Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/09-02/11**
Date: **28 October 2011**

PRE-TRIAL CHAMBER II

Before: **Judge Ekaterina Trendafilova, Presiding Judge**
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF THE PROSECUTOR V. FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI KENYATTA AND MOHAMMED HUSSEIN ALI

Public

Prosecution's Written Submissions Following the Hearing on the Confirmation of Charges

Source: **Office of the Prosecutor**

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I. INTRODUCTION

1. The Prosecution submits that its evidence is sufficient to establish substantial grounds to believe that the three suspects committed the crimes charged. It incorporates and relies on, for that purpose, the Prosecution's amended Document Containing the Charges ("DCC"), amended List of Evidence ("LoE"), and In-depth Analysis Charts ("IDAC"), and its oral presentations of its core evidence during the hearing. The Prosecution will not reiterate the evidence or re-argue its relevance and probative value.

2. This submission instead will address specific issues concerning the nature of the confirmation process or that arose during the hearing.

II. SUBMISSIONS

A. Standard of proof for the confirmation hearing

3. To meet the evidentiary burden established by Article 61(7) of the Rome Statute, the Prosecution must present concrete and tangible evidence that demonstrates a clear line of reasoning underpinning its specific allegations.[1]

B. Purpose of the confirmation hearing

4. The Prosecution's submissions are rooted in the purpose of the confirmation hearing to determine if the Prosecution's evidence, at its highest, establishes "substantial grounds" to believe that the suspect committed the crimes charged. As this Chamber and others have repeatedly observed, the

[1] ICC-01/04-01/06-803-tEN, para.39; ICC-01/04-01/07-717, para.65; ICC-01/05-01/08-424, para.29; ICC-02/05-02/09-243-Red, para.37.

confirmation hearing is not a mini-trial or a "trial before the trial".[2] Confirmation instead is designed to protect the Defence from wrongful and wholly unfounded charges and to distinguish between those cases that should go to trial from those that should not.[3]

5. The Prosecution submits that for purposes of confirmation, the Pre-Trial Chamber should accept as dispositive the Prosecution's evidence, so long as it is relevant.[4] It should avoid attempting to resolve contradictions between the Prosecution and Defence evidence, because such resolution is impossible without a full airing of the evidence from both sides and a careful weighing and evaluation of the credibility of the witnesses. That will occur at trial.

6. This position accords with the procedures of other international tribunals for reviewing mid-trial motions for acquittal.[5] While the confirmation process is unique to this Court, the ad hoc tribunals provide for a mid-trial review upon the Accused's application for acquittal that is a comparable, albeit more comprehensive, screening of the case after the close of the Prosecution's evidence.[6] The Yugoslav and Rwandan Tribunals consistently recognize that, in evaluating a Rule 98*bis* motion for acquittal, the trial court does not assess

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[2] ICC-01/09-01/11-221, para.9; ICC-01/09-02/11-321, para.8; ICC-01/04-01/07-717, para.64; ICC-02/05-03/09-121-Corr-Red, para.31. The Prosecution incorporates hereby its position on the scope of the Confirmation Hearing as submitted before this Chamber as ICC-01/09-01/11-297.

[3] ICC-01/04-01/06-803-tEN, para.37; ICC-01/04-01/07-717, para.63; ICC-01/05-01/08-424, para.28; ICC-02/05-02/09-243-Red, para.39; ICC-02/05-03/09-121-CORR-RED, para.31.

[4] See Rules 63(2), 64.

[5] *Prosecutor v Blagojevic and Jokic*, Judgement on Motions for Acquittal Pursuant to Rule 98*bis*, IT-02-60-T, 5 April 2004, para.15. See also, e.g. *Prosecutor v Jelisic*, Appeal Judgement, IT-95-10-A, 5 July 2001, para.37; *Prosecutor v Rukundo*, 22 May 2007, ICTR-2001-70-T, Decision on Defence Motion for Judgement of Acquittal Pursuant to Rule 98*bis*, paras.2-3; *Prosecutor v Rwamakuba*, Decision on Defence Motion for Judgment of Acquittal, ICTR-98-44C-R98*bis*, 28 October 2005, paras.5-7, 13; *Prosecutor v Brdjanin*, Decision on Motion for Acquittal Pursuant to Rule 98*bis*, IT-99-36-T, 28 November 2003, paras.2-4; *Prosecutor v Semanza*, Decision on the Defence Motion for a Judgment of Acquittal, ICTR-97-20-T, 27 September 2001, paras.14-15, 17.

[6] See ICTY Rule 98*bis*: The "applicable objective standard of proof under Rule 98*bis* of the Rules is 'whether a reasonable trier of fact could, *upon the evidence presented by the Prosecutor, taken together with all the reasonable inferences and applicable legal presumptions and theories that might be applied to it*, convict the accused'". *Prosecutor v Kvocka et al*., IT 98-30/1-T, Decision on Defence Motions for Acquittal, 15 December 2000, citing *Prosecutor v Kordic and Cerkez*, Decision on Defence Motion for Judgement of Acquittal, IT-95-14/2-T, 6 April 2000, and *Prosecutor v Kunarac et al*., Decision on Motion for Acquittal, IT-96-23-T, 3 July 2000 (emphasis added).

reliability or credibility of the evidence presented in the case-in-chief, nor does it give lesser weight to evidence that it deems "'suspect', 'contradictory' or in any other way unreliable".[7] Thus, even at trial -- after the Prosecution's witnesses and evidence have been tested through direct and cross examination – in evaluating the mid-trial motion "the Trial Chamber will not assess the credibility and reliability of witnesses unless the Prosecution case can be said to have 'completely broken down,' in that no trier of fact could accept the evidence relied upon by the Prosecution to maintain its case on a particular issue."[8]

7. The limited nature of the hearing is also consistent with national practices even in common law jurisdictions. For example, in the rough equivalent of a confirmation process, English courts will entertain pre-trial dismissal motions in cases involving serious criminal charges. If such an application is made, the judge is required to dismiss a charge "if it appears to him that the evidence against the applicant would not be sufficient for him to be properly convicted".[9] The Judge's question at that stage is not the credibility of the evidence, much less the weight of rebuttal evidence proffered by the applicant, but solely whether the Prosecution's evidence is sufficient to permit the case to go forward. In the other analogous situation – international extradition proceedings – the requesting State's evidence is considered on its face and the extradition court will not consider challenges to credibility of prosecution witnesses or contradictory versions offered by the defence; rather, the courts recognize that their limited function is to determine the sufficiency of the evidence to permit the committal of the person for the criminal trial, and leaves to that trial the process of weighing competing versions and resolving credibility issues. [10]

[7] *Prosecutor v Blagojevic and Jokic*, supra, para.15 (citations omitted)
[8] *Prosecutor v Blagojevic and Jokic*, supra, para.15 (citations omitted).
[9] Para.2 (2) Schedule 3, Crime and Disorder Act 1998.
[10] E.g., *Hoxha v. Levi*, 465 F.3d 554, 561 (3d Cir. 2006); *Eain v. Wilkes*, 641 F.2d 504, 511 (7th Cir. 1981).

8. The same rule should apply to the screening process that is the confirmation hearing. The Chamber should recognize that the Prosecution's evidence is "entitled to credence unless incapable of belief."[11] And it should not reject evidence for lack of corroboration, since "it is well-established that a reasonable trier of fact may reach findings based on uncorroborated […] evidence".[12]

C. Evaluation of the Prosecution's evidence

a) The Evidence should be evaluated as a whole

9. When assessing the Prosecution's evidence for the purposes of the confirmation, this Chamber and others[13] recognize that the evidence must be analyzed and assessed as a whole, including all tendered evidence.

10. The Chamber may rely on any evidence unless it expressly rules the evidence inadmissible, [14] in accordance with Rule 63(2) and Article 69.

b) The Chamber can base its decision on statements and summaries from anonymous witnesses

11. Article 61(5) authorizes the Prosecution to "rely on documentary or summary evidence" and explicitly states that it "need not call the witnesses expected to testify at the trial". Although oral evidence is permitted at the confirmation

[11] *Prosecutor v Mrksic* IT-95-13/1-T Rule 98*bis* oral decision of 28 June 2006, T.11311-11313. See further *Prosecutor v Lubanga* Decision on the confirmation of charges, ICC-01/04-01/06-803-tEN, 29 January 2007, paras.37 to 39; *Prosecutor v Katanga* Decision on the confirmation of charges, ICC-01/04-01/07-717, 30 September 2008, para.65.
[12] *Prosecutor v Rwamakuba*, supra, para.13.
[13] ICC-01/05-01/08-424, paras.54, 57, 72, 91, 94, 101, 108, 110, 115, 117, 126, 140, 180, 212, 246, 249, 258, 277, 282, 286, 322, 332, 374, 444, 446, 474, 478 ; see also ICC-01/04-01/06-803-tEN, para.39; ICC-01/04-01/07-717, para.66; ICC-02/05-02/09-243-Red, para.41.
[14] ICC-01/04-01/07-717, para.66.

hearing, "the single judge expects the parties to rely on live witnesses only so far as their oral testimony at the hearing cannot be properly substituted by documentary evidence or witnesses' written statements", [15] to prevent disclosure of information that might put at risk witnesses or members of their families.

12. The Prosecution submits that this decision guarantees "fairness", [16] which includes in the Chamber's view the respect for the statutorily protected rights of the Prosecutor, the Defence, and the Victims.[17] Fairness is directly linked to the ability of a party to present its case in circumstances which do not place it at a substantial disadvantage vis-à-vis the opposing party and requires that the procedural and substantive rights and obligations of all participants – appropriate for the particular stage of the proceedings -- be respected .[18]

13. In the Katanga decision of 25 April 2008,[19] the Single Judge concluded that the Prosecution's use of summaries is not only consistent with the limited scope, the object and the purpose of the confirmation hearing, but also satisfies the right of the suspects to a confirmation hearing within a reasonable time, without being prejudicial to or inconsistent with their other rights and with a fair and impartial trial.

14. In this case, most of the witnesses against the suspects are viewed by their ethnic communities as traitors and their cooperation with the Court as betrayal. As a consequence of legitimate security concerns about witnesses

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[15] ICC-01/09-02/11-181, para.9, ICC-01/09-01/11-153, para.9.
[16] ICC-01/04-141, para.48; ICC-02/04-01/05-212, paras.10-11; ICC-01/04-135-tEN, para.38.
[17] ICC-01/04-135-tEN, paras.38-39.
[18] ICC-01/04-135-tEN, paras.39. In *Prosecutor v. Zigiranyirazo*, the Trial Chamber noted, "[w]hile the Chamber must be diligent in ensuring that the accused is not deprived of his rights, the Prosecution must also not be unduly hampered in the presentation of its case." See *Prosecutor v. Zigiranyirazo*, Decision on the Prosecution Joint Motion for Re-Opening its Case and for Reconsideration of the 31 January 2006 Decision on the Hearing of Witness Michel Bagaragaza via Video-Link, Case No. ICTR-2001-73-T, T. Ch. III, 16 November 2006, para.18. See also *Prosecutor v. Karemera* et al., Decision on Severance of Andre Rwamakuba and Amendments of the Indictment, Case No. ICTR-98-44-PT, T. Ch. III, 7 December 2004, para.26.
[19] ICC-01/04-01/07-428-Corr, para.137.

(and their family members),[20]and recognizing the express authorization in Article 61 and 68(5), the Prosecution is both entitled and obligated to fulfill its protective duties by using, amongst others, summaries from anonymous witnesses.

15. This protects the fair trial right for the Prosecution, which can rely on the best evidence collected and fulfill its security obligations. The use of summaries and redacted statements and transcripts also respects the fairness due to the suspects by providing the information that, in the Prosecution's view, justifies holding them for trial and leaving to the Pre-Trial Chamber the determination whether this redacted and summarized information meets the standard. Again, the Pre-Trial Chamber is not tasked with deciding the guilt or innocence of the Suspects.[21]

16. The Prosecution also notes that anonymous statements and summaries expressly were found sufficient for confirmation in *Prosecutor v. Banda and Jerbo*. There, Pre-Trial Chamber I confirmed charges against Abdallah Banda Abaker Nourain and Saleh Mohammed Jerbo Jamus ("Banda and Jerbo"), based on evidence that came principally from anonymous insider witnesses.[22] Most of this evidence consisted of *summaries* of evidence from anonymous witnesses, rather than the original statements or transcripts of their interviews.[23] The Pre-Trial Chamber I did not reject anonymous evidence as

[20] As mentioned for example in ICC-01/09-01/11-2, para.4; ICC-01/09-01/11-3-CONF-Exp; ICC-01/09-02/11-5-CONF-Exp; ICC-01/09-01/11-56; ICC-01/09-02/11-101-Red, para.14; ICC-01/09-02/11-136-Red, para.15; ICC-01/09-02/11-203-Red, para.14; ICC-01/09-02/11-225-Red; ICC-01/09-02/11-279, para.12.

[21] This principle was confirmed very early on in the Lubanga case: ICC-01/04-01/06-102, para.55, referring to Shibahara, K., Confirmation of the Charges before Trial, in: *Triffterer, O., Commentary on the Rome Statute of the International Criminal Court*, Nomos, 1999, page 790.

[22] ICC-02/05-03/09-121-Corr-Red, *passim*.

[23] It should be noted that the Defence in *Banda and Jerbo* did not contest any of the material facts alleged in the Document Containing the Charges for the purposes of the confirmation hearing, and, together with the Prosecution, suggested that the Pre-Trial Chamber might "consider such alleged facts to be proven for the purposes of the confirmation of the charges" (ICC-02/05-03/09-80, para.5). However, the Defence concession did not bind the Chamber, which did not accept the facts as proven, but instead performed its own analysis of the Prosecution's evidence: ICC-02/05-03/09-121-Corr-Red, paras.43-47.

incredible because the sources were anonymous; where it expressed concerns, they were based on other factors, such as the consistency of the evidence with other evidence.

17. The Chamber must use anonymized evidence in a manner that is not prejudicial to or inconsistent with the rights of the suspects and with a fair and impartial proceeding.[24] At the same time, the Chamber should not unduly prejudice the Prosecution by *undervaluing* this evidence because the source, though identified to the Chamber (through redaction requests), is not also told to the Defence. Maintaining anonymity is a critical mechanism to protect witnesses and preserve their evidence for trial. It would pervert that protection if anonymity would not preserve evidence for trial, but instead operate to bar the case from even reaching that stage.

18. Moreover, there is no rule in the Statute or the Rules that anonymity *per se* signifies unreliability. The witnesses are not anonymous because they are unreliable, they are anonymous because the Chamber authorized the Prosecution to withhold their identity until they or their family members are adequately protected.

19. Nor does the use of anonymous evidence (a valid protective measure) at confirmation *per se* prejudice the suspects. The purpose of disclosing identity is to allow the Defence "to place the witnesses in their proper setting, so that their credibility and motive to testify could be tested".[25] But confirmation is designed to determine whether the Prosecution's evidence meets the requisite standard, not to litigate the credibility of that evidence by contradicting it or

[24] ICC-01/04-01/06-773 OA 5, para.51 (concerning the use of anonymous summaries).
[25] *United States. v. Varella*, 692 F.2d 1352, 1355 (11th Cir. 1982) and cases cited therein. In *Varella,* confidential informants who participated as flight crew in a drug smuggling operation were permitted to testify anonymously at the criminal trial; the appeals court affirmed, after weighing the nature of their evidence and the value that their identities would provide to the Defence case against the interests in protecting their safety and the safety of their families. See also the Criminal Evidence (Witness Anonymity) Act 2008 and the Coroners and Justice Act 2009 (UK statutes permitting anonymous witness testimony at trial, in certain circumstances, to protect the safety of witnesses.

impeaching the witnesses. Indeed, at a hearing that is primarily based on documentary evidence, such credibility challenges are impossible to resolve. Thus, they should be reserved for the criminal trial, when the witnesses will testify *viva voce* and the Chamber can intelligently assess credibility based on *all* available information, including the witnesses' demeanor, their responses to cross-examination, and any contradictory Defence evidence.

20. Since credibility cannot effectively be challenged or defended without converting the confirmation hearing into a trial, it follows that limiting the ability at confirmation to contest the credibility of a witness by identifying and placing the witness in his setting is not presumptively prejudicial to the Defence. For that reason, the Prosecution submits that there should be no exclusion of or lesser weight accorded to evidence at confirmation solely because the identity of its source has been withheld from the Defence for security reasons.

21. By the same token, evidence – from either Prosecution or Defence – should not be determined to be presumptively more reliable or weighty if it comes from an identified source. Knowing a source or witness' identity is not *the* – or necessarily even *a* – defining factor in determining probative value of his or her evidence.

c) Materials from the Commission of Inquiry into Post-Election Violence and Kenya National Commission on Human Rights

22. At the hearing, Muthaura objected to the admission into evidence of documents of the Commission of Inquiry into Post-Election Violence ("CIPEV") and Kenya National Commission on Human Rights ("KNCHR").[26] In support of its claim, the Defence referred to decisions in *Prosecutor v. Thomas Lubanga Dyilo* ("Lubanga case") and *Prosecutor v. Germain Katanga and Mathieu Ngudjolo* ("Katanga case") to argue that the Prosecution cannot rely on evidence at the confirmation hearing that will not be offered at trial.[27]

23. The Defence misrepresented the decisions concerned. The requirement in both Lubanga[28] and Katanga[29] was not that evidence reflecting information from witnesses could not be used at confirmation, but that, since using the evidence could implicate security and protection concerns, the materials could only be used if the witnesses were informed in advance. A second Katanga Decision that the Defence quoted dealt with the admission of evidence from a deceased witness. Most importantly, the Chamber admitted the evidence notwithstanding the fact that the witness had died and would not be available for trial.[30]

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[26] ICC-01/09-02/11-T-4-ENG, page 33 line 14 to page 37 line 10.
[27] ICC-01/09-02/11-T-4-ENG, page 33 line 24 to page 34 line 9, 14-21.
[28] Decision 29 January 2007, ICC-01/04-01/06-796, para.59 : 'in view of the Chamber, the first and foremost measure required under Article 68(1) and Rule 86 of the Rules is to inform each prospective witness of the fact that a party intends to rely on his or her statement, or the report or transcript of his or her interview for the purpose of the Confirmation Hearing in a specific case' (emphasis added).
[29] Decision 30 May 2008, ICC-01/04-01/07-537, para.17: "In this regard, the Single Judge highlights that all statements in the present case have been taken during the […] investigation […] prior to the initiation of the case against Germain Katanga and Mathieu Ngudjolo Chui. Thus, at the time the statements were taken, the initial consent given by the witnesses for the use of their statements by the Prosecution referred generally to "proceedings before the Court". Under these circumstances, the Single Judge considered that the "first and foremost" measure of protection of those witnesses on which the Prosecution intended to rely at the confirmation hearing was to make sure that the relevant witnesses were properly informed and voluntarily accepted the use of their statements in the confirmation hearing"(emphasis added)
[30] Decision 18 April 2008, ICC-01/04-01/07-412: "Decision on the admissibility for the confirmation hearing of the transcripts of interview of deceased Witness 12", page 9.

24. The Prosecution reiterates that Article 61(5) explicitly allows for the reliance on documentary or summary evidence. This fundamental principal has been repeated by this Chamber[31] and reiterated by the Muthaura Defence.[32] The rule suggested by Muthaura, to bar the use at confirmation of materials gathered by the CIPEV and KNCHR, has no support in the core texts and is contrary to Article 69(4), which allows the Chamber to freely assess all relevant evidence and accord it the weight considered appropriate.

d) Possible inconsistencies do not require the wholesale rejection of a piece of evidence

25. While the internal and external consistency of evidence is relevant to its probative value, inconsistencies do not require the wholesale rejection of a piece of evidence. Nor is a statement or other piece of evidence to be rejected in its entirety because a portion of it is seemingly inconsistent either with other parts of the statement or with other evidence. In the decision on the confirmation of charges in *Prosecutor v. Bemba*, this Chamber explained that:

> *inconsistencies do not lead to an automatic rejection of the piece of evidence, and do not bar the Chamber from using it. Rather, in order to define its probative value, the Chamber assesses whether the inconsistencies cast doubt on the overall credibility and reliability of the evidence.*[33]

26. This Chamber also held that, where one piece of evidence could be used to prove more than one issue in the case, any "inconsistencies contained within one piece of evidence have to be assessed in relation to a specific issue."[34] Further:

[31] ICC-01/09-02/11-T-4-ENG, page 21 lines 1-7.
[32] ICC-01/09-02/11-T-4-ENG, page 18 lines 18-21.
[33] ICC-01/05-01/08-424, para.55.
[34] ICC-01/05-01/08-424, para.56.

> *inconsistencies in such a piece of evidence might be so significant as to bar the Chamber from using it to prove one specific issue, but might prove immaterial with regard to another issue, which accordingly, does not prevent the Chamber from using it.*[35]

27. This rule is true at trial and even more so at confirmation. Fact-finders at trial routinely must evaluate and weigh evidence that appears to contain internal inconsistencies, assessing witness credibility as well as the statements themselves to determine what should be credited, what requires corroboration, and what it should reject. Given the purpose of confirmation and the difficulty in assessing credibility based on written statements and summaries, anything short of fatal inconsistencies – i.e., inconsistencies that are wholly inexplicable and render the evidence impossible to believe at all -- should not require rejection of the evidence.

28. The Prosecution acknowledges that the Chamber denied confirmation in Abu Garda. While the Prosecution does not agree with the decision, it notes nonetheless that the Chamber based its decision not on the existence of inconsistencies, but because it concluded that the witness summaries were too vague and inconsistent to accord them much probative weight on the fundamental issues of the suspect's knowledge, participation, and control.[36] However, the same Chamber later confirmed charges against Banda and Jerbo based largely on evidence from the very witnesses who, it earlier found, gave inconsistent evidence concerning Abu Garda.[37] Thus, inconsistencies in the evidence concerning Abu Garda did not prevent the Chamber from relying on evidence from the same witnesses to confirm charges against Banda and Jerbo.

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[35] ICC-01/05-01/08-424, para.56.
[36] ICC-02/05-02/09-243-Red, paras.170-173, 176-179, 186-216, 222-232.
[37] ICC-02/05-03/09-121-Corr-Red, fns. 200 *et seq*.

D. Sufficiency of the Prosecution's investigation

29. The purpose of the confirmation of charges is not to assess whether the Prosecution has fulfilled its duty under Article 54(1), nor to evaluate the sufficiency of the evidence presented against hypothetical evidence which may or may not exist and which the Defence teams loosely contended could have been collected.

30. The Defence claimed that the Prosecution failed to fulfill its duty under Article 54(1) to investigate exculpatory information,[38] identifying alleged deficiencies in the Prosecution's investigation and referring generically to other evidence that it claims should have been presented at the hearing.[39] In the Prosecution's submission, the adequacy of the Prosecution's pursuit of allegedly exculpatory evidence is not a relevant consideration at the confirmation stage unless it impacts on the Chamber's assessment of whether the Prosecutor's evidence as a whole has met the "substantial grounds to believe" threshold.[40] As this Chamber itself recognized, "The Chamber doesn't have the power to direct the Prosecutor's investigation. We have only to assess the quality of evidence."[41]

31. That said, and without prejudice to its position that this is not a proper issue at this stage of the proceedings, the Prosecution submits that in fact it took all reasonable steps to follow up exculpatory lines of enquiry.[42] For example, during interviews with its witnesses, which were conducted over many days, the Prosecution questioned them on possibly exculpatory factors, confronted

[38] For example ICC-01/09-02-11-T-4-ENG, page 26 line 13 to page 30 line 18.
[39] For example ICC-01/09-02-11-T-4-ENG, page 87 line 14 to page 88 line 22; ICC-01/09-02-11-T-7-ENG, page 5 lines 4-10; ICC-01/09-02-11-T-7-ENG, page 27, lines 11-16. The claim that the Prosecution would not have interviewed specific witnesses in respect of Ali was already addressed in ICC-01/09-02-11-T-5-ENG, page 33 line 21 to page 35 line 17 and in ICC-02/05-02/09-356, para.57.
[40] ICC-02/05-02/09-243-Red, para.48.
[41] ICC-01/09-01/11-T-12-ENG, page 75, line 25 to page 76, line 2.
[42] See also ICC-01/09-02/11-356, paras.53-57.

them about apparent inconsistencies in their testimony and explored their motivation for giving evidence. The Prosecution also noted in writing to the Defence with each disclosure of documents labeled as "incriminating", that many were hybrid documents that, while predominantly containing incriminating information, also contained exculpatory information. Indeed, the Prosecution notes that at the same time as the Defence attacked the Prosecution's failure to investigate exculpatory evidence, it also relied on exculpatory materials that the Prosecution disclosed.[43]

E. Cumulative charging and the crime of persecution

32. As indicated during the hearing, the Prosecution submits that the evidence establishing the charges of murder, rape, other inhumane acts and deportation or forcible transfer of population, also establishes the charges of persecution. The proven underlying conduct also qualifies as persecution.

33. Anticipating a Defence complaint that the charges are cumulative and cannot be confirmed on that basis, such a complaint is legally incorrect. Though the conduct violates multiple statutes, the crimes themselves are distinct. Each contains at least one element that the others do not require. Thus, they may all be charged. The Chamber should confirm all of these charges to convey the full range of injury to the victims and criminality on the part of the suspects.

34. Charging decisions are within the discretionary competence of the Prosecutor[44] and it is for the Prosecutor to choose the charges,[45] for the Pre-

[43] See for example the use by the Defence of Muthaura of the statement of General Michael Gichangi: EVD-PT-OTP-00340 and EVD-PT-OTP-00339.

[44] Article 42(1) and Article 54. Denial of confirmation on the basis of cumulative charging restricts the Prosecutor's right and ability, under Articles 42 and 54, to present its case. When that ability is improperly restricted, the proceedings are unfair to the Prosecution.

Trial Chamber to determine whether the Prosecutor has supported each charge with sufficient evidence and for the Trial Chamber to pronounce on them.[46] Article 61(7) empowers the Pre-Trial Chamber to "determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall (a) Confirm those charges in relation to which it has determined that there is sufficient evidence […] (b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence […]."

35. Nothing in the Statute authorises the Pre-Trial Chamber to decline to confirm charges because it considers that the charge is unnecessary or unduly burdensome to the Defence.[47] Rather, the Statute makes it clear that the Pre-Trial Chamber may refuse to confirm a charge only if the evidence is insufficient. Indeed, Pre-Trial Chamber II stressed the statutory mandate enshrined in Article 67(1) in the pre-trial proceedings of the *Bemba* case.[48] The Bemba decision recognizes that "the cumulative charging approach is followed by national courts and international tribunals under certain conditions" and endorses the Celebici test developed by the ICTY Appeals Chamber[49], whereby cumulative charging is permissible "if each statutory

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[45] *Prosecutor v. Delalić et al*., Case No. IT-96-21-A, Judgment, 20 February 2001, para.412; *see also Prosecutor v. Kunarac et al*., Case No. IT-96-23-T and IT-96-23/1-T, Judgment, 22 February 2001, para.548; *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, 2 August 2001, para.659; *Prosecutor v. Galić*, Case No. IT-98-29-T, Judgment, 5 December 2003, para.156; *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Judgment, 5 April 2004, para.63; *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Judgment, 5 April 2004, para.63; *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Judgment, 7 June 2001, para.108, *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgment, 16 November 2001, para.369; *Prosecutor v. G. and E. Ntakirutimana*, Case No. ICTR-96-10-T and ICTR-96-17-T, Judgment and Sentence, 21 February 2003, para.863; *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence, 15 May 2003, paras.60 and 108; *Prosecutor v. Nazibirinda*, Joseph, Case No. ICTR-01-77-I, Judgment, 27 November 2007, paras.276-277.

[46] It is only after the prosecutors present their evidence that the Trial Chamber will be able to "evaluate which of the charges may be retained based upon [precisely] the sufficiency of evidence": *Prosecutor v. Delalić et al*., Case No. IT-96-21-A, Judgment, 20 February 2001, para.400.

[47] ICC-01/05-01/08-424, paras.202, 204-205, 312.

[48] ICC-01/05-01/08-55, para.13.

[49] *Prosecutor v. Delalic et. al.,* Case No. IT-96-21, AC Judgment, 20 February 2001, paras.400 (on cumulative charging), and 412-413 (on cumulative convictions). The Appeals Chamber held that

provision alleged breached in relation to one and the same conduct requires at least one additional material element not contained in the other".[50] The principle that crimes arising out of the same conduct can be charged cumulatively is also followed in civil law jurisdictions. For instance, in Argentina, a recent legal opinion from the special unit in the Attorney General's office in charge of the coordination of the prosecution of past human rights violations encourages federal prosecutors to jointly charge rape and torture when the underlying conduct is one and the same, using the rules of concurrence of offences (concurso ideal/Idealkonkurrenz).[51]

36. Criminalizing murder, rape, other inhumane acts, deportation or forcible transfer of population, and persecution protects separate – but equally important – interests. The Prosecution submits that where facts are capable of establishing more than one type of criminal conduct and responsibility – as in this case – it is appropriate as well as statutorily required that the Pre-Trial Chamber confirm all the established charges in order to encompass the entire scope of criminality committed, and injury suffered.

37. To decide otherwise would mean that the suspects will avoid trial on serious charges for which the Prosecution has presented sufficient evidence to establish 'substantial grounds to believe that the person committed each of the crimes charged'. It also unfairly restricts the Trial Chamber's prerogative to pronounce judgment on the full range of crimes committed by the person

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there is a distinction between cumulative charging and cumulative convictions and that cumulative charging is permissible but fairness to the accused requires that "*multiple cumulative convictions* entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other" (emphasis added).

[50] See ICC-01/05-01/08-424, para.200, 202.

[51] Consideraciones sobre el juzgamiento de los abusos sexuales cometidos en el marco del terrorismo de Estado, Unidad Fiscal de Coordinación y Seguimiento de las causas por violaciones a los Derechos Humanos cometidas durante el terrorismo de Estado at: http://www.mpf.gov.ar/ics-wpd/DocumentosWeb/LinksNoticias/Delitos_sexuales_terrorismo_de_Estado.pdf

and the nature and degree of victimization suffered, and to address at sentencing the appropriate penalty for the underlying conduct.[52]

F. The Prosecution's evidence is sufficient to confirm the charges

a) MUTHAURA

38. The Prosecution described the evidence that furnishes substantial grounds to believe that Muthaura, acting as a co-perpetrator, made essential contributions to the commission of the crimes charged.[53] The Prosecution's evidence showed, *inter alia,* that Muthaura was present at a key meeting on 3 January 2008 at the Nairobi Members' Club, adopted a plan to retaliate against perceived Orange Democratic Movement ("ODM") supporters in the Rift Valley, and instructed Mungiki leaders to execute this plan. The evidence further shows that Muthaura assured Mungiki leaders that the police would not interfere with their "work" and instructed Ali not to interfere with the Mungiki and pro-Party of National Unity ("PNU") youth going into the Rift Valley.[54]

39. It is undisputed that Muthaura is a very senior Government official. Witness D12-25, a District Commissioner in Kenya, twice stated that compared to Muthaura he is a very junior officer.[55] Witness D12-01 described Muthaura as

[52] See above: *Prosecutor v. Delalic et. al.,* Case No. IT-96-21, AC Judgment, 20 February 2001, paras.400 (on cumulative charging), and 412-413 (on cumulative convictions).
[53] ICC-01/09-02/11-T-6-ENG, page 13, line 20 to page 37, line 20.
[54] See generally, ICC-01/09-02/11-T-6-ENG, page 19, lines 4-16.
[55] ICC-01/09-02/11-T-8-CONF-ENG, page 98, lines 20-21 and page 124, lines 23-25. In respect of this witness, it is important to mention that Muthaura's Defence failed to disclose the prior statement obtained from the witness thereby impairing the Prosecution's ability to properly analyze it and adequately prepare for the witness's cross-examination. See ICC-01/09-02/11-T-8-CONF-ENG, page 59, lines 11-13; ICC-01/09-02/11-T-9-CONF-ENG, page 6, lines 20-24.

a "*first among equals as the head of public service*"[56] – according to him, Muthaura is "*not an ordinary civil servant*".[57]

40. Muthaura also had *de facto* authority over Ali when he was the Commissioner of Police. For example, minutes of NSAC meetings record that Muthaura issued instructions to Ali on operational matters on at least two occasions.[58] Indeed, when confronted with Ali's admission that he reported to Muthaura, Witness D12-01 did not deny Muthaura's *de facto* authority over Ali; instead, he attempted to distinguish between *de jure* and *de facto* authority. [59]

41. In another attempt to discount Ali's admission, Ali's Defence also argued a distinction between reporting for operational purposes and general government consultations and denied that Muthaura had operational authority over him.[60] That effort, however, is contradicted by the NSAC meeting minutes, referred to above. Disputing the authority of Muthaura, the Defence presented contradictory evidence on Muthaura's authority over other Permanent Secretaries in Kenya. Witness D12-01 stated that although Muthaura often chaired the inter-ministerial committee meetings held at the level of Permanent Secretaries, [61] Muthaura's role was that of mere coordination.[62] But other Defence evidence suggested that Muthaura had authority over Permanent Secretaries. For example, Witness D12-23, then a

[56] ICC-01/09-02/11-T-9-CONF-ENG, page 27, lines 1-2.
[57] ICC-01/09-02/11-T-9-CONF-ENG, page 88, lines 16-19. In that context, Witness D12-01's opinion that Muthaura, though the "head of public service", had no capacity to make decisions on operational issues -- "I don't think he does *even when he serves as Cabinet or even head of public service*" – is hardly sufficient to discredit the objective evidence of his authority. ICC-01/09-02/11-T-9-CONF-ENG, page 28, lines 11-12, emphasis added.
[58] See EVD-PT-D12-00005 at 0039 and EVD-PT-D12-00004 at 0027. The Prosecution nevertheless disputes the authenticity of the NSAC minutes presented by Muthaura's Defence.
[59] ICC-01/09-02/11-T-9-CONF-ENG, page 76, lines 18-25.
[60] ICC-01/09-02/11-T-15-CONF-ENG, page 79, lines 15-24.
[61] ICC-01/09-02/11-T-9-CONF-ENG, page 29, lines 7-8.
[62] ICC-01/09-02/11-T-9-CONF-ENG, page 89, line 24 to page 90, line 6.

Permanent Secretary in the Ministry of Education at the time of the post-election violence, considered Muthaura to be his boss.[63]

42. Muthaura challenged the Prosecution's case by (i) alleging inconsistencies in the theory of the case, (ii) attacking the credibility of Prosecution witnesses and evidence, and (iii) proffering an alibi defence. The Prosecution addressed the claimed alibi (re the 3 January 2008 meeting at the Nairobi Members' Club) in its oral closing.[64] In addition, the Prosecution relies on its prior arguments that an alibi cannot be raised at confirmation and, even if it could, it must be preceded by adequate notice and supporting evidence so that the Prosecution can investigate and respond to that affirmative defence.[65]

43. The Defence also attacked the credibility of witnesses. First, it challenged Prosecution Witness 0010 because in his statement he could not recall the exact date of the Naivasha attack or the title/rank of two police officers.[66] As any experienced trier of fact can attest, witnesses often fail to recall or provide all facts with equal precision. That, however, does not require automatic rejection of their evidence in its entirety. Moreover, as previously noted, the Statute did not design the confirmation hearing as a trial wherein such credibility determinations could be made, based only on out-of-court statements and summaries. It is thus beyond the scope of the hearing – not to mention difficult or impossible – to reject as incredible the entirety of a witness's statement on such a flimsy ground.

44. The Defence also challenged the credibility of Witness 0012, who provided information on killings in farmlands outside Nakuru town and other attacks carried out against Kalenjins in the town.[67] Witness 0012 was present in

[63] EVD-PT-D12-00077 at 0090, para.38.
[64] ICC-01/09-02/11-T-15-CONF-ENG, page 14, lines 9-21.
[65] Rule 79(1)(a).
[66] ICC-01/09-02/11-T-7-ENG, page 36, line 7 to page 38, line 8.
[67] EVD-PT-OTP-00665 at 0395, lines 349-396, line 378.

Nakuru only briefly, and on the day the violence actually subsided.[68] In that context, it is meritless to complain, as the Defence did,[69] that his limited knowledge of crimes committed in Nakuru town (since he was not there during the height of the violence, he did not witness killings, rapes, or arsons there) somehow diminishes his "first-hand account"[70] of crimes in Nakuru town or other events about which he had greater knowledge.[71]

45. Relying in part on the statement of Prosecution Witness 0012, the Defence also sought to challenge the veracity of the allegation that prior to the 2007 elections, senior government and PNU officials negotiated with Mungiki leaders to secure the Mungiki's support in the upcoming elections.[72] However, according to Witness 0012:

> *"[…] shortly before the elections, they stopped the war. They started wooing us to support them; […] they used church leaders to come to Mungiki and tell them, […] '…The government is willing to act with you and you people will be given money so that you can support your PNU side.'"*[73]

> [*A Mungiki leader*] *"is brought money. These leaders will bring money to him. Now,* [*he*] *would advise some of his men on the ground to assist those leaders. So he did not order the whole movement to support that [unintelligible]. He only coordinated according to the people he used to talk to. Not all the members who were involved in that way. Because mostly even the members of the Mungiki were supporting the other side of ODM. […] So the ones who were on the PNU are ones who are … being paid and hired."*[74]

46. The excerpts from Witness 0012's statement cited by the Defence to show purported Mungiki support for the ODM – a briefer version of what is set out above -- were taken out of context.[75] When read in full context, Witness

[68] EVD-PT-OTP-00666 at 0406, lines 38 to page 407, line 54.
[69] ICC-01/09-02/11-T-15-CONF-ENG, page 47, line 11 to page 49, line8.
[70] ICC-01/09-02/11-T-15-CONF-ENG, page 47, line 15.
[71] ICC-01/09-02/11-T-15-CONF-ENG, page 47, line 11 to page 49, line 8.
[72] For a statement of the allegation, see ICC-01/09-02/11-197-Conf-AnxA, para.26; ICC-01/09-31-Red, para.26. For the Defence challenge, see ICC-01/09-02/11-T-6-ENG, page 67, line 11 to page 72, line 5.
[73] EVD-PT-OTP-00649 at 0060, lines 443-459.
[74] EVD-PT-OTP-00668 at 0458, lines 195-203.
[75] ICC-01/09-02/11-T-6-ENG, page 70, line 20 to page 71, line 11.

0012's statement is consistent with the Prosecution's theory that the Mungiki provided its services on a "*willing buyer, willing seller basis*",[76] which is also corroborated by other evidence, including National Security and Intelligence Service ("NSIS") situation reports.[77]

47. Thus, that the leader of the Mungiki made a public declaration of support for Raila Odinga two years later, on 29 October 2009,[78] must be viewed against the backdrop of the secrecy surrounding the Mungiki-PNU cooperation before the 2007 elections. According to Prosecution Witness 0011, "*[…] OKA, Operation Kibaki Again … was formed … as a group where Mungiki will operate from. They did not want to use the word Mungiki so they formed something that … will be seen, is a lobby group.*"[79] Public acknowledgement of the cooperation with the criminal organization that is the Mungiki would have been damaging to the PNU. As President Kibaki stated, "*Groups who support me would not allow the Mungiki to infiltrate them, as it would seriously prejudice my campaign and me.*"[80] Additionally, the declaration by the Mungiki leader was made only after the Kenya Police had turned against Mungiki leaders after the post-election violence as described in paragraph 49 of the Amended DCC.

48. Muthaura's evidence also differed from Prosecution witnesses with respect to a meeting between the Mungiki and senior government and PNU officials at the State House on 26 November 2007.[81] As noted previously, it is impossible for the Chamber at confirmation to reconcile conflicting versions of events, particularly since the evidence is largely documentary and the credibility of the sources can only rarely be determined. Thus, if the Prosecution's evidence establishes a fact and is reliable on its face, that should be sufficient

[76] ICC-01/09-02/11-T-6-ENG, page 36, lines 16-19.
[77] EVD-PT-OTP-00320 at 1479, lines 392-406; EVD-PT-OTP-00307 at 1288, lines 463-468; EVD-PT-OTP-00013 at 0088, para.386.
[78] EVD-PT-D12-00190 at 02:45-03:40.
[79] EVD-PT-OTP-00308 at 1294, lines 70-72.
[80] EVD-PT-D12-00062 at 0448, para.16.
[81] See ICC-01/09-02/11-T-6-ENG, pages 74-80 ; ICC-01/09-02/11-T-7-ENG, pages 4-8.

even when Defence evidence purports to establish a contrary fact. Any other rule would require arbitrary assessments of credibility.

49. That said, even accepting the Defence evidence, it does not require rejection of the Prosecution's evidence regarding the meeting with the Mungiki. First, Witness D12-46, who provided a list of attendees at the meeting, admitted that the names of several youth leaders were left off the list; thus, his list cannot be said to be complete.[82] Second, contrary to the Defence witnesses who denied the presence of Mungiki members at the State House, other Defence evidence suggested that at least three alleged Mungiki members, including Witness D12-37, were present that day.[83] Third, Witness D12-37 stated that he never met Muthaura,[84] yet Defence witnesses acknowledge that Muthaura was present, along with Witness D12-37, at the meeting.[85] Fourth, there is a significant discrepancy in the statements of Defence witnesses as to the amount of money given to each participant after the meeting. This amount ranged from 10,000 to 20,000 Kenyan Shillings per participant and 200,000 Kenyan Shillings for the group.[86] Fifth, a video and photograph (relied upon as purported evidence of the meeting)[87] is not a complete record of proceedings at the State House on 26 November 2007.[88]

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[82] See EVD-PT-D12-00199. See also EVD-PT-D12-00194 at 0012, para.31 where the witness initially stated: "The lists I have provided to you (annex D and D1) spells out the names of all youth leaders and youth group representatives from the various youth groups which attended State House Meeting on the 26th November 2007." However, he added: "I should point out that after I received the list, … the organizer of the previous day's meeting informed me that morning that some names of the leaders of the youth had been omitted because the list was compiled hurriedly."

[83] See EVD-PT-D12-00054 at 0417, para.30 (4th line from bottom of page). See also EVD-PT-OTP-00302 at 1053, paras.31-32 which states that the three named individuals are Mungiki members.

[84] EVD-PT-D12-00054 at 0418, para.36.

[85] EVD-PT-D12-00034 at 0286, para.54; EVD-PT-D12-00194 at 0013, para.33.

[86] See for example, EVD-PT-D12-00054 at 0418, para.34; EVD-PT-D12-00034 at 0285-0286, paras.52-53; EVD-PT-D12-00194 at 0014-0015, para.39; EVD-PT-D12-00228 at 0018, para.23.

[87] See EVD-PT-D12-00188 and EVD-PT-D12-00057 respectively.

[88] The date and time of the video and photograph were not verified; notably, the main date metadata field for the video reads 26 September 2007. Witness D13-08 admits that there are at least two people present at the meeting who were not in the said photograph. See EVD-PT-D13-00504 at 0538, paras.48-51; EVD-PT-D13-00500 at 0515; EVD-PT-D13-00501 at 0518-0519.

50. The Defence also relied on the statement of Witness D12-04 in challenging Muthaura's interactions with the Mungiki at the State House and Nairobi Members' Club.[89] Witness D12-04 stated that, "*Throughout, be it prior to, during, or immediately after the PEV, the government continued in its efforts to eradicate the Mungiki menace.*"[90] This is, however, contradicted by documentary evidence from the NSIS that the Mungiki not only participated in the post-election violence but also received support from current and former politicians, particularly from Central Province, during this time.[91]

51. Witness D12-04 also asserts that: "*There was almost nothing the Mungiki could do that the [NSIS] would not know due to the level of monitoring of the Mungiki sect activities given the threat it poses to national security*."[92] The evidence, however, shows that the NSIS did not monitor or record all Mungiki activity: Witness D13-02's admitted links with Mungiki leaders during the post-election period[93] do not appear anywhere in the NSIS situation reports.

52. Muthaura argued that Prosecution Witness 0004 was mistaken regarding the Nairobi Members' Club meeting because Muthaura "does not speak Kikuyu beyond saying hello" and as a Meru he would not have referred to the Kikuyu as part of his community.[94] On the first point, Muthaura attended secondary school in a predominantly Kikuyu-speaking area, which renders it unlikely that all he can say in Kikuyu is "hello". Furthermore, the Kikuyu, Meru and Embu are usually referred to as one community – the GEMA community[95] -- because of the deep historical and linguistic links between the three groups.

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[89] ICC-01/09-02/11-T-7-ENG, page 13, line 16 to page 15, line 2.
[90] EVD-PT-D12-00053 at 0409, para.30.
[91] See for example, EVD-PT-OTP-00013 at 0073, para.342; at 0059, para.264; at 0069-0070, para.321; at 0048-0049, para.199; at 0045, para.173.
[92] EVD-PT-D12-00053 at 0409, para.30.
[93] See for example, ICC-01/09-02/11-T-12-CONF-ENG, page 40, line 4 to page 41, line 5.
[94] ICC-01/09-02/11-T-7-ENG, page 48, lines 7-14.
[95] GEMA is shorthand for Gikuyu Embu Meru Association. E.g., EVD-PT-OTP-00650 at 0077, lines 99-100.

53. Muthaura further relies on figures provided by the CIPEV on reported deaths during the post-election violence by district (CIPEV list) to contradict the Prosecution's case theory.[96] The Prosecution notes the difficulty in obtaining accurate mortality figures for the post-election violence period. The Prosecution however submits that the evidence is consistent with its theory. Although other evidence suggests that there was fighting between the Kikuyu and Kalenjin in Nakuru District, the CIPEV list shows that Luos and Luhyas were killed mainly from 24 January 2008 onwards.[97] The fact that Kikuyus were also killed before, during and after this period in Nakuru *District* is not contradictory to the Prosecution theory.

54. Muthaura also made numerous other challenges to the Prosecution evidence, many of which either argued snippets out of context or contained misleading references. For example, Muthaura challenged the corroborative value of the evidence of Prosecution Witness 0001[98] to support Witness 0004's evidence that Muthaura was involved in planning retaliatory attacks against perceived ODM supporters. According to a summary of Witness 0001's statement: "*The witness also alleges that there were meetings that took place between the Mungiki and Government representatives whereby prior to the elections the Mungiki were recruited to support the PNU. After the breakout of violence he alleges that the Mungiki were recruited to retaliate against perceived ODM supporters in the Rift Valley. He alleges that both Uhuru Kenyatta and Francis Muthaura were involved in these meetings."*[99] *(Emphasis added).* In other words, the Mungiki were recruited prior to the elections to support the PNU, and then afterwards to retaliate against perceived ODM supporters. This same witness also asserted that Muthaura and Kenyatta were involved in the meetings.

[96] ICC-01/09-02/11-T-7-ENG, page. 81, line 12 to page 82, line 12.
[97] This is corroborated by EVD-PT-OTP-00288 at 0504 and EVD-PT-OTP-00150 at 0318.
[98] ICC-01/09-02/11-T-7-ENG, page 32, line 22 to page 34, line 5.
[99] EVD-PT-OTP-00572 at 0026.

55. Muthaura argued at the hearing[100] that the Prosecution miscited evidence in a footnote in the DCC in support of preparatory activities in Naivasha. A careful reading of the relevant passage shows that it is indeed relevant to the Naivasha attack.[101]

56. Muthaura relied on an excerpt from Witness 0011's statement to controvert Prosecution evidence on the planning of the Nakuru violence.[102] A fuller excerpt shows the statement is consistent with the Prosecution's other evidence:

> *"[…] all the same they succeeded because they knew where to get some Mungiki whom they can give monies … recruit them, and do those actions of retaliatory attacks. And the same things happened even in Nakuru. … Though in Nakuru you will find that … because … some areas had confrontation … some Mungiki people felt in their own initiative they'll have to defend themself (sic) and their community."[103] (Emphasis added)*

57. Muthaura alleged that Prosecution Witness 0012 stated that the war was a Kikuyu war, not a Mungiki war (which is inconsistent with paragraph 70 of the DCC).[104] This is not true. The witness stated: "*This war was not necessarily for Mungiki at all. You have to note that. It was for Kikuyu although the Mungiki men were leading because they are somehow organized*."[105] *(Emphasis added)*

58. Finally, the Defence offered contradictory evidence on its own behalf. As argued previously, a confirmation hearing is not the appropriate forum to resolve conflicting versions. This is particularly so since the Prosecution relied – as the Statute contemplates and security needs compel – on documentary evidence and summaries, whereas the Defence called some live

[100] ICC-01/09-02/11-T-7-ENG, page 23, lines 18-25.
[101] The citation provided is sufficiently clear on this point, but additional contextual information is available at EVD-PT-OTP-00650 at 0089, lines 541-549.
[102] ICC-01/09-02/11-T-7-ENG, page 80, line 21 to page 81, line 11.
[103] EVD-PT-OTP-00309 at 1315, lines 401-405.
[104] ICC-01/09-02/11-T-15-CONF-ENG, page 46, line 19 to page 47, line 10.
[105] EVD-PT-OTP-00652 at 0119, lines 256-258. For the broader context, see *ibid*, page 0018, line 185 to page 0119, line 258.

witnesses. This case illustrates why the fact-finder's task of determining which of opposite versions is the most truthful, including by evaluating comparative credibility, should not be undertaken at the preliminary confirmation stage. If the Prosecution's evidence is sufficient on its face to meet the substantial grounds standard, the charges should be confirmed, and the competing versions of the Prosecution and Defence cases will then be resolved at a trial on the merits.

b) KENYATTA

59. During the confirmation hearing, the Prosecution presented evidence to meet the standard of substantial grounds to believe that Kenyatta, acting as a co-perpetrator, made essential contributions to the commission of the crimes charged. The Prosecution adduced evidence showing that Kenyatta was instrumental in organizing meetings on 17 and 26 November 2007 which solicited the assistance of the Mungiki with the election of the PNU to power. In a series of crucial meetings at the Nairobi State House and Nairobi Members' Club, Kenyatta adopted a plan to retaliate against perceived ODM supporters in the Rift Valley and instructed Mungiki leaders to execute this plan. The evidence further shows that Kenyatta took part in a series of fundraising meetings to raise funds and provided funds and logistical support to the Mungiki leaders to ensure that they carried out the attacks.[106]

60. The Prosecution's case rests on 12 witnesses of varying backgrounds and experiences who were interviewed by the Prosecution and whose testimony are inherently consistent. Their testimony is corroborated not only by multiple and varied external and independent sources, but also by admissions in the evidence of the Defence. The evidence presented by the

[106] ICC-01/09-02/11-T-4-ENG, page 51 line 22 to page 54 line 1; ICC-01/09-02/11-T-5-CONF-ENG, page 36, line 18 to page 42, line 6; page 43, line 6 to page 46, line 9.

Prosecution as a whole more than meets the sufficiency standard required under Article 61(7) of the Statute.

61. Kenyatta's Defence attempted to create an alternative theory to the Prosecution's case theory. The Defence asserts that the source of the purported criminal liability of Kenyatta stems from political statements made by his political opponents which have developed into testimonies by unreliable and incredible Prosecution witnesses who should not be believed.

62. Specifically, the Defence contended (i) that the Prosecution's case rests on just three witnesses, whom it describes as unreliable and incredible;[107] (ii) that Prosecution Witness 0009 did not provide any evidence against Kenyatta;[108] and (iii) that the Prosecution relies on anonymous witness summaries and witnesses who have not been interviewed by the Office of the Prosecutor and other documents which they argue are inherently flawed and or irrelevant, or are un-attributable to the author or source.[109] Finally, the Defence further raises an alibi placing Kenyatta away from all the locations of the preparatory meetings alleged by the Prosecution.

63. The Defence tried to impugn the testimony of Prosecution Witnesses 0011 and 0012 by labeling them extortionists and Prosecution Witness 0004 a liar.[110] These Defence assertions are baseless and flawed. In general, witness accounts may vary and diverge based on their experiences and memories. What would be incredible and unbelievable would be for witnesses to mirror exact testimonies and accounts of events which occurred a few years before their interviews with the Prosecution. The wide-ranging accounts provided by Witnesses 0011 and 0012 were drawn largely from their vantage points as highly placed Mungiki insiders who had knowledge of the critical preparatory meetings, the details of the common plan by the three suspects,

[107] ICC-01/09-02/11-T-10-ENG, page 23, lines 15-16; page 13, lines 9-12.
[108] ICC-01/09-02/11-T-10-ENG, page 14, lines 4-6.
[109] ICC-01/09-02/11-T-10-ENG, page 14, lines 7-19.
[110] ICC-01/09-02/11-T-10-ENG, page 17, lines 5-15; page 21, lines 9-21.

and the involvement of other mid-level perpetrators in the planning and implementation of the attacks.

64. The testimony of Witness D13-02 (a friend of Kenyatta) on the witness stand, even if credited by the Chamber, did not portray an extortion attempt but rather a long-standing financial relationship between him and Mungiki leaders which can only be fully explored at trial. That Mungiki members have a financial relationship with politicians is even supported by the statement of Witness D13-23,[111] who indicated that a former Mungiki leader told him that he was paid 6 Million Kenyan Shillings to organize Mungiki members to demonstrate at a rally that sought to undermine the witness's reputation and that demonstrations present an opportunity to "*unlock more money from these guys*".[112] This all shows that there was clearly a money flow from politicians towards the Mungiki. In any event, there were inconsistencies between Witness D13-02's statement and his testimony during questioning by Counsel for Kenyatta and by Prosecution Counsel. And the witness's admitted proximity and close relationship to Kenyatta further makes the objectivity of his testimony questionable. Particularly incredible is his testimony that, although Kenyatta was his friend, he did not have access to his mobile number.

65. Furthermore, the investigative report of Gary Summers, which was commissioned by Kenyatta, cannot be relied upon in the face of its obvious failure to address or investigate the security concerns raised by the witnesses; its willingness to accept without any further investigation statements made by known associates of Kenyatta, particularly those alleged to have been involved in witness tampering; and the skewed and subjective analysis of the evidence provided to him.

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[111] EVD-PT-D13-00551 at 0792, para.42.

[112] EVD-PT-D13-00551 at 0792, para.43. At 0792, para.44, Witness D13-23 further indicated that a former Mungiki leader told him that in politics money comes easy and that he had made 6 Million KSH and bought himself a new car.

66. Regarding Witness 0004, Kenyatta alleged a number of so-called inconsistencies in his previous statements. Regarding his first statement, Prosecution Witness 0004 explained that he wanted to be discreet about his presence at the State House with the Mungiki on 26 November 2007 because he wanted to keep his Mungiki membership hidden. In any case, rather than indicating any inconsistencies, the limited purpose of the evidence he gave shows the security concerns of the Witness whilst he provided the statement.[113]

67. As regards the statement given to CIPEV, though different in some respects from the first statement, it is fundamentally consistent with the evidence provided by the Witness in the previous statement.[114] Crucially, the third and fourth statements of the Witness do not show any material inconsistency that may warrant the rejection of Witness 0004's evidence implicating Kenyatta in the common plan.[115] Rather, the evidence of the Witness highlighted the specific and essential contribution of Kenyatta to the effective implementation of the common plan. Furthermore, the core of the evidence of the Witness has remained consistent and corroborated by other sources.

68. In respect of Prosecution Witness 0009, the Defence asserted that the evidence is "flawed" and "unreliable". However, the Witness provided a clear account of his personal involvement in rallies organized to mobilize and recruit pro-PNU youth to participate in attacks,[116] a fact that is corroborated by other external and independent sources. Indeed the Witness indicated in his statement that KANU offices were used to recruit, mobilize and pay pro-PNU youths for attacks.[117] Kenyatta himself admitted on the stand that he was Chairman of KANU throughout the period of the PEV,[118] and this fact puts

[113] EVD-PT-OTP-00248 at 0054-0055, para.277.
[114] EVD-PT-OTP-00248 at 0059-0060, paras.300-304
[115] See EVD-PT-OTP-00248 (third statement) and EVD-PT-OTP-00302 (fourth statement).
[116] EVD-PT-OTP-00640 at page 0188, line 384 to page 0189, line 438.
[117] EVD-PT-OTP-00640 at 0189, lines 431-433.
[118] ICC-01/09-02/11-T-11-CONF-ENG, page 18, line 6; page 51, lines 19-20; and page 57, lines 20-21.

him in a position to have been aware of the use of the party's offices to implement the common plan. Witness D13-02, a member of the KANU party, also admitted to having links with the Mungiki.[119]

69. In addition to the Prosecution evidence, Defence witnesses also supported the Prosecution's case. Kenyatta relied on mainly Kikuyu witnesses who are either his close relatives or his business/political associates. Notwithstanding that these witnesses were inherently biased, even they provided support for the Prosecution's case. For instance, Witness D13-02 admitted that he was not in a position to comment on the purpose of fund-raising activities or the use to which monies raised at such fundraising was put.[120] He however admitted that one MP took him for a fundraising meeting to defend their communities.[121] Within the context of the period of the PEV, that phrase -- defending one's community -- referred to attacks against perceived ODM supporters. Furthermore, the witness by his own admission was not present with Kenyatta on 3 January 2008 at the Nairobi Member's Club where a key preparatory meeting was held.[122] Even when the witness alleged that he was present with Kenyatta at rallies and that these rallies were calls for peace among the Kenyan populace,[123] his evidence did not essentially contradict the Prosecution's case theory since the peace meetings were largely held after the

[119] EVD-PT-D13-00596 at page 0025, para.45 to page 0026, para.33; ICC-01/09-02/11-T-12-CONF-ENG, page 56, lines 4-16.
[120] ICC-01/09-02/11-T-12-CONF-ENG, page 72, lines 8-22.
[121] ICC-01/09-02/11-T-12-CONF-ENG, page 70, line 1 to page 87, line 20. See also EVD-PT-D13-00596 at 0024 para.40; EVD-PT-D13-00529 at 0624, 0625, 0627, para.20 where the witness confirmed that the purpose of the meeting at the Galileo Hotel on 24 January 2008 was for the GEMA to organize help for the Kikuyu community in Rift Valley and that Kenyatta spoke of the need to help "our people". Indeed an individual, who also received an invitation for the event, refused to attend on the basis that he would not attend any meeting that sought to raise funds for the Mungiki. Thus contrary to Defence assertions, these fundraising meetings, allegedly to help the IDPs, were designed instead to raise funds for the Mungiki to "help defend our people"; see also EVD-PT-D13-00550 at 0774, 0775, paras.3 and 6 where the witness also confirmed that he attended the Galileo meeting and made a passionate plea to help PNU supporters targeted by ODM supporters. Again within the context of the post-election violence, this is a thinly disguised admission of the call for mobilization of the funds and youths for retaliatory attacks against ODM supporters.
[122] ICC-01/09-02/11-T-12-CONF-ENG, page 53, lines 16-17.
[123] ICC-01/09-02/11-T-12-CONF-ENG, page 25, line 23 to page 32, line 4.

main violence in Nakuru and Naivasha, following the peace initiatives led by Kofi Annan. The statement of Witness D13-11 also asserted that the Mungiki supported Kenyatta's campaign actively in 2002 even though a dispute later ensued, showing that Kenyatta had Mungiki support for the elections.[124]

70. Finally, the testimony of Witness D13-02 supports the Prosecution's case that the Jacaranda hotel and other such hotels owned by senior pro-PNU politicians were meeting points for Mungiki elements. Although the Defence repeatedly ridiculed the notion that such meetings could occur openly, its own witness, Witness D13-02, admitted to having had at least seven to eight meetings with them at the Jacaranda hotel.[125] Witness D13-25's statement also supports the Prosecution's case theory. He asserted that Kenyatta was always invited to fundraising meetings; and asserts that Kenyatta was invited as a "*PNU member*",[126] contrary to Kenyatta's notable insistence that during the period of the PEV he was solely a KANU member. Even more telling, Witness D13-15 asserted that Kenyatta, as Chairman of KANU, was automatically a member of the PNU Council and that he worked closely with Kenyatta in both KANU and PNU. [127]

71. As regards the presence of youths at a meeting at the State House on 26 November 2007, at least three Defence witnesses support the Prosecution theory that the meeting took place, and point to the fact that the meeting presented a perfect official cover for a meeting with Mungiki representatives by the highest levels of government. One Witness, Witness D13-23 stated that the meeting started around 10:30 am in one of the boardrooms of State House and lasted about an hour and 20 minutes, which shows that the meeting with Mungiki could have easily taken place at 11:45 am. The Witness also stated that President Kibaki told the Vijana Na Kibaki (VNK) group that he had 20

[124] EVD-PT-D13-00535 at 0649 para.6.
[125] ICC-01/09-02/11-T-12-CONF-ENG, page 39, line 20 to page 40, line 7.
[126] EVD-PT-D13-00557 at 0862 para.9.
[127] EVD-PT-D13-00543 at 0724 para.7.

minutes to go before another engagement, which confirms that there was a second meeting at 11:45 am.[128] The Witness indicated that after the rally at Uhuru Park he organized the meeting of youths in the State House and prepared a list of attendees which he handed in. He stated that he did not know how KAWA (Kibaki Again Women's Association), OKA (Operation Kibaki Again) and representatives of Hawkers came to be on that list. Amongst those groups, names of Mungiki members are to be found.

72. Finally, Kenyatta asserted alibis that place him away from the locations of the preparatory meetings he is alleged to have attended with Mungiki leaders and other members of the common plan. The alibi raised by the Defence is insufficient to establish substantial grounds to believe that the suspect did not commit the crimes charged. At best, the Defence presented a factual dispute concerning material issues which can best be resolved by a full airing of the evidence, which can only be done at trial. Moreover, even if an affirmative alibi defence is appropriately raised at confirmation, he did not give sufficient advance notice of their intent to raise an alibi defence.[129]

73. In his testimony, Kenyatta denied any knowledge of any of the meetings. Apart from his obvious self-interest, he also displayed a selective recall of details of events which occurred in 2007 and 2008 during his direct testimony. But when questioned by the Prosecution and the representative of the victims, Kenyatta could not give as detailed information for events that occurred three or four months before his testimony. Kenyatta could not recall the details of his attendance of a public rally with a former KANU MP, which took place three or four months before his testimony at the ICC,[130] neither could he recall

[128] EVD-PT-D13-00551 at 0802 para.80, to page 0803 para.84.

[129] Rule 79(1)a requires the Defence to provide advance notice of an intent to rise an alibi defence, along with details of the evidence in support of it, specifically in order that the Prosecution may investigate and prepare for it without being surprised at trial.

[130] ICC-01/09-02/11-T-11-CONF-ENG, pages 65-66.

the names of some of the IDP camps he visited, around 2008, nor the specific dates of his visits.[131]

74. Meeting at the Yaya Centre on 25 November 2007: Kenyatta denied his presence at Yaya Centre on 25 November 2007 by asserting that he was at rallies in Uhuru Park and Bomet, after which he went home.[132] This is not really an alibi defence as it does not indicate that Kenyatta could not have been present for the meetings which took place at Yaya Centre, which is close to Uhuru Park. Even accepting his unsubstantiated claim that he attended rallies on that date, Kenyatta could have taken time away from the rallies to attend the meetings and then returned to the venue of the rallies, since no concrete evidence was provided to show that he was present at all, much less throughout the duration of both rallies.

75. Meeting at the State House on 26 November 2007: In this case, Kenyatta relied on a video clip showing him entering the Kenyatta International Conference Centre (KICC) on 26 November 2007.[133] Kenyatta further relied on a newspaper clipping and photos to substantiate that the KICC meeting and subsequent lunch at the Intercontinental Hotel took place.[134] In the most generous light, however, the evidence only shows that Kenyatta went into the KICC building at an unknown time. It does not show how long he stayed at the KICC. In fact, there is no further indication of his presence at the KICC or Intercontinental Hotel. He is conspicuously missing from the video showing people walking from the KICC to the Intercontinental Hotel. He is also missing from photos taken of the event. The alleged alibi further crumbles in light of the testimony of Witness D13-02 that Kenyatta lives just 400m from the State House.[135]

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[131] ICC-01/09-02/11-T-11-CONF-ENG, page 75, line 21 to page 76, line 17.
[132] ICC-01/09-02/11-T-11-CONF-ENG, page 21, line 5 to page 22, line 5.
[133] EVD-PT-D13-00201.
[134] EVD-PT-D13-00199; EVD-PT-D13-00200.
[135] See ICC-01/09-02/11-T-12-RED-ENG, page 49, lines 6-14.

76. Meeting at the State House on 30 December 2007: Kenyatta asserted that on the day of the meeting he was at the KICC tallying results along with other KANU party officials. He claimed he was accompanied by Witness D13-20 and they were together at the KICC and at his home before proceeding to State House for the swearing-in ceremony of President Kibaki.[136] The witness statement of Witness D13-20 puts the swearing-in ceremony of the President at 31 December 2007 and is vague on the timing of the movements the Witness purportedly had with Kenyatta on 30 December.[137] Moreover, the proximate distance between the State House and KICC means that Kenyatta could have attended the State House meeting after the election results were tallied. Kenyatta's purported alibi thus again fails to counter the Prosecution's theory of the case.

77. Meeting at the Nairobi Members Club on 3 January 2008: Kenyatta asserted that he was not at the Nairobi Members Club on 3 January 2008, but instead stayed home because of "*security reasons*" due to the calls for mass action by the ODM leadership.[138] This denial is hardly an alibi, nor does it establish that Kenyatta could not have been at the Nairobi Member's club on 3 January. The Defence relied on the statement of the Club Secretary, but he was not present on the date of the meeting. The manager, however, instructed his subordinates to co-operate with Defence Counsel and provide the required statements.[139] These statements are unlikely to be objective in view of the very powerful position of the suspects in contrast to the club staff providing the information. Furthermore, Kenyatta asserts that the Nairobi Members Club would not allow Mungiki members to just walk into the club since it was a members only club.[140] However, the Prosecution did not assert that the meeting was held with Witness 0004 and others who made known that they

[136] ICC-01/09-02/11-T-11-RED-ENG, page 27, line 19 to page 29, line 21.
[137] EVD-PT-D13-00548 at 0758, para.7 to 0759, para.8.
[138] ICC-01/09-02/11-T-11-RED-ENG, page 34, lines 4-21.
[139] EVD-PT-OTP-00106 at page 0112, para.11 to page 0113, para.12.
[140] ICC-01/09-02/11-T-11-CONF-ENG, page 36, lines 13-19.

were there overtly as Mungiki representatives; its theory is that the attendees were passed off as youth, present at such an exclusive location at the behest of senior members of the society such as the suspects. Furthermore, Witness D13-06, asserted in his statement that he was with Kenyatta the whole day, but not during the crucial hours when Kenyatta would have attended the meeting.[141]

78. Meeting at the Blue Post Hotel at Thika on 27 January 2008: The Prosecution asserts that this meeting at Blue Post Hotel in Thika was to directly provide funds to mid-level Mungiki perpetrators for the attacks in Nakuru and Naivasha.[142] Kenyatta denied attending such a meeting or any links with a former KANU MP,[143] but admitted to attending fundraising meetings solely for the purpose of raising money to support IDPs.[144] When questioned by the Legal Representative for victims if he visited or provided funds for Luo IDPs, Kenyatta was not clear in his response and merely asserted that the funds were for all Kenyans.[145] He clearly failed to refute the evidence that he attended these meetings.

[141] EVD-PT-D13-00479 at 0409, 0411, 0412-0416.
[142] ICC-01/09-02/11-T-5-CONF-ENG, page 41, line 25 to page 42, line 5.
[143] ICC-01/09-02/11-T-11-CONF-ENG, pages 65-66.
[144] ICC-01/09-02/11-T-11-CONF-ENG, page 42, lines 2-25.
[145] ICC-01/09-02/11-T-11-CONF-ENG, page 75, lines 5-20; page 78, line 5 to page 80, line 7.

c) ALI

79. The Prosecution demonstrated that Ali knew of the attacks through the instructions he received from Muthaura[146] and the NSIS situation reports.[147] He had the ability to act to decrease the loss of life and property,[148] but he did not take serious action. He failed to act because Muthaura ordered him not to do so. His police allowed crimes to occur because Muthaura's orders, conveyed to and through Ali, directed *inaction*.[149] His failure to prepare forces for the attack[150] and his subordinates' decision to withdraw forces at critical moments[151] and to allow direct perpetrators to bypass roadblocks[152] all demonstrate his conscious intention and his active contribution to the organizational policy. In addition, Ali chose not to investigate or prosecute those most responsible for the PEV.[153] This, together with his intentional cover-up of the co-perpetrators' actions by extra-judicial killings,[154] proves Ali's intention to further the common purpose and his knowledge of its illegality. The evidence, viewed together as a whole, establishes that Ali contributed to the common plan with the specific knowledge and intention of furthering the principal perpetrators' criminal activities and criminal purpose.[155]

80. Ali asserts that Article 25(3)(d) liability is available only for persons *outside* the group. The Defence claims that the distinction between individuals "belonging to the inner circle" and those "not belonging to the inner circle" is a crucial

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[146] ICC-01/09-02/11-T-6-ENG, page 45 lines 8-19.
[147] ICC-01/09-02/11-T-6-ENG, page 41 lines 18 to page 43 line 5.
[148] ICC-01/09-02/11-T-6-ENG, page 39 lines 23 to page 44 line 3.
[149] ICC-01/09-02/11-T-6-ENG, page 45 line 8 to 19.
[150] ICC-01/09-02/11-T-4-ENG page 108 line 12. The same information is provided by Defence Witness D14-02 in his testimony. ICC-01/09-02/11-T-13-ENG page 169 line 23. See also reference to an NSAC recommendation to have at least 30 police officers and 1 vehicle present in a given constituency. This NSAC recommendation was implemented by Mr. Ali, according to the Defence (ICC-01/09-02/11-T-13-ENG page 60 line 10); Defence statements EVD-PT-D14-00044 at 0044 and EVD-PT-D14-00050 at 0082 stating that the Naivasha police station had one vehicle only.
[151] ICC-01/09-02/11-T-6-ENG, page 47 line 20 to page 49 line 5.
[152] ICC-01/09-02/11-T-6-ENG, page 45 line 8 to page 46 line 23 and page 47 lines 6-19.
[153] ICC-01/09-02/11-T-6-ENG, page 50 line 19 to page 54 line 23.
[154] ICC-01/09-02/11-T-6-ENG, page 55 line 5 to page 57 line 24.
[155] ICC-01/09-02/11-T-6-ENG, page 58 line 13 to page 59 line 4.

distinction in the delimitation of subparagraph (d) and (a). Given that the Prosecutor places Ali in the inner circle, he argues that he could not be responsible under subparagraph (d).[156]

81. In support of this argument, the Defence cited Kai Ambos, who made the argument as Counsel for Mbarushimana in *The Prosecutor v. Callixte Mbarushimana* ("Mbarushimana case"). Ambos did not cite any authority for his position, much less establish that he had espoused that view before joining the Defence team. And none of the other authorities commonly referred to when interpreting Article 25(3)(d) advance this position.[157]

82. The Prosecution disagrees with the Defence's position. The plain language of Article 25(3)(d) does not distinguish between individuals within and outside the group. It does not exclude charging a person who is a member of the common purpose group with this mode of liability. If that limitation had been intended by the drafters, they would have written the Statute to say as much.

83. Instead, the structure of Article 25(3), including the language employed, signifies an unambiguous intent that *all* participants in the commission of these crimes – whether they act directly, order, solicit, aid or abet the crimes, or make an intentional or knowing contribution to the common purpose to commit the crimes – can be prosecuted. The Statute is designed to capture all forms of direct, indirect, accessorial and other participatory liability. Immunizing an insider member of the common purpose group who shares in the plan and makes an intentional or knowing contribution but does not directly perpetrate, order, or assist the crime would be wholly contrary to that broad intent.

84. The interpretation advanced by the Defence would furthermore lead to absurd results. If their interpretation were to be followed, a person not part of the

[156] ICC-01/09-02/11-T-13-ENG, page 112, lines 15-24; page 113, lines 17 to page 114, line 16.
[157] See W.A. Schabas, *An Introduction to the International Criminal Court*, 3rd, 2007, at 215: "Under the concept of common purpose complicity, those who participate in a criminal enterprise are liable for acts committed by their colleagues" (emphasis added).

group who would be charged under this article, could escape liability simply by declaring that he is part of the group or that he had a meeting of minds with the other perpetrators. In other words, by showing a greater degree of participation, he could in fact escape liability.

85. Neither is this interpretation consistent with the jurisprudence of this Chamber. It is contrary to the decision of this Chamber when it issued the summons to appear for Sang and Ali respectively[158], who are part of the group of persons who committed the crime. It is also contrary to the decision in the Mbarushimana case and in *The Prosecutor v. Harun* and *Abd-Al-Rahman*, where the Court found reasonable grounds to believe that they could be held liable under Article 25(3)(d).[159]

86. What's more, the Defence repeatedly argued that no evidence shows that "*Ali intended to contribute in any fashion, in any way to the crimes against humanity*"[160] or "*possessed the requisite knowledge of the planned attacks*."[161] The Defence argued that "*there was absolutely no action by either General Ali or the Kenya police that was part of a wide-spread and systematic attack*."[162] According to the Defence "*the Prosecution failed to cite what positive action was taken*."[163]

87. In fact, the Prosecution established that Ali, as Commissioner of Police, contributed to the execution of the common plan to target and attack unarmed civilian supporters of the ODM by ensuring that the Kenya Police did not intervene before, during or after the attacks, despite having prior knowledge of the attacks and the explicit authority to intervene by means of his function as

[158] ICC-01/09-01/11-01 and ICC-01/09-02/11-01.
[159] ICC-01/04-01/10-2; ICC-02/05-01/07-2; and ICC-02/05-01/07-3. That these decisions were at the arrest warrant stage is irrelevant, as this is a legal principle rather than an issue that goes to the threshold of proof.
[160] ICC-01/09-02/11-T-4-ENG, page 114 lines 17-19, emphasis added; see also ICC-01/09-02/11-T-4-ENG, page 115 line 24 to page 116 line 14; see also Ali's Defence submissions ICC-01/09-02/11-T-13-ENG, page 114 lines 11-16.
[161] ICC-01/09-02/11-T-13-ENG, page 115 lines 17-20.
[162] ICC-01/09-02/11-T-13-ENG, page 115 lines 12-14.
[163] ICC-01/09-02/11-T-13-ENG, page 115 lines 21-22

Commissioner of Police. He provided free access for the passage of the Mungiki to carry out the attacks in Nakuru and Naivasha, knowing fully well the purpose of the attacks.[164] In addition to the withdrawal of the prison guards, these actions showed Ali's contribution to creating a Free Zone.[165] He did so, moreover, not because of ineptitude or a failure to sufficiently appreciate the significance of the intelligence reports or the degree of violence that would erupt. He deliberately contributed police acquiescence and non-reaction to the violence because Muthaura ordered him to do so.[166]

88. The Defence did not dispute that Ali had absolute and effective control over the Kenya police forces as Commissioner of Police. Indeed, Counsel spelled out the ordinary chain of command placing Ali at the top of the chain.[167] In addition, the Defence agreed that "*General Ali was in constant communication with the PPOs in the field. That's true*."[168] Nor did the Defence dispute that Ali had access to intelligence information through NSIS reports; it acknowledged that he received intelligence reports that warned about impending attacks in Nakuru and Naivasha.[169] Ali therefore had knowledge that the crimes would occur.

89. The Defence appeared to urge, as argued in opening statement, that "*Kenya Police often lacked sufficient time or information to respond to attacks*."[170] But Ali not only received the NSIS reports in advance, he at times passed on the intelligence received through situation reports to the field.[171] The 33 police witnesses whose statements he proffered, however, agreed that they did not receive intelligence of any kind on impending attacks against Nakuru and Naivasha and that no incident of prior violence could be noted or seen in the

[164] ICC-01/09-02/11-T-6-ENG, page 45 lines 8 to page 46 lines 23; page 47 lines 6-19.
[165] ICC-01/09-02/11-T-6-ENG, page 47 lines 19 to page 49 line 5.
[166] ICC-01/09-02/11-T-6-ENG, page 19 lines 6-16.
[167] ICC-01/09-02/11-T-13-ENG, page 81 lines 1 to page 82 line 18; see also EVD-PT-D14-00036 at 0019.
[168] ICC-01/09-02/11-T-13-ENG, page 60 lines 17-18.
[169] ICC-01/09-02/11-T-13-ENG, page 54 line 3 to page 64 line 13.
[170] ICC-01/09-02/11-T-4-ENG, page 108 lines 18-19
[171] ICC-01/09-02/11-T-4-ENG, page 117 lines 8-11, ICC-01/09-02/11-T-13-ENG, page 54 line 3 to page 64 line 13 and ICC-01/09-02/11-T-15-CONF-ENG, page 77 line 11 to page 78 line 15, page 80 line 17 to page 81 line 25.

weeks and days proceeding the Naivasha and Nakuru attacks. The Defence did not establish, indeed it ignored in obtaining the witness' statements, whether instructions to beef up security and maintain law and order were implemented; thus there is no Defence evidence that Ali *effectively* reacted to security intelligence in an effort to prevent violence and protect persons. Witness D12-25 testified that he did not receive any "formal" intelligence information of impending attacks, though he admitted receiving informal intelligence.[172] Nor did he implement instructions by Ali to beef up security; rather, according to the Witness, actions to increase patrols and request reinforcements were based on the Witness' own instructions.[173]

90. The Defence further presented NSIS situation reports and Ali's alleged reaction thereto. For example, in response to a 21 January 2008 NSIS situation report on the possible confrontation in Naivasha,[174] Ali allegedly notified his officers through a situation report on 22 January 2008,[175] that Kikuyu youth were planning an attack in Naivasha and ordered his provincial police officers to beef up security and "*to ensure the security personnel were deployed on a 24 hour basis*."[176] But in none of the statements introduced by Ali did any witness say he had been informed of any impending attacks; on the contrary, all witnesses (including Witness D12-25) agreed that they had no prior notice of violence.[177]

91. Another NSIS situation report[178] regarding Nakuru, dated 16 January 2008, stated that the "*Kalenjin are threatening to barricade the Molo-Nakuru road and that violence is likely*."[179] According to the Defence, Ali thereafter instructed the Provincial Police Officers to "*beef up security and patrols and surveillance in the Rift*

[172] ICC-01/09-02/11-T-8-CONF-ENG, page 116 line 4 to page 117 line 11
[173] ICC-01/09-02/11-T-8-CONF-ENG, page 45 line 15-25.
[174] EVD-PT-OTP-00013 at 0052.
[175] EVD-PT-OTP-00108 at 0469 – 0470.
[176] ICC-01/09-02/11-T-12-CONF-ENG, page 48 lines 18-25 and page 49 lines 1-11.
[177] See for instance EVD-PT-D14-00056 at 0020 "Before the 27th I did not have any information that the violence would happen in Naivasha, I learnt on that day."
[178] EVD-PT-OTP-00013 at 0057.
[179] ICC-01/09-02/11-T-13-ENG, page 58 line 19 to page 59 line 13.

and order that the Molo-Nakuru road be manned to avert any acts of lawlessness".[180] Yet again, however, all Defence witnesses agreed that they had no prior notice and that the violence was spontaneous.

92. Finally, a NSIS situation report dated 23 January 2008 informed that a former Nakuru MP was organizing Mungiki to attack non-Kikuyu in Nakuru.[181] Though Ali claimed that he relayed this information to his officers and ordered them to warn off the MP,[182] none of the police officers from Nakuru interviewed by the Defence corroborated this assertion.

93. Furthermore, the Defence spelled out the ordinary chain of command within the police force and underscored that Ali believed in a well-organized force and liked matters to be handled in an orderly manner.[183] Accepting his line of Defence, if Ali had intended to prevent the violence he would have ensured that his instructions to beef up security or reprimand the Nakuru MP be effectively implemented through the chain of command.

94. For instance, the Defence argued that Ali had notice of Mungiki wearing police uniforms and sent a situation report to the field "*to go out and investigate, arrest and prosecute anybody that was wearing a uniform that shouldn't be*."[184] Yet none of the Defence witnesses for Ali and for Muthaura, who are police men and women from the field, indicated in their statements that they ever saw or heard of any civilians or Mungiki wearing police uniforms.[185]

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[180] ICC-01/09-02/11-T-13-ENG, page 59 lines 4-13.
[181] EVD-PT-OTP-00013 at 0048; ICC-01/09-02/11-T-13-ENG, page 61 lines 14-16.
[182] EVD-PT-OTP-00109 at 0477; ICC-01/09-02/11-T-13-ENG, page 61 lines 21-25.
[183] ICC-01/09-02/11-T-13-ENG, page 81 line 1 to page 82 line 4.
[184] ICC-01/09-02/11-T-4-ENG, page 119 lines 6-8.
[185] EVD-PT-D14-00066 at 0054, EVD-PT-D14-00064 at 0045, EVD-PT-D14-00036 at 0018, EVD-PT-D14-00048 at page 65, EVD-PT-D14-00046 at 0059-0060; EVD-PT-D12-00081 at 0170 to 0171 and EVD-PT-D12-00208 at 0022.

95. The Defence also claimed that Naivasha police station was inadequately manned by only 30 policemen.[186] If so, however, that supports the Prosecution's case. The Defence agrees that Ali had prior knowledge of the attacks. If, as it also argued, he acted upon receipt of intelligence information – despite the contrary evidence of inaction – acting responsibly he would have ordered pre-emptory measures, including providing sufficient police force. The failure to beef up the police forces is *not* because, as the Defence contended, that in the end "*the police didn't have enough equipment, didn't have enough personnel, that's all true*."[187] As a District Commissioner explained, they did not take pre-emptory measures because they "*did not anticipate*", they "*expected disruptions of the elections, but not the masses*".[188] In short, contrary to the Defence argument, knowing of the NSIS intelligence reports Ali failed to order sufficient security.

96. The Defence further argued that "*the police in Kenya are like police everywhere else in the world. They do not direct how much or how many resources they get. That is a government allocation decision*."[189] However, in his CIPEV statement, Mr. Ali explained that during the elections he invoked Section 48 of the Police Act to appoint officers of the prison service who thereby also came under his direct control.[190] Moreover, the Defence's evidence established that the police could allocate resources on their own in response to information on threats received through NSIS situation reports.[191]

97. Equally invalid is the Defence claim that the police investigated and prosecuted those responsible for the PEV. A chart presented by the Defence states, for example, that "*between December 29, 2007, and 12 February 2008, 938 arrests were*

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[186] ICC-01/09-02/11-T-4-ENG, page 108 line 12. The same information is provided by Witness D14-02 in his testimony. ICC-01/09-02/11-T-13-ENG, page 169 line 23; See also reference to an NSAC recommendation to have at least 30 police officers and 1 vehicle present in a given constituency. This NSAC recommendation was implemented by Mr. Ali, according to the Defence (ICC-01/09-02/11-T-13-ENG, page 59 line 25 to page 60 line 10).
[187] ICC-01/09-02/11-T-13-ENG, at page 36 lines 24-25.
[188] ICC-01/09-02/11-T-13-ENG, at page 35 line 22 to page 36 line 1.
[189] ICC-01/09-02/11-T-13-ENG, at page 37 lines 6-8.
[190] EVD-PT-OTP-00338, at 1962, 1988, and 1989.
[191] ICC-01/09-02/11-T-13-ENG, page 52 lines 12-14.

made and 501 criminal cases were finalized in the Rift Valley."[192] The document does not explain where in the Rift Valley these arrests were made, who the alleged perpetrators were, much less what "*finalized*" means. For all we know, cases may have been regarded as "*finalized*" for lack of evidence, because no genuine investigations were carried out. Furthermore, the statement that the "*decision to prosecute or not to prosecute rests not with the police*" but "*with the office of the Attorney General*" is a misstatement.[193] The Attorney General empowered the police to conduct investigations and prosecutions in subordinate courts.[194] The Prosecution does not deny that 156 criminals were arrested in Naivasha as presented by the Defence.[195] However, the Defence omits the fact that the 156 persons arrested in Naivasha were all released on bail and that the charges were either dropped or downgraded to a misdemeanor.[196] Finally, as regards investigations into gender-based violence, while Witness D14-01 mentioned a task force of 30 people set up by Ali to investigate sex-related offences,[197] Witness D14-02 clearly testified that the gender desk at the Naivasha police station was not manned during the PEV.[198]

98. There was also evidence of extrajudicial killings. Kenyatta Witness D13-02 testified that "*a gentleman (…) used to call me when there were extrajudicial killings*"[199]. He would call "*regarding young people who either disappeared or who he speculated would have been killed extrajudicially*".[200] Witness D13-02 visited the city mortuary and saw the bodies of young boys (from within the Kikuyu constituency) who had bullets in their head.[201] When asked who he believed

[192] ICC-01/09-02/11-T-13-ENG, page 117 lines 24-25.
[193] ICC-01/09-02/11-T-13-ENG, page 118 lines 2-6.
[194] ICC-01/09-02/11-T-6-ENG, page 50 line 22 to page 51 line 5
[195] ICC-01/09-02/11-T-4-ENG, page 108 line 11 and ICC-01/09-02/11-T-13 page 101 lines 9-19.
[196] ICC-01/09-02/11-T-6-ENG, page 52 lines 9-16.
[197] ICC-01/09-02/11-T-15-CONF-ENG, page 82 lines 19-21; ICC-01/09-02/11-T-14 page 55 lines 10-16.
[198] ICC-01/09-02/11-T-13-ENG, page 175 lines 13-25 and page 176 lines 1-5.
[199] ICC-01/09-02/11-T-12-CONF-ENG, page 53 lines 22-25.
[200] ICC-01/09-02/11-T-12-CONF-ENG, page 54 lines 6-8.
[201] ICC-01/09-02/11-T-12-CONF-ENG, page 54 lines 11-16

was responsible, he answered that Mungiki alleged it was the police, then headed by Ali.[202]

III. CONCLUSION

99. The Prosecution has established substantial grounds to believe that Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali committed the crimes against humanity of murder, rape, other inhumane acts, deportation or forcible transfer of population, and persecution. The Prosecution requests that the Chamber confirm the charges against all three suspects.

Luis Moreno-Ocampo, Prosecutor

Dated this 28th day of October 2011

At The Hague, the Netherlands

[202] ICC-01/09-02/11-T-12-CONF-ENG, page 54 line 18 to page 55 line 7. In cross-examination by the Defence of Ali, he backtracked from this testimony, claiming that he had "no evidence" and declining to attribute the killings to anyone. ICC-01/09-02/11-T-12-CONF-ENG, page 92 lines 4-13.