyus then started checking everybody and

1 circumcising Luos right there. I saw two of these. They grabbed one
2 man, about 30 years old, and told him to remove his pants. He just kept
3 saying, 'What? What?' Then they forcibly removed his pants. One person
4 was holding his penis, and another one was cutting his foreskin with a
5 piece of a broken Fanta bottle."

6 EVD-PT-OTP-00002, public, at 0300-0301.

7 The medical officer of health for Nakuru reports having received
8 at least six cases of forced circumcision which he described, and I
9 quote:

10 "Traumatic circumcision, because usually with circumcision,
11 either in the hospital or in a traditional setting, it is a clean
12 surgical procedure, but this one was a bit crude and it was not orderly,"
13 which is an understatement.

14 The doctor further referred to the cases as ones of pilary
15 amputation and explained that usually circumcision is the surgical
16 removal of foreskin but that in a particular case of a 22-year-old male,
17 his whole penis had actually been cut. EVD-PT-OTP-00004, public, at
18 0632.

19 Furthermore, one -- a witness also recalls as follows, and I
20 quote:

21 "On 21 January 2008, eight Luo men had their genitals chopped
22 off and even young boys, some of them as young as 11 and 5 years old had
23 their genitalia cut with blunt objects such as broken glass."

24 EVD-PT-OTP-00004, public, at 0572.

25 The next sample to be provided by the Prosecution, your Honours,

1 is from EVD-PT-OTP-00004, public, at 0481:

2 "Kikuyu militias, supported by members of the outlawed Mungiki
3 sect and angry displaced Kikuyu youth armed with new *pangas*, knives, and
4 petrol bombs were assembled and deployed to various estates."

5 And I mentioned these estate in my previous presentation:

6 Kaptembwa, Kwahorda, Mwariki, Free Area, Kiti.

7 They were deployed there to flush out enemy communities. They
8 rounded up Luo men who were forcefully circumcised using *pangas* and
9 broken bottles and those who resisted were beheaded. The provincial
10 medical officer for health for Rift Valley Province confirmed that the
11 Nakuru Provincial General Hospital attended to at least four cases of Luo
12 men who had been forcefully circumcised while another Luo man had his
13 penis amputated by his attackers on 25 January 2008.

14 A final sample, your Honours, is from EVD-PT-OTP-00004, public,
15 at 0481, where it was reported that forcible circumcision and penile
16 amputation was inflicted on seven Luo victims admitted at the Provincial
17 General Hospital, Nakuru. And five out of these seven incidences
18 occurred on the 25th of January, 2008, during the heat of the attacks in
19 Nakuru.

20 Your Honours, act of sexual violence were also committed in
21 Naivasha. I will refer to a few samples from our collection.

22 The first example is the witness who confessed that he was told
23 that in Naivasha men were forced to remove their underwear to confirm
24 their ethnicity, because Luo men traditionally are never circumcised.

25 And they were forcibly circumcised when they happened to be Luos. The

1 witness assessed that the act of forcible circumcision was viewed as a
2 punishment for having supported the Orange Democratic Movement, ODM.
3 EVD-PT-OTP-00617, confidential.

4 Again, an excerpt from the report of the Federation of Women
5 Lawyers in Kenya states as follows, and I quote:

6 "Those from ethnic communities who do not carry out male
7 circumcision were subjected to forced male circumcision and in some
8 cases, castration. This was the evidence that emerged from Naivasha,
9 where attacks on members of the Luo ethnic group took place.
10 EVD-PT-OTP-00011 public at 152.

11 Another witness, a Luo from Naivasha, confessed that a Kikuyu
12 gang had been looking for a woman's husband, and when they could not find
13 him, they set upon her brother, cutting off his testicles and his penis.
14 EVD-PT-OTP-00004, public, at 0630-0631.

15 The perpetrators forced the victims to undress, creating a
16 circumstance of forced nudity. They targeted the penis of the victims
17 who were then forcibly circumcised or amputated. These acts of sexual
18 violence perpetrated against the men was not confined to forcible
19 circumcision and penile amputation, as evidence will show, acts of male
20 sexual attacks were also perpetrated.

21 Your Honours, the Prosecution submits that the cruel, violent,
22 and sadistic conduct of the perpetrators and the intimidating and
23 humiliating nature of the crimes committed against the civilian
24 supporters of the ODM meet the gravity threshold required under
25 Article 7(1)(g) of the Rome Statute.

1 In conclusion, Madam President, your Honours, the selected sample
2 of evidence the Prosecution has provided is merely symptomatic of the
3 widespread nature of the rapes and other forms of sexual and gender-based
4 violence committed against civilians perceived as supporters of the ODM.

5 Madam President, your Honours, the Prosecution will submit that
6 there is no doubt that the suspects knew that rape and other sexual and
7 gender-based violence would be committed in Nakuru and Naivasha in the
8 ordinary course of the attacks. This was so for the following reasons:

9 First, the suspects purposely created a situation of lawlessness,
10 where the police were ordered not to stop any criminal offence committed
11 by the direct perpetrators. The suspects knew that all forms of violence
12 including rape would occur during the attacks.

13 Second, the suspects knew that rape had been taking place against
14 perceived PNU supporters in the first wave of post-election violence.
15 Consequently, rape was a foreseeable result of ordering direct
16 perpetrators to commit acts of revenge against ODM supporters. The
17 suspects ordered punishment for attacks against Kikuyus, and a
18 replication of the exact same type of violence against ODM supporters
19 must have been expected.

20 Thirdly, the suspects ordered the direct perpetrators to evict
21 perceived ODM supporters. Rape was an effective tool to threaten women
22 and men to leave their homes. Likewise, the suspects ordered direct
23 perpetrators to murder and destroy. Sexual violence was a powerful form
24 of destruction, in our submissions, and its use must have been
25 anticipated by the suspects.

1 Fourth, the suspects incited intense rage in the direct
2 perpetrators in an already heated conflict full of ethnic, economic, and
3 political tensions. Weeks before the election, there were rumours that
4 if election violence broke out, Kikuyus will circumcise Luo men. The
5 suspects used this ethnic hatred, some already coloured in sexually
6 violent terms, to carry out their common plan. Rape must have been
7 foreseen.

8 And fifth, the suspects employed and armed a violent criminal
9 gang to carry out their mission of destruction and revenge against the
10 helpless civilian population. The result of rape, if not explicitly
11 ordered by the suspects, was virtually certain to occur given the
12 volatile situation and the violent actors.

13 In closing, your Honours, the evidence establishes substantial
14 grounds to believe that rape and other forms of sexual violence
15 constituting a crime against humanity as alleged occurred.

16 Madam President, your Honours, I will now address you on counts 7
17 and 8 concerning the crimes of other inhumane acts as a crime against
18 humanity pursuant to Article 7(1)(k) of the Rome Statute.

19 During this presentation, I will again lead your Honours through
20 a selection of the Prosecution's core evidence on this crime. The
21 evidence cited will be confidential unless otherwise stated. The
22 examples are illustrative of the wide scope of inhumane acts perpetrated
23 by the Mungiki and PNU youth members who were organised by Muthaura and
24 Kenyatta and assisted by the nonintervention of the Kenya police as
25 orchestrated by Muthaura and Ali. The evidence will show that the

1 Mungiki and pro-PNU youth entered Nakuru and Naivasha armed with *pangas*,
2 knives, petrol bombs, spiked clubs, and other crude weapons. In an a
3 planned and systematic assault, these direct perpetrators viciously
4 attacked ODM supporters and their property. They hunted down perceived
5 ODM supporters. They beat them, they amputated their limbs, they
6 mutilated their bodies in front of their loved ones. With the assistance
7 of prepared lists and locals, they located the homes and business of
8 perceived ODM supporters. They burnt them down and looted the property
9 inside. The Prosecution submits that the evidence establishes that these
10 other inhumane acts was part of the suspects' organisational policy and
11 common plan to retain PNU power through every means necessary.

12 Your Honours, on your screen you now have a slide showing the
13 various elements which I will go through one after the other.

14 The first element of other inhumane acts which is now displayed
15 on the screen is that the perpetrator inflicted great suffering or
16 serious injury to body or to mental or physical health by means of an
17 inhumane act.

18 The Prosecution submits that the perpetrators inflicted great
19 suffering, serious injury to body, mental and physical health by severely
20 beating, hacking, amputating the limbs of perceived ODM supporters. The
21 Prosecution also submits that the perpetrators inflicted great suffering,
22 serious injury to mental and physical health by mutilating the bodies of
23 individuals in front of their family members, destroying homes and
24 businesses through acts of arson and looting personal properties. These
25 acts were a serious violation of international human rights law and a

1 serious attack on human dignity with implications for the victims'
2 physical and mental health.

3 Your Honours, in Katanga, the Pre-Trial Chamber I, reflecting on
4 ICTY jurisprudence, explained that to constitute another inhumane act,
5 the act in question must be a serious violation of international
6 customary law and the basic rights pertaining to human beings, drawn from
7 the norms of international human rights law. The reference for that is a
8 decision on the confirmation of charges on the 30th of September, 2008.

9 In the 1996 draft code, the international law commission defined
10 other inhumane acts as those that severely damage physical or mental
11 integrity, health or human dignity, such as mutilation and severe bodily
12 harm.

13 Your Honours, this presentation will not include the crimes of
14 forced circumcision and penile amputation. I mentioned in my
15 presentation on counts 5 and 6 that the Prosecution has elected to
16 classify the crimes of forced circumcision and penile amputation as other
17 forms of sexual violence because those crimes are of a sexual nature. As
18 was explained by the Pre-Trial Chamber in Katanga, none of the acts
19 constituting crimes against humanity according to Article 7(1)(a) to (j)
20 can be simultaneously considered as another inhumane act encompassed by
21 Article 7(1)(k) of the Statute. The Prosecution submits that because
22 forced circumcision and penile amputation meet the requirements of
23 Article 7(1)(g), it follows that they cannot be considered other inhumane
24 acts. Your Honours, this reasoning was adopted by the Special Court for
25 Sierra Leone in the Prosecutor against Norman et al. where the Chamber

1 found that other inhumane acts, even if residual, must logically be
2 restrictively interpreted as covering only acts of a nonsexual nature
3 amounting to an affront to human dignity.

4 Your Honours, I would then move to the scenes where these acts
5 were committed, starting first with Naivasha and then Nakuru.

6 In Naivasha, Mungiki and pro-PNU youth physically assaulted
7 perceived ODM supporters by beating, stabbing, and hacking at them with
8 weapons.

9 Prosecution Witness 0002, who was present during the attacks in
10 Naivasha, reports that in one particular instance, the perpetrators, and
11 I quote:

12 "Used a spike club to beat the young man. So even pieces of
13 flesh were missing from his body. The club had spikes like nails, and
14 where it gets into contact with the body, when you are hit with it, it
15 comes out with flesh."

16 EVD-PT-OTP-00243, confidential, at 0301-0302.

17 An eyewitness, turned victim, explains, and I quote:

18 "He was at his home when he was confronted and chased by Kikuyu
19 men. The attackers consisted of local youths and others from Eldoret and
20 Rift Valley. Whilst fleeing, the witness was hit with a sharp object on
21 the leg and sustained an injury."

22 EVD-PT-OTP-00578.

23 In Nakuru, your Honours, Mungiki and pro-PNU youth also inflicted
24 great suffering and serious injury to the mental health of perceived ODM
25 supporters by torching homes and businesses, destroying property and

1 looting. Both the Commission of Inquiry into the Post-Election Violence
2 and the Kenya National Commission on Human Rights report on the specific
3 incident of arson in Nakuru. In words of the CIPEV report:

4 "On 30 December 2007, Club Lule's, a restaurant along KANU
5 street, owned by a Luo was burned by some Kikuyu arsonists."

6 EVD-PT-OTP-00004, public. And the KNCHR report is public and
7 it's EVD-PT-OTP-00001.

8 According to the International Crisis Group, I quote:

9 "In Nakuru and Naivasha, Mungiki members were guided by local
10 youths who identified houses of non-Kikuyu, especially those of Luo and
11 Kalenjin origin. After the residents had been killed or fled, then
12 property was taken outside and burned as a sign of cleansing before the
13 house was reoccupied by Kikuyu IDPs."

14 EVD-PT-OTP-00009, public.

15 Your Honours, the situation was precisely the same in Nakuru
16 where the Mungiki and pro-PNU youth attacked perceived ODM supporters
17 with weapons, severely beating them and hacking at them.

18 In a documentary on the post-election violence by the Centre for
19 Rights, Education and Awareness, a witness describes how he lost his arm.
20 He explains, and I quote:

21 "The attackers were targeting young boys and men. They set the
22 house on fire demanding that any man who was in it should come out. The
23 attackers dragged the man out of the house and cut his hands off. They
24 found me hiding and cut my hand off too."

25 EVD-PT-OTP-00213, confidential, at time-stamp 00:02:25.

1 A witness in front of the Commission of Inquiry into the
2 Post-Election Violence explained that "once the violence started in
3 Nakuru, nobody was safe," I quote, "even women and children were
4 attacked. The crimes committed by the attackers included beatings."

5 EVD-PT-OTP-00576, confidential.

6 In addition to serious physical injuries sustained by perceived
7 ODM supporters, Mungiki and pro-PNU youth also caused great suffering and
8 serious injury to their mental health by mutilating victims in front of
9 their family members. The killing of these victims was murder, but the
10 mutilation of their bodies in front of loved ones was another inhumane
11 act.

12 A witness recalls that her brother was clobbered to death before
13 he was mutilated. She states, and I quote:

14 "The people who did that to him were using spiked clubs. They
15 had fixed nails on the club and as they hit his face, the nails would
16 pluck flesh from his body."

17 The witness explains that the man's five-year-old son was present
18 when his father was being clobbered and mutilated. The witness states,
19 and I quote:

20 "The boy has since gone mad. He keeps on saying," I'm going to
21 try to say this in Swahili, "*babawanakata kichwa yako, wana kata kitu*
22 *chako ...*" which means, "Dad, they are chopping off your head. They are
23 chopping off your penis."

24 EVD-PT-OTP-00004, public, at 0494-0495.

25 Prosecution Witness 0002 explains that this post-traumatic stress

1 and severe mental anguish experienced by this young boy is not an
2 isolated occurrence in Naivasha. The witness states, and I quote:

3 "I noticed a boy who was not active. This boy wouldn't even
4 laugh. He was just very, very rigid, and when I asked him when he was
5 alone, he told me bluntly that, 'The Kikuyus killed my father. They cut
6 my father's head.' What I know is that," the witness continues, "there
7 are children out there who are deeply traumatised because many children
8 watched their parents being killed. They watched their parents being
9 humiliated."

10 EVD-PT-OTP-00239.

11 It wasn't just that the Mungiki and pro-PNU youth beat and
12 mutilated persons, they also looted, destroyed and burned properties in
13 Naivasha.

14 A Kikuyu witness who interacted with the perpetrators describes
15 the events of January 27. He states, and I quote:

16 "Young men were walking in groups. Not only young men, because
17 it was everybody in the society. They were all walking in groups,
18 shoving people up and down. In fact, they were chasing the non-Kikuyus
19 like rabbits. They were burning properties, and the local women were
20 following them looting."

21 EVD-PT-OTP-00004, at 0493, public.

22 Two other witnesses who had personal experiences of material loss
23 at the hands of the Mungiki and pro-PNU youth state -- one of them
24 states, and I quote:

25 "His property was looted and he suffered financial losses

1 because of the violence."

2 EVD-PT-OTP-00578, confidential, at 0042; and EVD-PT-OTP-00600,
3 confidential, at 0166.

4 The rampage of burnings and lootings of Luo and Kalenjin shops
5 took place immediately after the Naivasha district commissioner agreed to
6 lift the curfew on the town. A witness who was present recounts that
7 when the district commissioner agreed to lift the curfew, I quote:

8 "People clapped and people dispersed, and when they dispersed,
9 and he left with his officers, that is, when one of -- it is in the
10 centre of the town" -- I'm trying to quote the witness "... it belongs to
11 a Kalenjin and was looted, and what they could not loot was burned
12 outside the shop immediately the DC left with the police."

13 EVD-PT-OTP-00004, public.

14 Your Honours, you have before you a photograph of one of the
15 properties set ablaze along the Kariuki Chotara street in Naivasha.
16 EVD-PT-OTP-00142, confidential.

17 Human Rights Watch traces the path of violence. It explains, and
18 I quote:

19 "Violence broke out on 27 January 2008, when bands of youths took
20 strategic positions and barricaded all roads paralysing transport within
21 Naivasha town and along the Nairobi-Nakuru highway. Every Kikuyu youth
22 was required to join in the violence. Those who did not join were
23 considered enemies of their community. The youths then began a wave of
24 terror targeted mainly at members of the Luo community. They destroyed
25 and burnt premises belonging to ODM supporters in town. Elementaita

1 chemist which belongs to a Kalenjin was vandalised and completely
2 destroyed. They went to Kabati estate where they hunted down the Luo
3 community. They then conducted a door-to-door search of the Luo
4 community in a manner suggesting that they knew where they lived."

5 EVD-PT-OTP-00001.

6 Prosecution Witness 0002 saw this burning of property first-hand.

7 The witness explains, and I quote:

8 "I saw so many bonfires of things being burned. I saw people
9 burning things. They were stealing their hangers and their clothes and
10 putting them in the bonfire. I still remember seeing metal cups burning.
11 Buildings were not being set alight, because almost all the buildings in
12 Naivasha are owned by Kikuyus. So they were removing their properties.
13 They vandalised the pumps and the toilets, they were cutting everything
14 out and burning them outside."

15 The same witness recalls, I quote:

16 "I remembered one plot owned by a mother who was single and she
17 was retired. It was completely burnt out in Kabati. That is what still
18 registers with me, because I felt for that woman."

19 EVD-PT-OTP-00241 confidential, at 0209-0211.

20 The Prosecution submits that this sample evidence, along with the
21 evidence in the list of evidence it has provided, establishes substantial
22 grounds to believe that the perpetrators caused great suffering and
23 serious injury and there was a direct and clear causal link between the
24 acts of physical assault, property theft and destruction and the great
25 suffering. The attacks produced prolonged and severe pain, physical

1 disability, severe trauma on perceived ODM supporters in Nakuru and
2 Naivasha. The weapons used by the Mungiki and the pro-PNU youth to
3 conduct the physical assaults, such as spiked clubs, assured a high
4 degree of pain and suffering on the part of the victims. Similarly, the
5 absolute destruction of homes, including the building structures and the
6 items inside, guaranteed that the victims would suffer greatly.

7 Your Honours, I will now move to the second element, which is
8 displayed on the screen.

9 The second element is that the act was of a character similar to
10 any other act referred to in Article 7(1) of the Statute.

11 Your Honours, according to footnote 30 of the Elements of the
12 Crimes, character refers to the nature and gravity of the act.
13 Therefore, acts whose consequences and nature were not similar in
14 character to those of the acts listed in paragraph 1 (a) to (j) might not
15 be covered by the Statute.

16 Your Honours, in the past international criminal tribunals have
17 found serious physical or mental injury, severe beating, destruction of
18 property, slashing of a victim's body with a machete, striking victims
19 with machetes and stones and leaving them for dead and causing serious
20 injuries to victims during a mass killing to constitute other inhumane
21 acts.

22 Your Honours, each case is different, but that Prosecution
23 submits that given consideration to all of the factual circumstances in
24 attacks on Nakuru and Naivasha, the acts of physical injury and
25 destruction of property reaches the similar nature and gravity of the

1 crimes referred to in Article 7(1) of the Statute. The malicious nature
2 of the act and its context in a campaign of revenge against a mainly
3 helpless civilian population suggest that these acts rise to the
4 necessary level of severity. So too does the identification of the
5 victims. They included children as young as 5, and individuals with
6 limited financial means, and the prolonged impact affects till today the
7 victim's physical and mental well-being.

8 The Commission of Inquiry into Post-Election Violence reports
9 that although a number of injuries sustained during the post-election
10 violence did not lead to death, a number of them were serious, possibly
11 life-changing experiences. The commission reports that in Nakuru alone,
12 at least 359 people were injured with different kinds of injuries caused
13 by blunt objects and sharp, pointed objects.

14 In Naivasha, out of 53 injured persons, 37 of those injuries were
15 by sharp pointed objects. EVD-PT-OTP-00004.

16 With regards to destruction of property and looting, the
17 Prosecution would like to stress that these offences were not simply
18 about mayhem. They were also about complete destruction.

19 One witness in Naivasha lost everything:

20 "He," and I will quote, "was chased from his home by a group of
21 Kikuyu men looking for Luos to kill. He was later attacked by another
22 group who injured his leg. His shop was also broken into and everything
23 was looted. He lost goods worth about 200.000 Kenyan shillings."

24 EVD-PT-OTP-00341, confidential.

25 Your Honours, I will now move to the third element. This element

1 is that the perpetrator was aware of the factual circumstances that
2 established the character of the act.

3 The evidence establishes to the standard of substantial grounds
4 to believe that the perpetrators were aware of the factual circumstances
5 is that established the nature and gravity of the acts they committed.
6 The perpetrators were aware of the gravity and nature of their acts
7 because, first, these acts were committed by them in instigating and the
8 gravity of the physical assault was visually apparent.

9 Second, the nature and gravity of the property destruction and
10 looting was ascertained by any person who was living in Kenya during that
11 period. The direct perpetrators were Kenyan, who must have understood
12 that the loss of property would be significant. Direct perpetrators, in
13 fact, were instructed to burn only the homes of perceived ODM supporters
14 and thus the consequences of burning Kikuyu homes must have been apparent
15 to the perpetrators. The economic importance of a home and a business
16 would have been known to the attackers.

17 Your Honours, this is corroborated in EVD-PT-OTP-00002, public,
18 at 0296. It is also corroborated by EVD-PT-OTP-00002, public, at 0297.

19 I will quote from the CIPEV report:

20 "According to a youth, there was then another meeting on
21 Saturday, January 26, in the afternoon. The organisers present at the
22 meeting were well-known local businessmen who had campaigned for a
23 Party of National Unity candidate and former MP during the election. The
24 youth who attended the meeting recalled: 'We were told that only Luo
25 houses should be burnt and that the mission starts in the morning. Every

1 person was given 100 or 200 shillings."

2 Thirdly, the perpetrators as members of the common plan
3 specifically intended to cause physical and mental harm and suffering and
4 must have been aware of all circumstances. In some instances, the
5 perpetrators intended to murder, but in others the specific goal was to
6 beat and maim to ensure that the survivors lived with the pain.
7 Your Honours, I will again refer to EVD-PT-OTP-00002, public.

8 The common plan and organisational policy was also adopted by
9 Ali, who ensured that the police force did not interfere in the attacks.

10 Prosecution Witness 0002 explains why one of the key mid-level
11 perpetrators wanted to punish ODM supporters. The witness explains that
12 the perpetrator wanted, and I quote:

13 "To make them suffer, because they really suffered, they were
14 really ... even the ones who were not injured, they were humiliated.
15 They really suffered; their properties were destroyed, they were
16 completely destroyed."

17 EVD-PT-OTP-00247. This is corroborated by evidence found in
18 EVD-PT-OTP-00607.

19 Your Honours, the fourth and fifth elements constitute the
20 contextual elements of the charge common to all crimes against humanity
21 including other inhumane acts. I ask your Honours to incorporate by
22 reference the submission given earlier by myself on the contextual
23 elements.

24 In conclusion, therefore, Madam President, the Prosecution
25 submits that all the required elements for counts 7 and 8 have been

1 fulfilled and that the evidence as a whole establishes substantial
2 grounds to believe that other inhumane acts constituting a crime against
3 humanity was committed by Muthaura, Kenyatta, and as co-perpetrators, or
4 in the alternative, as part of a group of persons within the meaning of
5 Article 7(1)(k) of the Rome Statute as charged in the amended document
6 containing the charges.

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

8 PRESIDING JUDGE TRENDAFILOVA: Thank you, Ms. Adeboyejo. Do you
9 intend to proceed with the last count of persecution?

10 MS. ADEBOYEJO: Your Honours, we do, but we see that we now have
11 about 20 minutes left, and my colleague, if he starts there's every
12 possibility that the presentation would then be broken in two, so we are
13 in your Honours' hands as regards how we can proceed.

14 PRESIDING JUDGE TRENDAFILOVA: So I would suggest that we just
15 proceed tomorrow in order for you to just have a concise and
16 uninterrupted presentation on this count.

17 MS. ADEBOYEJO: Much obliged.

18 PRESIDING JUDGE TRENDAFILOVA: Thank you very much, indeed,
19 Ms. Adeboyejo.

20 Today on this today's last -- third session of the hearing is
21 coming to an end. Tomorrow we shall proceed with the last count of
22 persecution and thereafter with the individual criminal responsibility
23 presentation.

24 Obviously, we might finish earlier. If the Prosecutor is not
25 going to exhaust all the time that is allocated to the team of the

1 Prosecutor, then pursuant to the decision on the schedule and the
2 introductory remarks that I made on behalf of the Chamber at the
3 beginning of this hearing, I shall invite the Defence team of
4 Mr. Muthaura, you, Mr. Khan, as the leader of this team, to be kindly
5 ready, if this is going to be the case, to start your presentation
6 tomorrow.

7 Do you think that you could manage if --

8 MR. KHAN: Madam President, we'll try our very best to be ready.
9 Perhaps an indication of the Prosecution's current estimate as to how
10 much of tomorrow they will take will be -- will be a good guide
11 (* overlapping speakers).

12 PRESIDING JUDGE TRENDAFILOVA: It would be helpful if you could
13 make such an estimation, Ms. Adeboyejo.

14 MS. ADEBOYEJO: If I may just confer.

15 PRESIDING JUDGE TRENDAFILOVA: Please do consult your colleagues.

16 MS. ADEBOYEJO: Thank you.

17 (Prosecution counsel confer)

18 MS. ADEBOYEJO: Madam President, your Honours, not more than two
19 sessions tomorrow.

20 PRESIDING JUDGE TRENDAFILOVA: Yes. That was my estimation.

21 So, Mr. Khan, I think that the last session of one hour and a
22 half you could use to start your presentation.

23 MR. KHAN: I'm grateful.

24 PRESIDING JUDGE TRENDAFILOVA: And then, of course, if any of the
25 teams would need a little bit more time, we're going to -- to grant you

1 this spare time. So we're not only trying to achieve expeditiousness but
2 to give the parties all the opportunities to be able to present the best
3 of their cases.

4 So for this evening, I would like to thank mainly the
5 Prosecutor's team, because it was their day today, also the Defence
6 teams, the interpreters, the court reporters, the stenographers, the
7 security officers, the court officers, and those in the public gallery.

8 We adjourn the hearing until tomorrow, and tomorrow in this same
9 courtroom we will again start at 2.30 sharp. Have a nice evening.

10 COURT USHER: All rise.

11 The hearing ends at 7.44 p.m.

12 CORRECTION REPORT:

13 The Court Interpretation and Translation Section has made the following corrections
14 in the transcript:

15 * Page 69 line 9:

16 "Eksiboi (* phon)" is corrected by "a Kisii boy"

17 * Page 69 line 11:

18 "Eksiboi elementary school (* phon)" is corrected by "A Kisii boy in elementary
19 school"

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