



**MUTHAURA, KENYATTA & ALI**  
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<p><b>Situation Case</b></p>	<p>Republic of Kenya                  01/09-01/11                  The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali</p>	<p><b>Francis Kirimi Muthaura:</b> born 1946 in Mariene, Kenya; National of the Republic of Kenya; currently Head of Public Service and Secretary to the Cabinet of the Republic of Kenya.</p>
<p><b>Hearing: Chamber:</b></p>	<p>Confirmation of charges                  Judge Ekatarina Trendafilova (Presiding Judge), Judge Hans-Peter Kaul, Judge Cuno Tarfusser</p>	<p><b>Uhuru Muigai Kenyatta:</b> born 1961 in Nairobi, Kenya; National of the Republic of Kenya; Currently Deputy Prime Minister and Minister for Finance of the Republic of Kenya</p>
<p><b>Parties:</b></p>	<p>OTP: Mr Fatou Bensouda and team;                  Defence Mr Muthaura: Mr. Karim A. A. Khan (QC), Ms. Essa M. Faal, Mr. Kennedy Ogetto and Ms. Shymala Alagendra;                  Defence Mr Kenyatta: Mr. Steven Kay (QC) and Ms. Gillian Higgins;                  Defence Mr Ali: Mr Evans Morari, Mr. John Philpot and Mr. Gershom Otachi Bw'Omanwa.</p>	<p><b>Mohammed Hussein Ali:</b> Born 1956 in Eldoret, Kenya; National of the Republic of Kenya; Currently the Chief Executive of the Postal Corporation of Kenya.</p> <p><b>Alleged crimes:</b>  <u>Francis Kirimi Muthaura and Uhuru Muigai Kenyatta</u> allegedly committed as indirect co-perpetrators and;  <u>Mohammed Hussein Ali</u> allegedly contributed to the commission of:</p>
<p><b>Participants</b></p>	<p>233 victims represented by Legal Representatives for Victims: Mr. Morris Anyah.</p>	<ul style="list-style-type: none"> <li>• <b>Crimes against humanity: Murder, rape, forcible transfer of population, other inhuman acts and persecution</b></li> </ul>

**21 September, 2011**  
 The three suspects' Defence Teams made observations on procedure. The participants then made their opening statements.

**Defence Observations**

The Defence of Mr. Muthaura made observations on:

- **Mr. Muthaura unsworn statement before the Court:** Mr Khan asked the Chamber to give probative value to MR. Muthaura's statement and thus to depart from the Abu Garda precedent<sup>1</sup>.
- **Exculpatory evidence:** The Prosecutor allegedly failed to investigate and communicate exculpatory evidence to the Defence: in particular, a letter addressed to the OTP from the Kenyan Government on the hierarchical organisation within the police, which had not been disclosed by the OTP to the Defence.

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<sup>1</sup> In the Abu Garda case the Pre-Trial Chamber held that a unsworn statement did not amount to evidence but rather constituted part of the opening of proceedings.  
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- **OTP Clarifications on Video documents of Prosecution witnesses 11 and 12:** The Defence have not received any answers or clarifications from the Prosecutor concerning Prosecution witnesses 11 and 12 who stated in a video that they would be given a good quality of life in exchange for their testimony.
- **Exclusion of certain evidence:** The Chamber should exclude all the evidence that the Prosecutor has submitted referring to the Waki Commission and Kenya National Human Rights Commission, as the Prosecutor cannot rely upon evidence without the consent of the witnesses in the commissions' investigations.

The Defence of Mr. Ali made observations on:

- **Lack of clarity in the charge of Mr. Ali under art. 25(3)(d):** It is unclear whether Mr. Ali has been charged with 'contribution' or for 'commission'.
- **Exculpatory material and exclusion of certain evidence:** The Prosecution has failed to provide exculpatory material. Also, the Chamber should exclude evidence related to the Waki and Kenya National Human Rights Commissions.

**Prosecution Opening Statement** - The Prosecutor, Mr. Luis Moreno-Ocampo submitted:

- **There are substantial grounds to believe that the suspects are individually responsible.**
- **Planned Violence:** A plan for avenging incidents provoked by ODM<sup>2</sup> supporters was carefully prepared. The Kikuyu<sup>3</sup> youth was incited to evict the targeted groups<sup>4</sup> from Nakuru and Naivasha towns.
- **The suspects:** Mr Muthaura and Mr Kenyatta used their positions as heads of public service and as prominent government members to plan and direct the common plan. Allegedly Mr Muthaura had de jure and de facto authority over Mr Ali who was the police commander at during the PEV. While Mr. Kenyatta had a relationship with the Mungiki<sup>5</sup> network and was able to direct and control that criminal organisation.
- **Organisation Created:** A highly efficient 'organisation' was created involving the PNU<sup>6</sup> leadership, the Mungiki criminal organization, local businessmen and the Kenyan Police who voluntarily did not intervene in the violence. This organisation possessed the means to infringe upon basic human rights and implemented various attacks against the civilian populations of Luo, Luhya and Kalenjin pursuant to a specific criminal policy.
- **2 Meetings held:** At least 2 decisive meetings took place to plan and coordinate attacks (1<sup>st</sup> Meeting on the 30<sup>th</sup> December 2007 at Kenya State House; 2<sup>nd</sup> Meeting on the 3<sup>rd</sup> January 2008 at Nairobi Members Club). In the first meeting Mr.

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<sup>2</sup> ODM: Orange Democratic Movement. First Opposition Party in Kenya allegedly supported by Luo, Luhya and Kalenjin communities.

<sup>3</sup> The Kikuyu is the largest ethnic tribe in Kenya, residing in central and southern Kenya and extremely active in politics where its interests are mainly represented by the Party of National Unity.

<sup>4</sup> The targeted groups were mainly the Luo, Luhya, and Kalenjin ethnic groups

<sup>5</sup> Kikuyu-centric Criminal Organization operating in Kenya since the late 1980s

<sup>6</sup> PNU: Party of National Unity; the ruling party in Kenya which supports President Kibaki.

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Muthaura, Mr. Kenyatta, PNU leaders and youth and local business men were allegedly present; in the second meeting, Muthaura, Kenyatta other PNU leaders and Mungiki members including the leader of the militant wing were allegedly present.

- **Attacks:** On 27<sup>th</sup> January 2008, Mungiki members allegedly assembled and (using locals to identify the victims) commenced house-to-house attacks killing, raping, looting and forcibly circumcising men and mutilating their genitals.
- **The role of the police:** Due to the de jure and de facto authority exercised by Mr. Muthaura over Mr. Ali, the police consciously did not intervene in the violence.
- **The motive:** the 'Organisation' planned and implemented attacks as a form of retaliation against those perceived to be supporters of ODM to retain political power.

#### Opening Statement of the Legal Representative of Victims, Mr. Morris Anyah:

- **Victims:** Represented victims include victims of sexual violence, forcible displacement and some have lost children and relatives.
- **Displaced Victims:** Virtually all victims had to flee their homes. Some have subsequently returned but live in a climate of fear and threats.
- **Justice and Impunity:** All victims want to vindicate their rights to justice and to know the truth.
- **Reparations:** Victims want to re-start and restore their lives and symbolic reparation for their suffering. They want security, medical (including psychological) assistance, and the support which is necessary for a decent life. The victims have also demanded economic compensation.

#### Defence Teams' Opening Statements

##### *Francis Muthaura's unsworn statement:*

- *His background as a promoter of dialogue and his repudiation of violence: Mr Ali had been a victim of violence when he was a child and that has subsequently worked as an ambassador for his country to promote peaceful cooperation.*
- *Prosecutor's investigation: The Prosecutor has never informed Mr Ali of his status as a suspect or asked him for any clarifications. The Prosecution case is based on lie. The Chamber should separate facts from lies and render justice.*
- *His unawareness of the meetings and the Organization: During the period of post election violence, the suspect was engaged in meetings with the National Security Committee, a technical and advisory board to the Government charged with dealing with the erupting violence. The suspect stated that he had never participated in any of the meetings alleged by the Prosecutor and as a public officer, he was engaged in fighting and not supporting a criminal organisation like the Mungiki.*

##### Francis Muthaura's Defence Team submitted:

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- **Prosecutor's failure to investigate exculpatory evidence:** The Prosecutor has failed to investigate exculpatory evidence. The Prosecutor has never contacted Mr. Muthaura for clarifications, nor spoken with President Kibaki or other members of the Government. The Defence has had to collect the evidence which contradicts the Prosecutor's case.

**Uhuru Kenyatta's Defence Team submitted:**

- **ODM's role in the violence:** It was ODM supporters and their network which fuelled the violence, protesting against stolen elections and calling for mass-action.
- **The role of Mr. Kenyatta:** Mr. Kenyatta has always worked to stop violence and to strengthen the peace process. There is evidence confirming that on several occasions Mr. Kenyatta persuaded Kikuyus not to commit attacks.
- **Political decision by the Prosecutor:** The Prosecutor has simply brought three people from each political side before the Court without any evidence or documents of probative value.
- **Reliability of Witnesses 11 and 12:** Allegedly, Prosecution Witnesses 11 and 12 attempted to extort money from the defence teams. Afterwards, they offered their testimonies to the OTP where their reliability was not tested.

**Mohammed Ali's Defence Team submitted:**

- **Standard of proof:** There are no substantial grounds to believe that Mr. Ali, through his role within the police, furthered the implementation of the common plan.
- **Mr. Ali and Kenyan Police role:** Mr. Ali as commander tried to maintain and restore law and order. The Police attempted to prevent attacks and massacres by both sides during the PEV. On several occasions IDPs<sup>7</sup> took shelter in police stations.
- **Charges against Mr. Ali:** The charges against Mr. Ali are based on the statement of one anonymous witness which is not corroborated by any evidence as no police officer in Naivasha or Nakuru has been interviewed. Moreover, 'inaction' does not constitute a crime.
- **Meetings:** Mr. Ali did not participate in any of the alleged meetings and did not incite or encourage anyone to commit crimes. Moreover there is no evidence of a role of Mr. Ali in the organizational policy nor of a phone call made by Mr. Muthaura to Mr. Ali.
- **Test of credibility of the witnesses:** It is not acceptable, as the Prosecutor has asserted, that the test for the credibility of the witnesses be made only at the trial stage.
- **The criminal organization:** The criminal organization described by the Prosecutor represents an improbable group of different actors which is not corroborated by any substantial evidence.

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<sup>7</sup> IDP: Internally Displaced Person, is the name given to those who have to flee from their houses during the violence.

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22 September, 2011

The Prosecution commenced the presentation of its case against the three suspects.

The Prosecution Team submitted its case:

- **Crimes Against Humanity - context and organisational policy:** An ad hoc organization was set up by Mr. Muthaura and Mr. Kenyatta through the merger of two different forces over which they exercised control, namely the Mungiki criminal group and the Police. It was created for the specific criminal plan it planned to implement.
- **Hierarchy of the Network:** Mr. Muthaura and Mr. Kenyatta used their authority to direct the Mungiki network and the PNU youth to commit the alleged crimes. Mr. Muthaura, as chairman of the National Security Committee, used his de jure and de facto authority over Mr. Ali to direct the Kenyan police to create a zone of impunity for the perpetrators.
- **Planning Meetings:** During two meetings, allegedly held in Nairobi on the 30<sup>th</sup> December 2007 and on the 3<sup>rd</sup> January 2008, the suspects planned and organized retaliatory attacks by inciting the PNU youth, instructing local coordinators and providing funds for weapons and transport for the Mungiki.
- **Widespread and systematic attacks:** The ad hoc Organization, through mid-level and low-level perpetrators (in particular PNU and Mungiki youth), coordinated and carried out a policy, consisting of widespread and systematic attacks, against the civilian population in particular in Naivasha and Nakuru towns.
- **Meetings:** The Prosecution described at least 8 documented meetings which took place during the month of January 2008 to discuss the retaliatory strategy. In those meetings Mr. Muthaura and Mr. Kenyatta were present as well as Mungiki leaders, PNU supporters and local business men.
- **Mr. Ali's role:** Mr. Ali should be held responsible, as deliberate inaction or failure to intervene must be considered as a method of implementation of the common plan.
- **Alleged Murder:** At least 600 people among Luo, Kalenjin and Luhya ethnicities were killed as a result of an organized massacre perpetrated by the ad hoc organization in Naivasha and Nakuru towns and surrounding areas in January 2008.
- **Forcible transfer:** Thousands of people were forcibly evicted from Naivasha and Nakuru towns, both with physical and psychological threats. The forcible displacement was not just a consequence of the attacks, but it was one of the organization's ultimate goals.
- **Rape:** There are numerous allegations of women from targeted groups having been gang-raped, with some contracting HIV.
- **Other Forms of Sexual Violence:** Allegations of penile mutilation and circumcision of Luo men have also been made. The Prosecutor asked the Chamber to consider crimes such as penile mutilation or forcible circumcision as other forms of sexual violence, rather than other inhuman acts, due to their special character as sexual offences.

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- **Other inhuman acts:** The ad hoc organization is allegedly responsible for crimes such as mutilation, looting, beating, and destroying houses and facilities which created great suffering and serious harm. This was in furtherance of the suspects' common plan to retain PNU power. These crimes should therefore be considered as other inhuman acts amounting to Crimes Against Humanity.
- **Persecution:** The crime of persecution has been committed against perceived ODM supporters who had been targeted for political reasons.
- **Hate Speech:** Derogatory language against the targeted groups was used during speeches at the preparatory meetings.

**23 September, 2011**

The Prosecutor concluded the presentation of its case. The Defence of Mr. Muthaura commenced its presentation.

- **Criminal Responsibility of Mr. Muthaura and Mr. Kenyatta:** The two suspects, during the documented meetings, planned and implemented the retaliatory strategy using their authority and control over the Police and the Mungiki, recruiting mid-level and low-level perpetrators, mobilizing the Mungiki network, provided funding, distributing weapons and instructing the police to create a zone of impunity for the perpetrators.
- **Criminal Responsibility of Mr. Ali:** Mr. Ali, who responded directly to Mr. Muthaura, used his position as a police commissioner to direct the police not to intervene before, during and after the attacks in Naivasha and Nakuru towns. In particular he created a zone of impunity for the perpetrators and did not investigate or prosecute properly those most responsible for the commission of the alleged crimes.
- **Special squad and extrajudicial killings:** The Prosecutor asserted that a special police squad was established to face the Mungiki menace. Under the supervision of Mr. Ali, the squad engaged in a policy of targeted killings of Mungiki members who could potentially testify on the relationship between the Mungiki organization and Government members during the PEV.

The Defence of Mr. Muthaura presented its case. It was submitted that there were no substantial grounds to believe that Mr Muthaura had committed the alleged crimes:

- **Mr. Muthaura's efforts in ensuring end of impunity for the violations:** Mr. Muthaura was member of NSAC<sup>8</sup> which recommended the creation of the Waki Commission whose findings later were of a fundamental importance to bring the case before the ICC. Mr. Muthaura's efforts to ensure accountability whilst at the same time being one of perpetrators was nonsensical.
- **Evidence contradicting Prosecutor's strategy:** The common plan alleged by the Prosecutor should not be considered due to the lack of evidence of political support given by the Mungiki to the PNU.

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<sup>8</sup> NSAC: National Security Advisory Council, is the highest decision-making organ on national security. This is an informal and unofficial summary of the trial hearings. Whilst every effort has been made to ensure accuracy, the CICC is not responsible for any omissions or inaccuracies contained within the following summary, which is provided for informational purposes only. Please do not forward without prior consultation with CICC staff.

- **Anonymous witnesses:** The OTP's case is based on anonymous witnesses whose reliability is highly contested. The Defence's case however contains evidence and numerous statements corroborating that the Mungiki had no contact with the Government.

**24<sup>th</sup> September 2011**

The Defence of Mr. Muthaura continued the presentation of its case.

The Defence of Mr. Muthaura continued the presentation of its case:

- **Failures in the OTP case:** The Prosecution case is based on heavily redacted, inconsistent and anonymous statements which are not corroborated by any identifiable sources. In particular the Prosecutor has based its case against Mr. Muthaura on four witnesses, at least three of whom (witness 1, 11 and 12) are unreliable.
- **Reliance on Reports:** The Prosecution has relied upon sources such as the Waki Commission Report or the NSIS<sup>9</sup> reports, only to the extent that they corroborate his case. Furthermore, the OTP has never interviewed persons who worked in a close relationship with Amb. Muthaura.
- **Alibis for Meetings:** Mr. Muthaura could not have participated in the alleged meeting with Mungiki leaders held on 30<sup>th</sup> December 2007 as he was present at the ceremony for the swearing-in of President Kibaki. There is also evidence excluding the participation of Mr. Muthaura at the alleged meeting of 3<sup>rd</sup> January 2008.
- **Authority of Mr Muthaura over the police:** Numerous Kenyan authorities interviewed by the Defence have stressed that Mr. Muthaura did not have de jure or de facto control over the police as described by the OTP's case. In particular President Kibaki, the Attorney General, and various generals interviewed, stated that Mr. Muthaura did not have the authority to give instructions to the head of the police.
- **Mr Muthaura and the Mungiki:** The records of NSAC meetings show the efforts of this organ, chaired by Amb. Muthaura, to arrest the perpetrators of the PEV.
- **The role of the police:** It is untrue that the police took no action in Naivasha: more than 9.000 IDPs found shelter at the police stations, where they gained assistance and protection.
- **Sources:** Sources such as the Waki Commission Report and other reports clearly show that the majority of victims during the Naivasha and Nakuru violence were Kikuyus, and that the police took action during the clashes.

**26 September 2011**

Witness 1 for Mr. Muthaura gave testimony. **Witness 1: Mr. Lucas Mwanza, District Commissioner in Kiliki District.**

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<sup>9</sup> NSIS: National Security Intelligence Service, is an independent civilian government agency mandated to identify threats against national security in Kenya.

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During questioning by the Defence of Mr. Muthaura, witness 1 testified on:

- **District Security Intelligence Committee:** The witness provided evidence on the work of the District Security Intelligence Committee as he was the chairman of the Committee during the relevant period<sup>10</sup>.
- **Committee:** The Committee was composed of people from different ethnicities. Decisions were taken by consensus and the Committee had no power to instruct the police over operational matters. The Committee had no direct relationship with the National Security Advisory Council.
- **Security Situation in Naivasha:** The witness referred that during the third week of January 2008 tensions started to arise because of the massive concentration of people, including IDPs, in the town. The witness testified that he did not receive any information on imminent attacks in Naivasha. On 26<sup>th</sup> January 2008, he went to Nakuru to bring his family to Naivasha.
- **Events of 27<sup>th</sup> January 2008:** The witness arrived in Naivasha in the morning of the 27<sup>th</sup> of January. There were demonstrations in various part of the town and aggressive mobs started confronting each other on the streets.
- **Police reaction:** The witness asserted that the police gave the order that everyone should leave the streets. The police arrested around 150 people and gave the necessary protection to approximately 8000 IDPs who found refuge in the police stations.
- **Police ensured safety:** The witness confirmed that the situation was extremely difficult and that, in those conditions, the police did its best to ensure safety and to restore law and order. The witness denied that the police received any order not to intervene and to allow the violence to occur.
- **Perpetrators:** No Mungiki were involved in the clashes, and the violence was spontaneous, due to inter-ethnic tensions.

During questioning by the OTP, Muthaura Defence witness 1 testified on:

- **Information on attacks:** The witness denied that he had received any intelligence on imminent attacks in Naivasha. In particular the witness denied receiving reports from NSIS on the increase of tensions in the area.
- **Number of casualties:** The witness alleged that to his knowledge around 50 people belonging to the Luo and Luhya communities were killed by mobs of Kikuyu youth following house-to-house searches during the Naivasha attacks.

During questioning by the LRV, Muthaura Defence witness 1 testified:

- **Witness relationship with Mr. Muthaura:** The witness stated that he knew Amb. Muthaura since his appointment to office but for not more than a decade.
- **Identity of the perpetrators:** The witness confirmed that most of the perpetrators of the violence in Naivasha were Kikuyus, but that he did not know about a specific plan or organization behind the violence.
- **Shooting at civilians denied:** The witness further denied that people in police

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<sup>10</sup> 'The relevant period': it is the period relevant to the Prosecutor case which goes from October 2007 until February 2008.

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uniforms shot at civilians in prisons.

Judge Trendafilova asked the witness 2 questions:

- **Information on attacks:** The witness asserted that one should distinguish between official intelligence information and information presented before the Waki Commission.

**27 September 2011**

Witness 2 for Mr. Muthaura gave testimony. **Mr. Muthaura Witness 2: Mr. Thuita Mwangi**, is the Permanent Secretary of the Kenyan Ministry of Foreign Affairs.

During questioning by the Defence of Mr. Muthaura, Muthaura Defence witness 2 testified on:

- **The role of NSAC:** The NSAC prepared briefs and recommendations to be forwarded to the National Committee for Security on the basis of information received from different bodies including the police.
- **Authority of Mr. Muthaura as chairman of NSAC:** Mr. Muthaura, as chairman of the NSAC did not give directions or orders, nor did he instruct the police not to interfere with any criminal plan. The police forces were under the authority of the Ministry of Internal Security not Mr. Muthaura.
- **The work of NSAC during the PEV<sup>11</sup>:** The witness stated that during the PEV, NSAC held meetings almost every day and recommended the police and the other security bodies to deploy more forces in the most affected areas.
- **NSAC meeting of 3<sup>rd</sup> January 2008:** The witness was shown a minute of a meeting concerning the appointment of Mr. Muthaura as a member of the Reconciliation Commission.
- **NSAC meeting of 25<sup>th</sup> and 27<sup>th</sup> January 2008:** The witness testified that these meetings were chaired directly by the Ministry of Internal Security to adequately address the situation in Naivasha and Nakuru towns. The witness asserted that NSAC received reports on possible retaliatory attacks by the Kikuyu community because of the failure by the Government and the police to protect them.
- **The role of Mr. Muthaura:** The witness rejected the assertion that the Ambassador was considered the head of Kenyan Security, including the police and NSIS.

During questioning by the OTP, Muthaura Defence witness 2 testified on:

- **Witness absence in several of the meetings:** The witness confirmed that he was not present at some of the NSAC meetings which took place in January 2008.
- **Authority over the police:** The witness stated that General Ali could not accept directions from any body other than the Ministry of Internal Security with regards to operational matters.
- **Allegations of Amb. Muthaura's behaviour:** The witness testified that allegations made by some cabinet ministers that Mr. Muthaura was exceeding his

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<sup>11</sup> The PEV: Post Elections Violence Period in Kenya (December 2007- January 2008).

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powers and acting as Prime Minister were not true.

- **Witness involvement in a money scandal involving public funds:** The witness confirmed that he has temporarily stepped aside from his public function to allow investigations into the illegal disposal of assets belonging to the Kenyan Government.

During Questioning by the LRV, Muthaura Defence witness 2 stated:

- **Witness involvement in the ICC process:** The witness confirmed that he had written an article in the *Daily Nation* newspaper criticising the involvement of the ICC in the Kenyan PEV.

#### 28 September 2011

The Defence team for Mr. Kenyatta presented its case.

The Defence submitted that there is no evidence that Mr Kenyatta should be considered responsible for the alleged crimes committed due to:

- **Credibility of Prosecutor witnesses:** The Prosecution case against Mr. Kenyatta is based on three meetings (26<sup>th</sup> November 2007, 30<sup>th</sup> December 2007, 3<sup>rd</sup> January 2008) referred to in the testimony of three anonymous witnesses (witness 4, 11 and 12) whose credibility cannot be tested by the Chamber.
- **Whole body of evidence flawed:** The whole body of evidence produced by the Prosecutor with regard to Mr. Kenyatta is unreliable, irrelevant or attributable to anonymous sources.
- **Witness 11 and 12:** Prosecution witnesses 11 and 12 who gave crucial OTP evidence, testified to the Defence that Mr. Kenyatta was not involved in the violence thus providing exculpatory evidence.
- **Attempted Extortion by Witnesses:** Allegedly, it was a refusal by the Defence to remunerate witnesses 11 and 12 that made them testify against the Defence. On the basis of a report now submitted to the Chamber, the evidence collected by the Defence should be considered 'devastating' for the credibility of these witnesses.
- **Witness 4:** Prosecution witness 4 gave two statements, in 2008 and 2010, which clearly contradict each other.
- **Corroborative evidence:** The summaries of depositions and written documents which have been provided by the Prosecutor which have allegedly corroborated witness testimonies about the link between Mr. Kenyatta and the Mungiki are unfounded, undated, anonymous and based upon generic hear-say.
- **Mr. Kenyatta political background:** Mr. Kenyatta is a member of the Kanu party (which is not related to any specific ethnic group) whose longstanding political aim has been Kenya unification and reconciliation.
- **Efforts as a peace maker:** During the PEV, Mr. Kenyatta repeatedly organised meetings within the Kikuyu Community in order to calm the situation and promote reconciliation within different ethnic groups.

#### 29 September 2011

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**Witness 1: Mr. Uhuru Kenyatta, testified in his own defence.**

During questioning by his Defence Team, Mr. Kenyatta testified on:

- **His political history:** Mr. Kenyatta stated that he is a member of the Kanu party, which is a national party not related to any specific ethnic group. Mr Kenyatta explained that in 2002 he publicly admitted defeat to Mr. Kibaki to stop rising tensions.
- **2007 elections campaign:** Mr. Kenyatta alleged that his party (Kanu) was originally part of the ODM coalition but then it split because of the aims of certain ODM leaders to create inter-ethnic tensions. The section led by Mr. Kenyatta subsequently joined the PNU coalition.
- **Meetings:** Mr Kenyatta categorically denied that he participated in meetings with Prosecution witness 4 and the Mungiki on 17<sup>th</sup> November or other meetings such as the one at the Yaya Center on 25<sup>th</sup> November or at State House on 27<sup>th</sup> November.
- **Election results announcement day:** Mr. Kenyatta categorically denied that on that on 30<sup>th</sup> December 2007 he participated in a meeting with Mungiki and other PNU officials.
- **3<sup>rd</sup> January 2008 meeting:** Mr. Kenyatta asserted that he did not go to the Nairobi Members Club nor participate in a meeting with Mungiki.
- **His relationship with Mungiki and his role in the criminal plan:** Mr. Kenyatta denied he was a commander of the Mungiki and that he received their support in previous election campaigns. Mr Kenyatta testified that he had always denounced Mungiki activities. He also denied having paid the Mungiki 30 million shillings or having created a network of mid-level and low-level PNU perpetrators of crimes.
- **His role in PEV:** Mr. Kenyatta testified that he intervened many times to calm down angry Kikuyu crowds and prevent them from conducting retaliatory attacks against non-Kikuyu members.

During questioning by Mr. Ocampo, Mr. Kenyatta gave insight on:

- **Responsibility of Mr. Odinga and plot to rig the election:** Mr. Kenyatta stated that he considers Mr. Odinga not criminally but politically responsible for the post election violence of 2007-08. He further stated that he was not aware of an alleged plot to rig the election results.
- **Agreement between PNU and ODM:** Mr. Kenyatta testified that he repeatedly called for dialogue with the ODM as the PNU could not rule without the support of ODM in the Parliament.

*The Prosecutor then asked Mr. Kenyatta to describe the amount of his patrimony but the Presiding Judge interrupted stating that it was not a relevant question to the case.*

The Prosecutor continued his cross-examination:

- **Mr. Kagwanja's article and Mr. Kenyatta relationship with Mungiki:** Mr.

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Kenyatta denied the statements made in Mr. Kagwanja's article according to which he was the link between Kanu Party and the Mungiki. Mr. Kenyatta stated that he has never been a member of the Mungiki or asked for their support.

During Questioning by the LRV, Mr. Kenyatta stated:

- **Mr. Kenyatta's visits to Rift Valley province:** Mr. Kenyatta stated that he visited many IDP camps from January to April 2008. Mr. Kenyatta then asserted that the financial resources in support of the IDPs had been allocated fairly by the Government.
- **Mr. Odinga's accusation:** Mr. Kenyatta asserted that the reason why some victims had mentioned him as a participant in a meeting to plan violence in Naivasha is probably due to Mr. Odinga's statement of 2<sup>nd</sup> January in which he allegedly accused Mr. Kenyatta of being involved in genocide along with Mungiki.

Judge Trendafilova asked the witness one question:

- **Legal action against Mr. Kagwanja:** Mr. Kenyatta stated that he did not take any legal action against Mr. Kagwanja for the article, as he learned about its existence only during the disclosure of evidence stage of the trial.

During Questioning by Mr. Muthaura Defence Team, Mr. Kenyatta stated:

- **His contacts with Mr. Muthaura:** Mr. Kenyatta testified that he did not meet with Mr. Muthaura during the election campaign as Amb. Muthaura was not involved in politics.

**30 September 2011**

Witness 2 for Mr. Kenyatta gave testimony: **Mr. Luis Nguyai**, Member of Parliament in the Kikuyu constituency.

During questioning by the Defence Team, the witness testified on:

- **Results day:** The witness stated that the day of the announcement of the results he was working at the KICC<sup>12</sup> until 5pm when he moved to the State House for the swearing-in ceremony. Allegedly he did not see any Mungiki at the State house.
- **First clashes:** The witness testified that when the first attacks started he received calls from many people targeted by the attacks and decided to set up a settlement committee.
- **Violence in Naivasha:** The witness reported that when violence erupted in Naivasha he had to accompany the Minister of Internal Security to calm things down. They went to the Karagita slum where different groups were confronting each other. One group appeared to be made up of Kikuyus from the area. The witness stated that no Mungiki were present. Afterwards, the witness moved to a police station where non-Kikuyu IDPs were present and finally to the Nairobi highway where a large group of Kikuyus was blocking the road.

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<sup>12</sup> Kenyatta International Conference Centre

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- **Spread of the violence:** The witness testified that the clashes in Naivasha had a domino effect and violence spread in various part of the Country including Kikuyu town and Nairobi. Allegedly, gangs of angry Kikuyu were rising up against the massacre of their population.
- **Mr Kenyatta's role:** The witness stated that Mr. Kenyatta was involved in pacifying the situation. Mr. Kenyatta was elected as one of the heads of a parliamentary delegation charged with carrying out peace rallies across the Kikuyu areas.
- **Fundraising meeting:** The witness testified that he participated in a fundraising meeting at the Galileo Club in which PNU MPs and Nairobi businessmen were present. The witness testified that Mr. Kenyatta also participated at that rally, which was not connected with any retaliatory strategy.
- **Witness meetings with Mungiki:** The witness stated that in January 2008 he was approached at various times by two Mungiki members (one of them is considered by the Defence to be Prosecutor witness 12) Allegedly, they asked the witness to put them in contact with PNU leaders such as Kibaki or Kenyatta. The witness stated that he gave money to one of them, but he never put them in contact with Mr. Kenyatta. The two Mungiki told him that the violence in Naivasha and Nakuru had not been planned.
- **Threats and attempted extortion:** The witness referred to numerous attempts made by the Mungiki men to extort money from him and Mr. Kenyatta in exchange for their cooperation with the Defence.

During questioning by the OTP, Kenyatta witness 2 testified on:

- **Witness involvement in Mr. Kenyatta case:** The witness stated that during the past twelve months he was one of the organisers of various rallies publicly defending Mr. Kenyatta in relation to the case before the ICC.
- **Extrajudicial killings:** the witness stated that during the period of extrajudicial killings the Chief of police was Mr. Ali.
- **Meetings with Mungiki:** The witness testified that when the two Mungiki men told him of their intention to cause violence after the Naivasha and Nakuru attacks, he reported the fact to the Provincial Police Officer. The witness explained that the reason why he gave money to them was to establish an interaction in order to maintain contact with the Mungiki in order to be informed about which strategy and plans they may adopt in the future, so that he might warn the political and security authorities in Kenya if something dangerous was going to happen.
- **Extortion:** The witness confirmed that the two Mungiki men asked him twice for money for exculpatory evidence they would give in relation to Mr. Kenyatta. On both occasions the witness informed the authorities.
- **Fundraising meetings:** The witness stated that he participated at two fundraising meetings during the relevant period, at the KICC and at the Galileo Club. He had not been aware of any meeting in the Kikuyu district in which weapons were provided for retaliatory attacks.

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During Questioning by the LRV, Kenyatta witness 2 stated:

- **Witness trip to Karagita:** The witness asserted that when clashes took place there was a sufficient police presence. At the police station there were more than one thousand non-Kikuyu IDPs but the witness admitted that he did not know what finally happened to them.
- **Action plan:** The witness stated that a three stage action plan was created to confront the situation. Firstly to provide water and sanitation; secondly to provide shelter and; finally to relocate people.

Judge Trendafilova asked the witness one question:

- **Witness' relationship with Mungiki:** The witness stated that he thought it was prudent to maintain contact with them. The witness then confirmed he did not inform Mr. Kenyatta about meeting them and that.
- **Mungiki unable to implement the plan:** The witness stated that the Mungiki did not possess the capacity to implement the criminal plan alleged by the Prosecutor as they appeared extremely poor and disorganised.

During Questioning by Mr. Muthaura Defence Team, Kenyatta witness 2 stated:

- **Mr. Muthaura's role:** The witness alleged that Mr. Muthaura did not play any role in the PNU political campaign nor in planning any attacks.

During Questioning by Mr. Ali Defence Team, Kenyatta witness 2 stated:

- **Extrajudicial killings:** The witness asserted that he had no evidence to confirm any extrajudicial killings by the Kenyan Police.

**03 October 2011**

The Defence team for Mr. Ali presented its case. Witness 2 for Mr. Ali gave testimony: **Mr. Peter Otienno**, secretary of the Kenya Plantation Institute (trade union) in Naivasha.

The Defence for Mr. Ali submitted that there are no substantial grounds to believe that Mr Ali should be considered responsible for the alleged crimes committed:

- **Mr. Ali's role in the PEV:** Under the command of Mr. Ali the police played a decisive role in bringing the Kenya back to order and safety.
- **Ignored evidence:** All the Police bodies' actions were reported in written documents so there is a whole body of written evidence which could have shed light on each action taken by the police during the PEV; all such documents were completely ignored by the Prosecutor who relied on three inconsistent witnesses.
- **Relationship between Mr. Muthaura and Mr. Ali:** There is no evidence of any alleged phone call from Mr. Muthaura to Mr. Ali on 3<sup>rd</sup> January 2008 ordering him not to intervene with the police while the Mungiki and the Kikuyu youth were going to commit violence in Nakuru and Naivasha towns.
- **Prosecution witness 4:** Witness 4 is a criminal whose testimony is based on hearsay, full of inconsistencies and highly unreliable. The only statements which appear consistent with witness 4's testimony are those of witness 11 and 12 who

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have been accused of extortion.

- **Police Records:** Police records show the efforts implemented by Mr. Ali to bring transparency to the police. In particular Mr. Ali has always been rewarded for his fierce opposition to the Mungiki which were repeatedly targeted by the police before, during and after the elections
- **Violence in Naivasha and Nakuru:** Despite the scarcity of the resources, the police under the command of Mr. Ali engaged in an outstanding effort to confront the overwhelming wave of violence. Records suggest that Mr. Ali urged the police to be impartial and Mr Ali ensured a rapid mobilization of security forces in response to warnings from intelligence reports.
- **Mr Ali's behaviour after the PEV:** The Police opened 142 investigations on the conduct of police officers, and dismissed those guilty of using illegal force.
- **Organisational Policy:** The Prosecution claim that there existed an organisational policy is contradictory. Previously it related to Mungiki and an affiliation of local businessmen, while it now refers to an ad hoc organisation.
- **Spontaneous Violence:** There is no policy as the violence was spontaneous rather than planned killings.
- **No Orders not to intervene:** No police officers have testified about receiving orders not to intervene.
- **Multi-ethnic police force:** It is unrealistic that a multi-ethnic police force would back the Mungiki which is exclusively Kikuyu.

Ali witness 2 sworn in; during questioning by the Defence Team, the witness provide insight on:

- **Violence in Naivasha:** The witness reported that the situation in Naivasha was tense because of the large amount of IDPs settled in the area. Allegedly On the 27<sup>th</sup> January, the witness was chased and was rescued and escorted to the police station where there were thousands of IDPs. The witness remained at the police station for a week.
- **Police role:** The witness asserted the police did what they could to confront a massive wave of violence.

During questioning by the OTP, Ali witness 2 testified on:

- **Witness previous statements:** The witness confirmed that he had testified before the Waki Commission and given statements both to Mr. Muthaura and Mr. Ali's Defence Team with some inconsistencies with his present statement.
- **27 January 2008:** The witness testified he saw people moving around with Pangas and machetes but that he did not recognise any Mungiki.
- **Conditions at the police station:** The witness alleged that the life at the police station was extremely hard and people lived in fear.

During Questioning by the LRV, Ali witness 2 stated:

- **IDP Camps:** The witness confirmed that two IDP Camps were set up in Naivasha around the middle of February 2008.

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**04 October 2011**

Witness 1 for Mr. Ali gave testimony: **Mr. Mohamed Amin**, senior police officer in the Kenyan Police investigation department. The parties then presented their closing statements.

During questioning by the Defence Team, the witness provided insight on:

- **Witness' role in the Criminal Investigation Department (CID):** The witness stated that the CID is the department charged with investigating serious crimes and that from 2006 until 2009 he was the provincial director of the investigation body for the Rift Valley province.
- **PEV in Rift Valley Province:** The witness testified on events in the Rift Valley Province after the election results. There was massive civilian participation in violence.
- **Nature of the violence:** The witness asserted that his unit did not receive any concrete indications of possible attacks in Nakuru or Naivasha. Kalenjin and Kikuyu youth started to assemble but nothing was planned or organised. The fact that they crude weapons were used corroborated the fact that the violence was not planned.
- **Mungiki involvement in the violence:** The witness testified that there were rumours about Mungiki being involved in the violence but that they could not find any corroborating evidence of such allegations.
- **Collecting evidence:** The witness stated that the main obstacles to the collection of evidence with regard to the PEV were the accessibility and the mental state of the witnesses and victims.

During questioning by the OTP, Ali witness 1 testified on:

- **Provincial Security Intelligence Committee (PSIC) meetings during PEV:** The witness testified that the Committee held various ad hoc meetings during January to discuss issues related to peace and security and the conditions for IDPs. Decisions were taken by consensus.
- **Mungiki meeting at Sten Hotel:** The witness confirmed that his office received information about a meeting of Mungiki at Sten Hotel in Naivasha but no Mungiki were found there.

During Questioning by the LRV, Ali witness 1 stated:

- **Police numbers:** 272 police officers were present in Naivasha, while 633 were in Nakuru during the relevant period.
- **Police behaviour during the violence:** The witness stated that he did not agree that victims of sexual abuse had no possibility to be heard by the police. Furthermore, if some civilians had been shot during the PEV, this could not have been attributed to the police who had never used force against victims.

During Questioning by Muthaura Defence Team, Ali witness 1 stressed:

- **Composition of the PSIC and other Nakuru police authorities:** The witness

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stated that the members of the various authorities charged to maintain law and order in Nakuru came from different ethnic groups.

- **Intelligence information about the attacks:** The witness stated that there was no 'actionable intelligence' information about perpetrators of violence wearing military or police uniforms.

During re-examination by Ali Defence Team, the witness gave insight on:

- **Creation of task force to investigate gender-based crimes:** The witness stated that it was a decision taken by Mr. Ali to create a special task force for that purpose.
- **Intelligence information about the attacks:** During the PEV, Mr. Ali and the police played a role in preventing anarchy and restoring law and order.

#### OTP - Closing statement

- **There are substantial grounds to confirm the charges:** This confirmation of charges clearly demonstrates the existence of a common plan to target perceived ODM supporters and to create a zone of impunity for the Mungiki to operate in. As a result of this plan, attacks were conducted in Nakuru and Naivasha and rape, murder, forcible transfer and persecution were committed.
- **Witnesses and evidence:** The Prosecutor decided not to call witnesses because of the fear of witness intimidation. It is also not possible to test the reliability of the witnesses at this stage of the proceedings.
- **Reliable Witnesses:** The Prosecution witnesses statements are largely consistent with evidence gathered by NGO and governmental reports. Also, Prosecution witnesses gave specific and detailed information which has been deliberately misinterpreted by the Defence.
- **Defence body of evidence:** The suspects alibis with regards to the meetings are not reliable and the witnesses called by the Defence are excessively linked with the three suspects to be considered impartial and reliable.
- **Mungiki committing attacks:** There are substantial grounds to believe that the Mungiki were involved as perpetrators of the attacks in Naivasha and Nakuru town.

#### LRV Closing Statement

- **Victims participation as a precedent:** The case has set an important precedent of allowing robust victims participation at this stage of the proceeding.
- **Victims as reality check:** Victims have provided reality to a case which is primarily about Kenya suffering.
- **Impact of the Chamber decision on the ground:** The decision of the Chamber will have an important impact, especially on the life of ordinary Kenyans.
- **Planned violence:** The victims participating in this process and the evidence confirm that perceived ODM supporters were targeted; this demonstrates that the attacks were planned, organized and coordinated with the involvement of the Mungiki backed by MPs and politicians. The police demonstrated a lack of will to confront the situation and allowed a climate of impunity.

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- **Charges should be confirmed simultaneously:** The chamber should issue the decisions on the two Kenya cases simultaneously, and confirm the charges at least in this case.
- **President Kibaki's statement:** It is not appropriate, looking at victims interests, that President Kibaki gave a statement in favour of Amb. Muthaura, as the President should demonstrate impartiality as the President of Kenya.
- **Legal and factual observations:** The LRV will file a written submission to the Chamber regarding whether the alleged acts of looting and burning of houses should be considered as part of a persecution or forcible transfer. Moreover the Prosecutor might consider to amend the modes of liability taking into account also art. 25(3)(c) concerning aiding and abetting.

#### **Defence of Francis Muthaura Closing Statement:**

- **Prosecution case:** The Prosecution case is unfounded and contradicted by a large amount of evidence. The confirmation of charges stage exists to stop unfounded charges being confirmed. The assessment of the reliability of certain witnesses should be made by judges not by the Prosecutor.
- **Victims point of view:** The Prosecutor failed to present the interests of victims as many victims have underlined the crucial role of the police in rescuing and protecting them.
- **Mr. Muthaura role:** The Prosecution case confers on Mr. Muthaura a role in politics, and within the police, that he does not possess. Moreover the accusations against Mr. Muthaura are in total disregard of the Waki Commission final caveats according to which 'the information, the evidence gathered so far is not in our assessment sufficient to meet the threshold of proof beyond reasonable doubt'.

#### **Defence of Uhuru Kenyatta Closing Statement**

- **Prosecutor witnesses:** The case against Mr. Kenyatta is based on the testimony of witnesses 4, 11 and 12 who are completely unreliable and inconsistent in their statements. The charges should thus not be confirmed.
- **Mr. Kenyatta cross-examination:** The cross-examination of Mr. Kenyatta and the vague and incoherent character of the questions posed by Mr. Ocampo to the suspect showed the inconsistencies in the accusations against Mr. Kenyatta. The only evidence supporting the Prosecutor's case is the article written by Mr. Kagwanja.

#### **Defence of Mohamed Ali Closing Statement**

- **Evidence against Mr. Ali:** Apart from witness 4, whose reliability has been heavily contested, there is no evidence against Mr. Ali: no evidence of a superior-subordinate relationship between Mr. Muthaura and Mr. Ali and no evidence of any instructions given by Mr. Ali to the police not to intervene in the clashes.
- **Police role in the fighting:** Under the command of Mr Ali, the police played a crucial role in restoring law and order.

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- **Not confirm the charges:** For the sake of international criminal justice and of future cooperation between Kenya and the ICC the Chamber should not confirm the charges.

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