



Original: **English**

No.: **ICC-01/09-02/11**
Date: **17 November 2011**

PRE-TRIAL CHAMBER II

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

SITUATION IN THE REPUBLIC OF KENYA

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

PUBLIC

**Defence Submissions on behalf of Uhuru Kenyatta Following the Confirmation of
Charges Hearing**

Source: Defence for Uhuru Muigai Kenyatta

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Mr. Luis Moreno-Ocampo, Prosecutor
Ms. Fatou Bensouda, Deputy Prosecutor
Ms. Adesola Adeboyejo, Trial Lawyer

Counsel for the Defence

Counsel for Francis Kirmi Muthaura
Mr. Karim A. A. Khan QC, Mr. Essa Faal,
Mr. Kennedy Ogetto & Ms. Shyamala
Alagendra
Counsel for Uhuru Muigai Kenyatta
Steven Kay QC and Gillian Higgins
Counsel for Mohammed Hussein Ali:
Mr. Evans Monari, Mr. Gershom Otachi, Mr.
Gregory Kehoe & Mr. John Philpot

Legal Representatives of the Victims
Mr. Morris Anyah

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia, Registrar

Deputy Registrar

Mr. Didier Daniel Preira, Deputy
Registrar

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

CONTENTS

I. CONFIRMATION HEARING: APPLICABLE PRINCIPLES

A. GENERAL PRINCIPLES GOVERNING THE CONFIRMATION HEARING

- (a) **Introduction**
- (b) **Probative Value, Credibility, Relevance and Reliability**
- (c) **Anonymous Hearsay Witness Summaries and Corroboration**
- (d) **Anonymous Non-ICC Witness Summaries**
- (e) **The Confirmation Hearing at the ICC is Not Analogous to the Rule 98bis Procedure at the Ad Hoc Tribunals**
- (f) **Alibi**

II. LACK OF PROBATIVE VALUE OF PROSECUTION EVIDENCE AGAINST UHURU KENYATTA

A. ANALYSIS OF PROSECUTION EVIDENCE

- (a) **Prosecution Witnesses 11 and 12**
- (b) **Prosecution Witness 4**
 - (i) First Account
 - (ii) Second Account
 - (iii) Third and Fourth Account
 - (iv) Defence Evidence Undermining Witness 4
- (c) **Prosecution Witness 9**
- (d) **6 Anonymous Prosecution Witness Summaries**
- (e) **11 Other Documents from the Prosecution's IDACs**
- (f) **7 Other Documents from the Amended Document Containing the Charges**

III. RELEVANT THRESHOLD REQUIREMENTS OF CRIMES AGAINST HUMANITY

A. NO ORGANISATION OR ORGANISATIONAL POLICY TO COMMIT AN ATTACK

(a) **The Mungiki does not Constitute an Organisation**

- (i) Whether the group is under a responsible command or has an established hierarchy
No Responsible Command
No Established Hierarchy
- (ii) Whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population
- (iii) Whether the group exercises control over part of the territory of a State
- (iv) Whether the group has criminal activities against the civilian population as a primary purpose
- (v) Whether the group articulates, explicitly or implicitly, an intention to attack a civilian population

(vi) Whether the group is part of a larger group which fulfils some or all of the abovementioned criteria

(b) No *ad hoc* Organisation Formed Including the Mungiki and the Kenya Police Force

(c) Pro-PNU Youth does not Constitute an Organisation

B. NO KNOWLEDGE OF A WIDESPREAD OR SYSTEMATIC ATTACK

C. NO PARTICIPATION BY PLANNING, DIRECTION OR ORGANISATION OF AN ATTACK

IV. MODE OF LIABILITY: INDIRECT CO-PERPETRATION

A. NO EXISTENCE OF A COMMON PLAN OR AGREEMENT WITH ONE OR MORE PERSONS

(a) The Lack of a Criminal Relationship between Uhuru Muigai Kenyatta and Francis Kirimi Muthaura

(b) The Lack of a Criminal Relationship between Uhuru Muigai Kenyatta and Mohammed Hussein Ali

(c) No Sufficient Evidence of Meetings Alleged to Constitute a Common Plan by the Prosecution

(i) Alleged Meeting 17 or 25 November 2007: Yaya Centre, Nairobi

(ii) Alleged Meeting on 26 November 2007: State house, Nairobi

(iii) Alleged Preparatory Meeting – “Kenyatta proposing to attack”: 30 December 2007, State House, Nairobi

(iv) Alleged Preparatory Meeting – “Muthaura agreeing on the organizational policy, recruiting the Mungiki and guaranteeing a free zone”: 3 January 2008, Nairobi Members Club

(v) Alleged Preparatory Meeting at Blue Springs Hotel, “Kenyatta co-ordinating and financing the Mungiki” – 3 January 2008

(vi) Allegation of Implementation of the Organisational Policy: Uhuru Kenyatta – Meeting at Blue Post Hotel, Thika: January 2008

B. NO ESSENTIAL CONTRIBUTION TO A COMMON PLAN BY UHURU KENYATTA

(a) First and Fifth Essential Contribution

(b) Second Essential Contribution

(c) Third Essential Contribution

(d) Fourth Essential Contribution

(e) Other Essential Contributions:

(i) 30 December 2007 Meeting at State House

(ii) Blue Springs Hotel Meeting

- C. NO CONTROL BY UHURU KENYATTA OVER ANY ALLEGED ORGANISATION
 - (a) No Control over the Mungiki
 - (b) No Control over the PNU
- D. THE MUNGIKI DOES NOT CONSIST OF AN ORGANISED AND HIERARCHICAL APPARATUS OF POWER
- E. CRIMES WERE NOT SECURED BY “ALMOST AUTOMATIC COMPLIANCE WITH THE ORDERS ISSUED” BY UHURU KENYATTA TO THE MUNGIKI
- F. UHURU KENYATTA DOES NOT SATISFY THE SUBJECTIVE ELEMENTS OF THE CRIMES ALLEGED
- G. NO EVIDENCE THAT UHURU KENYATTA AND THE ALLEGED CO-PERPETRATORS WERE MUTUALLY AWARE AND ACCEPTED THAT IMPLEMENTING THE COMMON PLAN WILL RESULT IN THE FULFILMENT OF THE MATERIAL ELEMENTS OF THE CRIMES
- H. NO EVIDENCE THAT UHURU KENYATTA WAS AWARE OF THE FACTUAL CIRCUMSTANCES AS TO HOW HE EXERCISED JOINT CONTROL OVER THE COMMISSION OF THE CRIME THROUGH ANOTHER PERSON

V. THE INTENTION OF UHURU KENYATTA

VI. CONCLUSION

I. CONFIRMATION HEARING: APPLICABLE PRINCIPLES

A. GENERAL PRINCIPLES GOVERNING THE CONFIRMATION HEARING

(a) Introduction

1. Article 61 of the Rome Statute (“the Statute”) requires the Prosecution to support each and every charge with sufficient evidence to establish substantial grounds to believe that Uhuru KENYATTA committed the crimes charged. Proof of substantial grounds to believe equates to “strong grounds for believing.”¹ The confirmation process is designed to protect the Defence against “wrongful and wholly unfounded charges.”²
2. The evidential burden to prove substantial grounds with sufficient evidence lies firmly with the Prosecution.³ The burden of proof requires the Prosecution to provide “concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations”.⁴

(b) Probative Value, Credibility, Relevance and Reliability

3. During the confirmation hearing, Mr. OCAMPO invited the Pre-Trial Chamber (“the PTC”) to reject the invitation of the Defence to “embark on an in depth scrutiny of the credibility and reliability of individual pieces of Prosecution evidence”,⁵ and to reserve such assessments until trial.⁶ The Defence submits that the Prosecutor’s approach fundamentally contravenes the intent and express language of Article 69(4) of the Statute, which is applicable to the confirmation hearing by virtue of Rule 122(9) of the Rules of Procedure and Evidence (“RPE”).

¹ Pre-Trial Chamber I, Prosecutor v Lubanga, Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803-tENG, at para 38 (“Lubanga Confirmation Decision”).

² *Ibid.*, at para 37.

³ *Ibid.*, at para 39; Article 61(5) of the Rome Statute.

⁴ *Ibid.*, at para 39.

⁵ ICC-01/09-02/11-T-4-ENG ET WT, at p 55 lines 10-21.

⁶ *Ibid.*, at p 55 lines 21-22.

4. A “lack of credibility directly impacts on the sufficiency of the evidence.”⁷ Non-consideration of the credibility of the evidence at the confirmation stage would necessitate a complete and erroneous abandonment of the approach previously taken by other PTCs before the ICC.⁸ In *Bemba*, the PTC expressly assessed whether or not inconsistencies cast doubt on the overall credibility and reliability of the evidence,⁹ examining the intrinsic coherence of each piece of evidence.¹⁰ The Chamber stated that an evaluation must be made for each individual witness,¹¹ and in weighing the evidence, it was guided by various factors, such as the nature, credibility, reliability, source, and context of the evidence in addition to its nexus to the charges of the case or the alleged perpetrator.¹²
5. The Prosecution’s argument that the non-consideration of credibility at the confirmation stage is consistent with national practices is without merit.¹³ The Prosecution relies on only one national procedure, that of England and Wales. The Schedule cited relates to offences that can only be tried in the Crown Court and are transferred to the higher court, without consideration of the evidence by the lower court. Moreover, the Prosecution ignores other national practices that do require a credibility assessment to be made at a similar stage in proceedings.¹⁴
6. The Prosecutor’s attempt to equate the confirmation hearing to international extradition proceedings is equally erroneous. Some States enter into agreements whereby cases are

⁷ Submissions of the Prosecutor to the Pre-Trial Judge under Rule 17 of the Rules of Procedure and Evidence, 27 April 2009, CH/PTJ/2009/0004, at paras 23-30; See also Order Regarding the Detention of Persons Detained in Lebanon in Connection with the Case of the Attack Against Prime Minister Rafiq Hariri and Others, 29 April 2009, CH/PTJ/2009/06 at para 25; ICC-01/09-02/11-T-10-ENG, at p12 line 21 – p 13 line 8.

⁸ Lubanga Confirmation Decision, at paras 119-121; Pre-Trial Chamber I, Prosecutor v. Katanga and Ngudjolo, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, paras. 70, 77, 109, 116, 120, 141, 181, 195 (“Katanga Confirmation Decision”); Pre-Trial Chamber II, Prosecutor v. Bemba, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, at paras. 42, 50, 51, 55-59, 104, 243, 258, 324, 450, (“Bemba Confirmation Decision”).

⁹ Bemba Confirmation Decision, at para 55.

¹⁰ *Ibid.*, at para 56.

¹¹ *Ibid.*, at para 57.

¹² *Ibid.*, at para 59.

¹³ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution’s Written Submissions Following the Hearing on the Confirmation of Charges, 28 October 2011, ICC-01/09-02/11-361 at para.7. (“Prosecution’s Written Submissions”).

¹⁴ See for example, Italy: Tonini, *Manuale di Procedura Penale*, Milano, 2010, p. 573 “Il giudice puo’ operare un fiarlo assai incisivo sulla richiesta di rinvio a giudizio. Se rimane un gubbio sulla attendibilita’ e sulla credibilita’ degli elementi di accusa, o se questi sono contraddittori, il giudice puo’ respingere la richiesta perche’ in casi del genere il dibattimento appare superfluo ed , anzi, dannooso in quanto sara’ pronunciata una sentenza di assoluzione (...)”.

transferred without consideration of evidence,¹⁵ other States require a rigorous examination of the evidence to determine whether an offence has been committed which is equivalent to a crime in its jurisdiction.¹⁶ None of the proceedings compare or relate to the same issues in the ICC confirmation process.

7. Further, the submission that the “Pre-Trial Chamber should accept as dispositive the Prosecution’s evidence, so long as it is relevant,” is unsupported by either Rule 63(2) or 64.¹⁷ The Prosecution fails to address the fact that reliability is a fundamental component of an admissibility assessment under Article 69(4). The Prosecution’s position is in effect, an invitation to ignore evidence and representations submitted lawfully by the Defence and thereby introduce inherent unfairness into the proceedings.
8. In the instant case, the Prosecutor cannot seek or be allowed to withdraw the issue of credibility from the PTC by relying on his decision not to call live evidence at confirmation. Prosecutors in national jurisdictions are accountable to government law officers and ultimately ministers, for their acts and conduct. As the Prosecutor at the ICC has frequently made clear, he is not subject to such constraints. The accountability of the ICC confirmation process is a much needed mechanism to enable the Court to receive evidence from the Defence to check the basis of the Prosecutor’s allegations.

(c) Anonymous Hearsay Witness Summaries and Corroboration

9. The Prosecution relies on six anonymous witness summaries in respect of Uhuru KENYATTA,¹⁸ only four of which are summaries of individuals who have been interviewed by the OTP.
10. The Prosecution’s argument that anonymous statements and summaries were found to be sufficient for the confirmation of the case of *Banda and Jerbo* is taken out of context.¹⁹ In that case, the Prosecution and Defence filed a joint submission agreeing facts, in which they informed the PTC that the Defence did not contest any material

¹⁵ E.g. Member States of the European Union.

¹⁶ E.g. USA.

¹⁷ Prosecution’s Written Submissions, at para 5.

¹⁸ EVD-PT-OTP-00571; EVD-PT-OTP-00598; EVD-PT-OTP-00605; EVD-PT-OTP-00572; EVD-PT-OTP-00570; EVD-PT-OTP-00674.

¹⁹ Prosecution’s Written Submissions, at para 16.

facts and that the PTC could consider these facts as proved.²⁰ Importantly, the PTC in *Banda and Jerbo* did not depart or intend to depart from the *Abu Garda* approach to anonymous witnesses/summaries whereby “statements of anonymous witnesses, whilst admissible, have to be evaluated on a case-by-case basis, depending on whether the information contained therein is corroborated or supported by other evidence presented into the case.”²¹

11. The Prosecution’s assertion that the *Katanga* decision on 25 April 2008²² stands for the proposition that the use of anonymous summaries is consistent with the purposes of the confirmation hearing, and non-prejudicial to the rights of the Defence has been misconstrued.²³ The paragraph relied upon by the Prosecution does not concern the use of anonymous summaries as incriminating evidence at the confirmation hearing. Instead, the paragraph concerns disclosure under Article 67(2) of the anonymous summaries of individuals who the Prosecution had decided not to rely on at confirmation, and for whom there would be insufficient time to implement protective measures.²⁴ The Chamber in *Katanga* stated that “summary evidence or statements in which the witness’s identifying information has been redacted, have a lesser probative value than the statements of witnesses whose identities have been disclosed to the Defence.”²⁵
12. The Prosecution’s submission that the use of anonymous evidence at confirmation does not *per se* prejudice the suspects is incorrect. Anonymous evidence denies the Defence the opportunity to investigate and scrutinize claims, a position which directly impacts upon the probative value of the evidence.²⁶ From the inception of the ICC, Chambers

²⁰ Pre-Trial Chamber I, Prosecutor v Banda and Jerbo, Joint Submission by the Office of the Prosecutor and the Defence as to Agree Facts and submissions regarding modalities for the conduct of the Confirmation hearing, 19 October 2010, ICC-02/05-03/09-80, at para 5.

²¹ Pre-Trial Chamber I, Prosecutor v Banda and Jerbo, Corrigendum of the “Decision on the Confirmation of Charges”, 7 March 2011, ICC-02/05-03/09-121-Corr-Red, at para 41.

²² Pre-Trial Chamber I, Prosecutor v Katanga, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventative Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, 25 April 2008, ICC-01/04-01/07-428-Corr, at para 137.

²³ Prosecution’s Written Submissions, at para 13.

²⁴ *Ibid.*, at paras 125-135.

²⁵ See, Pre-Trial Chamber I, Prosecutor v Katanga, Corrigendum to the Decision on Evidentiary Scope of the Confirmation hearing, preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, 21 April 2008, ICC-01/04-01/07-428-Corr at para 18; see also, paras 90 and 133 in which the Single Judge consistently emphasizes the lower probative value that will accrue to anonymous statements and summaries.

²⁶ Lubanga Confirmation Decision; Katanga Confirmation Decision, Bemba Confirmation Decision; Pre-Trial Chamber I, Prosecutor v Garda, Decision on the Confirmation of charges, 8 February 2010, ICC-02/05-02/09-243-Red, (“Garda Confirmation Decision”).

have recognised that “non-disclosure of the identity of witnesses on who the Prosecution intends to rely at the confirmation hearing (i) could affect the ability of the Defence to fully challenge the evidence and credibility of those witnesses; and (ii) has an impact on the rights of the Defence pursuant to Article 61(3), (6)(b) and 67(1)(b) of the Statute.”²⁷ The Appeals Chamber has also repeatedly confirmed that non-disclosure of the identity of a Prosecution witness – even at the confirmation hearing – is prejudicial to the Defence and for that reason should be resorted to only on an exceptional basis, and should be accompanied by counterbalancing measures to ameliorate the prejudice faced by the Defence and ensure the right to adversarial proceedings and equality of arms.²⁸

13. In the cases of *Katanga* and *Lubanga*, it was held that given the Defence cannot contest the truthfulness and authenticity of evidence derived from an anonymous source, the PTC can only use this evidence to corroborate other evidence.²⁹ In *Bemba*, the PTC treated such evidence with caution and stated that it would accord only low probative value.³⁰ In *Abu Garda*, the PTC was unable to confirm an allegation that was based solely on an anonymous summary.³¹ In relation to a different allegation supported by several anonymous witness summaries, the PTC determined that “considered as a whole, the summaries of interviews of anonymous witnesses lack specific information to enable the Chamber to establish to a satisfactory degree” an allegation concerning Abu Garda’s effective control.³²
14. In the instant case, the PTC has seen the benefit of the Defence knowing the identity of witnesses, thereby enabling them to investigate the Prosecution’s evidence.³³

²⁷ Pre-Trial Chamber I, Prosecutor v Lubanga, Decision Establishing General Principles Governing Application to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Statute, 19 May 2006, ICC/-01/04-01/06-108, at para 30, see also FN 21 therein.

²⁸ Appeals Chamber, Prosecutor v Lubanga, Judgment on the Prosecutor’s Appeal against the decision of Pre-Trial Chamber I entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence, 13 October 2006, ICC-01/04-01/06-568, at paras 34-36; Appeals Chamber, Prosecutor v Katanga, Judgment on the Appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements, 13 May 2008, ICC-01/04-01/07-475, at para 73.

²⁹ Lubanga Confirmation Decision, at paras 104-106; Katanga Confirmation Decision at paras 119-114.

³⁰ Bemba Confirmation Decision, at para. 50.

³¹ Garda Confirmation Decision, at para 176.

³² *Ibid.*, at para 196; See also ICC-01/09-02/11-T-10-ENG, at p 28.

³³ The Defence refers the PTC to the Defence investigations conducted in respect of Prosecution witnesses 11 and 12.

(d) Anonymous Non-ICC Witness Summaries

15. Two of the witness summaries relied upon by the Prosecution against Uhuru KENYATTA concern potential witnesses who have not consented to their summaries being used in ICC proceedings.³⁴ No source of origin of either EVD-PT-OTP-00598 or EVD-PT-OTP-00605 has been provided. The summaries contain neither “the identity of the witnesses nor the names of the organizations which took the statements or their agents...”³⁵ The Defence requests the PTC to adopt the approach taken in *Lubanga* in which the Chamber excluded witness statements due to the fact that the Prosecution had failed to obtain the witnesses’ consent to use them at the confirmation hearing.³⁶

(e) The Confirmation Hearing at the ICC is Not Analogous to the Rule 98bis Procedure at the Ad Hoc Tribunals

16. The underlying purpose of the Rule 98bis procedure at the ICTY and ICTR is not analogous to the confirmation hearing at the ICC. At the 98bis stage, no Defence evidence has been called. In contrast, Article 61(6) of the ICC Statute expressly enshrines the right of the Defence to present evidence at the hearing and Article 61(7) obliges the PTC to base its decision on the record of the hearing as a whole.³⁷
17. The ICC has previously rejected other attempts by the Prosecution to re-model or re-interpret the substantial grounds test at the confirmation stage.³⁸

³⁴ EVD-PT-OTP-00598 and EVD-PT-OTP-00605. Pre-trial Chamber II, Prosecutor v Muthaura et al., Redacted First Decision on the Prosecutor’s Request for Redactions and Related Requests, 12 July 2011, ICC-01/09-02/11-16-Conf-Red, at paras 71-72; Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution’s Amended List of Evidence, Annex B to Prosecution’s Amended Document Containing the Charges and List of Evidence Submitted Pursuant to Article 61(3) and Rule 121(3), (4) and (5), 2 September 2011, ICC-01/09-02/11-280-Conf-AnxB, at p.5.

³⁵ Pre-trial Chamber II, Prosecutor v Muthaura et al., Redacted First Decision on the Prosecutor’s Request for Redactions and Related Requests, 12 July 2011, ICC-01/09-02/11-16-Conf-Red, at paras 71-72.

³⁶ Lubanga Confirmation Decision, at para.59.

³⁷ A. Burrow The Standard of Proof in Pre Trial Proceedings in K Khan et al (eds) Principles of Evidence in International Criminal Justice (OUP 2010) pp.690-691.

³⁸ See the attempt in Abu Garda by the Prosecution to attempt to re-interpret the test: Pre-Trial Chamber I, Prosecutor v Abu Garda, Decision on the “Prosecution’s Application for Leave to Appeal the Decision on the Confirmation of Charges”, 23 April 2011, ICC-02/05-02/09-267, at paras 8-10; Pre-Trial Chamber I, Prosecutor v Abu Garda, Prosecution’s Application for Leave to Appeal the “Decision on the Confirmation of Charges”, 16 March 2010, ICC-02/05-02/09-252, at para 10(i).

18. The Prosecution's further submission that the Chamber should recognize that "the Prosecution's evidence is entitled to credence unless incapable of belief"³⁹ is not supported by ICC jurisprudence.⁴⁰ This approach does not conform to the notion of concrete and tangible proof.⁴¹

(f) Alibi

19. The Defence rejects the Prosecution's submission that it should have provided a notice of alibi pursuant to Rule 79(1)(a).⁴² The relevant batch of Prosecution disclosure was served on 19 August 2011. The Defence was under an obligation to serve the evidence it relied upon within 15 days thereafter. The confirmation hearing began on 21 September. The Defence did not have sufficient time to complete its investigations to formally raise alibi at this stage. A similar situation arose in the case of *Abu Garda* where the Defence relied upon evidence that the Suspect was not present at meetings alleged by the Prosecution, in the absence of an alibi notice.⁴³ In the instant case, the Prosecution has failed to raise any objection to the evidence as required under Rule 122 (3) before the hearing on the merits. It was also open to the Prosecution to apply for an adjournment to investigate the facts and matters relied upon by the Defence. The clear purpose of the evidence adduced from Uhuru KENYATTA and other sources⁴⁴ as to his whereabouts on key dates was to undermine significant aspects of the Prosecution's case, within the 15 day period available.

³⁹ Prosecution's Written Submissions at para 8, citing, *Prosecutor v Mrksic*, IT-95-13/1-T, Rule 98bis oral decision of 28 June 2006, T.11311-11313.

⁴⁰ The references cited by the Prosecution do not support this contention: see Prosecution's Written Submissions at footnote 11. See, Lubanga Confirmation Decision, at paras 37-39; Katanga Confirmation Decision, at para 65.

⁴¹ Lubanga Confirmation Decision, at para 39.

⁴² Prosecution's Written Submissions at para 72.

⁴³ ICC-02/05-02/09-149, at paras 17-18.

⁴⁴ EVD-PT-D13-00027; EVD-PT-D13-00479 at 0428-30; EVD-PT-D13-00543 at 0723-0725; EVD-PT-D13-00479 at 0430-0431; EVD-PT-D13-00201; EVD-PT-D13-00200; EVD-PT-D13-00384; EVD-PT-D13-00548 at 0760-0761; EVD-PT-D13-00073; EVD-PT-D13-00191; EVD-PT-D12-00226; EVD-PT-D12-00223; EVD-PT-D12-00222.

II. LACK OF PROBATIVE VALUE OF PROSECUTION EVIDENCE AGAINST UHURU KENYATTA

20. The Defence analysis of over 6500 pages of the Prosecution's In-Depth Analysis Charts ("IDACs") lays bare the following evidential structure of the Prosecution's case against Mr. KENYATTA:

- (a) Prosecution Witnesses 11, 12 and 4;
- (b) Prosecution Witness 9;
- (c) 6 anonymous witness summaries, 2 of which are non-ICC summaries;⁴⁵
- (d) 11 other documents;⁴⁶ and
- (e) 7 documents in the Amended Document Containing the Charges.⁴⁷

A. ANALYSIS OF PROSECUTION EVIDENCE⁴⁸

(a) Prosecution Witnesses 11 and 12

21. Prosecution Witnesses 11 and 12 were members of the Mungiki and were interviewed by the Prosecution after March 2011.⁴⁹ Both witnesses provided wide-ranging accounts of the role they *claimed* Uhuru KENYATTA played in the post-election violence ("PEV") and his relationship with the Mungiki. Their evidence constitutes the "critical mass of evidence".⁵⁰

22. The Defence interviewed both witnesses before they became protected witnesses for the Prosecution. Both gave exculpatory accounts about Uhuru KENYATTA and confirmed that he had no role or involvement with the Mungiki.⁵¹

⁴⁵ EVD-PT-OTP-00571; EVD-PT-OTP-00598; EVD-PT-OTP-00605; EVD-PT-OTP-00572; EVD-PT-OTP-00570; EVD-PT-OTP-00674.

⁴⁶ EVD-PT-OTP-00272; EVD-PT-OTP-00166; EVD-PT-OTP-00260; EVD-PT-OTP-00183; EVD-PT-OTP-00267; EVD-PT-OTP-00266; EVD-PT-OTP-00134; EVD-PT-OTP-00178; EVD-PT-OTP-00001; EVD-PT-OTP-00212; EVD-PT-OTP-00169.

⁴⁷ EVD-PT-OTP-00003; EVD-PT-OTP-00098; EVD-PT-OTP-00192; EVD-PT-OTP-00194; EVD-PT-OTP-00245; EVD-PT-OTP-00281; EVD-PT-OTP-00284.

⁴⁸ The Prosecution's written submissions state, without support or identification, that it relies upon 12 witnesses who are corroborated by external independent sources. The Defence contends that the Prosecution relies on Witnesses 4, 11, 12, 9 and 6 anonymous witness summaries, none of which are corroborated as alleged: See Prosecution's Written Submissions, at para 63.

⁴⁹ The precise dates of the OTP interviews conducted with witnesses 11 and 12 have been redacted in the material served on the Defence.

⁵⁰ ICC-01/09-02/11-T-10-ENG at p15 lines 19-24.

⁵¹ EVD-PT-D13-00559; EVD-PT-D13-00560; EVD-PT-D13-00575.

23. Upon receipt of the Prosecution's final batch of disclosure on 19 August 2011, Defence Counsel believed they had identified the names of both witnesses, now protected, from their previous contact. Independent counsel Mr. Gary SUMMERS was instructed on 26 August 2011, in order to verify the identity of these individuals and to investigate the matter further. Mr. SUMMERS determined that:
- (a) it had appeared to be the refusal to pay anything other than expenses that led to the disenchantment of Prosecution witnesses 11 and 12 with the legal team of Uhuru KENYATTA;
 - (b) both witnesses were knowing and willing parties to an extortion attempt on Uhuru KENYATTA in 2011 and;
 - (c) in his opinion, both had attempted to pervert the course of justice by giving a wholly inculpatory account to the ICC prosecutor after giving a wholly exculpatory account to the Defence in February 2011.⁵²

Mr SUMMERS had free access to the evidence collected and to members of the team who had contact with Witnesses 11 and 12.

24. Defence witness Lewis NGUYAI explained how the innocent nature of the contact arose between the Defence and Witnesses 11 and 12.⁵³ He also gave further evidence of their extortion and dishonesty.⁵⁴
25. The Defence submits that the extensive evidence⁵⁵ put before the PTC in respect of the conduct of these witnesses is devastating to their credibility, reliability and the ultimate sufficiency of their evidence.⁵⁶ The SUMMERS file reduces the probative value of Witnesses 11 and 12 to zero. The further evidence of Lewis NGUYAI confirms this assessment beyond peradventure.

⁵² EVD-PT-D13-00559 to EVD-PT-D13-00596.

⁵³ See, ICC-01/09-02/11-12-CONF-ENG, at pp36-48.

⁵⁴ *Ibid.*

⁵⁵ The Prosecution's written submissions fail to address the extent of the Defence evidence illustrating the fundamental unreliability and lack of credibility of Witnesses 11 and 12, simply asserting, without support, that "[Defence] assertions [regarding Prosecution Witnesses 11, 12 and 4] are baseless and flawed": Prosecution's Written Submissions, at para 63.

⁵⁶ ICC-01/09-02/11-T-10-ENG at pp15-p21.

(b) Prosecution Witness 4

26. Prosecution Witness 4 gave several different accounts of key events alleged to have taken place before and during the PEV.

(i) First Account

27. The first unsolicited statement Witness 4 provided on 7 January 2008 to Open Society East Africa does not refer to Uhuru KENYATTA.⁵⁷
28. In this account, one of the two undated meetings Witness 4 refers to concerns the Nairobi Members Club.⁵⁸ It is inconceivable that this witness would not have recalled the presence of Uhuru KENYATTA at this meeting, had he attended, given the celebrity status and publicity enjoyed by the son of Jomo KENYATTA, the first President of the independent nation of Kenya.⁵⁹ This first person account reveals that he was not present at either of the undated meetings he alleges.⁶⁰

(ii) Second Account

29. The second account given by Witness 4 was provided to the Waki Commission in September 2008.⁶¹ In this statement, Witness 4 claims that on 25 November 2007 he met with Uhuru KENYATTA, his personal assistant and Mungiki members, including D12-37,⁶² in the downstairs cafe at the Yaya Centre in Nairobi. Witness 4 claimed that Uhuru KENYATTA informed them that he had set up a meeting for them with the President the next day at State House on 26th November 2011.⁶³ Crucially, he abandons the date of this meeting in the third account he provides, without explanation.
30. Witness 4 states for the first time that on 3 January 2008, a meeting took place at the Nairobi Safari Club, as opposed to the Nairobi Members Club. Notwithstanding the more detailed account he now provides of this alleged meeting, there is no mention of the presence of Uhuru KENYATTA.

⁵⁷ EVD-PT-OTP-00084.

⁵⁸ ICC-01/09-02/11-T-10-ENG, at p. 22 lines 6-11.

⁵⁹ *Ibid.*, at p. 22 lines 9-11.

⁶⁰ *Ibid.*, at p. 22 lines 2-5.

⁶¹ EVD-PT-OTP-00041.

⁶² *Ibid.*, at 0490-0491.

⁶³ *Ibid.*, at 00041 at 0490.

(iii) Third and Fourth Accounts

31. In the 64 page account he provides to the Prosecution in 2010,⁶⁴ Witness 4 changes the date and location of the meeting he alleged took place on 25 November to 17 November on the second floor of the Yaya Centre.⁶⁵ He maintains that D12-37 and D12-48 were present with him at this alleged meeting with Uhuru KENYATTA and his personal assistant whom he names.⁶⁶ It is only in this third account that Prosecution Witness 4 alleges that Uhuru KENYATTA was present at a meeting on 26 November 2007 at State House in a tent, with himself, witnesses D12-37 and D12-48, Mr. MUTHUARA, the President of Kenya, and other individuals.⁶⁷ Witness 4 changes once again the location of the meeting he alleges took place on 3 January, back to the Nairobi Members Club and for the first time alleges that Uhuru KENYATTA was present.⁶⁸ The fourth account of 23 pages is heavily redacted.⁶⁹

(iv) Defence Evidence Undermining Witness 4

32. The following Defence evidence contradicting each of the accounts given by Prosecution Witness 4 destroys its sufficiency:
- (a) Sworn live testimony from Uhuru KENYATTA in which he denied being present at meetings alleged by Witness 4. He confirmed that he had never met Witness 4.⁷⁰
 - (b) Defence witness D12-37 who has never been contacted by the OTP,⁷¹ provided evidence that he did attend a meeting at State House on 26 November but not as a member of the Mungiki.⁷² The account given by D12-37 of the meeting at State House on 26 November accords with Defence evidence from different witnesses who helped to organise the event and attended as youth representatives.⁷³

⁶⁴ EVD-PT-OTP-00248.

⁶⁵ EVD-PT-OTP-00248 at 0030 para 144.

⁶⁶ ICC-01/09-02/11-T-10-ENG, at p 24 lines 19-25; EVD-PT-OTP-00248 at 0030 – 0031.

⁶⁷ EVD-PT-OTP-00248 at 0031-0037.

⁶⁸ EVD-PT-OTP-00248 at 0038-0042.

⁶⁹ EVD-PT-OTP-00302.

⁷⁰ ICC-01/09-02/11-T-11-ENG p34 line 4 – p37 line 12 and p20 line 1 – p21 line 12 and p22 – 26.

⁷¹ EVD-PT-D12-00054 at 0413 para 6.

⁷² EVD-PT-D12-00054 at 0417 para 29 to 0418 para 32.

⁷³ EVD-PT-D13-00551; EVD-PT-D13-00504; EVD-PT-D13-00491; EVD-PT-D12-00034.

- (c) D12-48 explained that he had never met Uhuru KENYATTA, President KIBAKI or Ambassador MUTHAURA;⁷⁴ that he did not know Witness 4;⁷⁵ and that he did not visit State House or the Nairobi Members Club in 2007 or 2008.⁷⁶
- (d) Statements from Defence witnesses D13-6⁷⁷ and D13-15⁷⁸ confirm that neither were present as alleged by Prosecution Witness 4 on either 17 or 25 November or on any other occasion at the Yaya Centre with Uhuru KENYATTA.
- (e) A contemporaneous newspaper report recording the nature of the event at State House on 26 November accords with the accounts provided by the Defence witnesses.⁷⁹
- (f) Defence evidence shows that Uhuru KENYATTA was at the KICC for a meeting on the morning of 26 November and that President KIBAKI did not attend as previously planned.⁸⁰ President KIBAKI did, however, attend a luncheon at the Intercontinental Hotel held for delegates after the KICC meeting.⁸¹
- (g) The Defence exhibited a list of attendees;⁸² video footage from inside the meeting⁸³ and photographs of those attendees⁸⁴ at the State House event on 26 November 2007 which accord with the accounts provided by Defence witnesses.
- (h) Defence witness D13-12⁸⁵ confirmed that the last café in the Yaya Centre closed on 25 November 2007 at 6.48pm.⁸⁶
- (i) Mr. MUTHAURA gave an unsworn statement that he is not a member of the Nairobi Members Club and has never held a meeting there. He stated that he could not imagine Mungiki “hanging around State House” and that the allegations were “just packaged lies”.⁸⁷
- (j) The Defence adduced evidence of 3 January 2008, an important date when Raila ODINGA called for mass action and made unfounded allegations using words prompted to him of “Mungiki”, “State House” and “principal master”.⁸⁸ Defence evidence from legal proceedings in Kenya establish the whereabouts that day of

⁷⁴ EVD-PT-D12-00201 at 0075, para 18 and at 0076 para 25 and 26.

⁷⁵ EVD-PT-D12-00201 at 0075, para 15.

⁷⁶ EVD-PT-D12-00201 at 0075 to 0076, para 19.

⁷⁷ EVD-PT-D13-00479.

⁷⁸ EVD-PT-D13-00543.

⁷⁹ EVD-PT-D13-00503.

⁸⁰ EVD-PT-D13-00201; EVD-PT-D13-00199; EVD-PT-D13-00479 at 0430 to 0431.

⁸¹ EVD-PT-D13-00200.

⁸² EVD-PT-D13-00484.

⁸³ EVD-PT-D13-00443.

⁸⁴ EVD-PT-D13-00444; EVD-PT-D13-00445; EVD-PT-D13-00447.

⁸⁵ EVD-PT-D13-00538 at 0689.

⁸⁶ ICC-01/09-02/11-T-4-ENG, p74 line 2 – p75 line 11.

⁸⁷ *Ibid.*, at p74 line 2 – p75 line 11.

⁸⁸ EVD-PT-D13-00228; EVD-PT-D13-00479 at 0410, para 7.

Uhuru KENYATTA, as well as witness statements showing that he was at home in the morning.⁸⁹

- (k) Evidence from the Nairobi Members Club demonstrates the implausibility of any meetings taking place between the Mungiki, Uhuru KENYATTA, Mr MUTHAURA and others in the club on the morning of 3 January 2008, or at any other time.⁹⁰ The evidence was plainly conjured from a mind that had never been there.
- (l) Defence witness D12-37 stated that he had only been to the Nairobi Safari club once in mid 2010; that he had never been to the Nairobi Members Club; that he had never met either Mr. SAITOTI or Mr. KENYATTA and that he had never been to the Yaya Centre in Nairobi.⁹¹

(c) Prosecution Witness 9

- 33. The Defence refers the PTC to the submissions made in respect of Prosecution Witness 9 during the confirmation hearing.⁹² The Defence submits that none of the evidence from this witness supports the charges against Uhuru KENYATTA.⁹³ Indeed, some of the evidence helps to explain to the PTC the reasons why Mr. KENYATTA was politically popular in 2002 with some Mungiki members.⁹⁴ Notably, the Prosecution has not adduced any evidence of Uhuru KENYATTA ever soliciting, encouraging, or fostering political or any other form of support from the Mungiki.

(d) 6 Anonymous Prosecution Witness Summaries

- 34. The Prosecution relies on six anonymous witness summaries against Uhuru KENYATTA.⁹⁵ The PTC is referred to paragraphs 9-15 herein which address the issues of anonymity and corroboration.

⁸⁹ EVD-PT-D13-00479 at 0417 paras 34-35; EVD-PT-D13-00084; EVD-PT-D13-00085; EVD-PT-D13-00086.

⁹⁰ EVD-PT-D12-00107; EVD-PT-D12-00184; EVD-PT-D12-00219; ICC-01/09-02/11-T-11-CONF-ENG, at pp.34-37.

⁹¹ EVD-PT-D12-00054 at 0419 para 42-45.

⁹² EVD-PT-OTP-00641 at 0216-0217; EVD-PT-OTP-00638 at 0150-0152; EVD-PT-OTP-00637 at 0131-0132; ICC-01/09-02/11-T-10-ENG, at p25 line 16 to p27 line 8.

⁹³ ICC-01/09-02/11-T-10-ENG, at p25 line 16 to p27 line 8.

⁹⁴ *Ibid.*, at p26, lines 20-24; EVD-PT-OTP-00637 at 0131 lines 177-186.

⁹⁵ EVD-PT-OTP-00571; EVD-PT-OTP-00598; EVD-PT-OTP-00605; EVD-PT-OTP-00572; EVD-PT-OTP-00570; EVD-PT-OTP-00674; ICC-01/09-02/11-T-10-ENG, at p.14 lines 7-8, at p27 line 9 – p.34 line 6.

35. These summaries are replete with generic un-sourced hearsay, and undated accounts that defy classification as either first, second or third-hand source material. Contrary to the Prosecution's assertion,⁹⁶ none of these summaries either corroborate each other, or the evidence of Prosecution Witnesses 11, 12 or 4. This summary evidence lacks the specificity necessary to accord probative value. The PTC is referred to Defence submissions on each of the summaries provided during the confirmation hearing.⁹⁷

(e) 11 Other Documents from the Prosecution's IDACs

36. The Defence has previously made detailed submissions⁹⁸ on the following eleven documents:

- (a) EVD-PT-OTP-00272: "Who's Who Profile of Uhuru Kenyatta";
- (b) EVD-PT-OTP-00166: "Mungiki's Long History of Clashes with the Law";
- (c) EVD-PT-OTP-00260: "Kenya: KANU in show of force as rainbow threatens Kenyatta" dated 8 September 2002, from Daily Nation on the Web;
- (d) EVD-PT-OTP-00183: "Facing Mount Kenya or Facing Mecca? The Mungiki, Ethnic Violence and the Politics of the Moi Succession in Kenya, 1987-2002";
- (e) EVD-PT-OTP-00267: "Kikuyu MPs Close Ranks";
- (f) EVD-PT-OTP-00266: "Battle for the Mungiki Sect in Kenya";
- (g) EVD-PT-OTP-00134: Confidential power point presentation from a human rights organization;
- (h) EVD-PT-OTP-00178: "The Challenges of National Cohesion and Integration: Mungiki Menace in Central Kenya Region", compiled by Michael E Muragu for the "Peace and Development Network Trust";
- (i) EVD-PT-OTP-00001 (at 0134): Report of the Kenyan National Commission on Human Rights: "On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence";
- (j) EVD-PT-OTP-00212: Confidential "Report on Post-Election Violence: A Journalist's Perspective;" and
- (k) EVD-PT-OTP-00169: Report in Africa Continental.

⁹⁶ See for example, ICC-01/09-02/11-T-5-CONF-ENG, at p13 line 23 – p14 line 22, at p18 line19 – p19 line 5, at p37 line 18 – p38 line 9, at p40 lines 3-20; See also, ICC-01/09-02/11-T-6-ENG, at p16 lines 11-23, at p 18 line 16 – p19 line 3, at p19 line 6 – p20 line 1.

⁹⁷ ICC-01/09-02/11-T-10-ENG, at pp27-34.

⁹⁸ *Ibid.*, at pp. 35-41.

37. These generic, evidentially remote materials without any criminal linkage between Uhuru KENYATTA and the PEV illustrate the failure of the Prosecution's case that is lacking "concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations".⁹⁹

(f) 7 Other Documents from the Amended Document Containing the Charges

38. The Defence refers to the detailed submissions during the confirmation hearing¹⁰⁰ on the following pieces of evidence:

- (b) EVD-PT-OTP-00003: "Ethnicity and a Failed Democracy: A Critical Surgery of the Pre and Post-Election Violence in Kenya" for the Oscar Foundation;
- (c) EVD-PT-OTP-00098: Thika District Security and Intelligence Committee – from 21/12/07 to 22/01/08;
- (d) EVD-PT-OTP-00192: Article entitled "Kenyan Opposition Leaders Position Upheld",
- (e) EVD-PT-OTP-00194: Wikipedia entry for Uhuru Kenyatta;
- (f) EVD-PT-OTP-00245 at 0343; Confidential transcript of an interview with an individual whose name was not disclosed to the Defence;
- (g) EVD-PT-OTP-00281: A political article dated 16 July 2006 about the race for the Nakuru town parliamentary seat and that declaration that the outcome of the by-election would be a reflection of the 2007 polls; and
- (h) EVD-PT-OTP-00284 "Warlord Democracy, the Proliferation of Militias and PEV in Kenya 1999-2002".

39. These generic, evidentially remote materials without any criminal linkage between Uhuru KENYATTA and the PEV illustrate the failure of the Prosecution's case that is lacking "concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations".¹⁰¹

⁹⁹ Lubanga Confirmation Decision, at para 39.

¹⁰⁰ ICC-01/09-02/11-T-10-ENG, at p.42- 44.

¹⁰¹ Lubanga Confirmation Decision, at para 39.

III. RELEVANT THRESHOLD REQUIREMENTS OF CRIMES AGAINST HUMANITY

A. NO ORGANISATION OR ORGANISATIONAL POLICY TO COMMIT AN ATTACK

40. The Prosecution has failed to establish the nature of the organisation it relies upon. Given the lack of clarity of the Prosecution case, the Defence submits that neither the Mungiki alone, nor a combination of the Mungiki and the Kenya police, nor “pro-Party of National Unity (“PNU”) youth”, are capable of constituting organisations within the meaning of Article 7 of the Statute.

41. The Defence refers the PTC to its submissions on jurisdiction.¹⁰² The Defence submits that the Prosecution has failed to prove the existence of any organisation even on the basis of the Majority’s prevailing test.¹⁰³

(a) The Mungiki does not Constitute an Organisation

(i) Whether the group is under a responsible command or has an established hierarchy

No Responsible Command

42. The only evidence used to support the allegation that Uhuru KENYATTA placed the Mungiki under the responsible command of ‘mid-level perpetrators’ such as a former KANU MP for Nakuru and a leader of the Mungiki,¹⁰⁴ comes from Prosecution Witnesses 4 and 11,¹⁰⁵ already shown by the Defence to be unreliable.¹⁰⁶ Other

¹⁰² Pre-Trial Chamber II, Prosecutor v Muthaura et al., Submissions on Jurisdiction on Behalf of Uhuru Kenyatta, 19 September 2011, ICC-01/09-02/11-339.

¹⁰³ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19-Corr, paras 90 and 93. See also Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, ICC-01/09-02/11-01, para 20.

¹⁰⁴ ICC-01/09-02/11-T-5-CONF-ENG, at p24 line 25- p28 line 17; ICC-01/09-02/11-T-6-ENG, p15 lines 8-12 and p23 lines 4 -13. Pre-Trial Chamber II, Prosecutor v Muthaura et al., Document Containing the Charges, 2 September 2011, ICC-01/09-02/11-280, at para 52 and 83.

¹⁰⁵ EVD-PT-OTP-00307 at 1287-9 ;EVD-PT-OTP-00309 at 1307-8 ; EVD-PT-OTP-00248 at 0040.

evidence from Witness 12 and an NSIS report of 23 January 2008, do not refer to Uhuru KENYATTA placing the Mungiki under a responsible command.¹⁰⁷ In the cross-examination of Uhuru KENYATTA,¹⁰⁸ no concrete linkage of him to the acts of the former KANU MP was demonstrated. In short, linkage evidence of the Mungiki being placed by Mr. KENYATTA under the responsible command of ‘mid-level perpetrators’ has not been established.

No Established Hierarchy

43. The Prosecution failed to adduce sufficient evidence to show that the Mungiki had an established hierarchy and how it functioned,¹⁰⁹ under, or responsive to, the command of Uhuru KENYATTA.¹¹⁰
44. Evidence adduced at confirmation demonstrates that the Mungiki did not have a determinable hierarchy or command structure.¹¹¹ Lewis NGUYAI confirmed that during the PEV, the network of the Mungiki had broken down and was “crumbling” as a result of the violence.¹¹² The government crackdown,¹¹³ and the detention of the purported leader Maina NJENGA at the time further impacted upon the functioning of the Mungiki.¹¹⁴
45. Evidence adduced by the Defence demonstrates the amorphous nature of the group, the lack of any identifying features, the lack of uniform and/or coherent purpose of origin or aim.¹¹⁵ This dearth of defining features led to groups of Kikuyu youth being mistakenly labelled as Mungiki during the PEV.¹¹⁶

¹⁰⁶ ICC-01/09-02/11-T-10-ENG, at p51-52. The Defence hereby corrects these oral submissions to reflect the fact that the Prosecution also relies on Prosecution Witness 4 on the issue of responsible command.

¹⁰⁷ *Ibid.*, at p51 line 21 – p52 line 4.

¹⁰⁸ ICC-01/09-02/12-T-11-CONF-ENG, at pp 65-66.

¹⁰⁹ The Prosecution’s allegation is at ICC-01/09-02/11-T-6-ENG, at p32 lines 9-13: “Both the Mungiki and the Kenya police are hierarchically organised. Both have a functioning internal structure with features such as the centralisation of important decision making and existence of an effective disciplinary regime.”

¹¹⁰ ICC-01/09-02/11-12-CONF-ENG, at p.39-40 and 42-43.

¹¹¹ EVD-PT-D14-00034 at 0012; EVD-PT-D14-00035 at 0014.

¹¹² ICC-01/09-02/11-T-12-CONF-ENG, at p62 lines 12-19.

¹¹³ EVD-PT-OTP-00081 at 0050 to 0052.

¹¹⁴ EVD-PT-OTP-00081 at 0049 to 0050.

¹¹⁵ ICC-01/09-02/11-T-12-CONF-ENG at p18 lines 18-20; EVD-PT-D13-00491 at 0475, para 37; EVD-PT-D13-00504 at 0524, para 62 and 0543 at para 71; EVD-PT-D13-00547 at 0749–0750, para 4; EVD-PT-D13-00557 at 0861, para 6; EVD-PT-D14-00036; EVD-PT-D14-00056 at 0020; EVD-PT-D14-00059 at 0029; EVD-PT-D14-00065 at 0049; EVD-PT-D14-00066 at 0053.

¹¹⁶ EVD-PT-OTP-00081 at 0055.

46. The Mungiki's lack of coherent ideology is further evidenced by its transient support for different religious movements, with its self-proclaimed leaders converting to both Islam and Christianity.¹¹⁷ The political allegiances of members of the Mungiki have also changed radically over the course of its existence, demonstrating once again that it lacked an ability to act in a uniform manner with a coherent purpose, subject to an established hierarchy.¹¹⁸ Different members were pursuing different aims for different purposes. Ndura WARUINGE and other purported Mungiki members used the group to secure individual political recognition and financial advancement for themselves as opposed to the group, further evidence contradicting the notion of the unity of purpose of the group.¹¹⁹

(ii) Whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population

47. The Prosecution's allegation that Francis MUTHAURA and Uhuru KENYATTA provided access for the "*ad hoc* organisation to substantial State and private resources" does not withstand proper scrutiny.¹²⁰ Evidence from both Mr. KENYATTA¹²¹ and Lewis NGUYAI¹²² directly contradicts the notion that the Mungiki were given funds by the former or that they possessed the means to carry out a widespread or systematic attack against a civilian population. Mr. NGUYAI referred to high profile Mungiki members Witness 12 and male X as having been reduced to begging.¹²³ The Prosecution failed to support through any concrete means the alleged supply of 100 million shillings cash to finance the Mungiki, a sum in the hands of any person that would have been traceable as to its issuance and distribution.

48. When questioned by the Bench about whether the Mungiki had the means, structure and organization to put an end to violence, Lewis NGUYAI stated that he did not believe they had either means or organisation and that "*people who normally ask you for small tokens of the equivalent of less than ten Euros to go home with, bus fare, obviously do*

¹¹⁷ EVD-PT-D13-00320 at Cols 1 and 3; EVD-PT-D13-00344; EVD-PT-D13-00352; EVD-PT-D13-00359.

¹¹⁸ EVD-PT-D13-00321; EVD-PT-D13-00322; EVD-PT-D13-00323; EVD-PT-D13-00325; EVD-PT-D13-00329; EVD-PT-D13-00338; EVD-PT-D13-00343; EVD-PT-D13-00349; EVD-PT-D13-00350; EVD-PT-D13-00354; EVD-PT-D12-00190 and EVD-PT-D12-00227.

¹¹⁹ EVD-PT-D13-00551 at page 0790 to 0793.

¹²⁰ ICC-01/09-02/11-T-5-CONF-ENG, at p10 lines 12-15.

¹²¹ ICC-01/09-02/11-T-11-CONF-ENG, at p41 line 10 – p42 line 25.

¹²² ICC-01/09-02/11-T-12-CONF-ENG, at p32 line 11 – p35 line 13.

¹²³ *Ibid.*, at p 40 lines 19 – 25 and p 97 lines 2 – 9.

not have that capacity.”¹²⁴ Mr. NGUYAI’s position as former Vice-Chairman of the Security Committee and a member of the Select Committee responsible for investigating crime gave him both the knowledge and experience to speak with authority on these matters.

(iii) Whether the group exercises control over part of the territory of a State

49. The evidence adduced shows that the activities of the Mungiki are limited in nature and territorially restricted, in particular to the slums of Nairobi.¹²⁵ The evidence clearly demonstrates that the Mungiki sought to exploit bus routes and extort money from the drivers of matatu buses.¹²⁶ There is also evidence to suggest that they have exploited the local population by controlling access to certain services.¹²⁷ Such activities constitute criminal extortion but do not constitute evidence of the entity having *de facto* control over part of the territory of the State of Kenya so as to be endowed with a capacity to form an organisational policy.

(iv) Whether the group has criminal activities against the civilian population as a primary purpose

50. The Mungiki as a group does not have criminal activities against the civilian population as a primary purpose.¹²⁸ Evidence has been adduced to show that members of the group have sought to alleviate crime within a number of the Nairobi slums and shantytowns.¹²⁹ It has been described as a “self-help effort to plug the gap left by decades of state neglect and failure.”¹³⁰ The Mungiki has also invested in social programmes and campaigned against drunkenness, rent hikes, drug use, prostitution and HIV.¹³¹ It clearly promotes religious adherence.¹³²

¹²⁴ *Ibid.*, at p 89 lines 11-14.

¹²⁵ EVD-PT-OTP-00081 at 0037, 0039, 0046.

¹²⁶ EVD-PT-OTP-00081 at 0051; EVD-PT-DI 3-00547 at 0749, para 5; EVD-PT-D13-00557 at 0868, para 34.

¹²⁷ EVD-PT-OTP-00081 at 0038, para 1; EVD-PT-OTP-00177 at 0306, para 6 – 7.

¹²⁸ EVD-PT-OTP-00081 at 0046.

¹²⁹ EVD-PT-D13-00320 at 0006 Col 2-3.

¹³⁰ EVD-PT-OTP-00081 at 0046.

¹³¹ EVD-PT-D13-00320 at 0006, column 2; EVD-PT-OTP-00177 at 0304, para 7.

¹³² EVD-PT-OTP-00081 at 0038 – 0040.

- (v) Whether the group articulates, explicitly or implicitly, an intention to attack a civilian population

51. No evidence has been adduced by the Prosecution to demonstrate that the Mungiki as an organisation articulated either explicitly or implicitly an intention to attack the civilian population or any other group.

- (vi) Whether the group is part of a larger group which fulfils some or all of the abovementioned criteria

52. No evidence has been adduced by the Prosecution to support the contention that the Mungiki as an organisation is part of a larger group which fulfils some or all of the abovementioned criteria.

(b) No *ad hoc* Organisation Formed Including the Mungiki and the Kenya Police Force

53. The Prosecution alleged for the first time during the hearing that “*a single ad-hoc organization consisting of the Mungiki and Kenya Police was created by Mr. Muthaura and Mr. Kenyatta ...*”¹³³

54. The history of the relationship between the Mungiki and the Kenyan police demonstrates the sheer implausibility of them working together in any context, even on the Prosecution’s own case.¹³⁴ In particular, there is evidence of a police crackdown against the Mungiki that continued into 2008.¹³⁵ Defence evidence also corroborates the implausibility of this alleged relationship.¹³⁶

¹³³ ICC-01/09-02/11-T-5-CONF-ENG, at pp9-10; see also p 17 lines 21-25 and p22 lines 3-11.

¹³⁴ EVD-PT-OTP-00081 at 0050-0052; EVD-PT-D12-00004 at 0027; EVD-PT-D12-00005 at 0038; EVD-PT-D12-00026 at 0198; EVD-PT-D12-00028 at 0218-0220; EVD-PT-D12-00032 at 0263-5; EVD-PT-D12-00033 at 0271.

¹³⁵ EVD-PT-OTP-00081 at 0038.

¹³⁶ ICC-01/09-02/11-T-12-CONF-ENG, at p94 lines 21-25; EVD-PT-D14-00043 at 0042; EVD-PT-D14-00044; EVD-PT-D14-00046 at 0059; EVD-PT-D14-00049 at 0069; EVD-PT-D14-00052 at 0007; EVD-PT-D14-00053 at 0009; EVD-PT-D14-00054 at 0012; EVD-PT-D14-00057 at 0023; EVD-PT-D14-00058 at 0026; EVD-PT-D14-00060 at 0031; EVD-PT-D14-00062 at 0038; EVD-PT-D14-00063 at 0042; EVD-PT-D14-00064 at 0045; EVD-PT-D14-00065 at 0049; EVD-PT-D14-00066 at 0053.

55. The Prosecution's attempt to rely on the situation in Darfur is misconstrued and bears no resemblance to the instant case.¹³⁷ As the Prosecution rightly asserts, "Janjaweed militias were **integrated** with the Sudanese army".¹³⁸ This is not the case advanced by the Prosecution in respect of the Mungiki. Issues of integration and the sharing of the group's structures do not feature in any of the evidence adduced. The Prosecution's case is rather that the Mungiki carried out attacks, while the police failed to stop them.¹³⁹

(c) Pro-PNU Youth does not Constitute an Organisation

56. It is unclear from the Amended DCC whether the Prosecution is alleging that "pro-PNU youth" constitutes part of an "organisation" comprising the Mungiki, or was used by the Mungiki.¹⁴⁰ The Prosecution did not adduce any evidence of any alleged structure within either the PNU coalition or party. There is no evidence of the existence of "pro-PNU youth" as an entity, let alone an organisation, in Naivasha, Nakuru or elsewhere.
57. Defence evidence from leaders of the youth wing ("Vijana na Kibaki", referred to as "VNK") of President KIBAKI's re-election campaign ("Kibaki Tena") confirms the non-existence of "pro-PNU youth" as an organisation.¹⁴¹ At no stage did the Prosecution allege that either VNK or Kibaki Tena constituted "pro-PNU youth". With little more than two months until the election, the PNU did not have sufficient time or funding to establish a youth wing capable of generating national recognition as an organisation.¹⁴² Neither did the PNU – as a coalition or a party – have the means to carry out the required recruitment process to establish such a body.¹⁴³

¹³⁷ ICC-01/-09-02/11-T-5-CONF-ENG, at p10 lines 16-25.

¹³⁸ *Ibid.*, at p10 lines 23-24.

¹³⁹ "He actively and deliberately caused the Kenya police to stand down, thereby providing the Mungiki and PNU youths space to commit the crimes and to travel to the incident location." ICC-01/09-02/11-T-6-ENG, at p39 lines 5-10; "Muthaura... With the support of Ali...provided safe passage for attacks to be carried out. Muthaura and Ali ensured that the Kenya Police did not intervene before, during or after the attacks." Pre-Trial Chamber II, Prosecutor v Muthaura et al., Document Containing the Charges, 2 September 2011, ICC-01/09-02/11-280, at para 25.

¹⁴⁰ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Document Containing the Charges, 2 September 2011, ICC-01/09-02/11-280-AnxA at para 42, alleges that: "[d]uring the post-election violence, the Mungiki mobilised additional human resources among local pro-PNU youth through aggressive recruitment before and after the elections."

¹⁴¹ EVD-PT-D13-00491 at 0479; EVD-PT-D13-00504 at 0530-0531; EVD-PT-D13-00551 at 0788 – 0789.

¹⁴² EVD-PT-D13-00551 at 0788 to 0789.

¹⁴³ EVD-PT-D13-00551 at 0788 to 0789.

58. Contrary to the Prosecution's case, during 2007 VNK drew significant hostility from the Mungiki as a result of its refusal to include them in its activities. The Mungiki staged a protest against the group's chairman in November 2007.¹⁴⁴ Key VNK leaders confirm that there was no mobilization of the youth groups that had been supporting President KIBAKI under the VNK or the *Kibaki Tena* banner to retain power by force.¹⁴⁵ These groups, which had been created as a campaign vehicle, ceased to exist after the election.¹⁴⁶

B. NO KNOWLEDGE OF A WIDESPREAD OR SYSTEMATIC ATTACK

59. The Prosecution has failed to adduce sufficient evidence that Uhuru KENYATTA had knowledge of a widespread or systematic attack and that he acted as part of the attack. The only sources relied on which mention Uhuru KENYATTA are Prosecution Witnesses 4,¹⁴⁷ 11¹⁴⁸ and 12¹⁴⁹ whose unreliability have been addressed herein.

C. NO PARTICIPATION BY PLANNING, DIRECTION OR ORGANISATION OF AN ATTACK

60. The Prosecution has failed to adduce sufficient evidence that Uhuru KENYATTA participated by planning, directing or organising an attack by reason of the foregoing Defence submissions.

¹⁴⁴ EVD-PT-D13-00551 at 0790 to 0791.

¹⁴⁵ EVD-PT-D13-00491 at 0488; EVD-PT-D13-00551 at 0811; EVD-PT-D13-00504 at 0545.

¹⁴⁶ EVD-PT-D13-00504 at 0543 para 75.

¹⁴⁷ EVD-PT-OTP-00248.

¹⁴⁸ EVD-PT-OTP-00319.

¹⁴⁹ EVD-PT-OTP-00652.

IV. MODE OF LIABILITY: INDIRECT CO-PERPETRATION

A. NO EXISTENCE OF A COMMON PLAN OR AGREEMENT WITH ONE OR MORE PERSONS

61. The first requirement of the mode of liability of indirect co-perpetration is that the Suspect is part of a common plan or agreement with one or more persons to commit the crimes charged.¹⁵⁰ Before examining the Prosecution's evidence of a common plan, it is necessary to assess whether any criminal relationship existed between the individuals who are alleged to be in agreement pursuant to such a plan. These individuals include Uhuru KENYATTA, Francis MUTHAURA and Mohammed Hussein ALI.¹⁵¹

(a) The Lack of a Criminal Relationship between Uhuru Muigai KENYATTA and Francis Kirimi MUTHAURA

62. No evidence has been adduced of any criminal relationship between Uhuru KENYATTA and Francis MUTHAURA. Uhuru KENYATTA did not have any contact with Ambassador MUTHAURA during the campaigning period of November and December 2007.¹⁵² Mr. MUTHAURA has never run for political office and is not a member of the PNU.¹⁵³ The only times Uhuru KENYATTA saw MUTHAURA were on 12 December when both men were present at the national Jamhuri day celebrations;¹⁵⁴ at the swearing-in ceremony of President KIBAKI on 30 December; the day on which Uhuru KENYATTA was sworn-in as a minister in the government; and at one or more cabinet meetings.¹⁵⁵

¹⁵⁰ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura and Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, ICC-01/09-02/11-01, at para 36; See also, Pre-Trial Chamber I, Prosecutor v Abu Garda, Public Redacted Version - Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red, at paras. 163, 171, 173-174, 176, 177, and 179. See in particular at para 174, "In view of the foregoing [lack of evidence concerning the defendant's presence at the meeting], it is unnecessary to determine whether the Prosecution's allegations regarding the subject matter of the meeting are supported by sufficient evidence"; see also para 180-200; Lubanga Confirmation Decision, at para 347; Katanga Confirmation Decision, at paras 511-514; Bemba Confirmation Decision, at paras 362-363, and para 369.

¹⁵¹ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Document Containing the Charges, 2 September 2011, ICC-01/09-02/11-280-AnxA at paras 18, 35 and 77.

¹⁵² ICC-01/09-02/11-T-12-CONF-ENG, at p86, lines 4-14.

¹⁵³ ICC-01/09-02/11-T-4-ENG, at p74 lines 18-19.

¹⁵⁴ ICC-01/09-02/11-T-12-CONF-ENG, at p86, lines 4-14.

¹⁵⁵ ICC-01/09-02/11-T-12-CONF-ENG, at p86, lines 15-21.

(b) The Lack of a Criminal Relationship between Uhuru Muigai KENYATTA and Mohammed Hussein ALI

63. At the relevant time, Mohammed Hussein ALI was the Commissioner of Police.¹⁵⁶ The Prosecution adduced no evidence of any relationship, meeting or even phone call between Mr. ALI and Uhuru KENYATTA.

(c) No Sufficient Evidence of Meetings Alleged to Constitute a Common Plan by the Prosecution

(i) Alleged Meeting 17 or 25 November 2007: Yaya Centre, Nairobi

64. Prosecution Witness 4 is the only evidential source for this allegation.¹⁵⁷ The PTC is referred to the Defence analysis of this evidence at paragraphs 26-32 herein, and the evidence that these meetings did not take place.¹⁵⁸

(ii) Alleged Meeting 26 November 2007: State House, Nairobi

65. Prosecution Witness 4 is the only evidential source for this allegation.¹⁵⁹ The PTC is referred to the Defence analysis of this evidence at paragraphs 26-32 herein, and the evidence to show that this meeting did not take place.¹⁶⁰

66. The Prosecution also seeks to rely on Witness 11, who refers to a meeting at State House on “26” and is clear by his own account that he did not attend.¹⁶¹ No

¹⁵⁶ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Document Containing the Charges, 2 September 2011, ICC-01/09-02/11-280-AnxA, at para 13.

¹⁵⁷ EVD-PT-OTP-00248 at 0030 – 0031.

¹⁵⁸ ICC-01/09-02/11-T-10-CONF-ENG, at p71, line 20 – p75, line 17; ICC-01/09-02/11-T-11-CONF-ENG, at p19, line 25–p21, line 12; EVD-PT-D13-00027; EVD-PT-D13-00030; EVD-PT-D13-00479 at 0428-0430; EVD-PT-D13-00543 at 0723-0725; EVD-PT-D13-00538 at 0689; EVD-PT-D12-00201 at 0075, para 18; EVD-PT-D12-00054 at 0419, para 45.

¹⁵⁹ EVD-PT-OTP-00248 at 0030 – 0031.

¹⁶⁰ ICC-01/09-02/11-T-10-CONF-ENG, at p75, line 18 – p79, line 21; ICC-01/09-02/11-T-11-CONF-ENG, at p22, line 6 – p25, line 23; EVD-PT-D13-00479 at 0430 to 0431; EVD-PT-D13-00201; EVD-PT-D13-00199; EVD-PT-D13-00200; EVD-PT-D13-00551 at 0800 – 0806; EVD-PT-D13-00441; EVD-PT-D13-00447; EVD-PT-D13-00448; EVD-PT-D13-00491; EVD-PT-D13-00504; EVD-PT-D12-00201 at 0075 to 0076, paras 19 – 20; EVD-D12-PT-00054 at 0417 to 0419; EVD-PT-D12-00034 at para 51.

¹⁶¹ EVD-PT-OTP-00322 at 1519.

corroboration of this alleged meeting is provided by Prosecution Witness 11, or by EVD-PT-OTP-00013 or EVD-PT-OTP-00178 as suggested by the Prosecution.¹⁶²

(iii) Alleged Preparatory Meeting – “KENYATTA proposing to attack”: 30 December 2007, State House, Nairobi

67. The Prosecution relies on only two sources of evidence: Prosecution Witnesses 11 and 12.¹⁶³ The PTC is referred to the Defence analysis of the evidence of these witnesses at paragraphs 21-25 and the evidence to show that this meeting did not take place.¹⁶⁴
68. The account given by Witness 11 shows he was not present at the meeting he alleges. Neither is he clear about the precise date or the source of his information.¹⁶⁵ His account is not corroborated by Prosecution Witness 12. The account cited in the Amended DCC from Witness 12 is redacted to such an extent that the redactions render the evidence unintelligible.¹⁶⁶ The Prosecution also attempts to rely on anonymous Witness 6,¹⁶⁷ however his account amounts to no more than hearsay in respect of which it is impossible to access the origin or circumstances of his source.
69. On 30 December 2007, the violence was of a restricted nature, and a fight-back was not necessary. It does not make logical sense to talk of a meeting convened to strategise and organise resources for reprisal attacks.¹⁶⁸ Defence evidence showing the election result, events at KICC, and the swearing-in ceremony illustrate the implausibility of the scene and in particular, the handing over of bags of money of an astronomical quantity.¹⁶⁹

¹⁶² ICC-01/09-02/11-T-5-CONF-ENG, at p 22 line 15 – p23 line 22.

¹⁶³ ICC-01/09-02/11-T-10-ENG, at p46 line 22 – p47 line 12.

¹⁶⁴ ICC-01/09-02/11-T-10-CONF-ENG, at p79, line 22 – p82, line 6; ICC-01/09-02/11-T-11-CONF-ENG, at p25, line 24 – p34, line 3; EVD-PT-D13-00073; EVD-PT-D12-00191; EVD-PT-D13-00548 at 0759; EVD-PT-D12-00226; EVD-PT-D12-00222.

¹⁶⁵ ICC-01/09-02/11-T-10-ENG, at p47 lines 2-5.

¹⁶⁶ EVD-PT-OTP-00667 at 0427-0429; Pre-Trial Chamber II, Prosecutor v Muthaura et al., Document Containing the Charges, 2 September 2011, ICC-01/09-02/11-280-AnxA, at p17 fn 106 and 112.

¹⁶⁷ EVD-PT-OTP-00570 at 0019; ICC-01/09-02/11-T-5-CONF-ENG page 14, lines 11-19.

¹⁶⁸ ICC-01/09-02/11-T-5-CONF-ENG, at p12, line 1 – p14, line 19.

¹⁶⁹ *Ibid.*, at p14, lines 2 – 10; ICC-01/09-02/11-T-10-CONF-ENG, at p82, line 7 – p84, line 9; ICC-01/09-02/11-T-11-CONF-ENG, at p34, line 4 – p37, line 12; EVD-PT-D13-00073; EVD-PT-D13-00384; EVD-PT-D12-00191; EVD-PT-D13-00548 at 0759.

- (iv) Alleged Preparatory Meeting – “MUTHAURA agreeing on the organisational policy, recruiting the Mungiki and guaranteeing a free zone”: 3 January 2008, Nairobi Members Club

70. Prosecution Witness 4 is the only evidential source for this allegation.¹⁷⁰ The PTC is referred to the Defence analysis of this meeting, the evidence of Witness 4 at paragraphs 26-32 herein, and the evidence to show that this meeting did not take place.¹⁷¹
71. During the confirmation hearing, the Defence addressed in detail the seven sources relied upon by the Prosecution in its attempt to provide corroboration for this alleged meeting on 3 January 2008.¹⁷² The Defence refers the PTC to those submissions and reiterates the point that there is only one account of this meeting, described by the Defence as “toxically unreliable”,¹⁷³ namely, the account of Prosecution Witness 4. There is no other corroboration.

- (v) Alleged Preparatory Meeting at Blue Springs Hotel, “KENYATTA co-ordinating and financing the Mungiki” – 3 January 2008

72. The only evidential source for this alleged meeting is Prosecution Witness 4 who conceded that he did not attend nor did he ever receive a report about what was alleged to have been said.¹⁷⁴ The PTC is referred to the Defence analysis of Witness 4 in paragraphs 26-32 herein. The Prosecution did not even call evidence as to the alleged location of the hotel, which would have been a traceable event of significance. In his testimony, Uhuru KENYATTA denied ever organizing or attending any meetings to plan violence.¹⁷⁵ The Defence submits that a meeting of the nature alleged is a “fiction”.¹⁷⁶

¹⁷⁰ EVD-PT-OTP-00248 at 0030 – 0031.

¹⁷¹ ICC-01/09-02/11-T-11-CONF-ENG, at p37, line 21 – p38, line 14; ICC-01/09-02/11-T-15-CONF-ENG, at p63, line 4 – p64, line 8; EVD-PT-D13-00548 at 0760 to 0761; EVD-PT-D13-00479 at 0411; EVD-PT-D12-00107; EVD-PT-D12-00184; EVD-PT-D12-00219; EVD-PT-D12-00054 at 0419, paras 42 – 44; EVD-PT-D12-00201 at 0076, para 22.

¹⁷² The Prosecution reply on Prosecution Witness 4, 11 and 12; EVD-PT-OTP-00572; EVD-PT-OTP-00570; EVD-PT-OTP-00581; EVD-PT-OTP-00341; See Defence Submissions: ICC-01/09-02/11-T-10-ENG, at p47 line 12 – p48 line 22.

¹⁷³ ICC-01/09-02/11-T-10-ENG, at p47 lines 18-22.

¹⁷⁴ EVD-PT-OTP-00248 at 0041 para 207.

¹⁷⁵ ICC-01/09-02/11-T-11-ENG, at p83 lines 15 – 18.

¹⁷⁶ ICC-01/09-02/11-T-10-ENG, at p49 line 7.

(vi) Allegation of Implementation of the Organisational Policy: Uhuru KENYATTA – Meeting at Blue Post Hotel, Thika: January 2008

73. The only sources for this allegation are Prosecution Witnesses 11 and 12¹⁷⁷ who did not attend the meeting they allege.¹⁷⁸ The PTC is referred to the Defence analysis of these witnesses in paragraphs 21-25 herein and the evidence about the proper context of the meetings that did take place at Blue Post Hotel on 3 January, 28 January and 26 February in order to assist displaced persons.¹⁷⁹
74. In his testimony, Uhuru KENYATTA denied ever attending a meeting to plan retaliatory violence.¹⁸⁰ Given the fact that the Nakuru conflict took place between 24 and 27 January 2008, with the Naivasha conflict occurring between 27 and 28 January, it is difficult to understand how an alleged provision of funds on 28 January, could have contributed to the violence in these areas in any event. The violence in Naivasha took place in only a single day.

B. NO ESSENTIAL CONTRIBUTION TO A COMMON PLAN BY UHURU KENYATTA

75. The second element of indirect co-perpetration requires the Suspect and the other co-perpetrator(s) to carry out essential contributions in a coordinated manner resulting in the fulfilment of the material elements of each of the crimes.¹⁸¹ In *Lubanga*, the PTC stated that essential tasks are the *sine qua non* for the commission of the crime, such that the commission of the crime would be frustrated if the defendant decided not to perform them.¹⁸²

¹⁷⁷ Counsel notes that the relevant section of the transcript for 28 September 2011 states that the only witness for this issue is witness 11. These submissions should be corrected to include witness 12: Pre-Trial Chamber II, Prosecutor v Muthaura et al., Transcript of 28 September 2011, ICC-01/09-02/11-T-10-ENG, at p49 lines 16-18; see further Counsel's submissions that both witnesses 11 and 12 come as a pair: ICC-01/09-02/11-T-10-ENG, at p15 lines 16-17.

¹⁷⁸ See, EVD-PT-OTP-00309, at 1308-1309, lines 116-159; EVD-PT-OTP-00666 at 0409-0414.

¹⁷⁹ ICC-01/09-02/11-T-10-CONF-ENG, at p89, line 5 – p90, line 24; EVD-PT-D13-00420 at 0065 – 0068; EVD-PT-D13-00411 at 0032; EVD-PT-D13-00416 at 0046; EVD-PT-D12-00201, para 30.

¹⁸⁰ ICC-01/09-02/11-T-11-ENG, at p83 lines 15 – 18.

¹⁸¹ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura and Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, ICC-01/09-02/11-01, at para 36; Pre-Trial Chamber I, Bemba Confirmation Decision, at para 350.

¹⁸² Lubanga Confirmation Decision, at para 347.

76. In outline, the Prosecution alleges that Uhuru KENYATTA made essential contributions at a key meeting alleged to have taken place on 3rd January 2008 at the Nairobi Members' Club.¹⁸³ This evidence emanates from Prosecution Witness 4.¹⁸⁴ The Prosecution alleges that this evidence is corroborated by anonymous Prosecution Witness 1,¹⁸⁵ who does not however provide any detail of the date or location of any meeting he refers to and does not therefore corroborate Witness 4.¹⁸⁶

(a) First and Fifth Essential Contribution: Allegation that Francis MUTHAURA Adopted the Common Plan and Instructed the Police to Create a Free Zone as Part of the Common Plan

77. The first and fifth essential contributions relate solely to Francis MUTHAURA and allege that it was at a meeting on 3 January that he adopted the common plan.¹⁸⁷ These alleged contributions will be addressed by the MUTHAURA team.

(b) Second Essential Contribution: Allegation that Uhuru KENYATTA and Francis MUTHAURA mobilised the Mungiki to implement the common plan

78. The Prosecution alleges that the second essential contribution is that both Uhuru KENYATTA and Francis MUTHAURA mobilized the Mungiki to implement the common plan.¹⁸⁸ The PTC is referred to Defence submissions at paragraphs 26-32 herein in respect of Prosecution Witness 4.

79. The Prosecution also refers to an NSIS report from 7 January (confidential) at EVD-PT-OTP-00013, 0069-0070, paragraph 321, however, this report refers merely to Maina NJENGA organizing recruitment and oathing for Mungiki to take part in "skirmishes". There is no mention of Uhuru KENYATTA – neither has the Prosecution produced any evidence of any kind of criminal link between Uhuru KENYATTA and Maina NJENGA, who was, during the election, both imprisoned and supporting the Orange

¹⁸³ ICC-01/09-02/11-T-6-ENG, at p 15 line 22 – p20 line 9.

¹⁸⁴ EVD-PT-OTP-00248 at 0040-0041.

¹⁸⁵ ICC-01/09-02/11-T-6-ENG, at p 16 lines 19-20.

¹⁸⁶ ICC-01/09-02/11-T-10-ENG, at p 30 line 11 – p31 line 4.

¹⁸⁷ ICC-01/09-02/11-T-6-ENG, at p 15 line 22 – p20 line 9.

¹⁸⁸ *Ibid.*, at p 16 line 24 – p17 line 17.

Democratic Movement (“the ODM”).¹⁸⁹ There is no evidence as to where the intelligence contained in the NSIS report emanates from.

(c) Third Essential Contribution: Allegation that Uhuru KENYATTA placed the Mungiki under the Responsible Command of a former KANU MP

80. The third alleged essential contribution is that Uhuru KENYATTA placed the Mungiki under the responsible command of a former KANU MP.¹⁹⁰ Reliance is placed solely on Prosecution Witnesses 4 and 12. The Defence requests the PTC to have regard to submissions made in respect of both witnesses herein. No link has been established between any alleged activities by the former KANU MP and Uhuru KENYATTA at the material time. Neither has the authority of the former KANU MP over “pro-PNU youth” or the Mungiki been explained or defined.

(d) Fourth Essential Contribution: Allegation that Uhuru KENYATTA made Arrangements for the Provision of Logistical Support and Money

81. The fourth alleged essential contribution is that Uhuru KENYATTA made arrangements for the provision of logistical support and money.¹⁹¹ The Prosecution cites Witnesses 4, 6, 11 and 9.¹⁹² The PTC is referred to Defence submissions in respect of these witnesses. The evidence relied upon is anonymous, and/or unsupported and/or generic hearsay.

¹⁸⁹ EVD-PT-D12-00190; EVD-PT-D12-00227; EVD-PT-OTP-00081 at 0049.

¹⁹⁰ ICC-01/09-02/11-T-6-ENG, at p 15 lines 8-12.

¹⁹¹ *Ibid.*, at p 18 line 14 – p19 line 3.

¹⁹² *Ibid.*, at p18 line 14 – p19 line3; Pre-Trial Chamber II, Prosecutor v Muthaura et al., Document Containing the Charges, 2 September 2011, ICC-01/09-02/11-280, at paras 23, 26, 50, 80 and 85.

(e) Other Essential Contributions

(i) 30 December 2007 Meeting at State House¹⁹³

82. The PTC is referred to Defence submissions on Prosecution Witnesses 11, 12 and 4 and the section herein addressing the alleged meeting on 30 December 2007.

(ii) Blue Springs Hotel Meeting¹⁹⁴

83. The PTC is referred to Defence submissions in respect of this alleged meeting at paragraph 72 herein.

C. NO CONTROL BY UHURU KENYATTA OVER ANY ALLEGED ORGANISATION

84. The third element of indirect co-perpetration requires the Prosecution to prove that the Suspect had control of the alleged organization.¹⁹⁵ Pre-Trial Chamber I has held that the indirect perpetrator, or the ‘master-mind’, must control “the will of the direct perpetrator”.¹⁹⁶ The indirect perpetrator must have more than an influence, even if that influence is substantial, over the alleged organisation.¹⁹⁷ An individual cannot be considered an indirect perpetrator if they are merely advising, contributing to the implementation of plans or orders without the power to give new orders, or someone who simply provides the means to commit the offences.¹⁹⁸

¹⁹³ ICC-01/09-02/11-T-6-ENG, at p 20 lines 20 – 24.

¹⁹⁴ *Ibid.*, at p 21 lines 8-17.

¹⁹⁵ Pre-Trial Chamber II, *Prosecutor v Muthaura et al.*, Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura and Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, ICC-01/09-02/11-01, at para 36.

¹⁹⁶ Katanga Confirmation Decision, at para 497.

¹⁹⁷ See, for instance: *Prosecutor v. Delalic et al.*, Appeal Judgment, 20 February 2001, paras 258-266; also see, *Prosecutor v. Kordic*, Trial Judgment, 26 February, 2001, para. 415; *Prosecutor v. Brima et al*, Trial Judgment, 20 June, 2007, para. 784; *Prosecutor v. Fofana & Kondewa*, SCSL-04-14-T, Trial Judgment, 2 August 2007, para. 238; *Prosecutor v. Brima et al*, Appeal Judgment, 22 February, 2008, para. 289; *Prosecutor v Ntagerura et al*, Trial Judgement, 25 February, 2004, para. 628; *Prosecutor v. Nahimana et al*, Appeal Judgment, November 28, 2007, para. 882; *Prosecutor v Karera*, Judgement and Sentence, 7 December, 2007, paras. 564, 567-568; *Prosecutor v Oric*, Trial Judgement, 30 June, 2006, para. 311; *Prosecutor v Hadzihasanovic & Kubura*, Trial Judgement, 15 March, 2006, para. 80.

¹⁹⁸ Hector Olasolo and Ana Perez Capeda, The Notion of Control of the Crime and its Application by the ICTY in the Stakic Case, *International Criminal Law Review* 474 (2004) p485-489; The Prosecution do not in fact allege that Mr. Kenyatta controlled the will of any organisation, but that he “mobilised and secured the support of the Mungiki and provided financial and logistical support” and therefore the means to commit the offences, see for example, Pre-Trial Chamber II, *Prosecutor v Muthaura et al.*, Transcript, 23 September 2011, ICC-01/09-02/11-T-6-ENG, at p15 lines 6-9; Prosecution Witness 11 stated that the attacks went ahead because the idea was “pushed through money, a lot of money” therefore the Prosecution do not even assert that it was Mr. Kenyatta’s

85. The indirect perpetrator must have control over the hierarchical organisational apparatus, and possess “power and authority that can neither be blocked nor disturbed by any way from above”,¹⁹⁹ including control that enables unwilling executors to be instantly replaced by willing ones.²⁰⁰ Such control “only applies to the leadership level of the formally established government, and in exceptional cases, to the top hierarchy of the military, police and intelligence forces”.²⁰¹ In short, the relationship must be similar to that between superior and subordinate in the case of command responsibility.²⁰² Both doctrines pursue the same objective of linking superiors to crimes committed on their behalf.²⁰³
86. The PTC is referred to Defence submissions at paragraphs 40-58 herein addressing the fact that no such organisation based upon the Mungiki acting alone, a combination of the Mungiki and the Kenyan Police, or the pro-PNU Youth (or a combination thereof) existed. No control by Uhuru KENYATTA over any alleged organisation has been established by the Prosecution.

(a) No control over the Mungiki

87. The Prosecution alleges that Uhuru KENYATTA had a “longstanding relationship” with the Mungiki, a “long history of association”²⁰⁴ that enabled him to exercise *de facto* control over them.²⁰⁵ Each item of evidence alleging a relationship between

control or dominant will that ensured compliance but the provision of money. Njenga given money so the organisation could be used, see p26.

¹⁹⁹ Kai Ambos, The Fujimori Judgment A President’s Responsibility for Crimes Against Humanity as Indirect Perpetrator by Virtue of an Organized Power Apparatus, *Journal of International Criminal Justice* 9 (2011) 137, at pp. 151-152.

²⁰⁰ Kai Ambos, Joint Criminal Enterprise and Command Responsibility, *Journal of International Criminal Justice* (2007) 5, 159, at p182; K. Ambos, O. Triffterer, Commentary on the Rome Statute of the International Criminal Court (CH. Beck. Hart, Second ed), at pp.751-752 para 11.

²⁰¹ Kai Ambos, The Fujimori Judgment A President’s Responsibility for Crimes Against Humanity as Indirect Perpetrator by Virtue of an Organized Power Apparatus, *Journal of International Criminal Justice* 9 (2011) 137, at pp. 151-152.

²⁰² Albin Eser, Individual Criminal Responsibility, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds): *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I, Oxford University Press 2002, page 795. See further: Kai Ambos: Joint Criminal Enterprise and Command Responsibility, 5 *Journal of International Criminal Justice*, March 2007, 159 at page 180. See also: K. Ambos, Triffterer, Commentary on the Rome Statute of the International Criminal Court, (1999), pp.479-80.

²⁰³ Kai Ambos, Joint Criminal Enterprise and Command Responsibility, *Journal of International Criminal Justice* (2007) 5, 159, at pp.181-183.

²⁰⁴ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Document Containing the Charges, 2 September 2011, ICC-01/09-02/11-280, at paras 39-42; ICC-01/09-02/11-T-5-CONF, at p 18 line 7 – p 20 line 4.

²⁰⁵ *Ibid.*, at p18 lines 7-9 and p 31 lines 19-21.

Uhuru KENYATTA and the Mungiki was entirely discredited during the confirmation hearing.²⁰⁶

88. Furthermore, in order for this proposition of control over the Mungiki to have any validity, Uhuru KENYATTA must have been in command of Maina NJENGA,²⁰⁷ the acknowledged leader of the Mungiki. Such a contention has never been pleaded by the Prosecution, neither does it cohere with the video evidence presented in respect of Maina NJENGA who stated publically that he supported the ODM during the 2007 elections.²⁰⁸
89. In 2000, Mungiki members protested against Uhuru KENYATTA, accusing him of orchestrating a police crackdown on sect members.²⁰⁹ During the protest, the group burnt an effigy of Mr. KENYATTA outside his father's mausoleum in central Nairobi.²¹⁰ Reacting to killings allegedly carried out by Mungiki members in Kariobangi estate in 2002, Uhuru KENYATTA pledged to have investigations launched into the violence and to act on the perpetrators accordingly.²¹¹ This evidence and reaction contravenes the contention that Mr. KENYATTA controlled the Mungiki.
90. In 2007, Ndura WARUINGE admitted that following Uhuru KENYATTA's public denouncement of the Mungiki in the 2002 presidential election campaign,²¹² the group ceased to follow him as its preferred candidate.²¹³ In August 2002, Maina NJENGA also denied allegations that the Mungiki had received funding from Mr. KENYATTA.²¹⁴ In December 2002, representatives from within KANU denied allegations that the party had any links with the Mungiki or Maina NJENGA.²¹⁵ Uhuru KENYATTA revoked NJENGA's nomination certificate after he obtained it by intimidating party representatives.²¹⁶ In 2007, Mr. KENYATTA exercised his official

²⁰⁶ ICC-01/09-02/11-T-10-ENG, at pp49-50, illustrates that the evidence relied upon is Prosecution Witness1, Witness 10 and an article by Professor Kagwanja –none of which speak to control. Also relied upon are witnesses 11&12, who the Defence have shown to be entirely unreliable: See also, ICC-01/09-02/11-T-10-ENG, at pp15-p21.

²⁰⁷ *Ibid.*, at p50 lines 10-15.

²⁰⁸ EVD-PT-D12-00190; EVD-PT-D12-00227.

²⁰⁹ EVD-PT-D13-00319.

²¹⁰ ICC-01/09-02/11-T-11-ENG, at p4, lines 18 – 25 and p5 1 -15; EVD-PT-D13-00530; EVD-PT-D13-00319; EVD-PT-D13-00491; EVD-PT-D13-00479 at 0426; EVD-PT-D13-00425.

²¹¹ EVD-PT-D13-00330.

²¹² EVD-PT-D13-00335.

²¹³ EVD-PT-D13-00320, at column 5.

²¹⁴ EVD-PT-D13-00336.

²¹⁵ EVD-PT-D13-00339.

²¹⁶ EVD-PT-D13-00491 at page 0424 to 0425.

veto, which he possessed since his appointment as KANU Chairman in January 2005, against Ndura WARUINGE when he applied to run as the party's Langata parliamentary representative.²¹⁷ WARUINGE had also obtained a nomination form by force. Mr. KENYATTA made it clear that Mungiki members would never run on a KANU ticket.²¹⁸ This subject was addressed by Defence Witness 6.²¹⁹ Indeed, it has already been illustrated that Mr. NJENGA supported the ODM in the 2007 election.²²⁰

91. In June 2007, Uhuru KENYATTA attended a high-level security meeting chaired by Francis MUTHAURA, which was focused on combatting Mungiki violence in Nairobi and Central Province.²²¹ Mr. KENYATTA later addressed the Kenyan press at Jomo Kenyatta International Airport, stating that Government should take stern action against the gang to restore order.²²² These *indicia* demonstrate clearly Mr. KENYATTA's opposition to the Mungiki and his lack of any control.
92. Defence evidence of Uhuru KENYATTA denouncing the Mungiki forcefully contradicts and undermines the contention that he controlled them.²²³ Defence witness Lewis NGUYAI confirmed during his testimony that in the course of his research and public duties, he had never heard of Mr. KENYATTA even being a member of the Mungiki, let alone a commander thereof.²²⁴ In the course of his work in the Select Committee on Organised Crime, Mr. NGUYAI and other MPs had numerous formal contacts with senior members of the Mungiki including a formal meeting with Maina NJENGA in Naivasha Prison.²²⁵
93. Defence evidence concerning the National Alliance Rainbow Coalition propaganda campaign against Uhuru KENYATTA in 2002, which attempted to link him with the Mungiki, is also relevant to undermining the contention that the Mungiki were under his responsible command.²²⁶

²¹⁷ EVD-PT-D13-00491 at page 0425 – 0426.

²¹⁸ EVD-PT-D13-00491 at page 0425 – 0426; EVD-PT-D13-00474.

²¹⁹ EVD-PT-D13-00491.

²²⁰ EVD-PT-D12-00190; EVD-PT-D12-00227.

²²¹ EVD-PT-D13-00365.

²²² EVD-PT-D13-00365 at 0164; EVD-PT-D13-00366 at 0166; EVD-PT-D13-00367.

²²³ ICC-01/09-02/11-T-11-ENG, at p39 lines 9-17 and p62 lines 4-15; See, ICC_01/09-02/11-T-12-CONF-ENG, at p76 line 24 – p77 line 8; EVD-PT-D13-00335.

²²⁴ ICC-01/09-02/11-T-12-CONF-ENG, at p43 lines 2-3.

²²⁵ *Ibid.*, at p 42 lines 6-23.

²²⁶ EVD-PT-D13-00551 at 0807 to 0809; EVD-PT-D13-00491 at 0477 at 0488, para 53; EVD-PT-D13-00557 at 0866, para 27. .

94. The account of Defence Witness D13-02 clearly contradicts the assertion made by the Prosecution that a relationship between Uhuru KENYATTA and the Mungiki existed. The Prosecution fails to engage with this aspect of the Witness' evidence.²²⁷ The Prosecution draws unhelpful generic conclusions from the evidence of Witness D13-23, which fail to show any relationship between Uhuru KENYATTA and the Mungiki.²²⁸ Further, the Prosecution failed to provide any evidence to contradict the Defence's submission that Uhuru KENYATTA did not solicit the support of the Mungiki in 2002.²²⁹

(b) No Control over the PNU

95. Although the Amended DCC pleads that Uhuru KENYATTA had influence over PNU supporters, neither the precise nature nor extent of such alleged influence has been established by the Prosecution. There is no indication in the DCC that Mr. KENYATTA was the effective head of the PNU party or coalition support structure. Indeed, Defence witnesses central to the youth campaign of President KIBAKI have explained that the PNU party was conceived as a vehicle for the re-election of the President,²³⁰ with Mr. KENYATTA joining the PNU coalition at a late stage in September 2007.²³¹ Once the PNU had been established as a party, President KIBAKI's election campaign, *Kibaki Tena*, was rebranded as PNU – and the two entities became synonymous with each other.²³² Mr. KENYATTA, however, continued in his role as KANU chairman, which maintained its own identity and fielded its own parliamentary and civic candidates.²³³ In mid-November 2007, within the loose PNU coalition,²³⁴ Mr. KENYATTA remained inextricably linked to his role as KANU Chairman, representing party concerns in

²²⁷ Defence Witness 13-02 explained the manner in which Prosecution Witnesses 11 and 12 came to be introduced to the Defence team, the fact that "high level" Mungiki members had no money, and, crucially, that he never conveyed any information regarding the intentions of Witnesses 11 and 12 to Uhuru KENYATTA.

²²⁸ Prosecution's Written Submissions, at para 64. The Prosecution's allegation that "there was clearly a money flow from politicians towards the Mungiki" is drawn for the account of Witness D13-23 at EVD-PT-D13-00551 pages 0789 to 0783, in which D13-23 clearly states that the rogue politician in question was acting outside of his role as a pro-KIBAKI politician, and was attempting to sabotage the President's campaign. Neither the VNK nor those associated with the KIBAKI election campaign were aware of or condoned the use of the Mungiki.

²²⁹ The Prosecution merely states that "...Kenyatta had Mungiki support for the elections". Prosecution's Written Submissions, at para 69.

²³⁰ EVD-PT-D13-00551 at 0784; EVD-PT-D13-00491 at 0477.

²³¹ EVD-PT-D13-00491 at 0477; EVD-PT-D13-00479 at 0421.

²³² EVD-PT-D13-00551 at 0788; EVD-PT-D13-00431.

²³³ ICC-01/09-02/11-T-11-CONF-ENG, at p.16, lines 5 – 17.

²³⁴ Ibid. at p.16, lines 13 – 14.

discussions concerned with nominations. The Prosecution has failed to establish that Mr. KENYATTA controlled either the PNU as a party or as a coalition.²³⁵

96. The Prosecution misunderstands the distinction between the PNU as a party and as a coalition, when it asserts, without support, that Uhuru KENYATTA insisted that during the period of the PEV, he was solely a KANU member.²³⁶ Mr. KENYATTA clearly stated that his KANU party was a part of the PNU coalition, however it still retained its own party identity.²³⁷ By virtue of his role as KANU Chairman and as a member of the PNU coalition, Mr. KENYATTA represented KANU concerns and presided over nomination disputes within the PNU Council.²³⁸

D. THE MUNGIKI DOES NOT CONSIST OF AN ORGANISED AND HIERARCHICAL APPARATUS OF POWER

97. The fourth element of indirect co-perpetration requires the Prosecution to prove that the organization consists of an organized and hierarchical apparatus of power. The PTC is referred to Defence Submissions on “No Established Hierarchy” at paragraphs 43-46 herein.

E. CRIMES WERE NOT SECURED BY “ALMOST AUTOMATIC COMPLIANCE WITH THE ORDERS ISSUED” BY UHURU KENYATTA TO THE MUNGIKI

98. The fifth element requires the Prosecution to prove that the crimes were secured by almost automatic compliance with orders issued by Uhuru KENYATTA.²³⁹ The PTC is referred to Defence submissions on Prosecution Witness 11 herein. The evidence relied upon fails to establish this allegation.

F. UHURU KENYATTA DOES NOT SATISFY THE SUBJECTIVE ELEMENTS OF THE CRIMES ALLEGED

²³⁵ *Ibid.*, at p.17, lines 14 – 25, p.18, lines 1 – 10.

²³⁶ Prosecution’s Written Submissions, at para. 70.

²³⁷ See ICC-01/09-02/11-T-11-CONF-ENG, p.16, lines 5 – 17.

²³⁸ EVD-PT-D13-00543 at 0724, para 7; EVD-PT-D13-00479 at 0428, para 2.

²³⁹ The Prosecution alleges that “Uhuru Kenyatta secured the cooperation of Mungiki leaders and thereby procured the services of a violent, proscribed and criminal organization known for its brutal and efficient disciplinary regime” DCC, OTP Transcript; EVD-PT-OTP-00158; EVD-PT-OTP-00275 at 0117-0118; EVD-PT-OTP-00004 at 0721; Prosecution Witness 2.

99. The sixth element requires the Prosecution to prove that Uhuru KENYATTA has satisfied the subjective elements of the crimes charged. The Defence submits that the Prosecution has not adduced any evidence of substantial grounds that Uhuru KENYATTA satisfied any of the subjective elements of counts 1, 3, 5, 7 or 9.

G. NO EVIDENCE THAT UHURU KENYATTA AND THE ALLEGED CO-PERPETRATORS WERE MUTUALLY AWARE AND ACCEPTED THAT IMPLEMENTING THE COMMON PLAN WILL RESULT IN THE FULFILMENT OF THE MATERIAL ELEMENTS OF THE CRIMES

100. In respect of the seventh element of indirect co-perpetration, the PTC is referred to the Defence submissions concerning the lack of a common plan at paragraphs 61-74 herein

H. NO EVIDENCE THAT UHURU KENYATTA WAS AWARE OF THE FACTUAL CIRCUMSTANCES AS TO HOW HE EXERCISED JOINT CONTROL OVER THE COMMISSION OF THE CRIME THROUGH ANOTHER PERSON

101. In respect of the eighth requirement, the Prosecution has not adduced sufficient evidence of Uhuru KENYATTA being aware of factual circumstances as to how he exercised joint control over the commission of crimes by others.

V. THE INTENTION OF UHURU KENYATTA

102. During the confirmation hearing, the Prosecution submitted that the intent of Uhuru KENYATTA could be identified from his “words and actions”.²⁴⁰ The Defence submits that Mr. KENYATTA’s extensive deeds and public speeches provide powerful evidence of his efforts to stop the violence and bring peace to the region. The source of this evidence comes substantially from eyewitnesses and contradicts the notion of his alleged individual criminal responsibility.
103. Before, during and after the PEV, Uhuru KENYATTA eschewed tribalism, preached peace, alleviated the suffering of Kenyans, and sought dialogue as opposed to violence. Mr. KENYATTA’s campaign in the lead up to the 2007 elections – and indeed his previous campaigns²⁴¹ - centred on national as opposed to tribal issues.²⁴² Mr. KENYATTA never advocated the use of violence during his 2007 election campaign.²⁴³ He sought to diffuse ethnic tension through dialogue during his campaign.²⁴⁴ He joined the coalition with the PNU because President KIBAKI’s campaign focused on national issues and was devoid of tribal affiliation, focusing instead on economic revival, education, infrastructure and development.²⁴⁵ In response to the disputed election result, Uhuru KENYATTA implored the ODM to engage in dialogue with the PNU and to seek peaceful, legal redress as opposed to resorting to calls for mass action.²⁴⁶
104. In response to the violence that broke out as a reaction to the disputed 2007 election result, on 30 and 31 December 2007 Uhuru KENYATTA used his position as a prominent politician to publicly campaign on national and vernacular radio stations for individuals from all sides to lay down their weapons and exercise ethnic tolerance.²⁴⁷ At the end of January 2008, Uhuru KENYATTA successfully appealed to an uprising of Kikuyu youths in Kikuyu town to desist from violence and not to commit acts of

²⁴⁰ ICC-01/09-02/11-T-6-ENG, at p34 lines 11 -13.

²⁴¹ EVD-PT-D13-00479 at page 0418 to 0420.

²⁴² EVD-PT-D13-00479 at page 0422; EVD-PT-D13-00058; EVD-PT-D13-00379.

²⁴³ EVD-PT-D13-00424 at pages 0089; EVD-PT-D13-00535 at page 0650.

²⁴⁴ EVD-PT-D13-00479 at page 0422 to 0423.

²⁴⁵ EVD-PT-D13-00479 at page 0422.

²⁴⁶ EVD-PT-D13-00080, col 6; EVD-PT-D13-00082; EVD-PT-D13-00083; EVD-PT-D13-00105; EVD-PT-D13-00102; EVD-PT-D13-00106; EVD-PT-D13-00103; EVD-PT-D13-00122 at 00.22.

²⁴⁷ EVD-PT-D13-00122 at 01.05 and 18.22; EVD-PT-D13-00128; EVD-PT-D13-00390 at page 0107.

revenge upon their non-Kikuyu neighbours.²⁴⁸ Uhuru KENYATTA continued to preach peace into February 2008, leading a group of MPs from different political parties²⁴⁹ on a peace tour in Kiambu District – travelling to Wangige, Tigoni and Nderi – to prevent any retaliatory attacks.²⁵⁰ Other Defence witnesses corroborated his intention to disseminate a message of peace and tolerance during the election and post-election period.²⁵¹

105. The Prosecution mistakenly focuses on the date of the peace rallies referred to by Defence Witness D13-02, stating that they “did not essentially contradict the Prosecution’s case theory”.²⁵² The Prosecution’s selective analysis of the conduct of Mr. KENYATTA fails to take into consideration his extensive efforts to maintain peace and promote dialogue throughout late December 2007 and January 2008, which demonstrate a clear and continuing intention to prevent violence throughout the period of the PEV.²⁵³

106. In order to raise awareness and alleviate the suffering of the victims of the PEV, Uhuru KENYATTA was involved in a number of fundraising meetings in Nairobi. His actions and conduct during the fundraising meetings he attended directly contravenes the indirect, un-sourced allegation contained in paragraph 509 of the KNCHR report.²⁵⁴ In January 2008, Mr. KENYATTA attended a fundraising event at Sagret Hotel to provide aid for victims of PEV²⁵⁵ and a number of receipts, including one from the Red Cross,

²⁴⁸ EVD-PT-D13-00124; EVD-PT-D13-00389; WITNESS 1. EVD-PT-D13-00409 at 0022; EVD-PT-D13-00425 at p0098; EVD-PT-D13-00428 at 0117 to 0119; EVD-PT-D13-00535 at p0652; ICC-01/09-02/11-T-11-CONF-ENG, at p44; ICC-01/09-02/11-T-12-CONF-ENG, at pp.22-24.

²⁴⁹ ICC-01/09-02/11-T-11-CONF-ENG, at p.43; ICC-01/09-02/11-T-12-CONF-ENG, at p.25, line 25 to p.31, line 20; EVD-PT-D13-00535 at p.0652.

²⁵⁰ EVD-PT-D13-00133; EVD-PT-D13-00425 at page 0098; EVD-PT-D13-00532; EVD-PT-D13-00131; EVD-PT-D13-00130; EVD-PT-D13-00391.

²⁵¹ WITNESS 20. EVD-PT-D13-00548 at 0761 to 0763; EVD-PT-D13-00546 at page 0744; EVD-PT-D13-00547 at page 0753 to 0754; EVD-PT-D13-00596 at page 0019 – 0022; EVD-PT-D13-00557 at 0865 to 0866.

²⁵² Prosecution’s Written Submissions, at para 69.

²⁵³ EVD-PT-D13-00074; EVD-PT-D13-00535 at 0651; EVD-PT-D13-00548 at 0757-0760; EVD-PT-D13-00077; EVD-PT-D13-00082; EVD-PT-D13-00058; EVD-PT-D13-00379; EVD-PT-D13-00077; EVD-PT-D13-00080; EVD-PT-D13-00105; EVD-PT-D13-00130; EVD-PT-D13-00102; EVD-PT-D13-00106; EVD-PT-D13-00103; EVD-PT-D13-00076; EVD-PT-D13-00088; EVD-PT-D13-00385 at 0020; EVD-PT-D13-00122 at 01:05 to 01:27, 04:10 to 05:15, 17:55 to 18:22; EVD-PT-D13-00128; EVD-PT-D13-00390 at 0107; EVD-PT-D13-00078; EVD-PT-D13-00479 at 0423 to 0424; EVD-PT-D13-00409 at 0022; EVD-PT-D13-00425 at 0098; EVD-PT-D13-00428 at 0117 to 0119; EVD-PT-D13-00124; EVD-PT-D13-00389; EVD-PT-D13-00535 at 0652; EVD-PT-D13-00532; EVD-PT-D13-00131; EVD-PT-D13-00546 at 0744; EVD-PT-D13-00547 at 0753 to 0754; EVD-PT-D13-00596 at 0019–0022; EVD-PT-D13-00557 at 0865 to 0866; EVD-PT-D13-00548 at 0761 to 0763.

²⁵⁴ EVD-PT-OTP-00001 at 0134.

²⁵⁵ D13-3 ; EVD-PT-D13-00424 atm0087-0091; D13-15; EVD-PT-D13-00543 at 0725; D13-4. EVD-PT-D13-00425 +Anxs at 0094-0098.

in Mr. KENYATTA's name have been exhibited.²⁵⁶ In January 2008, Mr. KENYATTA attended meetings alongside a number of other parliamentarians at the KICC, which were convened to address the lawlessness pervading the country at that time.²⁵⁷ At the KICC meetings, impromptu fundraisers would sometimes take place, with the proceeds being spent on essential items to assist the IDPs.²⁵⁸ On 24 January 2008, Mr. KENYATTA addressed a harambee at Galileo Hotel, at which he spoke to the crowd about the need for all attendees to provide help to victims by providing essential aid such as blankets, food and water.²⁵⁹

107. The Prosecution clearly misrepresents Defence evidence in order to support its submission that fundraising meetings were convened to “defend...communities”,²⁶⁰ and that that phrase “referred to attacks against perceived ODM supporters.”²⁶¹ Contrary to the reference in Prosecution footnote 121, Defence Witness D13-02 did not mention in his testimony that fundraising events were convened to “defend communities”.²⁶² Indeed, the only time Witness D13-02 mentions the phrase “defend ourselves” is in relation to a statement made by Jayne KIHARA during a meeting that did not seek to promote violence, and at which Uhuru KENYATTA was not present.²⁶³

108. The Prosecution ignores or takes out of context the wealth of Defence evidence which illustrates that the meeting at Galileo was convened to raise funds for relief efforts, not to organise violence,²⁶⁴ and that Uhuru KENYATTA directly referred to the need to provide essential aid to victims of PEV.²⁶⁵ In the face of clear and substantial Defence evidence to the contrary,²⁶⁶ the Prosecution maintains, without foundation²⁶⁷ that “these

²⁵⁶ EVD-PT-D13-00421; EVD-PT-D13-00422; EVD-PT-D13-00423.

²⁵⁷ EVD-PT-D13-00557 at 0862.

²⁵⁸ EVD-PT-D13-00557 at 0863.

²⁵⁹ EVD-PT-D13-00529 at 0624-0629; EVD-PT-D13-00518; EVD-PT-D13-00550; EVD-PT-D13-00557 at 0864-0865; EVD-PT-D13-00596 at 0022-0023.

²⁶⁰ Prosecution's Written Submissions, at para.69.

²⁶¹ *Ibid.*, at para 69 and footnote 121.

²⁶² ICC-01/09-02/11-T-12-CONF-ENG, p.70 line 1 to p87 line 20.

²⁶³ EVD-PT-D13-00596 at 0024, paras 39 – 42.

²⁶⁴ See Prosecution's Written Submissions at footnote 121; EVD-PT-D13-00550 at 0075-0076, para 7; EVD-PT-D13-00557 at 0863, para 14 and 0865, para 23; EVD-PT-D13-00596 at 0022-0023; EVD-PT-D13-00529 at 0624-0625, para 6; EVD-PT-D13-00518 at 0591, para 21.

²⁶⁵ EVD-PT-D13-00529 at 0627, para 20.

²⁶⁶ EVD-PT-D13-00541 at 0698, para 4; EVD-PT-D13-00409 at 0016, Para 19, 0017, para 26 and at 0018, Para 33; EVD-PT-D13-00420 at 0066, para 18 and 0067, para 24; EVD-PT-D13-00425 at 0098, para 17-18; EVD-PT-D13-00424 at 0088-0089; EVD-PT-D13-00428 at 0117, para 19; EVD-PT-D13-00542 at 0710, para 21; EVD-PT-D13-00550 at 0075-0076, para 7; EVD-PT-D13-00557 at 0863, para 14 and 0865, para 23; EVD-PT-D13-00545 at 0735, para 8; EVD-PT-D13-00546 at 0742, para 12; EVD-PT-D13-00596 at 0022-0023; EVD-PT-D13-00529 at 0624-0625, para 6; EVD-PT-D13-00535 at 0653, para 29; EVD-PT-D13-00518 at 0591, para 21.

fundraising meetings, allegedly to help IDPs, were designed instead to raise funds for the Mungiki to “help defend our people”.²⁶⁸

109. Uhuru KENYATTA did not attend any fundraisers at Landmark Hotel (now known as Jacaranda Hotel) or Marble Arch Hotel.²⁶⁹ Aside from the meetings held by parliamentarians in January 2008, Mr. KENYATTA attended no other fundraising events at the KICC.²⁷⁰

110. Finally, it is not the case that Uhuru KENYATTA “relied on mainly Kikuyu witness who are either his close relatives or his business associates”.²⁷¹ The Defence submits that the aforementioned Prosecution submission is patent mischaracterization.²⁷²

²⁶⁷ In relation to the Galileo event, the only evidence that the Prosecution proffers in support of its contention is grossly misrepresented. At footnote 106, the Prosecution claim that an individual refused to attend the Galileo event on the basis that “he would not attend any meeting that sought to raise money for the Mungiki.” The evidence of the Defence Witness in question (see EVD-PT-D13-00529 at 0637, para 50) clearly states that the individual in question attended and made no such statement in relation to the Galileo event.

²⁶⁸ Prosecution’s Written Submissions at footnote 121.

²⁶⁹ EVD-PT-D13-00409; EVD-PT-D13-00542; EVD-PT-D13-00545; EVD-PT-D13-00550.

²⁷⁰ EVD-PT-D13-00529; EVD-PT-D13-00428; EVD-PT-D13-00541; EVD-PT-D13-00546; EVD-PT-D13-00550.

²⁷¹ Prosecution’s Written Submissions at para. 69.

²⁷² A significant number of key Defence witnesses are neither business associates nor relatives of Mr. KENYATTA, having had little or no contact with him in the past: EVD-PT-D13-00409 at 0022, para 50; EVD-PT-D13-00428 at 0118, para 22; EVD-PT-D13-00504 at 0531, paras 23 – 24; EVD-PT-D13-00549 at 0771, para 54; EVD-PT-D13-00551 at 0780, paras 4-5; EVD-PT-D13-00518 at 0597, para 5; EVD-PT-D13-00552 at 0818; EVD-PT-D13-00546 at 0745, para 21; EVD-PT-D13-00547; EVD-PT-D13-00538.

VI. CONCLUSION

111. The failure to discredit the Defence evidence presented at the confirmation hearing demonstrates the lack of substance of the Prosecution's allegations. The testimony of the live witnesses called on behalf of the Defence, Uhuru KENYATTA and Lewis NGUYAI, was not discredited during cross-examination. The Prosecutor's questioning demonstrated both a lack of substance and the speculative nature of the evidence and case theory. An example is the contradiction within the Prosecution's submissions,²⁷³ which rely on a meeting at the Yaya Centre on 25 November 2007,²⁷⁴ an assertion subsequently abandoned by Witness 4 in his further statement to the Prosecution.²⁷⁵ In respect of a key date, namely 3 January 2008 and the alleged early meeting at the Nairobi Members Club, there is no corroboration within the Prosecution's own case or other evidence to counter that adduced by the Defence, through written witness statements, documentary sources and Uhuru KENYATTA's live testimony.
112. Contrary to the Prosecution's submission that Defence admissions corroborated the testimony of their witnesses,²⁷⁶ the Defence case contradicts the Prosecution's in its entirety. The lack of substance of the Prosecution's case is also demonstrated by a close scrutiny of key elements that are not supported by the nature of the conflict or reliable evidence. This is apparent in relation to the allegation of astronomical amounts of money being handed over as cash without any apparent trace or provenance. It is simply beyond belief that millions of shillings in cash could have been put into the hands of criminals for distribution without there having been any apparent evidential trace.
113. The PTC is asked to believe facts in respect of which there is no supporting evidence beyond that of mere assertion. Not a single contemporaneous statement, act, or deed emanating from the Suspect has been adduced to support the Prosecution's case theory. Instead, the court has been provided with witness accounts lacking in specificity, often anonymous, and often amounting to rumour and gossip, never progressing to the level of substantial grounds to believe. This is no more evident than when the Prosecutor questioned Uhuru KENYATTA and stated as follows: *"the only link, the only evidence*

²⁷³ Prosecution's Written Submissions, para.74.

²⁷⁴ Prosecution Witness 4.

²⁷⁵ Witness 4 changed the date of the alleged meeting to 17 November 2007 in his third account.

²⁷⁶ Prosecution's Written Submissions at para. 60.

*we have connecting the Mungiki's with this coalition is through you. There is no...we have no other link between the Mungiki or PNU or others. Can you explain to us a different reason?"*²⁷⁷ This question reveals a Prosecutor searching rather than providing the answer from within his own case. The question states that "the member of the party" allegedly involved in the preparation of attacks only had Uhuru KENYATTA as his link to the Mungiki. This allegation is not supported by evidence to establish the premise of the theory advanced. The evidence did not establish that the former MP about whom this question is concerned was still a member of KANU, nor was there any evidence provided linking Uhuru KENYATTA to his alleged acts. The alleged criminal link between the Mungiki and Uhuru KENYATTA was never established by credible evidence. Even in questioning the Suspect, the Prosecutor used the words "our theory", correcting himself to "our evidence".²⁷⁸ At this point, the proceedings had reached the stage where the submissions of the Defence were so manifestly accurate and persuasive that even the Prosecutor was conscious of the lack of substantive evidence underpinning his own case. This passage of questioning culminated with the offer to Uhuru KENYATTA to fill the evidential gaps when he was asked "*But maybe this is a chance for you to explain to us now it is a different person who did that because the fact is that the Mungiki were involved in the attacks.*"²⁷⁹ The Prosecutor did not have the evidence to put to Mr KENYATTA to support his assertion. He ended with a rhetorical question: "*is it a different person than you who organised this?*"²⁸⁰

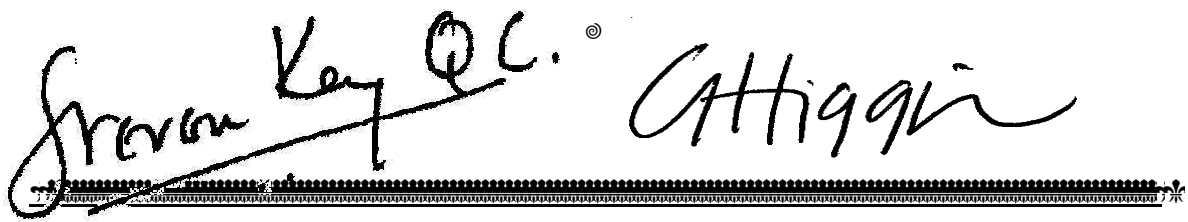
114. Contradictions abound within the Prosecution's case to such an extent that they demonstrate a complete lack of coherence and confused reasoning resulting in a failure to establish a foundation for a criminal trial. The suppression by government forces of the conflicts in Nakuru and Naivasha; exhortations to use the courts to resolve the election dispute; pleas not to resort to violence and revenge; charitable support for victims of the conflict; the nebulous state of the Mungiki and its relationships with others, all confound the Prosecution's case theory. The weight of the actual evidence presented by the Defence left those observing the proceedings at the ICC with a clear concern over the nature and quality of this prosecution.

²⁷⁷ ICC-01/09-02/11-T-11-CONF-ENG, at p.67 lines 9-12.

²⁷⁸ *Ibid.*, at p.67 line 14.

²⁷⁹ *Ibid.*, at p.67 lines 15-18.

²⁸⁰ *Ibid.*, at p.67 line 18.

The image shows two handwritten signatures in black ink. The first signature, on the left, is 'Steven Kay QC.' followed by a registered trademark symbol (®). The second signature, on the right, is 'G Higgins'. Below the signatures is a horizontal line with a decorative, repeating pattern.

Steven Kay QC and Gillian Higgins

On behalf of Uhuru Kenyatta

Dated this Thursday, 17 November 2011

At London, England