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Before: Judge Kuniko Ozaki, Presiding Judge
Judge Robert Fremr
Judge Geoffrey Henderson

SITUATION IN THE REPUBLIC OF KENYA

***IN THE CASE OF
THE PROSECUTOR V. UHURU MUIGAI KENYATTA***

Public

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I.	Introduction.....	1
II.	The Principal Actors.....	2
	a. Uhuru Kenyatta	2
	b. The Mungiki.....	3
	i. Size and structure	4
	ii. Rules and discipline.....	6
	iii. Communication and mobilisation.....	7
	iv. Organisational capacity.....	8
III.	Statement of facts.....	9
	a. The PNU and ODM contest the 2007 elections	9
	b. The Accused and the PNU bring the Mungiki into the fold.....	9
	i. The Accused’s intermediaries offer the Mungiki a deal	10
	ii. The deal between the PNU and the Mungiki is sealed	11
	c. The election is held, President Kibaki is declared the winner, and violence breaks out.....	13
	d. The Accused and the PNU leadership resolve to retain power at any cost and to attack perceived ODM supporters to that end	13
	e. Mobilisation for the retaliatory attacks begins.....	14
	i. The Accused and other members of the common plan dispatch intermediaries to persuade Mungiki members to carry out the retaliatory attacks.....	15
	ii. The Accused personally enlists Mungiki members to carry out retaliatory attacks against perceived ODM supporters and provide instructions, money and security guarantees.....	16
	iii. The Accused secures Maina Njenga’s approval to use Mungiki members in the retaliatory attacks.....	17
	f. Young men are recruited for the Rift Valley attacks	18
	g. [REDACTED]	19
	h. The Accused and his agents provide money, security guarantees and materiel for the Rift Valley attacks.....	19
	i. Mr Kenyatta contributes money for the attacks.....	19
	ii. The Mungiki are protected from police intervention	21
	iii. The Accused and other members of the common plan ensure that the Mungiki and pro-PNU youth are provided with weapons, uniforms and other materiel for the attacks	22
	iv. The Accused uses intermediaries to coordinate the logistical elements of the Rift Valley attacks.....	23
	i. The Accused’s agents issue scorched earth orders.....	25
	j. The Nakuru attack.....	26
	i. Preparatory meetings are held to plan the attack	27

ii.	Mungiki and pro-PNU youth mobilise and receive arms, cash and instructions from the Accused's agents	28
iii.	The execution of the Nakuru attack	29
iv.	The crimes committed	31
k.	The Naivasha attack.....	34
i.	The Accused's agents enlist, pay and arm local Mungiki to participate in the Naivasha attack	34
ii.	Mungiki and pro-PNU youth are transported to Naivasha for the attack	35
iii.	Execution of the attack	36
iv.	The crimes committed	39
l.	A campaign is launched to conceal the Accused's involvement in the PEV43	
i.	The Accused's agents attempt to retrieve the materiel provided to the attackers during the PEV.....	44
ii.	Mungiki members who interacted with the Accused during the PEV are killed or forcibly disappeared	44
iii.	Attempts are made to suborn Mungiki witnesses to provide false exonerating testimony	46
iv.	Attempts are made to bribe Prosecution witnesses.....	48
IV.	The Article 7 contextual elements	50
a.	The targeted civilian population.....	50
b.	Widespread attack.....	50
c.	Systematic attack	51
d.	The organisation	54
e.	The policy	55
V.	The individual criminal responsibility of the Accused.....	56
a.	Indirect co-perpetration under Article 25(3)(a) of the Statute	56
i.	Existence of a common plan or agreement	57
ii.	The Accused's contributions	58
iii.	The existence of an organised and hierarchical apparatus of power	60
iv.	The Accused's ability to cause the organisation to contribute to the crimes	61
v.	The organisation was composed of fungible individuals capable of replacement.....	62
vi.	The Accused's intent and knowledge	63
b.	Liability under Article 25(3), subsections (b)-(d) of the Statute.....	67

I. Introduction

1. This case concerns the post-election violence that followed Kenya's 2007 presidential and parliamentary elections. Uhuru Kenyatta (also "Mr Kenyatta" or the "Accused") was a leading politician, a member of the Party of National Unity ("PNU"),¹ the son of Kenya's first President, and one of Kenya's wealthiest and most influential political figures. He, along with other prominent PNU supporters, deliberately entered into an alliance with a widely known and feared criminal organisation, the Mungiki, paying them in cash and promises of protection, in order to keep the PNU in power through every means necessary and to carry out retaliatory attacks against perceived ODM supporters and to avenge prior attacks against the Kikuyu and perceived PNU supporters.
2. When President Kibaki, the PNU candidate, was declared the winner of the 2007 presidential election, the opposition Orange Democratic Movement ("ODM") denounced the results as fraudulent.² Violence erupted, pitting PNU supporters against those perceived to be ODM supporters, and ODM supporters against those perceived to support the PNU.³ The violence was one of the most brutal episodes in Kenya's post-independence history. The Prosecution alleges that the Accused and others formulated a plan to attack perceived ODM supporters to force them to abandon their attempts to overturn the announced election results. This case focuses on Nakuru and Naivasha, the locations of two attacks in the Rift Valley, the epicenter of the violence. To carry out the attacks, the Accused paid, armed, instructed and transported Mungiki members and other pro-PNU youths to the attack sites. The attackers committed scores of crimes over a five-

¹ ICC-01/09-02/11-T-11-CONF-ENG, pages 13-16.

² ICC-01/09-02/11-479-AnxA, agreed fact 23.

³ ICC-01/09-02/11-479-AnxA, agreed facts 10, 24; [REDACTED].

day period, many of which – such as forcible circumcision, rape and hacking victims with *pangas* – were chosen for their barbarity and capacity to instil fear. The attacks left hundreds dead and wounded, thousands displaced, and countless victims with severe physical and mental injuries.

II. The Principal Actors

a. Uhuru Kenyatta

3. Mr Kenyatta is a career politician.⁴ He entered the 2007 election campaign needing to prove his loyalty to the Kikuyu political elite, having run (unsuccessfully) against President Kibaki in the 2002 election on the Kenya African National Union (“KANU”) ticket,⁵ and having opposed President Kibaki in the 2005 constitutional referendum.⁶ Within the Kikuyu community, Mr Kenyatta’s previous opposition to President Kibaki was seen as an attempt to divide the Kikuyu vote.⁷ In the 2007 election, Mr Kenyatta supported the PNU and the incumbent, President Kibaki.⁸ Mr Kenyatta has been associated with the Mungiki since at least 2000.⁹ The Mungiki supported his candidacy in the 2002 presidential election,¹⁰ campaigned for him, and provided security on the campaign trail.¹¹ As explained below, Mr Kenyatta’s ties to the Mungiki enabled him to engage the organisation’s members to carry out the attacks in Nakuru and Naivasha (together, “Rift Valley attacks”) in January 2008.

⁴ KEN-OTP-0046-0103.

⁵ ICC-01/09-02/11-T-11-CONF-ENG, pages 5-8.

⁶ ICC-01/09-02/11-T-11-CONF-ENG, pages 11-12.

⁷ ICC-01/09-02/11-T-11-CONF-ENG, pages 6-7.

⁸ ICC-01/09-02/11-T-11-CONF-ENG, pages 13-16.

⁹ [REDACTED].

¹⁰ [REDACTED]; KEN-OTP-0046-0056.

¹¹ [REDACTED].

b. The Mungiki

4. The Mungiki's violent reputation, ability to mobilise fighting age men, and history of selling its services made it an ideal tool for the Accused to use for the Rift Valley attacks. The "Mungiki", which means "many" or "multitude" in the Kikuyu language,¹² was an organisation primarily comprised of Kenyans from the "GEMA" community (ethnic Gikuyu/Kikuyu,¹³ Embu, and Meru),¹⁴ the majority of whom were Kikuyu.¹⁵ Formed by Maina Njenga and others as a self-defence and tribal militia following land-related ethnic clashes in the Rift Valley in the late 1980s,¹⁶ it quickly grew in size, expanded outside the Rift Valley, and developed a national presence.¹⁷ It became increasingly involved in extortion and violent crime, including armed confrontations with the police and other ethnic militias.¹⁸ It was declared a proscribed organisation by the Government of Kenya ("GoK") in 2002.¹⁹ Notwithstanding its criminal practices, politicians and community leaders traded money and political patronage for the Mungiki's backing.²⁰
5. After the Mungiki opposed the Kibaki government in the 2005 constitutional referendum,²¹ the government launched a campaign of extra-judicial killings, enforced disappearances, and arbitrary arrests of Mungiki members.²² The

¹² [REDACTED].

¹³ "Gikuyu" and "Kikuyu" are used interchangeably and both refer to Kenya's largest ethnic group.

¹⁴ [REDACTED].

¹⁵ KEN-OTP-0001-0364, at 0568.

¹⁶ [REDACTED]; KEN-OTP-0008-0029, at 0038- 0039; KEN-OTP-0033-0297, at 0301-0302; KEN-OTP-0033-0514, at 0517; KEN-OTP-0033-0437, at 0441; KEN-OTP-0046-0277, at 0305-0306.

¹⁷ KEN-OTP-0008-0029, at 0037; KEN-OTP-0033-0297, at 0303-04.

¹⁸ [REDACTED].

¹⁹ KEN-OTP-0033-0297, at 0301.

²⁰ [REDACTED].

²¹ [REDACTED].

²² [REDACTED].

crackdown lasted into 2007.²³ As explained below, the PNU suspended the crackdown in late 2007 to secure the Mungiki's support in the 2007 election.²⁴

i. Size and structure

6. While estimates of the Mungiki's membership vary, in January 2008 it was a large organisation, capable of mobilising thousands quickly when required.²⁵ The Mungiki had a hierarchical structure with a functioning chain of command,²⁶ illustrated in general terms in the chart attached at the end of this document.
7. At the top of the hierarchy was Maina Njenga, the organisation's founder, spiritual leader and Chairman.²⁷ He had ultimate decision-making authority, and decisions with national import required his approval.²⁸ From June 2007 until April 2009, Maina Njenga was in custody for alleged firearm and drug possession.²⁹ Although incarcerated during the period covered by the charges, Maina Njenga received a constant stream of information about the organisation's activities, made decisions on important matters, and retained a veto power.³⁰ Throughout the PEV, Charles Ndungu Wagacha was the Acting Chairman who supervised day-to-day operations³¹ and, along with other senior leaders, communicated with Maina Njenga and visited him in prison.³²
8. Below Maina Njenga and Charles Ndungu Wagacha, the next level within the Mungiki hierarchy was the Council of Elders, approximately 50-100 senior

²³ [REDACTED].

²⁴ *See, infra*, paras 19-21.

²⁵ [REDACTED]; KEN-OTP-0033-0317, at 0329; KEN-OTP-0033-0297, at 0303-0304.

²⁶ [REDACTED].

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ KEN-OTP-0072-0371, at 0372; KEN-OTP-0053-0243; He was released following widespread protests by Mungiki members who alleged that the PNU had promised to release him in exchange for support during the 2007 election campaign and the subsequent violence: *see* [REDACTED]; KEN-OTP-0053-0243.

³⁰ [REDACTED].

³¹ [REDACTED].

³² [REDACTED].

Mungiki members who met regularly.³³ The Council had a secretary and treasurer,³⁴ and decision-making authority,³⁵ including resolving disputes between regional Mungiki chapters and the formation and implementation of policy.³⁶

9. Within the Council of Elders were two important sub-groups of influential members. The highest ranking members in the “Junction Five” or “J5”, the Mungiki’s top leadership cell, came from the organisation’s original members from its two founding families: the Kamunyas (to which Maina Njenga belonged) and the Wagachas (to which Charles Ndungu Wagacha [REDACTED] belonged).³⁷ The J5 advised Maina Njenga and formulated the organisation’s policy, strategy, and rules.³⁸ The second sub-group, just below the J5, was the *Mutukumi*, also referred to as the “Governing Council” or “Big Ten”.³⁹ This group was comprised of approximately a dozen of the most respected, dedicated and longest-serving Mungiki members, and was particularly influential within the organisation’s national leadership.⁴⁰
10. Below the Council of Elders, regional chairmen were responsible for large territorial areas.⁴¹ Their functions generally included administering oath-taking ceremonies, adjudicating disputes, and handing down punishments to members who broke the organisation’s rules.⁴² Regional chairmen generally had three coordinators and one *Mzebu* (oath administrator) and his *Archguard(s)* working

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ [REDACTED].

³⁶ [REDACTED].

³⁷ [REDACTED].

³⁸ [REDACTED].

³⁹ [REDACTED]; KEN-OTP-0002-0015, at 0127.

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

⁴² [REDACTED].

with them.⁴³ Below the regional chairmen were local, village-level units, known as *itura*, which means “community” or “village” in Kikuyu.⁴⁴ Each *itura* had a local chairman and three coordinators,⁴⁵ who were responsible for organising meetings,⁴⁶ passing income up the hierarchy,⁴⁷ and resolving conflicts under the organisation’s disciplinary system.⁴⁸

11. Under the local chairmen and coordinators were “platoons” or “cells” of rank and file Mungiki members.⁴⁹ In general, platoons were comprised of approximately ten members, one of whom acted as the platoon’s leader, or “chief”.⁵⁰ Platoon leaders were responsible for resolving conflicts, organising meetings, communicating information, coordinating business activities, and collecting money.⁵¹

ii. Rules and discipline

12. Like many gangs and secret societies, the Mungiki had initiation procedures for new recruits.⁵² One of the most important was the Mungiki oath.⁵³ The oath was designed to promote unity, and required recruits to swear loyalty to the Kikuyu community, to pledge allegiance to the organisation, and to follow its rules.⁵⁴ The oath swore members to secrecy.⁵⁵ Aspects of the oathing process were designed to instil fear in new recruits, who were told they would be killed if they violated

⁴³ [REDACTED].

⁴⁴ [REDACTED].

⁴⁵ [REDACTED].

⁴⁶ [REDACTED].

⁴⁷ [REDACTED].

⁴⁸ [REDACTED].

⁴⁹ [REDACTED].

⁵⁰ [REDACTED].

⁵¹ [REDACTED].

⁵² [REDACTED].

⁵³ [REDACTED].

⁵⁴ [REDACTED].

⁵⁵ [REDACTED].

the oath or left the organisation.⁵⁶ Members also took supplementary oaths for specific purposes. For example, during the post-election violence that occurred from late December 2007 until the end of January 2008 (“PEV”), members took an oath to defend the GEMA community and to ensure that the Presidency remained in Kikuyu hands.⁵⁷

13. The Mungiki organisation had defined rules of social conduct, which also prohibited revealing the names of Mungiki members to the police, and required members to follow orders.⁵⁸ The rules were enforced through a quasi-judicial disciplinary system. Members who broke the rules were given a hearing before more senior members, in which the accused or the parties to a dispute were permitted to present their accounts.⁵⁹ Penalties were imposed on those found guilty,⁶⁰ and included caning.⁶¹ The maximum potential penalty was death.⁶²

iii. Communication and mobilisation

14. Information was passed quickly and effectively within the Mungiki using a relay system in which members communicated with those above and below them in the hierarchy.⁶³ Information also passed laterally between different cells.⁶⁴ The Mungiki used face-to-face meetings and mobile phones as their primary means of communication.⁶⁵ The Mungiki’s communication network enabled its members to mobilise quickly.⁶⁶ The Muranga⁶⁷ and Uhuru Park⁶⁸ rallies in November 2007,

⁵⁶ [REDACTED].

⁵⁷ [REDACTED].

⁵⁸ [REDACTED].

⁵⁹ [REDACTED].

⁶⁰ [REDACTED].

⁶¹ [REDACTED].

⁶² [REDACTED].

⁶³ [REDACTED].

⁶⁴ [REDACTED].

⁶⁵ [REDACTED].

⁶⁶ [REDACTED].

each assembling thousands of Mungiki from across the country, are indicative of the Mungiki's ability to mobilise large numbers on short notice. The Mungiki's ability to mobilise, particularly against other ethnic gangs and militias, led the GEMA community to rely on it for protection in times of crisis,⁶⁹ and made the organisation a valuable asset for politicians to harness for their own ends.

iv. Organisational capacity

15. The Mungiki had substantial financial operations. It controlled the *matatu* industry in parts of the country,⁷⁰ sold protection services to businesses,⁷¹ and was paid by politicians to campaign and intimidate opponents,⁷² although the scale of these operations was reduced during the 2006-2007 crackdown.⁷³ Mungiki members were also expected to generate income through business ventures and to contribute a portion up the hierarchy.⁷⁴ The Mungiki provided essential social services such as garbage collection, security, water, electricity, and public toilets in certain areas.⁷⁵
16. The Mungiki had quasi-military characteristics in terms of its capacity to mobilise its members to carry out violent operations.⁷⁶ Maina Kangethe Dlambo was in charge of the organisation's militant elements during the period covered by the charges.⁷⁷ Members received military-style training, including marching, hand-

⁶⁷ [REDACTED].

⁶⁸ [REDACTED].

⁶⁹ [REDACTED].

⁷⁰ [REDACTED].

⁷¹ [REDACTED]; KEN-OTP-0002-0774, at 0824; KEN-OTP-0033-0150, at 0168; KEN-OTP-0001-0364, at 0568.

⁷² See, *infra*, paras 22-24; see also [REDACTED]; KEN-OTP-0033-0437, at 0458-0460.

⁷³ [REDACTED].

⁷⁴ [REDACTED].

⁷⁵ [REDACTED]; KEN-OTP-0001-0364, at 0568; KEN-OTP-0002-0015, at 0149-0150, para 719; KEN-OTP-0046-0128, at 0136; KEN-OTP-0033-0297, at 0306-0307.

⁷⁶ [REDACTED].

⁷⁷ [REDACTED].

to-hand combat, and weapons handling.⁷⁸ One of the militant elements was known as the “Bagation squad”, a unit of hardened fighters drawn from the ranks of slum-dwelling homeless children with unquestioned loyalty to the organisation, which was deployed for violent operations such as beheading and skinning victims.⁷⁹ Platoons of Bagation squad members supported regular Mungiki units during conflict situations such as the PEV.⁸⁰

III. Statement of facts

a. The PNU and ODM contest the 2007 elections

17. Kenya’s 2007 presidential and parliamentary elections were polarised along ethno-political lines.⁸¹ The two main political parties were the ODM, which put forward Raila Odinga as its candidate, and the PNU, which put forward President Mwai Kibaki.⁸² Broadly, political affiliation was divided along ethnic lines: the PNU mainly drew its support from the GEMA community, and the ODM mainly drew its support from the non-GEMA community, and the Luhya, Kalenjin and Luo communities in particular.⁸³

b. The Accused and the PNU bring the Mungiki into the fold

18. From mid-2007, individuals acting on behalf of the Accused and the PNU initiated contacts with senior Mungiki members to secure their support in the upcoming presidential election,⁸⁴ an insurance policy in case of a disputed election followed by violence.⁸⁵

⁷⁸ [REDACTED].

⁷⁹ [REDACTED].

⁸⁰ [REDACTED].

⁸¹ ICC-01/09-02/11-479-AnxA, agreed fact 14.

⁸² KEN-OTP-0001-0002, at 0018.

⁸³ ICC-01/09-02/11-479-AnxA, agreed fact 21.

⁸⁴ [REDACTED].

⁸⁵ [REDACTED].

i. The Accused's intermediaries offer the Mungiki a deal

19. The Accused's attempts to establish an alliance between the PNU and the Mungiki were made through several channels. One was Geoffrey Machira, thought to be an agent in the National Security and Intelligence Service ("NSIS"),⁸⁶ and who enjoyed direct access to President Kibaki and Mr Muthaura,⁸⁷ the Permanent Secretary to the Presidency, Head of Public Service, and Secretary to the Cabinet of the GoK.⁸⁸ In late 2007, the Accused and other PNU officials dispatched Mr Machira to present an offer to the Mungiki: in exchange for Mungiki support in the election, the PNU would end the extra-judicial killings of its members, permit the organisation to operate without police interference and provide monetary payments.⁸⁹ With Mr Muthaura's backing, Mr Machira promised to secure the release of any Mungiki members arrested by local police.⁹⁰
20. Between September and November 2007, in advance of the December 2007 elections and with the backing of Mr Muthaura and other members of the PNU leadership,⁹¹ Mr Machira, other government intermediaries and senior Mungiki members agreed to form "Operation Kibaki Again" ("OKA"), a front to facilitate the Mungiki's support of the PNU without revealing that the outlawed organisation was allied with the State.⁹²

⁸⁶ [REDACTED].

⁸⁷ [REDACTED].

⁸⁸ ICC-01/09-02/11-479-AnxA, agreed fact 4.

⁸⁹ [REDACTED].

⁹⁰ [REDACTED].

⁹¹ [REDACTED].

⁹² [REDACTED]; KEN-OTP-0067-0515.

21. The Accused and the PNU leadership also employed other intermediaries to secure an alliance with the Mungiki, including Reverend Samuel Murigu;⁹³ Waitiri Michuki,⁹⁴ wife of the then Minister of Internal Security and Provincial Administration, John Michuki;⁹⁵ and local politicians, who reached out to Mungiki leaders in their constituencies with the same offer Mr Machira had conveyed.⁹⁶

ii. The deal between the PNU and the Mungiki is sealed

22. Maina Njenga's approval was needed to finalise the deal between the PNU and the Mungiki.⁹⁷ The Accused and others in the PNU leadership sent Mr Machira and other PNU interlocutors to Naivasha prison on at least one occasion in November 2007.⁹⁸ Prominent PNU supporters facilitated the prison visit(s).⁹⁹ As a result of monetary payments and promises that Mr Machira and the other intermediaries made on the PNU's behalf, Maina Njenga approved Mungiki support of the PNU.¹⁰⁰ Mr Machira discussed the prison visit with the Accused, who was "very happy" with the outcome.¹⁰¹

23. Because many Mungiki members continued to distrust the Kibaki administration, several steps were taken to demonstrate that the government's offer for a truce was genuine. These included:

- Mr Machira, acting on behalf of Mr Muthaura, intervened to secure the release of several Mungiki members without charge, after they had been

⁹³ [REDACTED].

⁹⁴ [REDACTED].

⁹⁵ KEN-D12-0002-0195, at 0195.

⁹⁶ *See, e.g.*, [REDACTED].

⁹⁷ [REDACTED].

⁹⁸ [REDACTED].

⁹⁹ [REDACTED].

¹⁰⁰ [REDACTED].

¹⁰¹ [REDACTED].

arrested at a Mungiki rally in Muranga in November 2007.¹⁰² This intervention sent an important message to the Mungiki: the government was keeping its side of the bargain and the organisation could now operate without fear of police interference.

- President Kibaki tasked Mr Muthaura with handling Mungiki grievances, which were expressed at a 26 November 2007 meeting at Nairobi State House between the Accused, senior PNU officials and senior Mungiki members.¹⁰³ The State House meeting assured the Mungiki that the deal brokered by Mr Machira was endorsed at the highest level of government.¹⁰⁴
- Police non-intervention at a November 2007 rally at Uhuru Park, Nairobi, in which thousands of Mungiki were permitted to gather and perform their rituals in public,¹⁰⁵ sending a message that the government and Mungiki were now allies.¹⁰⁶

24. The Mungiki accordingly supported the PNU in the election. Its members, for cash payments generally made through Mr Machira, campaigned on the PNU's behalf.¹⁰⁷ The extra-judicial killings were suspended and Mungiki members were permitted to gather publicly without police interference.¹⁰⁸ The alliance with the Mungiki provided the PNU with grass roots political support during the campaign and a reserve of manpower in case the PNU lost the election and

¹⁰² [REDACTED].

¹⁰³ ICC-01/09-02/11-479-AnxA, agreed fact 33; [REDACTED].

¹⁰⁴ [REDACTED].

¹⁰⁵ [REDACTED].

¹⁰⁶ [REDACTED].

¹⁰⁷ [REDACTED].

¹⁰⁸ [REDACTED].

needed to retain power by force.¹⁰⁹ As described below, the Accused and others within the PNU used this reserve force of Mungiki members to attack perceived ODM supporters after the election.

c. The election is held, President Kibaki is declared the winner, and violence breaks out

25. Voting in the presidential and parliamentary elections took place on 27 December 2007.¹¹⁰ Irregularities were reported during the vote and rumors of vote-rigging spread during tallying.¹¹¹ On 30 December 2007, the Electoral Commission announced that President Kibaki had won re-election,¹¹² and he was sworn in shortly afterwards.¹¹³ The ODM denounced his victory as fraudulent and violence erupted throughout the country,¹¹⁴ pitting the GEMA community (perceived PNU supporters) against the other major ethnic blocks (perceived ODM supporters) and lasted until the end of January 2008.¹¹⁵

d. The Accused and the PNU leadership resolve to retain power at any cost and to attack perceived ODM supporters to that end

26. As the contest for power moved to the streets, the Accused and the PNU leadership resolved to retain control by retaliating against perceived ODM supporters, turning to Mungiki members and other pro-PNU youth to carry out the attacks. Mr Kenyatta articulated this policy at a crisis meeting he chaired in Nairobi State House on or about 30 December 2007,¹¹⁶ attended by Mr Kenyatta, several GEMA elders and Mungiki or former Mungiki members.¹¹⁷ Mr Kenyatta

¹⁰⁹ [REDACTED].

¹¹⁰ ICC-01/09-02/11-479-AnxA, agreed fact 18.

¹¹¹ KEN-OTP-0001-0248, at 0271-0272.

¹¹² ICC-01/09-02/11-479-AnxA, agreed facts 19 and 20.

¹¹³ ICC-01/09-02/11-479-AnxA, agreed fact 22.

¹¹⁴ ICC-01/09-02/11-479-AnxA, agreed facts 10, 23 and 24.

¹¹⁵ ICC-01/09-02/11-479-AnxA, agreed fact 10; [REDACTED]; KEN-OTP-0001-0002, at 0013-0014.

¹¹⁶ [REDACTED].

¹¹⁷ [REDACTED].

announced that the PNU was “not ready to hand over power” and that the attendees should “talk to the Mungiki”, “organise our men” and “counter [ODM supporters] on the ground”.¹¹⁸ He then summoned an assistant to bring in a large sum of cash, which was distributed to the Mungiki to mobilise men and purchase materiel for the attacks.¹¹⁹ When the cash was distributed, Mr Kenyatta instructed the coordinators to “go and organise your people” and get “prepared for war”.¹²⁰ The coordinators to whom the funds were distributed included Jayne Kihara, John Mututho, and Mr Waruinge.¹²¹ As explained below, these individuals played important roles in executing the Rift Valley attacks and used the funds from Mr Kenyatta to pay and arm the Mungiki and pro-PNU youth who carried them out.

e. Mobilisation for the retaliatory attacks begins

27. Following the crisis meeting at State House, the Accused, PNU officials and local GEMA leaders enlisted youths for the attacks by approaching Mungiki contacts to urge them to fight on the PNU side. To this end, numerous meetings took place between 30 December 2007 and January 2008 between the Accused, members of the PNU and their intermediaries on the one hand, and Mungiki members on the other, to mobilise Mungiki and pro-PNU youth to carry out retaliatory attacks against perceived ODM supporters and provide the attackers with the means to carry out the task. To secure the Mungiki’s agreement, the PNU interlocutors offered the same terms as during the election campaign: the Mungiki’s grievances – particularly the cessation of the extra-judicial killings –

¹¹⁸ [REDACTED].

¹¹⁹ [REDACTED].

¹²⁰ [REDACTED].

¹²¹ [REDACTED].

would be resolved and the Mungiki would be paid for carrying out the attacks.¹²² As a sweetener, PNU interlocutors also promised to secure Maina Njenga's release from prison.¹²³

i. The Accused and other members of the common plan dispatch intermediaries to persuade Mungiki members to carry out the retaliatory attacks

28. The Accused and other members of the common plan first dispatched Mr Machira to persuade his Mungiki contacts to join the fight. On or about 30 December 2007, Mr Machira assembled approximately a dozen senior Mungiki members at the Marble Arch Hotel in Nairobi.¹²⁴ Accompanied by a representative of the State security apparatus, Mr Machira urged the Mungiki attendees to mobilise their members to fight on the PNU side.¹²⁵ The State security official and Mr Machira explained that the Mungiki would be provided with weapons, uniforms and money.¹²⁶ When the Mungiki attendees inquired about their security, Mr Machira responded that they would be provided with "the same security the [PNU] promised . . . before" (*i.e.*, during the election campaign) and that the Mungiki's involvement had been endorsed at the highest levels of the government, including by the Accused.¹²⁷ The Mungiki attendees agreed.¹²⁸

29. The Accused dispatched additional intermediaries to approach Mungiki members. Among them was George Thuo, the PNU MP for Juja constituency and

¹²² [REDACTED].

¹²³ *See, e.g.*, [REDACTED].

¹²⁴ [REDACTED].

¹²⁵ [REDACTED].

¹²⁶ [REDACTED].

¹²⁷ [REDACTED].

¹²⁸ [REDACTED].

Chief Whip,¹²⁹ who urged senior Mungiki members and Ndura Waruinge to fight on the PNU side, explaining that high government officials had endorsed the use of the Mungiki.¹³⁰ Mr Thuo similarly assured that in return for the Mungiki's support in the attacks, the extra-judicial killings would cease, Maina Njenga would be released, and the Mungiki would receive cash payments.¹³¹ Francis Kimemia, then Deputy Permanent Secretary of Provincial Administration and Internal Security,¹³² was also dispatched to persuade Mungiki members to mobilise for the Naivasha attack.¹³³ Lewis Nguyai, the PNU MP for Kikuyu constituency, approached senior Mungiki members, whom he urged to fight on the PNU side, offering cash in return.¹³⁴

ii. The Accused personally enlists Mungiki members to carry out retaliatory attacks against perceived ODM supporters and provide instructions, money and security guarantees

30. In early January 2008, the Accused met at the Nairobi Club¹³⁵ with several senior Mungiki members¹³⁶ to persuade them to mobilise the Mungiki for the retaliatory attacks.¹³⁷ Mr Kenyatta stated that “we should not give the government to people who were not circumcised” (*i.e.*, Luos),¹³⁸ and urged the Mungiki to “wake and defend their tribe and community and be with the side of the government”.¹³⁹ Mr Muthaura, also at the meeting, assured the Mungiki attendees that the organisation's grievances – particularly the cessation of government persecution

¹²⁹ See KEN-D13-0005-0859, at 0860.

¹³⁰ [REDACTED].

¹³¹ [REDACTED].

¹³² KEN-D12-0001-0301, at 0301.

¹³³ [REDACTED].

¹³⁴ [REDACTED].

¹³⁵ Also referred to as the Nairobi Members Club.

¹³⁶ [REDACTED].

¹³⁷ [REDACTED].

¹³⁸ [REDACTED].

¹³⁹ [REDACTED].

– would be resolved if they fought on the PNU side.¹⁴⁰ The Mungiki attendees were told that they would receive money and “[w]hatever they needed” for the fight.¹⁴¹ The Mungiki were each given a sum of money and Mr Kenyatta told them if more was needed, they should see Mr Thuo.¹⁴² Following this, Mungiki members started recruiting youths for the attacks.¹⁴³

31. From mid-January 2008, additional meetings were held between Mungiki members, and the Accused and other PNU representatives, including Messrs Muthaura and Kimemia,¹⁴⁴ to plan and coordinate the Rift Valley attacks.¹⁴⁵ At the meetings, the Mungiki attendees and Mr Waruinge were given instructions and large sums of money for the Rift Valley attacks.¹⁴⁶ Mr Muthaura assured the Mungiki attendees that they would not be interrupted by the police and would receive “whatever they need[ed]” from the government.¹⁴⁷ He also distributed large sums of money to Mungiki members and instructed them to undertake the Rift Valley attacks.¹⁴⁸ Funds distributed at these meetings were later used to purchase weapons for the Rift Valley attacks.¹⁴⁹

iii. The Accused secures Maina Njenga’s approval to use Mungiki members in the retaliatory attacks

32. The Accused sent intermediaries to visit Maina Njenga in prison to secure his approval for the Mungiki’s involvement in the retaliatory attacks.¹⁵⁰ Mr Kenyatta

¹⁴⁰ [REDACTED].

¹⁴¹ [REDACTED].

¹⁴² [REDACTED].

¹⁴³ [REDACTED].

¹⁴⁴ [REDACTED].

¹⁴⁵ [REDACTED].

¹⁴⁶ [REDACTED].

¹⁴⁷ [REDACTED].

¹⁴⁸ [REDACTED].

¹⁴⁹ [REDACTED].

¹⁵⁰ [REDACTED].

also telephoned Maina Njenga directly¹⁵¹ and sent intermediaries to make cash payments to Maina Njenga.¹⁵² Maina Njenga thereafter approved the use of Mungiki members in the attacks.¹⁵³ Charles Ndungu Wagacha and other Mungiki leaders told the Mungiki members that the Accused and others in the PNU were providing money and weapons for the attacks and instructed ground commanders to mobilise.¹⁵⁴ At a January 2008 meeting at the Kenyatta family's Blue Post Hotel in Thika, Mr Kenyatta told a group of Kikuyu elders that he had obtained a commitment from the Mungiki to participate in the retaliatory attacks.¹⁵⁵ The elders agreed that Mr Kenyatta should lead and organise the Mungiki for this purpose.¹⁵⁶

f. Young men are recruited for the Rift Valley attacks

33. In preparation for the retaliatory attacks, senior Mungiki members were dispatched to the Rift Valley and to other regions, including Nairobi,¹⁵⁷ to recruit youths for the attacks; instructions were also issued to Mungiki in the area to do the same.¹⁵⁸ Mr Waruinge oathed and recruited youths in Nakuru and Naivasha who were willing to fight and he received money from Mr Kenyatta for this purpose.¹⁵⁹

¹⁵¹ [REDACTED].

¹⁵² [REDACTED].

¹⁵³ [REDACTED].

¹⁵⁴ [REDACTED].

¹⁵⁵ [REDACTED].

¹⁵⁶ [REDACTED].

¹⁵⁷ [REDACTED].

¹⁵⁸ [REDACTED].

¹⁵⁹ [REDACTED].

g. [REDACTED]

34. [REDACTED].¹⁶⁰ [REDACTED].¹⁶¹ [REDACTED].¹⁶² [REDACTED].¹⁶³
[REDACTED].¹⁶⁴

h. The Accused and his agents provide money, security guarantees and materiel for the Rift Valley attacks

35. From 30 December 2007 through January 2008, the Accused, members of the PNU leadership, wealthy members of the GEMA community and local leaders, at almost daily meetings, raised funds and provided Mungiki members and pro-PNU youth with money, material and logistical support, and security guarantees for the retaliatory attacks.

i. Mr Kenyatta contributes money for the attacks

36. Mr Kenyatta personally provided large sums of money to finance the retaliatory attacks, which were distributed to Mungiki commanders and attackers on the ground.¹⁶⁵ Mr Kenyatta also gave money to individual Mungiki members,¹⁶⁶ including a large sum of money to Mungiki leader Njoroge Gichere at a meeting at the Jacaranda Hotel in early- to mid-January 2008,¹⁶⁷ and additional large sums of money to Charles Ndungu Wagacha and a member of the J5, for use in the attacks.¹⁶⁸ Similarly, during at least one of the multiple meetings held in the Kenyatta family's Blue Post Hotel in Thika,¹⁶⁹ Mr Kenyatta contributed a large

¹⁶⁰ [REDACTED].

¹⁶¹ [REDACTED].

¹⁶² [REDACTED].

¹⁶³ [REDACTED].

¹⁶⁴ [REDACTED].

¹⁶⁵ [REDACTED].

¹⁶⁶ [REDACTED].

¹⁶⁷ [REDACTED].

¹⁶⁸ [REDACTED].

¹⁶⁹ [REDACTED].

sum of money to Mungiki members.¹⁷⁰ At the Blue Post Hotel and elsewhere, Mr Thuo also provided cash to Mungiki members on Mr Kenyatta's behalf.¹⁷¹ These funds were spent on weapons used by Mungiki and pro-PNU youth in the Rift Valley attacks, and the recruitment, transport and payment of the attackers.¹⁷²

37. After one fundraising meeting at the Blue Post Hotel, [REDACTED], instructed several senior Mungiki members to go to Mr Kenyatta's residence to get additional funds.¹⁷³ There, they met Mr Machira, David Manyara (a former Nakuru MP and member of Mr Kenyatta's KANU party)¹⁷⁴ and others, who had received a large sum of money from Mr Kenyatta.¹⁷⁵ The Mungiki members who went to Mr Kenyatta's residence received a cut of the money, and Mr Manyara delivered the rest to Mungiki members in Nakuru.¹⁷⁶
38. Additional funds were contributed for the retaliatory attacks in a January 2008 meeting at the Windsor Hotel in Nairobi,¹⁷⁷ at which Mr Kenyatta stated that he would "sell[] part of his father's land if necessary to secure the safety of the Kikuyus".¹⁷⁸ It was agreed that funds raised for the Rift Valley attacks would be consolidated at the Jacaranda Hotel in Nairobi,¹⁷⁹ which became the venue of several fundraising meetings for the attacks.¹⁸⁰ In one such meeting at the Jacaranda Hotel, held in mid-January 2008 and attended by prominent PNU supporters, Mr Kenyatta gave Mungiki members money for recruitment and

¹⁷⁰ [REDACTED].

¹⁷¹ [REDACTED].

¹⁷² [REDACTED].

¹⁷³ [REDACTED].

¹⁷⁴ [REDACTED].

¹⁷⁵ [REDACTED].

¹⁷⁶ [REDACTED].

¹⁷⁷ [REDACTED].

¹⁷⁸ [REDACTED].

¹⁷⁹ [REDACTED].

¹⁸⁰ [REDACTED].

weapons.¹⁸¹ Funds provided to Mungiki members at the Jacaranda Hotel were used to pay and arm the Mungiki and pro-PNU youth who carried out the Rift Valley attacks.¹⁸²

39. Many other meetings were held during January 2008 in which individuals acting for the Accused and other members of the GEMA community contributed and distributed funds for the retaliatory attacks.¹⁸³

ii. The Mungiki are protected from police intervention

40. In January 2008, Mr Muthaura assured the Mungiki that the police would not interfere in the Rift Valley attacks, a message which was passed down to Mungiki members on the ground.¹⁸⁴ This security guarantee was a key reason why Mungiki members agreed to carry out the Rift Valley attacks.¹⁸⁵ Mr Muthaura's security guarantee had particular credence, having previously ensured that the Kenya police would not intervene in attacks the Mungiki had launched elsewhere in the country.¹⁸⁶ Acting through Mr Machira, Mr Muthaura had also secured the release of Mungiki members arrested for forcibly circumcising Luo males during the violence in Nairobi.¹⁸⁷

41. Indeed, throughout the PEV, Mr Muthaura arranged release from custody whenever a Mungiki member was arrested or detained, Mungiki leaders contacted Mr Machira, who contacted Mr Muthaura, and he ensured the release

¹⁸¹ [REDACTED].

¹⁸² [REDACTED].

¹⁸³ *See, e.g.*, [REDACTED] (KICC); [REDACTED] (KICC), [REDACTED] (Galileo); [REDACTED] (Vibe Star).

¹⁸⁴ [REDACTED].

¹⁸⁵ [REDACTED].

¹⁸⁶ [REDACTED].

¹⁸⁷ [REDACTED]. These individuals purportedly received a sum of money from Mr Kenyatta as payment for their "work". *See* [REDACTED].

of the Mungiki detainees.¹⁸⁸ Charles Ndungu Wagacha also had a direct line of communication to Mr Muthaura, which he used to ensure that Mungiki were not interrupted by the police during the PEV.¹⁸⁹

iii. The Accused and other members of the common plan ensure that the Mungiki and pro-PNU youth are provided with weapons, uniforms and other materiel for the attacks

42. Before the Rift Valley attacks, Mungiki members received automatic weapons, ammunition, grenades, camouflage uniforms and police handcuffs that the Accused and Mr Muthaura had authorised PNU intermediaries, including Mr Kimemia, to supply them.¹⁹⁰ Among other actions, Mr Kimemia instructed senior Mungiki members to collect guns and uniforms from Nakuru State House for use in the Nakuru attack,¹⁹¹ which they did.¹⁹² Mr Kimemia also provided Mungiki members with automatic weapons, grenades and ammunition that had been collected at a meeting at the Nairobi Railway Club.¹⁹³ In addition, Mungiki members and supporters purchased guns using funds obtained from Mr Kenyatta and others,¹⁹⁴ which were transported to Mungiki members in Nakuru¹⁹⁵ and Naivasha.¹⁹⁶

43. Mr Manyara and Mr Machira, among others, purchased, transported and distributed uniforms and weapons (guns and *pangas*) to the Mungiki attackers in Nakuru and elsewhere.¹⁹⁷

¹⁸⁸ [REDACTED].

¹⁸⁹ [REDACTED].

¹⁹⁰ [REDACTED].

¹⁹¹ [REDACTED].

¹⁹² [REDACTED].

¹⁹³ [REDACTED].

¹⁹⁴ [REDACTED].

¹⁹⁵ [REDACTED].

¹⁹⁶ [REDACTED].

¹⁹⁷ [REDACTED].

iv. The Accused uses intermediaries to coordinate the logistical elements of the Rift Valley attacks

44. In addition to his direct contribution, the Accused, in conjunction with other members of the common plan, used intermediaries to coordinate the Rift Valley attacks, including the following.
45. The Accused and other members of the common plan engaged Francis Kimemia to liaise with Mungiki members in Nairobi and on the ground in the Rift Valley.¹⁹⁸ Among other tasks, Mr Kimemia discussed logistics with them and distributed money and materiel.¹⁹⁹ He also organised meetings between the Accused and Mungiki members,²⁰⁰ transmitted the Accused's orders,²⁰¹ and maintained regular contact with senior Mungiki commanders during the execution stage of the attacks.²⁰²
46. George Thuo also liaised with Mungiki members on the Accused's behalf, channeling Mr Kenyatta's payments to them, and organising transport to take the attackers to and from the Rift Valley.²⁰³ Mr Thuo also attended meetings to raise funds for the attacks on Mr Kenyatta's behalf, in which he urged Kikuyus to contribute money to fund the Rift Valley attacks.²⁰⁴
47. On Mr Kenyatta's behalf, Mwangi Kiunjuri, a Lakipia East MP, attended fundraising and planning meetings in January 2008, to collect money for the

¹⁹⁸ [REDACTED].

¹⁹⁹ [REDACTED].

²⁰⁰ [REDACTED].

²⁰¹ *See, infra*, paras 51-53; [REDACTED].

²⁰² [REDACTED].

²⁰³ [REDACTED].

²⁰⁴ [REDACTED].

retaliatory attacks and to distribute the same to Mungiki members.²⁰⁵ He also provided arms to Mungiki attackers.²⁰⁶

48. The Accused tasked David Manyara with coordinating the Nakuru attack and channeling money and materiel to Mungiki and pro-PNU youth.²⁰⁷ The Mungiki used funds received from Mr Manyara to purchase weapons, among other things.²⁰⁸

49. The Accused tasked Jayne Kihara, a former Naivasha MP, with coordinating the Naivasha attack and she received a large sum of money from Mr Kenyatta for that purpose.²⁰⁹ She organised and attended planning meetings in Naivasha and elsewhere to coordinate the Naivasha attack, distributed money received from Messrs Kenyatta and Thuo to Mungiki and pro-PNU youth in Naivasha, and instructed them to attack perceived ODM supporters.²¹⁰

50. The Accused also tasked John Mututho, an MP from Mr Kenyatta's KANU party, with coordinating the Naivasha attack and Mr Kenyatta payed him a large sum of money for this purpose.²¹¹ Mr Mututho organised and attended planning meetings in Naivasha and elsewhere to coordinate the Naivasha attack.²¹² He distributed *pangas* and money from Mr Kenyatta to Mungiki members for the purpose of the attack.²¹³

²⁰⁵ [REDACTED].

²⁰⁶ [REDACTED].

²⁰⁷ [REDACTED].

²⁰⁸ [REDACTED].

²⁰⁹ [REDACTED].

²¹⁰ [REDACTED].

²¹¹ [REDACTED].

²¹² [REDACTED].

²¹³ [REDACTED].

i. The Accused's agents issue scorched earth orders

51. The Accused, through his agents, directed Mungiki members and pro-PNU youth dispatched to the Rift Valley to show no mercy during the retaliatory attacks. For example, Mr Manyara instructed Mungiki members and pro-PNU youth in Nakuru to kill Luos and Kalenjins and burn their property,²¹⁴ and to rape non-Kikuyu women and forcibly circumcise Luo men, so that the Luos would leave the area.²¹⁵ To conceal the use of guns (which would reveal government support of the attackers), Mr Manyara instructed attackers to mutilate the bodies of those killed with gunshots.²¹⁶ He also informed the attackers that Mr Kenyatta was "in solidarity" with them, and that they should not fear anything.²¹⁷ Mr Manyara's instructions to the attackers were echoed by Mungiki commanders.²¹⁸
52. Similarly, in the days before the Naivasha attack, senior Mungiki members were summoned to a meeting with Mr Kimemia.²¹⁹ Mr Kimemia explained that Messrs Kibaki, Kenyatta and Muthaura had identified Naivasha as the target for the attack.²²⁰ Mr Kimemia tasked the Mungiki members with recruiting young men to carry out the attack.²²¹ Messrs Kimemia and Mwenje conveyed explicit instructions to the Mungiki members: they were to "burn more than one hundred houses, kill people", and forcibly circumcise Luo men to instill fear into their community.²²² Mirroring Mr Manyara's instructions to the Nakuru attackers, Mr

²¹⁴ [REDACTED].

²¹⁵ [REDACTED].

²¹⁶ [REDACTED].

²¹⁷ [REDACTED].

²¹⁸ [REDACTED].

²¹⁹ [REDACTED].

²²⁰ [REDACTED].

²²¹ [REDACTED].

²²² [REDACTED].

Kimemia instructed the Mungiki members to mutilate the bodies of gunshot victims.²²³ Mr Kimemia gave the Mungiki a large cash payment for the attacks and promised more upon completion.²²⁴ Mr Kimemia also introduced the Mungiki members to intermediaries, whom he instructed to provide guns for the attack,²²⁵ and who later did so.²²⁶

53. Before the Naivasha attack, Ms Kihara met with Mungiki and pro-PNU youth and instructed them to “kill” and “get rid of” Luos from Naivasha.²²⁷ George Thuo also instructed Mungiki attackers with respect to the Naivasha attack.²²⁸ Mungiki commanders conveyed the same orders to the Naivasha attackers: have “no mercy . . . the leaders want to see Naivasha [o]n fire . . . this should be the mother of all battles . . . to teach them [perceived ODM supporters] a lesson”.²²⁹ The attackers were told that if the attack were successful, the PNU would address the Mungiki’s grievances (the release of Maina Njenga, end of extra-judicial killings, etc.).²³⁰ They were instructed to do the “worst actions” possible; orders they understood to include rape.²³¹

j. The Nakuru attack

54. Together with other members of the common plan, the Accused organised Mungiki and pro-PNU youth to attack perceived ODM supporters in and around Nakuru between 24 and 27 January 2008.

²²³ [REDACTED].

²²⁴ [REDACTED].

²²⁵ [REDACTED].

²²⁶ [REDACTED].

²²⁷ [REDACTED].

²²⁸ [REDACTED].

²²⁹ [REDACTED].

²³⁰ [REDACTED].

²³¹ [REDACTED].

i. Preparatory meetings are held to plan the attack

55. From early January 2008, meetings were held in and around Nakuru to plan and coordinate the attack. These included:

- A meeting held at the [REDACTED] in Nakuru in early January 2008,²³² attended by local Mungiki members, Charles Ndungu Wagacha, Mr Manyara, and Nakuru elders, including Maina Zakayo,²³³ a businessman.²³⁴ On behalf of the Accused, Mr Manyara told Mungiki members to recruit youths for fighting and promised to provide them with guns and uniforms.²³⁵ Messrs Manyara and Wachaga assured local Mungiki that if there were any problems with the police, they would contact Messrs Kenyatta and Muthaura.²³⁶
- A meeting at a hotel/restaurant on the way from Nakuru to Molo, held in the days before the main attack, in which Messrs Manyara and Waruinge distributed money from “State House” and *pangas* to youths who were later deployed to attack Kalenjins in Nakuru.²³⁷
- Multiple meetings held at Nakuru State House, facilitated by Mr Kimemia, in which Mr Manyara and local elders planned the attack and uniforms and weapons were distributed to Mungiki members.²³⁸

²³² Also spelled “[REDACTED]”.

²³³ Also spelled “Zachio”.

²³⁴ [REDACTED].

²³⁵ [REDACTED].

²³⁶ [REDACTED].

²³⁷ [REDACTED].

²³⁸ [REDACTED].

ii. Mungiki and pro-PNU youth mobilise and receive arms, cash and instructions from the Accused's agents

56. The Mungiki used a residential compound outside Nakuru to stage the attack.²³⁹

It was referred to by various names, including “[REDACTED]”, “[REDACTED]” and the “[REDACTED]”.²⁴⁰ [REDACTED] was in charge of the [REDACTED] house and was the Mungiki commander tasked with coordinating the Nakuru attack.²⁴¹ Charles Ndungu Wagacha instructed local Mungiki leaders to “recruit as many youth as possible . . . to fight”, explaining that this was an order from Maina Njenga and that Mr Kenyatta would provide weapons and financing.²⁴² Scores of Kikuyu youths from Nakuru and elsewhere came to the [REDACTED] house to take the Mungiki oath and prepare for the attack.²⁴³ Mungiki oath administrators traveled from Nairobi and other locations to oath the new recruits.²⁴⁴ Large scale oathing also took place at other locations in and around Nakuru, including Nyama Choma, Subukia, and Gilgil.²⁴⁵ The goal of the recruitment drive was to increase the available manpower to attack perceived ODM supporters.²⁴⁶

57. Mr Kenyatta provided David Manyara with the money and uniforms which were used for the attacks in Nakuru.²⁴⁷ Mr Manyara was the principal liaison between the Accused and the Mungiki in the Nakuru area.²⁴⁸ Together with other Nakuru elders, Mr Manyara planned the attack and coordinated its logistical elements

²³⁹ See, e.g., [REDACTED].

²⁴⁰ [REDACTED]. See [REDACTED].

²⁴¹ [REDACTED].

²⁴² [REDACTED].

²⁴³ [REDACTED].

²⁴⁴ [REDACTED].

²⁴⁵ [REDACTED].

²⁴⁶ [REDACTED].

²⁴⁷ [REDACTED].

²⁴⁸ [REDACTED].

with the Mungiki members tasked with carrying it out.²⁴⁹ In the lead up to the attack, Mr Manyara provided Mungiki leaders with camouflage uniforms,²⁵⁰ guns,²⁵¹ and ammunition,²⁵² which were distributed to Mungiki members and used in the attack.²⁵³ He also provided Mungiki leaders with money,²⁵⁴ which was used, among other things, to (i) purchase weapons for the attackers,²⁵⁵ and (ii) pay for other expenses, such as transportation and food.²⁵⁶ Later, Mr Manyara distributed *pangas* to Mungiki attackers.²⁵⁷

58. Additional funds were contributed to the Mungiki attackers by the Nakuru council of elders,²⁵⁸ and Mr Zakayo.²⁵⁹ Charles Ndungu Wagacha also delivered cash to local Mungiki leaders, at least some of which had been obtained from Mr Kenyatta, and which was used to fund the attack.²⁶⁰ Charles Ndungu Wagacha, Naftali Irungu (AKA “Markus”) and Maina Diambo also delivered additional weapons and uniforms, which they said had been obtained through the Accused.²⁶¹ Further uniforms were delivered by a prison warden who was an associate of Mr Manyara.²⁶²

iii. The execution of the Nakuru attack

59. In the lead up to the attack, Mr Manyara travelled around Nakuru with a loudspeaker, warning non-Kikuyus to leave and urging Kikuyus to take

²⁴⁹ [REDACTED].

²⁵⁰ [REDACTED].

²⁵¹ [REDACTED].

²⁵² [REDACTED].

²⁵³ [REDACTED].

²⁵⁴ [REDACTED].

²⁵⁵ [REDACTED].

²⁵⁶ [REDACTED].

²⁵⁷ [REDACTED].

²⁵⁸ [REDACTED].

²⁵⁹ [REDACTED].

²⁶⁰ [REDACTED].

²⁶¹ [REDACTED].

²⁶² [REDACTED].

revenge.²⁶³ He also coordinated the distribution of leaflets, which instructed non-Kikuyus to leave the area.²⁶⁴

60. The Nakuru attack began on 24 January 2008 and lasted until 27 January 2008.²⁶⁵ The Mungiki and pro-PNU youth deployed in platoons of ten,²⁶⁶ and attacked perceived ODM supporters.²⁶⁷ The Mungiki and pro-PNU youth were armed with guns²⁶⁸ and crude weapons, including *pangas*, *rungus*, swords and metal bars.²⁶⁹ Some wore camouflage uniforms, which made them look like police and enabled them to surprise their victims.²⁷⁰ Some had dreadlocks, a hairstyle associated with Mungiki members.²⁷¹ The Mungiki and pro-PNU youth went house to house looking for ODM supporters, whom they killed and raped.²⁷² They burned houses belonging to perceived ODM supporters and destroyed their property.²⁷³ The attackers also forcibly circumcised Luo men and sometimes cut off their genitals before killing them.²⁷⁴ Non-Kikuyus fled their homes in fear for their safety and because the destruction of their property deprived them of their means of survival.²⁷⁵ The police did not intervene to stop the attackers.²⁷⁶

²⁶³ [REDACTED].

²⁶⁴ [REDACTED].

²⁶⁵ [REDACTED].

²⁶⁶ [REDACTED].

²⁶⁷ [REDACTED].

²⁶⁸ [REDACTED].

²⁶⁹ [REDACTED].

²⁷⁰ [REDACTED].

²⁷¹ [REDACTED].

²⁷² [REDACTED].

²⁷³ [REDACTED]; KEN-OTP-0077-0457.

²⁷⁴ [REDACTED].

²⁷⁵ [REDACTED].

²⁷⁶ [REDACTED].

iv. The crimes committed

1. Murder – Article 7(1)(a) of the Statute (count 1).

61. The Mungiki and pro-PNU youth acting on the Accused’s behalf killed score of perceived ODM supporters in and around Nakuru.²⁷⁷ The attackers shot, cut and burned to death unarmed men, women and children, whom they found in the streets, in their homes, and in shops.²⁷⁸ Bodies of those killed with gunshots were mutilated to hide the gunshot wounds.²⁷⁹ The Nakuru quarry was used as an execution site and the bodies of the deceased were thrown inside.²⁸⁰ In one incident in Ponda Mali, attackers pulled a Luo man from his bicycle, bludgeoned him and his children with *pangas* and clubs, poured petrol on them, and set them alight.²⁸¹ Among the victims killed were [REDACTED] and [REDACTED].²⁸²
62. The Mungiki and pro-PNU youth identified their victims through a variety of means, including language, the use of checkpoints and the examination of identification cards for names from ethnic groups perceived to support the ODM.²⁸³ Individuals identified from those ethnic groups were killed.²⁸⁴ Approximately 112 people were killed in Nakuru between 24 and 27 January 2008, of whom at least 45 can be identified as belonging to ethnic groups perceived as supporting the ODM.²⁸⁵

²⁷⁷ [REDACTED].

²⁷⁸ [REDACTED]; KEN-OTP-0001-0248, at 0300.

²⁷⁹ [REDACTED].

²⁸⁰ [REDACTED].

²⁸¹ [REDACTED].

²⁸² [REDACTED].

²⁸³ [REDACTED].

²⁸⁴ [REDACTED].

²⁸⁵ KEN-OTP-0001-0364, at 0481; KEN-OTP-0041-0679, at 0681-0690; KEN-OTP-0005-9277.

2. Deportation or forcible transfer – Article 7(1)(d) of the Statute (count 2).

63. Thousands of perceived ODM supporters were expelled from their homes as a result of the attack, many out of fear that they would be killed.²⁸⁶

64. Initially, many took shelter in the Afraha Stadium.²⁸⁷ Data from shortly after the attack recorded over 50,000 internally displaced people (“IDPs”) in Nakuru,²⁸⁸ including approximately 4,000 sheltering in Afraha Stadium, most of whom were from ethnic groups perceived as supporting the ODM.²⁸⁹ From Afraha Stadium and elsewhere in Nakuru, IDPs were transported to areas outside Nakuru where it was thought they would be safe.²⁹⁰ Many perceived ODM supporters never returned to Nakuru, having had their property and sources of income destroyed in the attack.²⁹¹ The looting, property destruction, murders, rapes, forcible circumcisions, penile amputations, beatings, torture and severe physical injuries perpetrated by the attackers coerced perceived ODM supporters to leave Nakuru.

3. Rape – Article 7(1)(g) of the Statute (count 3).

65. The Mungiki and pro-PNU youth forced women perceived as ODM supporters to have sexual intercourse with them,²⁹² including [REDACTED], who were raped after being identified as Luos.²⁹³ Raped women suffered serious injuries and long-term health consequences.²⁹⁴ Twenty-nine rapes were reported at Provincial General Hospital in Nakuru,²⁹⁵ Unreported rapes (or rapes reported

²⁸⁶ [REDACTED].

²⁸⁷ [REDACTED].

²⁸⁸ KEN-OTP-0064-1019, at 1029.

²⁸⁹ KEN-OTP-0064-1019, at 1029; *see also* [REDACTED].

²⁹⁰ [REDACTED].

²⁹¹ [REDACTED]; KEN-OTP-0077-0457.

²⁹² [REDACTED].

²⁹³ [REDACTED].

²⁹⁴ [REDACTED].

²⁹⁵ KEN-OTP-0001-0364, at 0481; KEN-OTP-0001-1288, at 1505.

later or in different locations) were higher because of the under-reporting of rape in Kenya due to stigma and shame and/or because displaced women had difficulty reporting rapes.²⁹⁶

4. Inhumane acts – Article 7(1)(k) of the Statute (count 4).

66. The Mungiki and pro-PNU youth forcibly circumcised non-Kikuyu men using *pangas* and other sharp objects, such as broken bottles and pieces of glass.²⁹⁷ The attackers amputated the penises of non-Kikuyu men.²⁹⁸ At least four men admitted to Provincial General Hospital in Nakuru were forcibly circumcised during the attack, and at least one had his penis amputated.²⁹⁹ As previously argued,³⁰⁰ forcible circumcision and penile amputation should be characterised as “other forms of sexual violence” under Article 7(1)(g), not “other inhumane acts”, as the Pre-Trial Chamber held.³⁰¹

67. The Mungiki and pro-PNU youth also beat, tortured and mutilated perceived ODM supporters during the attack, causing them severe injuries. Among other actions, the attackers cut victims with *pangas*, and bludgeoned them with *rungus*, clubs, and other blunt instruments.³⁰² Victims suffered serious injuries to their mental health as a result of the crimes perpetrated on them, the injuries they suffered, and those they saw inflicted on others.³⁰³

²⁹⁶ [REDACTED]; *see also* KEN-OTP-0001-1288; KEN-OTP-0001-1516; KEN-OTP-0003-0850; KEN-OTP-0003-0872; KEN-OTP-0005-9325; KEN-OTP-0005-9821, at 9828; KEN-OTP-0005-9849; KEN-OTP-0033-0076; KEN-OTP-0038-0864.

²⁹⁷ [REDACTED].

²⁹⁸ [REDACTED].

²⁹⁹ KEN-OTP-0001-0364, at 0481; KEN-OTP-0001-1288, at 1505.

³⁰⁰ *See* ICC-01/09-02/11-445, paras 18-22.

³⁰¹ ICC-01/09-02/11-382-Conf, paras 264-270.

³⁰² [REDACTED]; KEN-OTP-0001-0002, at 0093, para 314.

³⁰³ [REDACTED].

5. Persecution – Article 7(1)(h) of the Statute (count 5).

68. The predicate acts for the persecution charge are referenced above in relation to counts 1-4. In committing those crimes, the Mungiki and pro-PNU youth targeted their victims intentionally and in a discriminatory manner, based on their political affiliation as perceived ODM supporters, which was determined by reference to their ethnic group.³⁰⁴

k. The Naivasha attack

69. Together with other members of the common plan, the Accused organised Mungiki and pro-PNU youth to attack perceived ODM supporters in and around Naivasha between 27 and 28 January 2008.

i. The Accused's agents enlist, pay and arm local Mungiki to participate in the Naivasha attack

70. Prior to the Naivasha attack, the Accused's agents met with local Mungiki members to persuade them to join the fight on the PNU side.³⁰⁵ In particular, [REDACTED] and [REDACTED] met with a local Mungiki leader at [REDACTED]³⁰⁶ in Naivasha prior to the attack to persuade him to mobilise Mungiki members to participate in the violence.³⁰⁷ [REDACTED] gave the Mungiki member a large sum of money that he said had been received from Mr Kenyatta.³⁰⁸ Later, [REDACTED] provided the Mungiki with a large number of *pangas*, which were used in the Naivasha attack.³⁰⁹

³⁰⁴ To avoid doubt, the Prosecution intends to offer evidence of looting and destruction of property as acts underlying the crime of persecution. *See* ICC-01/09-02/11-445, paras 23-26.

³⁰⁵ [REDACTED].

³⁰⁶ Also referred to as [REDACTED].

³⁰⁷ [REDACTED].

³⁰⁸ [REDACTED].

³⁰⁹ [REDACTED].

ii. Mungiki and pro-PNU youth are transported to Naivasha for the attack

71. The Accused and his intermediaries recruited Mungiki and pro-PNU youth from outside Naivasha to participate in the attack. The intermediaries included Mr Thuo,³¹⁰ Mr Kimemia,³¹¹ David Mwenje,³¹² Ms Kihara,³¹³ and Kuria Kanyiny, a former Kiambu MP.³¹⁴ The attackers they recruited were transported to Naivasha using various means, including City Hoppa buses and trucks organised by George Thuo,³¹⁵ using funds obtained from Mr Kenyatta.³¹⁶ The out-of-town attackers were transported from multiple locations, including Thika,³¹⁷ Limuru,³¹⁸ Nairobi,³¹⁹ and Nakuru.³²⁰ The police did not interfere with the vehicles carrying the attackers.³²¹ The attackers transported to Naivasha were equipped with guns, crude weapons, camouflage uniforms and handcuffs supplied by the Accused's agents.³²² On the way to Naivasha, some Mungiki members deserted.³²³ Mr Kenyatta engaged a local Mungiki leader named Anthony Mwenje (AKA "Noriega") to gather a group of Mungiki to replace those who had left.³²⁴ Mr Kenyatta paid Noriega a large sum of money for this purpose.³²⁵

³¹⁰ [REDACTED].

³¹¹ [REDACTED].

³¹² [REDACTED].

³¹³ [REDACTED].

³¹⁴ [REDACTED].

³¹⁵ [REDACTED].

³¹⁶ [REDACTED].

³¹⁷ [REDACTED].

³¹⁸ [REDACTED].

³¹⁹ [REDACTED].

³²⁰ [REDACTED].

³²¹ [REDACTED].

³²² See, *supra*, para 42; see also [REDACTED].

³²³ [REDACTED].

³²⁴ [REDACTED].

³²⁵ [REDACTED].

72. Among the Mungiki transported to Naivasha were members of the “Bagation Squad”.³²⁶ The out-of-town attackers also included pro-PNU youth who were recruited for the purpose of the attacks.³²⁷ The out-of-town Mungiki and pro-PNU youth groups started arriving in Naivasha in the days before the attack.³²⁸ [REDACTED] arrived in Naivasha on or about 26 January 2008 with a group of other Mungiki to get acquainted with the town.³²⁹ Lodging and food for out-of-town attackers was organised by Mungiki from Naivasha.³³⁰ Other groups of Mungiki and pro-PNU youth arrived in Naivasha on or about 27 January 2008, including [REDACTED], and Noriega.³³¹ Attackers who arrived from outside Naivasha were joined by local Mungiki and pro-PNU youth who had been recruited by Mr Mututho, Ms Kihara, and other community leaders.³³² Some attended a meeting held by Ms Kihara at the La Belle Inn shortly before the attack, in which she briefed them about the planned attack.³³³

iii. Execution of the attack

73. The Naivasha attack began on 27 January 2008.³³⁴ The Mungiki and pro-PNU youth attacked in an organised manner, simultaneously from several parts of Naivasha.³³⁵ Mungiki and pro-PNU youth from Naivasha mixed with attackers who had arrived from other locations and identified non-Kikuyus and their property, to ensure that only perceived ODM supporters were targeted in the

³²⁶ [REDACTED].

³²⁷ [REDACTED].

³²⁸ [REDACTED].

³²⁹ [REDACTED].

³³⁰ [REDACTED].

³³¹ [REDACTED].

³³² [REDACTED].

³³³ [REDACTED].

³³⁴ [REDACTED].

³³⁵ [REDACTED].

attack.³³⁶ The Mungiki and pro-PNU youth were divided into groups, led by senior Mungiki members, which in turn were comprised of platoons of approximately ten men.³³⁷ The various groups communicated with each another during the attack using mobile phones.³³⁸

74. The Mungiki and pro-PNU youth who participated in the Naivasha attack were paid using funds received from the Accused, his agents, and other wealthy Kikuyus.³³⁹ Some of the funds were distributed before the attack.³⁴⁰ During the attack, Maina Dlambo brought additional funds to Naivasha, which were distributed to the Mungiki attackers on the ground.³⁴¹ The attackers were equipped with guns, *pangas*, handcuffs, metal bars and clubs.³⁴² Most wore civilian clothes during the day, and some had dreadlocks, a hairstyle associated with Mungiki members.³⁴³ At night, certain attackers wore the camouflage uniforms that had been received from the Accused's agents,³⁴⁴ which enabled them to pass themselves off as police and trick victims into opening doors or approaching them for help.³⁴⁵

75. The Mungiki and pro-PNU youth targeted non-Kikuyus perceived as ODM supporters.³⁴⁶ The attackers injured and killed their victims with various weapons, including *pangas*, *rungus*, metal bars, sticks, and guns,³⁴⁷ and destroyed

³³⁶ [REDACTED].

³³⁷ [REDACTED].

³³⁸ [REDACTED].

³³⁹ [REDACTED].

³⁴⁰ [REDACTED].

³⁴¹ [REDACTED].

³⁴² [REDACTED].

³⁴³ [REDACTED].

³⁴⁴ [REDACTED].

³⁴⁵ [REDACTED].

³⁴⁶ [REDACTED].

³⁴⁷ [REDACTED].

their shops, residences and personal property.³⁴⁸ The Mungiki and pro-PNU youth also incited other local Kikuyus to join the attack.³⁴⁹ The attackers chanted, sang songs and shouted slogans against perceived ODM supporters.³⁵⁰ They chased victims from their homes, destroyed or looted their belongings, and burned their houses, sometimes with the inhabitants inside.³⁵¹ Guided by locals, the attackers went door-to-door in search of perceived ODM supporters,³⁵² whom they beat, wounded and killed.³⁵³ Handcuffs from the Accused's agents were used to restrain victims.³⁵⁴

76. To identify perceived ODM supporters and prevent them from fleeing, the Mungiki and pro-PNU youth erected barriers and check-points on the roads.³⁵⁵ At the checkpoints, the attackers stopped civilians and identified those perceived to be ODM supporters, based on their identification cards and the languages they spoke; individuals from ethnic groups believed to support the ODM were beaten and killed.³⁵⁶ Thousands of perceived ODM supporters were forced to flee from their homes as a result of the attack.³⁵⁷

77. As in Nakuru, the Kenya police took little or no action to stop the Mungiki and pro-PNU youth from committing crimes in Naivasha, and even tacitly approved the crimes.³⁵⁸ To avoid police interference, Mungiki ground commanders were in constant contact with the overall Mungiki coordinators for the attack, Charles

³⁴⁸ [REDACTED].

³⁴⁹ [REDACTED].

³⁵⁰ [REDACTED].

³⁵¹ [REDACTED].

³⁵² [REDACTED].

³⁵³ [REDACTED].

³⁵⁴ [REDACTED].

³⁵⁵ [REDACTED]; KEN-OTP-0077-0457.

³⁵⁶ [REDACTED].

³⁵⁷ [REDACTED]; KEN-OTP-0028-0102; KEN-OTP-0028-0103.

³⁵⁸ [REDACTED]; KEN-OTP-0026-4751.

Ndungu Wagacha and Maina Diambo, who were in direct contact with Mr Muthaura.³⁵⁹ Mr Muthaura provided instructions on how to ensure that the attackers were not bothered by the police.³⁶⁰ He also provided the Mungiki and pro-PNU youth attackers with directions to a farm where they could rest at night without risk of being apprehended by the police.³⁶¹ Whenever police approached the Mungiki's areas of operation, the ground commanders called Messrs Wagacha and Diambo, who called Mr Muthaura, and the police stood down.³⁶² The coordination between Mr Muthaura and the Mungiki worked: the police did not intervene to stop the Mungiki and pro-PNU youth from attacking perceived ODM supporters, and the attackers were given a free reign.³⁶³

78. The attack lasted until at least 28 January 2008.³⁶⁴ As the Kenyan army moved into Naivasha,³⁶⁵ the Mungiki and pro-PNU youth from outside Naivasha were evacuated in government trucks.³⁶⁶ Mr Muthaura organised the trucks and Mr Diambo coordinated the pick-up of the attackers.³⁶⁷

iv. The crimes committed

1. Murder – Article 7(1)(a) of the Statute (count 1).

79. The Mungiki and pro-PNU youth acting on the Accused's behalf killed scores of perceived ODM supporters in and around Naivasha during the attack.³⁶⁸ The attackers hacked perceived ODM supporters to death with *pangas*, *rungus*, and

³⁵⁹ [REDACTED].

³⁶⁰ [REDACTED].

³⁶¹ [REDACTED].

³⁶² [REDACTED].

³⁶³ [REDACTED].

³⁶⁴ [REDACTED].

³⁶⁵ [REDACTED].

³⁶⁶ [REDACTED].

³⁶⁷ [REDACTED].

³⁶⁸ [REDACTED]; KEN-OTP-0028-0102.

knives and/or shot them with guns.³⁶⁹ Some victims were decapitated, sometimes in front of their children.³⁷⁰ Among the victims was [REDACTED], who was mutilated and killed in the street, having his penis amputated prior to death.³⁷¹ In one incident, Mungiki attackers rounded up six to eight perceived ODM supporters, forcibly circumcised at least one, and beat and tortured the others before killing them.³⁷² Bodies of murdered civilians remained in the street for days and others were thrown into the local quarry.³⁷³ In accordance with orders received from the Accused's agents, the attackers mutilated bodies of gunshot victims to conceal that they had been killed with guns supplied by the government.³⁷⁴ The attackers burned houses that were known to belong to perceived ODM supporters with the residents still inside.³⁷⁵ In one incident, the Mungiki and pro-PNU youth set fire to a dwelling in Kabati Estate, in which 19 victims, [REDACTED], were burned alive.³⁷⁶ In another incident, [REDACTED] and other Mungiki burned at least three women and children alive in a house in Karagita.³⁷⁷ At least 41 perceived ODM supporters were killed during the attack.³⁷⁸

³⁶⁹ [REDACTED]; KEN-OTP-0028-0102, KEN-OTP-0077-0453; KEN-OTP-0033-0119.

³⁷⁰ [REDACTED].

³⁷¹ [REDACTED].

³⁷² [REDACTED].

³⁷³ [REDACTED].

³⁷⁴ [REDACTED].

³⁷⁵ [REDACTED].

³⁷⁶ [REDACTED]; KEN-OTP-0033-0119; KEN-OTP-0028-0103; KEN-OTP-0028-0055; KEN-OTP-0038-0864; KEN-OTP-0077-0457; KEN-OTP-0005-9937, at 9937-9938; [REDACTED].

³⁷⁷ [REDACTED].

³⁷⁸ KEN-OTP-0041-0679, at 0679-0681; KEN-OTP-0011-0658, at 0658-0661.

2. *Deportation or forcible transfer – Article 7(1)(d) of the Statute (count 2).*

80. Thousands of perceived ODM supporters were expelled from their homes as a result of the attack, many out of fear that they would be killed.³⁷⁹ The Mungiki and pro-PNU youth looted and destroyed homes, businesses and personal property of perceived ODM supporters to coerce them to leave Naivasha.³⁸⁰ IDPs found temporary refuge at Naivasha police station, Naivasha prison, the showground, and at other makeshift camps, from which they were transported to other parts of Kenya.³⁸¹ At least 9,000 IDPs were forced to take refuge at the Naivasha police station, most of whom were from ethnic groups perceived as supporting the ODM.³⁸² Many displaced civilians never returned to Naivasha.³⁸³ The looting, destruction of property, murders, rapes, forcible circumcisions, penile amputations, beatings, torture and severe physical injuries perpetrated by the Mungiki and pro-PNU youth coerced perceived ODM supporters to leave Naivasha.

3. *Rape – Article 7(1)(g) of the Statute (count 3).*

81. The Mungiki and pro-PNU youth raped women who were perceived to be ODM supporters.³⁸⁴ Wives and daughters of known ODM supporters were targeted in particular.³⁸⁵ [REDACTED] was gang raped,³⁸⁶ which caused her serious injuries and as a result of which she contracted HIV and died.³⁸⁷ [REDACTED] was also

³⁷⁹ [REDACTED]; KEN-OTP-0028-0102.

³⁸⁰ [REDACTED]; KEN-OTP-0077-0457.

³⁸¹ [REDACTED].

³⁸² [REDACTED]; KEN-OTP-0064-1019, at 1029; KEN-OTP-0001-0364, at 0494.

³⁸³ [REDACTED].

³⁸⁴ [REDACTED].

³⁸⁵ [REDACTED].

³⁸⁶ [REDACTED].

³⁸⁷ [REDACTED].

gang raped.³⁸⁸ Many other cases of rape, including the rapes of [REDACTED], occurred in Naivasha during the attack,³⁸⁹ but went unreported or were reported later as a consequence of the under-reporting of rape in Kenya due to stigma and shame, or because displaced women had difficulty reporting the rapes.³⁹⁰

4. Inhumane acts – Article 7(1)(k) of the Statute (count 4).

82. The Mungiki and pro-PNU youth forcibly circumcised non-Kikuyu men using knives, *pangas* and other sharp implements such as broken bottles.³⁹¹ In one incident in Karagita, [REDACTED] forcibly circumcised two Luo men and watched another attacker forcibly circumcise a third.³⁹² In other incidents, Mungiki and pro-PNU youth rounded up groups of non-Kikuyu men, brought them to centralised locations, and forcibly circumcised them.³⁹³ Men who resisted were killed on the spot.³⁹⁴ At least four cases of forcible circumcision were reported in Naivasha District Hospital at the time.³⁹⁵ Some men had their penises amputated; one such individual was [REDACTED], whose penis was chopped off and placed in his mouth before he died.³⁹⁶ As previously argued,³⁹⁷ forcible circumcision and penile amputation constitute “other forms of sexual violence” under Article 7(1)(g), not “other inhumane acts”, as the Pre-Trial Chamber held.³⁹⁸

³⁸⁸ [REDACTED].

³⁸⁹ [REDACTED]; KEN-OTP-0045-0205; KEN-OTP-0033-0076; KEN-OTP-0038-0864, at 5.10; KEN-OTP-0049-0052, at 20.35; KEN-OTP-0001-1516, at 1519-1520.

³⁹⁰ [REDACTED]; *see also* KEN-OTP-0001-1288, at 1346; KEN-OTP-0001-1516, at 1521; KEN-OTP-0003-0850, at 0850-0853; KEN-OTP-0003-0872, at 0872-0878; KEN-OTP-0005-9821, at 9828; KEN-OTP-0005-9849, at 9865; KEN-OTP-0004-0504; KEN-OTP-0038-0864.

³⁹¹ [REDACTED].

³⁹² [REDACTED].

³⁹³ [REDACTED].

³⁹⁴ [REDACTED].

³⁹⁵ KEN-OTP-0011-0658, at 0658-0661; KEN-OTP-0001-0248, at 0298; KEN-OTP-0001-0364, at 0493.

³⁹⁶ [REDACTED].

³⁹⁷ *See* ICC-01/09-02/11-445, paras 18-22.

³⁹⁸ ICC-01/09-02/11-382-Conf, paras 264-270.

83. The Mungiki and pro-PNU youth also beat, tortured and mutilated perceived ODM supporters during the attack, causing them severe injuries.³⁹⁹ Among other actions, the attackers pulled out victims' teeth with pliers, cut them with *pangas*, and bludgeoned them with *rungus*, rocks, and other blunt instruments.⁴⁰⁰ Victims suffered serious injury to their mental health as a result of the crimes perpetrated on them, the injuries they suffered, and those they saw inflicted on others.⁴⁰¹

5. Persecution – Article 7(1)(h) of the Statute (count 5).

84. The predicate acts for the persecution charge are referenced above in relation to counts 1-4. In committing those crimes, the Mungiki and pro-PNU youth targeted their victims intentionally and in a discriminatory manner, based on their political affiliation as perceived ODM supporters, which was determined by reference to their ethnicity.⁴⁰²

1. A campaign is launched to conceal the Accused's involvement in the PEV

85. After the PEV, the Accused took steps to cover up his involvement in the PEV, with the goal of avoiding criminal prosecution. As further explained below, these actions constitute consciousness of guilt evidence that bear on the Accused's *mens rea*. These actions are also crucial to understanding the witness testimony that will be presented at trial. They illustrate the threats, bribery and intimidation to which witnesses are subject in this case, which provides the context against which the Chamber will be called upon to consider their testimony.

³⁹⁹ [REDACTED].

⁴⁰⁰ [REDACTED].

⁴⁰¹ [REDACTED].

⁴⁰² For the avoidance of doubt, the Prosecution intends to offer evidence of looting and destruction of property as underlying acts of the crime of persecution under Article 7(1)(d). *See* ICC-01/09-02/11-445, paras 23-26.

i. The Accused's agents attempt to retrieve the materiel provided to the attackers during the PEV

86. After the PEV, the Accused attempted to retrieve guns and uniforms provided to the Mungiki during the PEV. Acting through PNU intermediaries, including Ms Michuki and Mr Machira, the Accused and other members of the common plan contacted Mungiki members and demanded the return of the materiel.⁴⁰³ Materiel not returned remained in the possession of Mungiki members to whom they were supplied.⁴⁰⁴

ii. Mungiki members who interacted with the Accused during the PEV are killed or forcibly disappeared

87. In the aftermath of the PEV, the Mungiki members who dealt personally with the Accused and his agents were systematically eliminated.⁴⁰⁵ They include:

- Charles Ndungu Wagacha, Mungiki, who liaised with the principal actors on the PNU side to coordinate the Rift Valley attacks and in particular with Mr Muthaura, for whom he had a direct channel of communication.⁴⁰⁶ Mr Wagacha was reportedly killed by police in April 2008.⁴⁰⁷
- Maina Dlambo, a senior Mungiki leader present at planning meetings with PNU officials and who had a direct channel of communication to Mr Muthaura during the PEV.⁴⁰⁸ Mr Dlambo was reportedly arrested by the police in June 2008 and subsequently disappeared.⁴⁰⁹

⁴⁰³ [REDACTED].

⁴⁰⁴ [REDACTED]; KEN-OTP-0083-0116, at 0116-0124; KEN-OTP-0083-0126, at 0126-0132; KEN-OTP-0083-0087, at 0087-0090.

⁴⁰⁵ [REDACTED].

⁴⁰⁶ [REDACTED].

⁴⁰⁷ [REDACTED]; KEN-OTP-0053-0072, at 0072-0073; KEN-OTP-0053-0061.

⁴⁰⁸ [REDACTED].

⁴⁰⁹ [REDACTED]; KEN-OTP-0053-0074, at 0116, para 61.

- Naftali Irungu, AKA “Marcus”, a member of the Mungiki J5, who received money and weapons from PNU officials for the retaliatory attacks.⁴¹⁰ Mr Irungu was killed with Mr Wagacha in April 2008.⁴¹¹
- Anthony Mwenje, AKA “Noriega”, a Mungiki leader who dealt with Mr Kenyatta during the PEV and controlled a platoon of Mungiki attackers during the Naivasha attack.⁴¹² Mr Mwenje was arrested by police in May 2009 and subsequently disappeared.⁴¹³
- Njoroge Gichere, a senior Mungiki leader who attended planning meetings for the Rift Valley attacks and received money from Mr Kenyatta.⁴¹⁴ Mr Gichere disappeared shortly after the PEV.⁴¹⁵
- Timothy Mburu Gatira, a member of the Mungiki J5, who met with the Accused and received money and materiel for the Rift Valley attacks.⁴¹⁶ Mr Gatira was killed/disappeared in mid-2008.⁴¹⁷
- Njuguna Gitau Njuguna, a Mungiki spokesman who collected money from Mr Kenyatta and uniforms from Mr Kimemia for the Rift Valley attacks.⁴¹⁸ Mr Njuguna was killed in Nairobi on 5 November 2009 by plain clothes police officers, after expressing an intention to meet with former the ICC Prosecutor, who was in Nairobi that day.⁴¹⁹

⁴¹⁰ [REDACTED].

⁴¹¹ [REDACTED]; KEN-OTP-0053-0072; KEN-OTP-0053-0061.

⁴¹² [REDACTED].

⁴¹³ [REDACTED].

⁴¹⁴ [REDACTED].

⁴¹⁵ [REDACTED].

⁴¹⁶ [REDACTED].

⁴¹⁷ [REDACTED].

⁴¹⁸ [REDACTED].

⁴¹⁹ [REDACTED].

- George Njoroge Wagacha, AKA “Afco”, a member of the J5 and personal assistant to Maina Njenga.⁴²⁰ Mr Wagacha was reportedly killed together with Virginia Nyakio, Maina Njenga’s wife, on 12 April 2008 on the way to meet Mr Njenga in prison.⁴²¹

88. These killings and forced disappearances were part of a “clean up” campaign to conceal the Accused’s involvement in the PEV.⁴²² In addition, even if the Chamber concludes that these events cannot be directly attributed to the Accused, they are nonetheless relevant because of the effect they have had on the witnesses who will be testifying at trial.

iii. Attempts are made to suborn Mungiki witnesses to provide false exonerating testimony

89. In February 2011, three Mungiki insiders, Prosecution trial witnesses 11, 12 and 152, were approached by Defence intermediaries, including Mbuthi Gathenji, a lawyer working for the Kenyatta Defence team, and Charles Waithaka, an individual purportedly from “State House”, who attempted to enlist them to identify Mungiki witnesses who would be willing to “say whatever they [the intermediaries] want” about Mr Kenyatta’s involvement in the PEV.⁴²³ The intermediaries told Witnesses 11 and 12 that funds had been “set aside to buy” witnesses,⁴²⁴ and instructed them to “[l]ook for these people. We buy them”.⁴²⁵ The intermediaries stated that individuals who “volunteered to defend Uhuru, to say Uhuru . . . did not use the Mungikis, will be paid a large amount of

⁴²⁰ [REDACTED].

⁴²¹ [REDACTED]; KEN-OTP-0053-0065, at 0066-0067.

⁴²² *See, e.g.*, [REDACTED].

⁴²³ [REDACTED].

⁴²⁴ [REDACTED].

⁴²⁵ [REDACTED].

money”.⁴²⁶ The intermediaries also coached the witnesses on what to say to Mr Kenyatta’s UK lawyers: “Uhuru was not involved in any way of maybe funding those people who go and fight . . . he did not use Mungiki at all”.⁴²⁷

90. The intermediaries also conveyed a more sinister message: they would “just get rid of . . . kill” those who refused to comply with the scheme to procure false testimony;⁴²⁸ “unless a witness . . . cooperated [with the scheme], he will be eliminated”.⁴²⁹ Fearing for their safety, Witnesses 11, 12 and 152 purported to cooperate with the scheme for a period before they fled due to fears that they themselves would be killed.⁴³⁰ Among the intermediaries involved in the scheme was Mr Machira, who assured the witnesses that Mr Kenyatta had given it the “green light”.⁴³¹ Mr Kenyatta paid a significant sum of money to the intermediaries who implemented the scheme.⁴³²

91. At the same time, Messrs Machira and Kimemia decided to wage a public relations campaign on the Accused’s behalf. [REDACTED].⁴³³ Messrs Machira and Kimemia then paid [REDACTED] to [REDACTED].⁴³⁴ Fearing for their security if they refused, the witnesses [REDACTED].⁴³⁵ Other Mungiki members were also approached by individuals holding themselves to be members of the Kenyatta Defence team, who asked them to provide false exonerating testimony and offered security guarantees and/or monetary payments in return.⁴³⁶

⁴²⁶ [REDACTED].

⁴²⁷ [REDACTED].

⁴²⁸ [REDACTED].

⁴²⁹ [REDACTED].

⁴³⁰ [REDACTED]; KEN-OTP-0056-0094.

⁴³¹ [REDACTED].

⁴³² [REDACTED].

⁴³³ KEN-OTP-0056-0102; KEN-OTP-0056-0104.

⁴³⁴ [REDACTED]; KEN-OTP-0080-0105; KEN-OTP-0061-0102.

⁴³⁵ [REDACTED].

⁴³⁶ [REDACTED].

iv. Attempts are made to bribe Prosecution witnesses

92. At each stage of the judicial process, the Accused's intermediaries have attempted to bribe witnesses to shield the Accused from responsibility for his role in the PEV.

1. The campaign to bribe Witness 4.

93. In 2009, Prosecution Witness 4 was tracked down by intermediaries purportedly acting on behalf of the Accused, who bribed him to withdraw his testimony regarding the PEV.⁴³⁷ The intermediaries include Njee Muturi, personal assistant to Mr Kenyatta,⁴³⁸ and Bildad Kagai,⁴³⁹ an individual said to have acted as a Defence intermediary.⁴⁴⁰ In exchange for withdrawing his testimony and agreeing not to co-operate with the ICC,⁴⁴¹ Witness 4 was paid substantial sums of money and land was purchased for his family.⁴⁴² The intermediaries informed Witness 4 that if he refused to withdraw his statements, his family may be harmed.⁴⁴³ The intermediaries informed Witness 4 on multiple occasions that the money they paid to him originated from Mr Kenyatta.⁴⁴⁴ The Prosecution relied on Witness 4's evidence at confirmation, but will not do so at trial, in part because the bribery campaign has damaged his credibility.

2. The campaign to bribe Witnesses 11 and 12.

94. The Defence has attempted to cast the pre-confirmation attempt by Defence intermediaries to use Witnesses 11 and 12 to suborn Mungiki witnesses as

⁴³⁷ See [REDACTED].

⁴³⁸ [REDACTED].

⁴³⁹ [REDACTED].

⁴⁴⁰ See [REDACTED]. In the context of an Article 70 investigation into witness tampering, Counsel for Mr Muthaura have stated that "Mr Bildad Kagai has nothing to do with the Muthaura Defence Team".

⁴⁴¹ When the intermediaries first approached Witness 4, he had not provided evidence to the Prosecution.

⁴⁴² See, e.g., [REDACTED]; KEN-OTP-0072-0492.

⁴⁴³ See, e.g., [REDACTED].

⁴⁴⁴ See, e.g., [REDACTED].

“extortion attempts” by the witnesses against Mr Kenyatta.⁴⁴⁵ As the Pre-Trial Chamber correctly observed, “the evidence . . . manifestly does not support [the Defence’s] allegations”.⁴⁴⁶ New evidence that will be presented at trial demonstrates the point.

95. Shortly after the Prosecution disclosed the identities of Witnesses 11 and 12 in August 2012, the witnesses informed the Prosecution that purported Kenyatta intermediaries were attempting to locate them to offer a “deal” for them to agree not to testify. One of the intermediaries was Ferdinand Waititu, a sitting Member of Parliament and an associate of Mr Kenyatta. In a series of controlled telephone conversations recorded by the Prosecution with the witness’ consent, Mr Waititu told Witness 12 that he wanted to meet with him to discuss assisting Mr Kenyatta to “solve this fight” and the “lump of money to be given”.⁴⁴⁷ Mr Waititu indicated that he had spoken about the scheme to Mr Kenyatta and was keeping him informed of its progress.⁴⁴⁸ He explained that Mr Kenyatta wanted to avoid “direct” involvement because he was worried about getting caught tampering with evidence.⁴⁴⁹ Mr Waititu’s attempts to bribe Witness 12 – the recordings of which will be presented at trial – demonstrate that the Defence’s “extortion” theory regarding Witnesses 11 and 12 gets it backwards. Far from targeting Mr Kenyatta for “extortion”, it is the witnesses themselves who have been targeted by Mr Kenyatta’s associates – apparently with his knowledge – in attempts to resolve this case through bribery rather than the judicial process.

⁴⁴⁵ ICC-01/09-02/11-452, para 17.

⁴⁴⁶ ICC-01/09-02/11-382-Red, para 95.

⁴⁴⁷ KEN-OTP-0078-2268.

⁴⁴⁸ KEN-OTP-0089-0080.

⁴⁴⁹ KEN-OTP-0078-2268.

IV. The Article 7 contextual elements

96. The crimes occurred in the context of a widespread and/or systematic attack against members of a civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack, within the meaning of Articles 7(1) and 7(2)(a) of the Statute.

a. The targeted civilian population

97. During the Rift Valley attacks the Mungiki and pro-PNU youth subjected non-Kikuyus, perceived as supporting the ODM,⁴⁵⁰ to systematic acts of violence.⁴⁵¹ Non-Kikuyus from multiple ethnic groups were targeted in the attacks, and Kalenjins, Luos and Luhyas in particular.⁴⁵²

b. Widespread attack

98. The Rift Valley attacks were “widespread” within the meaning of Article 7(1) of the Statute as they affected a large number of civilian victims over a large geographical area.⁴⁵³ As discussed above, the attacks resulted in hundreds of dead, raped and wounded victims and thousands of displaced in two sizeable municipalities.⁴⁵⁴

⁴⁵⁰ See e.g., ICC-01/09-02/11-382-Red, para 110 (“[T]he qualifier ‘any civilian population’ has been previously interpreted to mean ‘groups distinguishable by nationality, ethnicity or other distinguishing features.’ (citing, *inter alia*, ICC-01/09-19-Corr, para 81). In the view of the Chamber, the civilian population targeted can include a group defined by its (perceived) political affiliation.”).

⁴⁵¹ See, *supra*, paras 61-68 for Nakuru; see, *supra*, paras 79-84 for Naivasha.

⁴⁵² Nakuru: see e.g. [REDACTED], Naivasha: see, e.g., [REDACTED]; KEN-OTP-0001-0364, at 0491; KEN-OTP-0001-0002, at 0094-0095; KEN-OTP-0001-1057, at 1066.

⁴⁵³ See e.g. ICC-01/04-01/07-717, para 395 (Pre-Trial Chamber I accepting that a ‘widespread’ attack can be one that covers a large geographical area or an attack in a small geographical area directed against a large number of civilians); ICC-01/09-02/11-382-Red, para 229 (Pre-Trial Chamber II holding that the attack on Nakuru and Naivasha was “widespread” for the purpose of Article 7(1); *Prosecutor v Jelisi*, Case No. IT-95-10-T, Judgement, 14 December 1999, paras 18, 21, 53-57 (holding that an attack on a single town and municipality of Br ko constituted a “widespread” attack for the purpose of the contextual elements of a crime against humanity charge).

⁴⁵⁴ See, *supra*, paras 59-60, 73-78.

c. Systematic attack

99. The attacks were systematic in that they were not “random occurrences”,⁴⁵⁵ but deliberately targeted perceived ODM supporters using means of identification such as door-to-door searches,⁴⁵⁶ (with locals guiding attackers to targets),⁴⁵⁷ physical attributes,⁴⁵⁸ roadblocks,⁴⁵⁹ identification cards,⁴⁶⁰ language,⁴⁶¹ and pre-identification of targets.⁴⁶² The systematic nature of the attacks is further evidenced by:

100. *The well-planned nature of the attacks.* At several planning meetings held before the attacks, the Accused and other members of the common plan announced their plan to carry out the attacks, tasked individuals with coordinating them at the local level, and provided support for the attackers in the form of money, materiel and logistics.⁴⁶³ The Accused’s coordinators then held planning meetings at the local level to finalise the details of the attacks and to give the Mungiki and pro-PNU youth instructions.⁴⁶⁴

101. *The coordinated manner in which the attackers operated.* The attackers in Nakuru and Naivasha operated in platoons of approximately ten men.⁴⁶⁵ Weapons were allocated to ensure that each platoon had an adequate selection of arms to carry out the attack.⁴⁶⁶ Senior Mungiki members oversaw the attacks, and issued

⁴⁵⁵ See e.g. ICC-01/04-01/07-717, para 394 (defining a ‘systematic attack’ by reference to the “organised nature of the acts of violence and the improbability of their random occurrence”).

⁴⁵⁶ [REDACTED].

⁴⁵⁷ [REDACTED]; KEN-OTP-0001-1076, at 1093; KEN-OTP-0001-1288, at 1365-1366.

⁴⁵⁸ See, e.g., [REDACTED].

⁴⁵⁹ [REDACTED].

⁴⁶⁰ [REDACTED].

⁴⁶¹ [REDACTED].

⁴⁶² [REDACTED]; KEN-OTP-0001-0248, at 0298.

⁴⁶³ See, *supra*, paras 27-31, 33, 35-39, 42-50.

⁴⁶⁴ See, *supra*, paras 55-58, 70-72.

⁴⁶⁵ See, *supra*, para 11.

⁴⁶⁶ See, *supra*, para 60; [REDACTED].

operational orders on the ground to ensure that the attackers were deployed for maximum effect.⁴⁶⁷ The attackers from out-of-town were integrated with local Mungiki members, who directed them to perceived ODM supporters.⁴⁶⁸

102. *The coordination between the attackers, the Accused and his agents.* During the attacks, the Accused and other members of the common plan communicated with Mungiki attackers using mobile phones. In Naivasha Mr Muthaura gave instructions to Charles Ndungu Wagacha and Maina Diambo Mungiki.⁴⁶⁹ Messrs Wagacha and Diambo then communicated these instructions to unit commanders on the ground.⁴⁷⁰ In addition, Mungiki members communicated with the Accused's agents for operational purposes, such as transport and securing the release of arrested Mungiki.⁴⁷¹

103. *The transport of attackers from other locations.* Mungiki and pro-PNU youth were mobilised from various locations and transported to Naivasha in trucks and buses to participate in the attack.⁴⁷² Although the out-of-town attackers travelled from different locations, their arrival in Naivasha was timed to ensure that a maximum number were present at the time designated for the attack.⁴⁷³ At the end of the Naivasha attack, Mr Muthaura provided several government trucks to transport the out-of-town attackers to different locations.⁴⁷⁴ The trucks arrived at pre-determined locations at precise times, indicating a high level of

⁴⁶⁷ See, *supra*, para 77.

⁴⁶⁸ See, *supra*, para 75.

⁴⁶⁹ See, *supra*, para 77.

⁴⁷⁰ See, *supra*, para 77.

⁴⁷¹ See, *supra*, paras 23, 40-41, 78.

⁴⁷² See, *supra*, paras 71-72.

⁴⁷³ See, *supra*, paras 71-72.

⁴⁷⁴ See, *supra*, para 78.

coordination.⁴⁷⁵ In Nakuru, out-of-town attackers assembled at the [REDACTED] house, where they were oathed, armed, trained and deployed for the attack.⁴⁷⁶

104. *The recruitment of young men for the attack.* Pro-PNU youths were recruited into the Mungiki and oathed to increase the fighting capacity for the Rift Valley attacks.⁴⁷⁷ The recruitment efforts were coordinated and systematic and occurred in various locations in the lead up to the attacks.⁴⁷⁸

105. *The well-funded nature of the attacks.* The Accused provided funding for the attacks, which he transmitted to Mungiki members both directly and through intermediaries.⁴⁷⁹ These funds were used to purchase weapons, pay for logistics, and to pay the attackers themselves.⁴⁸⁰ Some of the funds were collected in central locations, divided and transmitted to Mungiki members, who then disbursed them to the attackers who carried out the attacks.⁴⁸¹

106. *The provision of materiel.* The Accused, through his agents, provided the Mungiki and pro-PNU youth with a variety of weapons and materiel, including guns, pangas, grenades, and camouflage uniforms, which were distributed to, and used by, the Mungiki and pro-PNU youth during the attacks.⁴⁸² The weapons and materiel enabled the attackers to inflict maximum harm on perceived ODM supporters and their property.

⁴⁷⁵ See, supra, para 78.

⁴⁷⁶ See, supra, para 56.

⁴⁷⁷ See, supra, paras 12, 33, 56

⁴⁷⁸ See, supra, paras 33, 52, 55-56, 71-72.

⁴⁷⁹ See, supra, paras 30-31, 35-39.

⁴⁸⁰ See, supra, paras 48, 57, 70-71, 74.

⁴⁸¹ See, supra, paras 35-39, 46, 74.

⁴⁸² See, supra, paras 42-43, 45.

d. The organisation

107. Article 7(2)(a)'s "organisation" requirement does not require the exercise of any "State-like" functions,⁴⁸³ or a hierarchically-organised structure able to ensure compliance. As the majority of Pre-Trial Chamber II explained:

"the formal nature of a group and the level of its organisation should not be the defining criterion. Instead, [...] a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values".⁴⁸⁴ And "had the drafters intended to exclude non-State actors from the term 'organisation', they would not have included this term in article 7(2)(a) of the Statute".⁴⁸⁵

108. Nevertheless, as explained above in Section II, the Mungiki, the primary group used to carry out the attacks, was a hierarchically-organised structure with certain State-like characteristics. While the pre-existing structure of the Mungiki was the primary vehicle through which the attacks were committed, the organisation that came together for the purpose of carrying out the Nakuru and Naivasha attacks was also comprised of:

- Elements of the GoK, the Kenyan State security apparatus, PNU officials, and prominent members of the GEMA community, who formulated the plan for the attacks and provided the Mungiki and pro-PNU youth with the monetary and institutional support to carry them out. The Accused was part of this element of the organisation;⁴⁸⁶ and

⁴⁸³ *C.f., e.g.,* Judge Kaul, ICC-01/09-02/11-382-Conf, para 7 (citing ICC-01/09-19-Corr, pp.84 *et seq.*).

⁴⁸⁴ ICC-01/09-02/11-382-Red, para 112 (citing ICC-01/09-19-Corr, para 90).

⁴⁸⁵ ICC-01/09-02/11-382-Red, para 112 (citing ICC-01/09-19-Corr, para 92); *see also, e.g.,* Hall, pp 236-237: "Clearly, the policy need not be one of a State. It can also be an organisational policy. Non-state actors, or private individuals, who exercise *de factor* power can constitute the entity behind the policy. This provision in the article reflects the contemporary position that individuals not linked to a state or its authorities can commit crimes under international law".

⁴⁸⁶ *See, supra,* paras 27-29, 35-50.

- Other pro-PNU youth, most of whom were Kikuyu, and who were mobilised as additional manpower to support the Mungiki in the attacks.⁴⁸⁷

109. Together, these three pillars comprised a single *ad hoc* organisation, which came together to launch the Rift Valley attacks.

e. The policy

110. The “policy” element of Article 7(2)(a) is satisfied where the attack “is planned, directed or organised – as opposed to spontaneous or isolated acts of violence”.⁴⁸⁸ “The policy need not be formalised”⁴⁸⁹ or “explicitly defined by the organisational group”.⁴⁹⁰ The policy of the Accused and other members of the organisation was simple: keep the PNU in power through any means necessary. To implement this policy, they resolved to carry out attacks against perceived ODM supporters, which were intended to (i) avenge prior attacks by ODM supporters against the Kikuyu community; (ii) prevent additional attacks against the Kikuyu community; and (iii) force ODM supporters to abandon their attempts to overturn the announced election results by demonstrating that the Kikuyu community was willing to do whatever it took to keep President Kibaki in office.⁴⁹¹

111. The existence of the policy can be inferred from, among other matters, actions taken by the Accused and other members of the organisation to (i) plan the

⁴⁸⁷ See, *supra*, para 60 for Nakuru; see, *supra*, paras 71-75 for Naivasha. At confirmation, the Pre-Trial Chamber described the pro-PNU youth as “an integral part of the Mungiki” during the Rift Valley Attacks”: see ICC-01/09-02-11-382-Conf, para 123. In the Prosecution’s view, the “integral part” language employed by the Pre-Trial Chamber is not a requirement of Article 7(2) of the Statute. Rather, the question is whether the different parts of the organisation operated together to implement the organisational policy.

⁴⁸⁸ See e.g. ICC-01/09-02/11-382-Conf, para 111.

⁴⁸⁹ ICC-01/05-01/08-424, para 81.

⁴⁹⁰ ICC-01/04-01/07-717, para 396.

⁴⁹¹ [REDACTED].

attacks;⁴⁹² (ii) recruit Mungiki and pro-PNU youth to carry them out;⁴⁹³ (iii) raise and distribute funds for the attacks;⁴⁹⁴ (iv) equip the attackers with weapons and other materiel;⁴⁹⁵ and (v) provide the attackers with logistical support to carry out the attacks.⁴⁹⁶

V. The individual criminal responsibility of the Accused

a. Indirect co-perpetration under Article 25(3)(a) of the Statute

112. The Pre-Trial Chamber confirmed a theory of indirect co-perpetration under Article 25(3)(a) with respect to the Accused.⁴⁹⁷ This mode of liability is not settled law at the trial and appellate levels in this Court, and the Prosecution acknowledges that the Trial Chamber's interpretation may vary from that of the Pre-Trial Chamber.⁴⁹⁸ For present purposes, the Prosecution proceeds on the basis that indirect co-perpetration requires a six-part showing: (i) the existence of a common plan or agreement between two or more persons, including the accused; (ii) the accused made a substantial contribution, which, together with the contributions of other perpetrators, resulted in the fulfillment of the material elements of the crime; (iii) the existence of an organised and hierarchical apparatus of power; (iv) the accused had the ability to cause the organisation to contribute to the crime; (v) the organisation was composed of "fungible individuals" capable of replacement by others; and (vi) the accused acted with intent and had the requisite knowledge.⁴⁹⁹

⁴⁹² *See, supra*, paras 30-31.

⁴⁹³ *See, supra*, paras 33, 44-50, 71.

⁴⁹⁴ *See, supra*, paras 30-31, 35-39, 70-71, 74.

⁴⁹⁵ *See, supra*, paras 42-43, 45.

⁴⁹⁶ *See, supra*, paras 74, 77-78, 40-41.

⁴⁹⁷ ICC-01/09-02/11-382-Red, paras 297, 428.

⁴⁹⁸ *See, e.g.*, Separate Opinion of Judge Adrian Fulford, ICC-01/04-01/06-2842; Concurring Opinion of Judge Christine Van den Wyngaert, ICC-01/04-02/12-4.

⁴⁹⁹ ICC-01/09-02/11-444, paras 8-23.

i. Existence of a common plan or agreement

113. The Accused was part of a common plan or agreement to keep the PNU in power at any cost. After the election results were announced and violence broke out, members of the common plan agreed to use violence to keep the PNU in power, and to carry out retaliatory attacks against perceived ODM supporters to that end.⁵⁰⁰ Nakuru and Naivasha were identified as targets.⁵⁰¹ The principal facts demonstrating the existence of the common plan or agreement are:

- The actions taken before the election to secure the Mungiki's support for the PNU coalition;⁵⁰²
- The mobilisation of Mungiki members and pro-PNU youth to execute the common plan by carrying out the Rift Valley attacks;⁵⁰³
- Meetings held to plan and fundraise for the retaliatory attacks and to activate the Mungiki and pro-PNU to carry them out;⁵⁰⁴
- The articulation of the common plan at the above meetings;⁵⁰⁵
- The actions taken to secure Maina Njenga's approval for the use of Mungiki members in the retaliatory attacks;⁵⁰⁶
- [REDACTED];⁵⁰⁷
- The provision of money, materiel and security guarantees to the Mungiki and pro-PNU youth attackers;⁵⁰⁸

⁵⁰⁰ See, *supra*, paras 28-31, 51-53.

⁵⁰¹ See, *supra*, para 52.

⁵⁰² See, *supra*, paras 19-21.

⁵⁰³ See, *supra*, paras 27-31.

⁵⁰⁴ See, *supra*, paras 26, 30, 32, 38-39.

⁵⁰⁵ See, *supra*, paras 26, 30, 32.

⁵⁰⁶ See, *supra*, para 32.

⁵⁰⁷ See, *supra*, para 34.

- The instructions given by the Accused and his agents for the Mungiki to prepare for and carry out the retaliatory attacks;⁵⁰⁹
- The coordinated and systematic nature of the Rift Valley attacks;⁵¹⁰
- The crimes committed against perceived ODM supporters during the Rift Valley attacks.⁵¹¹

ii. The Accused's contributions

114. The Accused made the following contributions to the common plan, which resulted in the fulfilment of the material elements of the crimes:

- Securing the Mungiki's agreement to support the PNU coalition during the election campaign and later leveraging that agreement to persuade the Mungiki to fight on the PNU side during the PEV;⁵¹²
- Formulating and adopting the common plan;⁵¹³
- Mobilising, authorising and directing the Mungiki and pro-PNU youth to implement the common plan, in particular by directing them to carry out the Rift Valley attacks, thus activating the mechanisms leading to the commission of the crimes;⁵¹⁴
- Ensuring that pro-PNU youth were recruited for the attacks and providing them with logistical and other support;⁵¹⁵

⁵⁰⁸ See, *supra*, paras 30-31, 35-39, 40-43, 45, 70-71, 74, 77-78.

⁵⁰⁹ See, *supra*, paras 26, 30, 51.

⁵¹⁰ See, *supra*, paras 44-50, 60, 75, 99-106.

⁵¹¹ See, *supra*, paras 54-84.

⁵¹² See, *supra*, paras 19-21, 28-29.

⁵¹³ See, *supra*, paras 26, 30, 44-51.

⁵¹⁴ See, *supra*, paras 28-32, 40-41, 44-51.

⁵¹⁵ See, *supra*, paras 44-52, 71.

- Meeting with Mungiki members in early January at the Nairobi Club to persuade them to carry out the retaliatory attacks and to provide them with operational directions;⁵¹⁶
- Ensuring that the Mungiki and the pro-PNU youth were provided with weapons, uniforms, handcuffs and other materiel for use in the attacks;⁵¹⁷
- Soliciting the support and contributions of local politicians and businessmen for the retaliatory attacks and providing them with funds and logistical support for the same;⁵¹⁸
- Securing Maina Njenga's approval for Mungiki members to be used in the retaliatory attacks;⁵¹⁹
- Providing Mungiki members with large sums of money to carry out the Rift Valley attacks;⁵²⁰
- Dispatching intermediaries to fundraising meetings to raise money for the retaliatory attacks;⁵²¹
- Mobilising, through mid-level perpetrators, Mungiki members and pro-PNU youth to carry out the Rift Valley attacks;⁵²²
- Tasking local politicians, including David Manyara in Nakuru and Jayne Kihara and John Mututho in Naivasha, with coordinating the Rift Valley

⁵¹⁶ *See, supra*, para 30.

⁵¹⁷ *See, supra*, paras 42-43, 45.

⁵¹⁸ *See, supra*, paras 26, 28-29, 32, 44-50.

⁵¹⁹ *See, supra*, para 32.

⁵²⁰ *See, supra*, paras 26, 28-29, 32, 44-50.

⁵²¹ *See, supra*, paras 46-47.

⁵²² *See, supra*, paras 26, 28-29, 44-50.

attacks and placing Mungiki and pro-PNU youth attackers under their command,⁵²³ and

- Ensuring that vehicles were provided to transport Mungiki and pro-PNU youth attackers to Naivasha for the attack.⁵²⁴

iii. The existence of an organised and hierarchical apparatus of power

115. The Mungiki was the primary vehicle through which the Rift Valley attacks were carried out. As explained above, the Mungiki was an organised group, structured in a hierarchical manner.⁵²⁵ It had a functioning command structure, under which the Accused and his agents dealt with senior Mungiki members, who passed instructions to the direct perpetrators of the Rift Valley attacks.⁵²⁶ The pro-PNU youth were integrated with the Mungiki and organised under commanders, who liaised with the Accused and/or his agents and executed their instructions.⁵²⁷ The Accused strengthened these command structures by (i) designating local politicians and community leaders with responsibility for geographic areas familiar to them and prescribed logistical tasks;⁵²⁸ (ii) providing money, materiel and logistical support to the direct perpetrators of the attacks;⁵²⁹ and (iii) coordinating the attacks through planning meetings and telephone communication with the Mungiki members in charge of executing the attacks on the ground.⁵³⁰

⁵²³ See, *supra*, paras 26, 28-29, 44-50.

⁵²⁴ See, *supra*, paras 46, 71.

⁵²⁵ See, *supra*, paras 6-16.

⁵²⁶ See, *supra*, paras 28-31, 55-58.

⁵²⁷ [REDACTED].

⁵²⁸ See, *supra*, paras 45-50, 58, 71.

⁵²⁹ See, *supra*, paras 35, 45.

⁵³⁰ See, *supra*, paras 24, 28, 55, 58, 77.

iv. The Accused's ability to cause the organisation to contribute to the crimes

116. The Accused caused the organisation to contribute to the crimes by:

- Allying the Mungiki and the PNU during the election campaign;⁵³¹
- Instructing Mungiki members and local coordinators regarding the execution of the retaliatory attacks;⁵³²
- Paying and promising payments, through his agents, to the attackers for the attacks;⁵³³
- Reaching an agreement with Maina Njenga that Mungiki members could be used in the retaliatory attacks;⁵³⁴
- Ensuring, through his agents, that the Mungiki's grievances would be resolved if the organisation's members carried out the retaliatory attacks;⁵³⁵
- Past extra-judicial killings of Mungiki members by the State security apparatus, which led surviving Mungiki members to believe that they could be killed if they refused to support the PNU in the PEV;⁵³⁶
- Providing materiel and logistical support to the Mungiki and pro-PNU youth for the attacks;⁵³⁷ and
- The position of authority the Accused occupied in the GEMA community at the time of the PEV.

⁵³¹ See, *supra*, para 22.

⁵³² See, *supra*, paras 27, 28, 51.

⁵³³ See, *supra*, paras 27, 28, 35, 48, 51-53; [REDACTED].

⁵³⁴ See, *supra*, para 32.

⁵³⁵ See, *supra*, paras 30-32, 51.

⁵³⁶ See, *e.g.*, [REDACTED].

⁵³⁷ See, *supra*, paras 37, 50, 58, 75, 78.

v. The organisation was composed of fungible individuals capable of replacement

117. The Mungiki members and pro-PNU youth used in the Rift Valley attacks were fungible and capable of replacement in the sense that there were “enough [of them] to provide a sufficient supply of subordinates” to replace any who refused to act.⁵³⁸ Vehicles full of Mungiki were transported to the Rift Valley to participate in the attacks,⁵³⁹ and hundreds of young men were oathed for the same purpose.⁵⁴⁰ The fungible nature of the attackers is further demonstrated by (i) the desertion of Mungiki members on the way to the Rift Valley attacks, and their substitution with replacements;⁵⁴¹ (ii) certain attackers leaving part-way through the attacks, which were completed by those who remained;⁵⁴² (iii) local pro-PNU youth joining the attackers and bolstering their ranks during the course of the attacks;⁵⁴³ (iv) the willingness of Mungiki members to carry out mercenary acts, including the retaliatory attacks, in exchange for money;⁵⁴⁴ (v) the fact that the attackers operated in groups rather than alone;⁵⁴⁵ (vi) the understanding and agreement of the attackers’ superiors with the objectives of the common plan;⁵⁴⁶ and (vii) the Mungiki’s effective disciplinary regime, which ensured that orders were followed.⁵⁴⁷

⁵³⁸ ICC-01/04-01/07-717, para 516.

⁵³⁹ *See, supra*, para 71.

⁵⁴⁰ *See, supra*, para 56.

⁵⁴¹ *See, supra*, para 71.

⁵⁴² *See, e.g.*, [REDACTED].

⁵⁴³ *See, supra*, para 75.

⁵⁴⁴ [REDACTED].

⁵⁴⁵ *See, supra*, paras 60, 73.

⁵⁴⁶ *See, supra*, paras 32, 55, 58.

⁵⁴⁷ *See, supra*, paras 6-16.

vi. The Accused's intent and knowledge

1. Intent and knowledge with respect to the crimes.

118. With respect to counts 1, 2, 4 and 5, the principal facts demonstrating the Accused's intent and knowledge are:

- The Accused's role in the pre-election deal with the Mungiki;⁵⁴⁸
- The suspension of extra-judicial killings of Mungiki members during the election campaign and PEV, demonstrating that the Accused and others in the PNU held up their side of the pre-election deal;⁵⁴⁹
- The Accused's articulation of the common plan at meetings conducted from 30 December 2007 until the end of January 2008;⁵⁵⁰
- The instructions the Accused issued with respect to the execution of the retaliatory attacks;⁵⁵¹
- The Accused's provision of cash, weapons, materiel and logistical support to local coordinators and Mungiki and pro-PNU youth;⁵⁵²
- [REDACTED];⁵⁵³
- The issuance, through intermediaries, of orders to the Mungiki and pro-PNU youth to "kill", "burn", forcibly circumcise and do their "worst", in order to instil fear into the non-Kikuyu community;⁵⁵⁴

⁵⁴⁸ See, *supra*, paras 19-21.

⁵⁴⁹ See, *supra*, paras 22-24.

⁵⁵⁰ See, *supra*, paras 28-31.

⁵⁵¹ See, *supra*, paras 28-31.

⁵⁵² See, *supra*, paras 28-31.

⁵⁵³ See, *supra*, para 34.

⁵⁵⁴ See, *supra*, para 51.

- The organised and systematic manner in which the Rift Valley attacks were perpetrated, with attackers operating in groups and striking simultaneously for maximum impact;⁵⁵⁵
- The precision with which perceived ODM supporters were targeted during the attacks, while perceived PNU supporters were spared;⁵⁵⁶
- The forcible circumcision and penile amputation of Luo men, crimes with deep cultural significance, which aimed to instil fear and demonstrate the perceived cultural superiority of the attackers;⁵⁵⁷
- The actions taken after the PEV to conceal the Accused's involvement in the PEV.⁵⁵⁸
- The Accused's role in securing Maina Njenga's approval for Mungiki members to be used in the retaliatory attacks;⁵⁵⁹
- The Accused's announcement that he had agreed with the Mungiki that its members would participate in the retaliatory attacks;⁵⁶⁰
- The Accused's tasking of Mr Waruinge and Noriega with recruitment for the Rift Valley attacks.⁵⁶¹

119. With respect to the crime of rape (count 3), the Prosecution alleges that the Accused knew rapes would occur in the ordinary course of the attacks (*dolus directus* in the second degree). The Accused's knowledge is demonstrated by three principal factors.

⁵⁵⁵ See, *supra*, paras 59-78, 99-106.

⁵⁵⁶ See, *supra*, paras 59-78, 99-106.

⁵⁵⁷ See, *supra*, paras 79-82.

⁵⁵⁸ See, *supra*, paras 85-88.

⁵⁵⁹ See, *supra*, para 32.

⁵⁶⁰ See, *supra*, para 32.

⁵⁶¹ See, *supra*, paras 71-72.

120. *First*, the attackers were given *carte blanche*. The Accused, through his agents, instructed Mungiki and pro-PNU youth to do their “worst”; instructions the attackers understood to include rape.⁵⁶² The Accused’s agents also instructed attackers to forcibly circumcise non-Kikuyu men, which conveyed the message that one of the aims of the Rift Valley attacks was to subject perceived ODM supporters to sexual humiliation.⁵⁶³ The attackers were thus informed that they were free to carry out any crimes they chose, and the instructions regarding forcible circumcision enlarged the scope of permissible behaviour to include crimes of a sexual nature, such as rape.

121. *Second*, the Accused was on notice that rapes would be committed. From the beginning of the PEV, domestic and international media reported widespread rapes, including those committed by ethnic gangs.⁵⁶⁴ These reports put the Accused on notice that rape was being employed in the violence, and that it would be used in the ordinary course of the retaliatory attacks, which were ethnically motivated. This is particularly true given the PEV’s ethnic dimension, of which the Accused was also aware, as demonstrated through his actions and statements.⁵⁶⁵ Empirical research and international jurisprudence has found that rape is employed in the ordinary course of ethnically-driven conflicts as a means of humiliating and subjugating victims.⁵⁶⁶ Further, since the Rift Valley attacks

⁵⁶² See, *supra*, para 51.

⁵⁶³ See, *supra*, para 51. As the Prosecution has argued elsewhere, forcible circumcision should be characterised as sexual violence.

⁵⁶⁴ KEN-OTP-0003-0894; KEN-OTP-0003-0898, at 0902-0916; KEN-OTP-0091-0869; KEN-OTP-0091-0872; KEN-OTP-0091-0867; KEN-OTP-0091-0923; KEN-OTP-0091-0878; KEN-OTP-0091-0886; KEN-OTP-0091-0916; KEN-OTP-0091-0892; KEN-OTP-0091-0891; KEN-OTP-0091-0905; KEN-OTP-0091-0907; KEN-OTP-0091-0900; KEN-OTP-0091-0915; KEN-OTP-0091-0880; KEN-OTP-0091-0883; KEN-OTP-0091-0909; see also KEN-OTP-0003-0887; KEN-OTP-0091-0902; KEN-OTP-0091-0875.

⁵⁶⁵ See, *supra*, paras 30-31.

⁵⁶⁶ KEN-OTP-0001-0973, at 0974, KEN-OTP-0038-0866, at 0877-81; *Prosecutor v Kvočka et al.*, Judgement, IT-98-30/1-T, 2 November 2011, para 327; Patricia Viseur Sellers, ‘Individual(s’) Liability for Collective Sexual Violence’ in Karen Knop, ed, *Gender and Human Rights* (OUP, 2004), p 184; Anne-Marie LM de

were in part retaliation for earlier attacks on Kikuyus, which included the rapes of Kikuyu women,⁵⁶⁷ it was foreseeable that the Mungiki and pro-PNU youth would employ the same means against their victims.

122. *Third, rapes were committed in an organised and systematic fashion.* The systematic nature of the rapes, and especially gang rapes, shows that they were not simply opportunistic, but rather part of a concerted course of action to harm, humiliate, and instil fear into perceived ODM supporters. Rape victims were singled out based on their ethnicity and perceived political affiliation.⁵⁶⁸ Whereas the attackers sought to murder and mutilate men, they raped the women, some of whom were targeted because they were related to known ODM members.⁵⁶⁹

2. Mental elements of indirect co-perpetration.

123. Indirect co-perpetration requires proof that the Accused was aware: (i) that the common plan or agreement involved an element of criminality;⁵⁷⁰ (ii) of the fundamental features of the organisation;⁵⁷¹ and (iii) of the factual circumstances that enabled him, together with other co-perpetrators, to jointly exercise functional control over the crime.⁵⁷² These elements are demonstrated by the facts above in paragraphs 17-95. In particular, the Accused's knowledge of the criminal elements of the common plan is demonstrated by (i) his engagement of a criminal group to carry out the attacks; (ii) his instructions to Mungiki members with respect to the execution of the attacks; and (iii) the actions taken after the

Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Intersentia, 2005), p. 168; Partly Dissenting Opinion of Judge Chowhan in *Prosecutor v Milutinovic et al.*, Judgement, IT-05-87-T, 26 February 2009, Vol 3, p. 481.

⁵⁶⁷ See *supra* footnote 581; see also, e.g., KEN-OTP-0001-1516, at 1517, KEN-OTP-0038-0864, KEN-OTP-0049-0052, KEN-OTP-0045-0205 and KEN-OTP-0033-0076.

⁵⁶⁸ See, *supra*, paras 79, 81-82.

⁵⁶⁹ See, *supra*, paras 79, 81-82.

⁵⁷⁰ See ICC-01/04-01/06-803, paras 361-365.

⁵⁷¹ ICC-01/04-01/07-717, para 534.

⁵⁷² ICC-01/04-01/06-803, paras 366-367; ICC-01/04-01/07-717, paras 538-539.

PEV to conceal the Accused's involvement. The Accused's knowledge of the fundamental features of the organisation and the circumstances that enabled him to exercise joint functional control over the crime is demonstrated in particular by his (i) role in securing the agreement of Mungiki members and other pro-PNU youth to participate in the attacks; (ii) appointment of agents to carry out operational aspects of the plan; and (iii) provision of money, materiel and logistical support.

3. *Mental elements of crimes against humanity*

124. The facts above in paragraphs 17-95 also demonstrate that (i) the Accused either knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population,⁵⁷³ and (ii) that the conduct was pursuant to or in furtherance of an organisational policy or common plan.⁵⁷⁴

b. Liability under Article 25(3), subsections (b)-(d) of the Statute

125. As previously explained,⁵⁷⁵ the Accused's contributions may equally be characterised as: (i) ordering, soliciting or inducing under Article 25(3)(b); (ii) aiding, abetting or otherwise assisting under Article 25(3)(c); or (iii) contributing "[i]n any other way" to a crime committed by a "group of persons acting with a common purpose" under Article 25(3)(d).

126. Liability under Article 25(3)(b) is supported by, among others, (i) the Accused's engagement of the Mungiki and pro-PNU youth to carry out the Rift

⁵⁷³ Elements of Crimes, Article 7(1)(a)(3); ICC-01/09-02/11-382-Red, para 417.

⁵⁷⁴ There is no explicit reference to knowledge of the policy element. However, as the second paragraph of the Introduction to the Elements of Crimes under Article 7 indicates, it is not required that the perpetrator knew the precise details of the policy. This implies that some awareness of an underlying policy is required, even if it leaves considerable ambiguity as to the extent of that awareness: *see* Robinson D., 'The Elements of Crimes against Humanity', (Transnational Publications, 2001) Lee et al. (ed.), in ICC: Elements of Crimes and Rules of Procedure and Evidence, page 73.

⁵⁷⁵ ICC-01/09-02/11-444, paras 24-47.

Valley attacks, including through the use of monetary payments and promised payments, and promises to fulfill the Mungiki's grievances; (ii) the Accused's instructions regarding the execution of the Rift Valley attacks; and (iii) the Accused's agreement with Maina Njenga regarding the use of Mungiki members in the attacks.

127. Liability under Article 25(3)(c) is supported by, among others, the Accused's (i) provision of money, materiel and logistics; (ii) establishment of an effective system of command, in which local politicians and businessmen were appointed to coordinate the attacks with Mungiki and pro-PNU youth; (iii) designation of agents to provide material support for the attacks; and (iv) provision of instructions and operational advice to Mungiki members regarding the execution of the Rift Valley attacks.

128. Liability under Article 25(3)(d) is supported by each of the above facts because (i) the actions were carried out by “a group of persons acting with a common purpose” – namely, the members of the common plan –whose “common purpose” was keeping the PNU in power through any means necessary; and (ii) satisfy the “any other” contribution standard.



Fatou Bensouda,
Prosecutor

Dated this 19 January 2015

At The Hague, The Netherlands