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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 with Annexes

**Public Redacted Version of General Mohammed Hussein Ali's Final Submissions
on the Confirmation of Charges Hearing**

Source: Defence for General Mohammed Hussein Ali

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I. INTRODUCTION

1. The post-election violence that engulfed Kenya in January 2008 was “unprecedented...in [scale] and [extent] of destruction.”¹ Confronting this challenge, the Kenya Police, under General Ali’s guidance, marshalled an undermanned, overworked police force, to pull the country back from the brink of destruction and restore peace and normalcy. General Ali worked tirelessly to prepare for and respond to the violence by transmitting vital intelligence to his officers and directing police action not only in Nakuru and Naivasha, but across the entire nation of Kenya.
2. As proven by the evidence discussed below, because valiant police efforts were imperfect in preventing all violence, OTP attempts, *post hoc*, to criminalise those heroic efforts with charges against General Ali. OTP’s claim is not only unsupported by either evidence or law, but is also constitutes an unfounded and tragic attempt to levy charges against a man whose efforts saved thousands of Kenyan lives.
3. Sections II and III below explain why, as a matter of procedure and evidence, charges against General Ali should not be confirmed. Sections IV and V highlight evidence of police actions on behalf of Kenyan citizens that cannot be reconciled with OTP’s belaboured efforts to criminalise the efforts of the Kenya Police to prevent and suppress violence. Sections VI, VII and VIII demonstrate conclusively OTP’s alleged “facts” are completely at odds with the evidentiary record. Sections IX, X and XI explain how the rules and jurisprudence of this Court preclude confirmation of the charges. Section XII summarises the legal and factual reasons why both justice and the jurisprudence of this Court require that charges against General Ali be dismissed, and why any other result would constitute a gross miscarriage of justice.

¹ EVD-PT-OTP-00338 at 1972.

II. PROCEDURAL BACKGROUND

4. The Confirmation of Charges Hearing (“Hearing”) was conducted between 21 September and 5 October 2011. On the final day, the Presiding Judge gave the Defence until 21 November 2011 to file final written observations.²
5. Pursuant to the directions of the Pre-Trial Chamber (“Chamber”),³ the Defence for General Ali files the enclosed written observations and incorporates by reference its List of Evidence, In-Depth Analysis Chart, Challenge to Jurisdiction and Admissibility and oral presentations from the Hearing.

III. STANDARD OF PROOF AND EVALUATION OF EVIDENCE

6. In its submission, OTP argues unconvincingly that the confirmation process should be a rubber stamp for its allegations. OTP urges that its evidence should be accepted without scrutiny, that Defence evidence should not be fully considered, and that anonymous witness statements and summaries are sufficient to confirm charges even where they are clearly contradictory, inconsistent and factually incorrect. OTP is manifestly wrong.

A. The “Substantial Grounds” and Sufficient Evidence” Standards

7. The Rome Statute requires OTP to “support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged.”⁴ As the *Lubanga* Chamber explained, this standard requires OTP to “offer concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations,” and empowers the Chamber to carry out “an exacting scrutiny of all the evidence,”⁵ including the Defence’s evidence.⁶

² ICC-01/09-02/11-T-15-CONF-ENG, p. 88:17-19.

³ ICC-01/09-02/11-T-6-ENG, p. 87:20 to p. 88:4.

⁴ Rome Statute, Article 61(5).

⁵ Pre-Trial Chamber I, *Prosecutor v. Lubanga*, Decision on the confirmation of charges, ICC-01/04-01/06-803, para. 39, [“LUBANGA CONFIRMATION”] [emphasis added]; followed by Pre-Trial Chamber II, *Prosecutor v. Katanga and Ngudjolo*, Decision on the confirmation of charges ICC-01/04-01/07-717, paras. 65-66 [“KATANGA CONFIRMATION”]; Pre-Trial Chamber III, *Prosecutor v. Bemba*, Decision pursuant to article

8. The “substantial grounds” requirement “protect[s] the rights of the Defence against wrongful and unfounded charges”⁷ and confines charges only to persons “against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought.”⁸ This is a rigorous standard, requiring a higher level of proof than the “reasonable grounds” standard required at the summons stage.⁹ Whereas a summons is issued on the basis of “reasonable grounds to believe”¹⁰ that a crime has been committed, a heightened level of proof is required to confirm charges.¹¹ If the evidence is “insufficient,”¹² the Chamber must decline to confirm the charges.
9. In defining “substantial grounds to believe,” the *Lubanga* Chamber looked to the jurisprudence of the European Court of Human Rights, which defined the standard to mean that “substantial grounds have been shown for believing,”¹³ and emphasized that “the Court will assess the issue in the light of all the material placed before it.”¹⁴
10. Although the Hearing is not a trial, the Chamber’s ability to “assess the evidence as a whole” is not limited to OTP’s submissions. OTP’s assertions that its evidence should be accepted as dispositive and that the Chamber cannot attempt to resolve contradictions between OTP’s and Defence’s evidence¹⁵ are legally incorrect. To determine whether “substantial grounds” to confirm charges exist,

61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, para. 29 [“BEMBA CONFIRMATION”]; Pre-Trial Chamber I, *Prosecutor v. Abu Garda*, Public Redacted Version Decision on the Confirmation of Charges against Bahr Idriss Abu Garda, ICC-02/05-02/09-243, para. 36 [“ABU GARDA CONFIRMATION”]; Pre-Trial Chamber I, *Prosecutor v. Banda and Jerbo*, Corrigendum of the “Decision on the confirmation of the charges”, ICC-02/05-03/09-121-Corr-Red, paras. 29-30. [“BANDA AND JERBO CONFIRMATION”].

⁶ Rome Statute, Article 61(6)(b)-(c).

⁷ *Abu Garda Confirmation*, para. 39 (quoting *Katanga Confirmation*, para. 63; Pre-Trial Chamber I, *Prosecutor v. Katanga and Chui*, Decision on Evidentiary Scope of the Confirmation Hearing, ICC-01/04-01/07-428-Corr, para. 5 [“KATANGA EVIDENTIARY DECISION”]; *Lubanga Confirmation*, para. 37.

⁸ *Ibid.*

⁹ Rome Statute, Article 61(7).

¹⁰ *Ibid.*, Article 58(1)(a).

¹¹ *Ibid.*, Article 61(5).

¹² *Ibid.*, Article 61(7)(a)-(c).

¹³ European Court of Human Rights, *Soering v United Kingdom*, Judgment of 7 July 1989, Application No. 14038/88.

¹⁴ European Court of Human Rights, Grand Chamber, *Mamatkulov and Askarov v Turkey*, Judgment of 4 February 2005, Applications Nos. 46827/99 and 46951/99 at para 69.

¹⁵ Filing of OTP, *Prosecution’s Written Submissions Following the Hearing on the Confirmation of Charges*, ICC-01/09-02/11-361, para. 5 [“OTP OBSERVATIONS”].

the Chamber *must* examine the relevance, probative value and weight of both OTP and Defence evidence.¹⁶

B. Rule 98 bis

11. OTP argues, with no legal support, that its evidence should be accepted as “dispositive, so long as it is relevant.”¹⁷ OTP cites Rules 63(2) and 64 of the ICC Rules of Procedure and Evidence, neither of which substantiate its claim.¹⁸ Contrary to OTP’s argument, a confirmation of charges hearing does not “accord with the procedures of other international tribunals” for reviewing Rule 98 *bis* motions for acquittal, nor is a Rule 98 *bis* analysis applicable here.¹⁹
12. The Rule 98 *bis* process has nothing in common with the ICC’s Article 61 procedure. The Rule 98 *bis* analysis tests only the sufficiency of the Prosecution’s evidence for a conviction before any evidentiary confrontation by the Defence.²⁰ By contrast, the ICC confirmation of charges permits the Defence to challenge OTP’s case and present its own evidence. While the Rule 98 *bis* standard is whether there is “no evidence” to support a conviction, the key question here is whether, after weighing evidence from both sides, the “sufficient evidence” standard is satisfied.
13. OTP is also wrong in equating the ICC confirmation of charges process to international extraditions proceedings.²¹ International extradition proceedings also bear no similarity to the Article 61 process because they are treaty-based and

¹⁶ Article 69(4) (noting that Rule 63(1) of the Rules of Procedure and Evidence empowers all Chambers before the Court to apply Article 69).

¹⁷ OTP Observations, para. 5; ICC-01/09-02/11-T-5-Red-ENG, p. 8:20-23 (arguing that an assessment of the credibility of the evidence “is simply not what happens at a confirmation hearing”).

¹⁸ *Ibid*, para. 5. Rule 63 allows the Chamber to assess freely all evidence submitted in order to determine its relevance or admissibility. Rule 64 relates to the timing and procedures of raising admissibility issues.

¹⁹ *Ibid*, para. 6; Rule 98 *bis* provides that “(a)t the close of the Prosecutor’s case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgement of acquittal...if there is no evidence capable of supporting a conviction. ” Rules of Procedure and Evidence, International Criminal Tribunal for the Former Yugoslavia, Rule 98 *bis*.

²⁰ See for example *Prosecutor v. Muvunyi*, ICTR-2000-55A-T, Decision on Tharcisse Muvunyi’s Motion for Judgement of Acquittal Pursuant to Rule 98 *bis*, 13 October 2005, paras. 35-36 (“the Chamber is of the opinion that sufficiency of the Prosecution evidence is the key to determining whether a Rule 98 *bis* motion should be granted”).

²¹ OTP Observations, para. 7.

rarely involve questions of the sufficiency of the evidence. This example bears no similarity to the ICC confirmation process, and should be rejected.

C. OTP's Failure to Discharge the "Substantial Grounds" Burden of Proof

14. OTP's evidence is of far lower probative value than the evidence proffered by the Defence. OTP's ability to discharge its burden of "substantial grounds to believe" has been seriously diminished by its pervasive use of anonymous witnesses and uncorroborated statements. By contrast, the Defence witnesses are named, have provided full statements with nothing to hide and have no underlying political or ethnic agenda which veils of anonymity may otherwise conceal. It is respectfully submitted that OTP's burden of "substantial grounds to believe" remains unsatisfied.

IV. THE CONCRETE AND EXTENSIVE STEPS TAKEN BY GENERAL ALI AND THE KENYA POLICE TO PREVENT AND SUPPRESS VIOLENCE

15. The overwhelming evidence before this Chamber confirms that General Ali and the Kenya Police worked diligently to prevent post-election violence ("PEV") not only in Nakuru and Naivasha, but across all of Kenya. OTP ignores actions by these dedicated Kenya Police officers who risked their lives in the effort to combat widespread violence.²²

16. OTP's allegations, in large part, focus on crimes by Mungiki. Yet it would be difficult to imagine a more robust record than the one before this Chamber attesting to the consistent and the long-standing opposition of General Ali and the Kenya Police to the Mungiki and other criminal gangs.

17. Throughout 2007, the Kenya Police worked tirelessly to suppress Mungiki criminal activity.²³ For example, in June 2007, 6 months before the 2007 elections, the Kenya Police arrested 2,464 suspected Mungiki members involved in violent

²² EVD-PT-D14-00024 at 0286.

²³ EVD-PT-OTP-00013 *et passim*.

attacks.²⁴ Several months later, on 14 November 2007, General Ali ordered the arrests of two Mungiki affiliates and a crackdown on the sect's members.²⁵

18. Before the 2007 presidential election, General Ali took positive steps to prepare for what many expected to be a hotly contested election. On 14 November 2007, General Ali stressed the dangers of media hate speech "[to] avoid abusive language during campaigns," so as not to incite violence.²⁶
19. To ensure that all 55,000 Kenyan polling stations were manned on Election Day, in December 2007 General Ali, pursuant to Section 48 of the Police Act, requested 4,000 prison officers from the Kenya Prisons, National Youth Service and Kenya Wildlife Service to assist the Kenya Police in manning the polling stations on that day only.²⁷ Their collective vigilant efforts resulted in a polling day that was largely peaceful and without serious incidents.²⁸
20. Also in December 2007, General Ali and the Kenya Police produced a video titled "Behind the Scenes," which described a recent increase in Mungiki violence. The video, which included interviews of Mungiki violence victims and their families,²⁹ ran daily on Kenyan broadcast television up to 30 December 2007, only four days before OTP alleges that General Ali was "instructed" to facilitate Mungiki violence.³⁰
21. Between Election Day and the eruption of violence, General Ali enhanced security and police patrols throughout the country.³¹ In Nakuru, police "separated the warring groups and created a buffer zone between Luos and Kikuyus."³² That same day, police and military units were deployed to clear blocked highways and streets in the northern Rift Valley. Police were also deployed to guard camps of

²⁴ EVD-PT-OTP-0177 at 0309; EVD-PT-OTP-00275 at 0119.

²⁵ EVD-PT-OTP-00115 at 0591.

²⁶ ICC-01/09-02/11-T-9-CONF-ENG, p.44:17-22.

²⁷ EVD-PT-OTP-00334 at 1827-28.

²⁸ EVD-PT-OTP-00054 at 9355-56.

²⁹ ICC-01/09-02/11-T-13-ENG, p. 39:5 to p.46:25.

³⁰ ICC-01/09-02/11-T-13-ENG, p. 28:25 to p. 29:8.

³¹ EVD-PT-OTP-00004 at 0416-17.

³² *Ibid* at 0475.

internally displaced persons (IDPs) and escort public service vehicles and fuel tankers from Eldoret to the Kenya/Uganda border.³³

22. Contemporaneous documentary evidence confirms the diligent work by General Ali and the Kenya Police to prepare for and prevent criminality irrespective of the ethnic communities involved.³⁴ As demonstrated during the Hearing and below, there are numerous examples of this action:

- a. On 4 January 2008, General Ali received NSIS intelligence of a planned Mungiki attack on Luos/Kalenjins travelling along the Nairobi-Naivasha highway.³⁵ He immediately relayed this to his officers, directing a “crack down of the sect members” and ordering “PPO Rift Valley to intensify patrols along Naivasha-Nairobi highway to avert the intended attacks.”³⁶ OTP makes no attempt to address these events, because they occurred one day after OTP’s illusory “first phone call,” and destroy totally OTP’s theory of a “free zone” for Mungiki violence.
- b. Three days later, on 7 January 2008, General Ali received a report that Kalenjin youth were receiving combat training and planned to evict Kikuyus from Nakuru.³⁷ *On the very same day*, General Ali passed this intelligence to his officers, and ordered the Rift Valley PPO and others to arrest “any person found...engaging in acts of lawlessness.”³⁸
- c. On 10 January 2008, General Ali received an NSIS report of an upcoming Mungiki meeting at Stem Hotel in Nakuru and Mungiki plans to attack ODM supporters in Nakuru that day. General Ali *immediately* ordered officers “to storm the Stem Hotel in Nakuru with a view of making as many arrests as possible” and demanded that “security...be beefed up to contain the situation

³³ *Ibid* at 0416-17.

³⁴ EVD-PT-D14-00024 at 0286; *for examples see* EVD-PT-OTP-00103 at 0415; EVD-PT-OTP-00108 at 0470. General Ali, being part of a very small minority in Kenya himself (Somali), consistently deployed and encouraged the Kenya Police to work diligently to prevent and suppress criminal violence without regard to ethnicity or political affiliation.

³⁵ EVD-PT-OTP-00013 at 0070.

³⁶ EVD-PT-OTP-00104 at 0429.

³⁷ EVD-PT-OTP-00013 at 0068.

³⁸ EVD-PT-OTP-00103 at 0411-12.

and avert any possible fresh attacks.”³⁹ Nowhere in its submissions does OTP respond to testimony provided by Witness D14-01 attesting to this fact.

- d. On 14 January 2008, General Ali received a report that “Mungiki plan to attack members of the Luo community in Nairobi and Nakuru on the eve of January 16, 2008.”⁴⁰ General Ali *immediately* relayed the intelligence to his officers,⁴¹ ordered PPOs “to ensure security surveillance and patrols are maintained,” and ordered the arrest of named persons who “incit[ed] members of [the] public to violence.”⁴²
- e. On 28 January 2008, in response to an NSIS report that “Kalenjin youth are allegedly regrouping at Menengai Crater in Nakuru district with a view of attacking the Kikuyu,”⁴³ General Ali *immediately* ordered an “ambush” on Menengai Crater “with a view of making as many arrests as possible.”⁴⁴

23. OTP’s acknowledgment of these well-documented efforts is breathtakingly selective.⁴⁵ OTP assiduously avoids any mention of General Ali’s demonstrable efforts to combat the Mungiki, because these efforts decisively undermine OTP’s theory of “inaction” designed to create a “free zone” for violence. OTP’s evidence fails to support any “free zone” because, quite simply, no such “free zone” ever existed.

A. OTP’s Groundless Accusations of Ineffectiveness

24. OTP admits, as it must, that not only did General Ali “receive the NSIS reports in advance,” but that he specifically “passed on the intelligence received through Situation Reports to the field.”⁴⁶ Yet despite this, and despite the uncontroverted documentary record of General Ali acting on vital intelligence to end the random violence, OTP’s dismisses these actions as criminally insufficient.⁴⁷ The Defence

³⁹ EVD-PT-OTP-00105 at 0438.

⁴⁰ EVD-PT-OTP-00013 at 0059.

⁴¹ EVD-PT-OTP-00106 at 0442 and 0444.

⁴² EVD-PT-OTP-00106 at 0445.

⁴³ EVD-PT-OTP-00013 at 0042.

⁴⁴ EVD-PT-OTP-00112 at 0498.

⁴⁵ ICC-01/09-02/11-T-5-CONF-ENG, p. 41:1-4 and ICC-01/09-02/11-T-6-ENG, p.42:3-22 (all 3 NSIS reports referenced had corresponding Situation Reports sent from General Ali to his PPOs).

⁴⁶ OTP Observations, para. 89.

⁴⁷ *Ibid*, para. 89.

emphasizes that the burden of proof is on OTP to bring a substantiated case and not the inverse.

25. OTP attempts to support its claim with Witness D12-25, who stated he did not receive formal intelligence on the impending attacks.⁴⁸ Notably, Witness D12-25 (the District Commissioner) is not a member of the Kenya Police and therefore not under the authority and command of the Police Commissioner. Witness D12-25 was privy only to DSIC intelligence.⁴⁹ It is apparent that OTP does not comprehend the important difference between the Kenya Police and the District Administration, nor does OTP comprehend police reporting procedures. The Chamber need only examine the testimony of Witness D14-01 to appreciate how actionable intelligence was relayed to field officers for appropriate police action.⁵⁰
26. OTP also urges the Chamber to believe that none of the thirty-three Defence police witnesses received “intelligence of any kind on impending attacks against Nakuru and Naivasha.”⁵¹ Most of these witnesses, as junior police officers, received intelligence via orders from senior officers, not from NSIS reports. This hardly equates to “not [receiving] intelligence of any kind.”⁵² All thirty-three witnesses confirmed that they were given orders to patrol, arrest those engaged in lawlessness, unblock roads and save lives.⁵³
27. OTP’s arguments on General Ali’s degree of “inaction,” like its ever evolving attempts to define an “organization,” have shifted dramatically. In the DCC, OTP claimed that General Ali failed to act on security intelligence.⁵⁴ Since then, documentary evidence and *viva voce* testimony have forced OTP to shift its position and now challenge the “effectiveness” of General Ali’s well-documented

⁴⁸ *Ibid*, paras. 89-90.

⁴⁹ ICC-01/09-02/11-T-8-Red-ENG, p. 46:1-23.

⁵⁰ *See generally* ICC-01/09-02/11-T-14-CONF-ENG, p. 84:25 to p. 85:4.

⁵¹ OTP Observations, para. 89. OTP provides no citation for such a proposition.

⁵² *Ibid*.

⁵³ *For examples see* EVD-PT-D14-00040 at 0031; EVD-PT-D14-00044 at 0045-46; EVD-PT-D14-00054 at 0012; EVD-PT-D14-00055 at 0015-16.

⁵⁴ Filing of OTP, *Amended Document Containing the Charges*, ICC-01/09-02/11-280-AnxA, para. 26 [“DCC”] (“MUTHAURA and ALI made the following additional contributions: (1) securing the non-intervention of the Kenya Police”); *see also* para. 31 (claiming that the attacks were “abetted by the failure of the Kenya Police to intervene”) and para. 35 (claiming that Ali “orchestrated a police failure”).

orders to heighten security and maintain order.⁵⁵ OTP consistently downplays evidence that many Kenya Police officers regularly received actionable intelligence from General Ali. The 10 January 2008 police raid on the Stem Hotel in Nakuru is but one of many example of police action that would have been impossible, had General Ali not conveyed vital intelligence to his officers the same day he received it.⁵⁶

28. Equally illogical and equally unjust are OTP's strenuous arguments that NSIS and NSAC reports equate to General Ali's "knowledge" that crimes would occur.⁵⁷ This position ignores the numerous reported predictions that never materialized.
29. One example, a 4 January 2008 NSIS report received by General Ali's office, predicted an assassination attempt by Mungiki against Raila Odinga and William Ruto⁵⁸ that never took place. That same report stated that ODM supporters planned attacks on Kibera and Nairobi churches;⁵⁹ again, attacks that never occurred. On 9 and 14 January 2008 NSIS pinpointed the date of Mungiki attacks that actually occurred weeks later.⁶⁰ In its zeal to criminalise police failures to prevent all violence, OTP's efforts to equate imperfect, incorrect, albeit well-intended intelligence with the clairvoyance of hindsight, are astounding.
30. Never once acknowledging Kenya's severely limited police resources or that Kenya was experiencing widespread security challenges across the country, OTP seeks to criminalise General Ali for failing to order sufficient security in Nakuru and Naivasha.⁶¹ Contrary to these allegations, well-documented police orders to beef up security *were* implemented and patrols *were* intensified in affected areas.

⁵⁵ OTP Observations, para. 89.

⁵⁶ EVD-PT-OTP-00105 at 0438.

⁵⁷ OTP Observations, para. 89.

⁵⁸ EVD-PT-OTP-00013 at 0071.

⁵⁹ *Ibid* at 0070.

⁶⁰ *Ibid* at 0065 and 0059-61.

⁶¹ OTP Observations, para. 95.

B. Police Resources and Deployment

31. OTP wrongly argues that General Ali orchestrated a police failure by keeping the Naivasha police station “inadequately manned by only 30 policemen,”⁶² and that if General Ali had acted “responsibly,” he would have “ordered pre-emptory measures” to provide a “sufficient police force” in Naivasha.⁶³
32. OTP’s argument misrepresents the realities of police deployment in Naivasha. The Police Station located in the *town* of Naivasha is only one of four police stations in the larger *district* of Naivasha,⁶⁴ which is comprised of 4 police stations, 8 patrol bases, 3 police posts and 2 traffic sections.⁶⁵ Contrary to OTP’s claims, 272 police officers - not 30 - were deployed in Naivasha District during the PEV in January of 2008.⁶⁶ At the same time, 607 police officers were deployed in Nakuru District.⁶⁷
33. When the violence erupted, the Kenya Police called in reinforcements, worked extra shifts and sheltered tens of thousands of IDPs, providing food from their homes while working very long hours with only brief naps to keep them going.⁶⁸
34. OTP likewise misrepresents statements made by General Ali,⁶⁹ whose CIPEV Statement about Section 48 of the Police Act was not about resource allocation, but rather about appointing special police officers for the purpose of polling day only.
35. OTP either does not understand or ignores the fact that the Police Commissioner does not decide how the nation allocates resources to the Kenya Police. In fact,

⁶² *Ibid*, para. 95.

⁶³ *Ibid*, para. 95.

⁶⁴ EVD-PT-D14-00046 at 0055. In addition to Naivasha police station, the Gilgil, Kongoni and Mai Mahiu police stations- all within the Naivasha Police District- were manned with police officers.

⁶⁵ EVD-PT-D14-00068; *see also* EVD-PT-D14-00046 at 0055 (noting that the Nakuru nominal roll accidentally labels Mai Mahiu as a patrol base instead of a police station).

⁶⁶ EVD-PT-D14-00068 at 0028 (Naivasha *town* had an established police force of 102 officers at Police Headquarters (11), Naivasha Police Station (73), Suswa Police Post (10), Longonot Police Post (5) and Kayole Patrol Base (3), EVD-PT-D14-00068 at 0028-31).

⁶⁷ EVD-PT-D14-00028 (Nakuru *town* had an established police force of 323 officers at 999 Section (44), Nakuru Police Station (184), Mwariki Police Post (14), Lanet Police Post (13), Kaptembwo Police Post (8), Teachers Police Post (10) and Nakuru Traffic Section (50), EVD-PT-D14-00028 at 0301-08).

⁶⁸ EVD-PT-OTP-00332 at 1741.

⁶⁹ DCC, para. 96.

General Ali's Strategic Plan stressed resource needs,⁷⁰ but these pleas were not honoured. Like all government agencies, the Police operate within the budgetary allocations set by the Government's legislative branch.

36. That the Police intervened and responded to unprecedented levels of violence is undisputed. Furthermore, all sides of the conflict were hostile to the Police⁷¹ and many officers were injured or killed.⁷² Though overwhelmed, the Kenya Police, through General Ali, did its best with limited resources and ultimately prevented a possible civil war.⁷³

C. The Term "Mungiki"

37. OTP frequently employs the term "Mungiki" to refer to a group that it argues was given free rein to operate in Naivasha and Nakuru. Once the term "Mungiki" is understood to apply without precision to random criminal activity, and not to actual "organized" Mungiki, OTP's desultory efforts to attribute any PEV crime to the police force and General Ali become transparent.

38. No accurate way exists to identify Mungiki or isolate Mungiki members. OTP's own evidence confirms that the term Mungiki is often used to refer to any Kikuyu youth engaged in crime and not an organization. The "Ballots to Bullets" report, for example, refers to "any group of marauding Kikuyu youth as 'Mungiki.'"⁷⁴

39. One Defence witness described "Mungiki" as a generic term that defies precise definition and stated that violent youths were just pockets of local youths.⁷⁵ Other witnesses have affirmed that while the general population ascribes certain types of criminal activity to Mungiki, subsequent police investigations often reveal that not all such crimes are committed by Mungiki.⁷⁶ Extortionists and kidnappers

⁷⁰ EVD-PT-D14-00015 at 0132-33.

⁷¹ EVD-PT-D14-00066 at 0053; EVD-PT-D14-00065 at 0048; EVD-PT-D14-00062 at 0036; EVD-PT-D14-00060 at 0032; EVD-PT-D14-00057 at 0023; EVD-PT-D14-00055 at 0015-16; EVD-PT-D14-00052 at 0007.

⁷² EVD-PT-D14-00024 at 0286; EVD-PT-OTP-00004 at 0758.

⁷³ ICC-01/09-02/11-T-14-CONF-ENG, p. 94:2-7.

⁷⁴ EVD-PT-OTP-00002 at 0294.

⁷⁵ EVD-PT-D14-00036 at 0017.

⁷⁶ EVD-PT-D14-00041 at 0034; ICC-01/09-02/11-T-13-ENG, p. 160:1-11.

often feign membership in Mungiki to instil fear in their victims.⁷⁷ This pattern replicated itself during the PEV regardless of the actual criminal element involved. Rumours of Mungikis' supposed arrival served to spread fear.⁷⁸

40. On other occasions, murderers would be labelled as Mungiki. “For some, the name was used to make them appear tough, and for others to show that one is vile.”⁷⁹ The term has been transformed into an all-encompassing, generic ethnic tag. Complicating matters further, it was virtually impossible for police officers to identify Mungiki.⁸⁰
41. The evidence conclusively demonstrates that the term “Mungiki” is used loosely. Quite often, the general population labels any crime committed by Kikuyu youth as Mungiki. One fact, however, is indisputable the Kenya Police took all rumours seriously and investigated all alleged criminal activity, including crimes attributed to Mungiki in Nakuru and Naivasha.

D. Police Action in Gilgil

42. OTP's theory of a “free zone” in Naivasha and Nakuru is completely discredited by the events in Gilgil. Gilgil is not included in OTP's charges, perhaps because the circumstances there prove the consistency and effectiveness of police action. Being the halfway point between the two towns, logic dictates that any orders to facilitate the free flow of Mungiki attackers on the highway would apply to Gilgil as well.
43. Only one day after the Naivasha attack, local Kikuyu youth in Gilgil attempted a similar attack on non-Kikuyus.⁸¹ They burned tyres, pulled non-Kikuyus from their vehicles and attempted to block the highway.⁸² Responding swiftly, the

⁷⁷ EVD-PT-D14-00036 at 0018.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ EVD-PT-00036 at 0018; EVD-PT-D14-00037 at 0022; EVD-PT-D14-00047 at 0063; EVD-PT-D14-00059 at 0029.

⁸¹ EVD-PT-D14-00049 at 0068-69; EVD-PT-D14-00043 at 0039-43; EVD-PT-D14-00035 at 0013-15; EVD-PT-D14-00058 at 0025-27.

⁸² EVD-PT-D14-00049 at 0068; EVD-PT-D14-00058 at 0026.

Kenya Police made a number of arrests and prevented the attackers from engaging in further crimes. Those arrested were charged in Naivasha Court.⁸³

44. Gilgil Police Station falls under the same command as Naivasha.⁸⁴ Prompt police action in Gilgil was consistent with police action throughout the entire area. As in Naivasha and Nakuru, reinforcements were deployed from the ASTU and the Army to assist the police⁸⁵ and the Police sheltered IDPs streaming into the Police Station.⁸⁶

45. Like their counterparts in Naivasha and Nakuru, Gilgil police officers stated that they never received orders to allow crimes by Mungiki or anyone else. As one officer put it, “[p]olice did not take sides during this time,” and that “there were no orders to deal leniently with the Mungiki.”⁸⁷

46. The swift police action in Gilgil completely undermines OTP’s strenuous efforts to explain Mungiki violence by concocting what in truth is a fictional “free zone.” There is little wonder why OTP arduously avoids any mention of these telltale facts, which conclusively demonstrate active and vigorous police intervention and irrefutably destroy OTP’s fictional “free zone.”

E. Investigations into the PEV

47. OTP’s unjust criticism of the Kenya Police and General Ali for inadequately investigating PEV crimes ignores the fact that in the midst of PEV in both Nakuru and Naivasha, the Kenya Police under General Ali investigated and arrested “those engaged in lawlessness” without regard to ethnic or political affiliation. OTP also ignores that, during the PEV, General Ali publicly announced that twenty-four alleged perpetrators were being taken to court for the ongoing

⁸³ EVD-PT-D14-00058 at 0026.

⁸⁴ EVD-PT-D14-00068 at 0036.

⁸⁵ EVD-PT-D14-00049 at 0068.

⁸⁶ EVD-PT-D14-00035 at 0014.

⁸⁷ EVD-PT-D14-00058 at 0026.

killings.⁸⁸ On the 27 January 2008, at the height of violence in Naivasha, the Kenya Police arrested 157 people for preparing to commit felonies.⁸⁹

48. Witness D14-01 testified in detail as to the nature of ongoing investigations, the reasons offenders were charged with specific offences, how courts processed and charged offenders, and why the accused were released on bail.⁹⁰ The Human Rights Watch report submitted by OTP reported that HRW examined court records and confirmed arrests and charges of at least 156 people before Naivasha Law Courts.⁹¹ Knowing of these public records, OTP *deliberately ignored* to ascertain the circumstances under which some of the suspects were released on bail by the Court, often over the objections of local law enforcement.⁹²

49. OTP persists in urging this Chamber to blame the Police for court decisions to release certain offenders on bail. Equally disturbing, OTP's submissions never acknowledged that 22 people pleaded guilty in Naivasha on 27 January 2008. OTP's claim that "none" of those arrested were seriously prosecuted and punished⁹³ is completely wrong as the Defence adduced concrete evidence that those arrested were prosecuted.⁹⁴

50. As Witness D14-01 explained, the selection of charges was based on available evidence⁹⁵ and any decision to revoke the Constitutional right to bail is made by the judiciary, not the police.⁹⁶ In fact, after the arrests in Naivasha, the Naivasha

⁸⁸ EVD-PT-OTP-00680 at 0054.

⁸⁹ EVD-PT-D14-00080; ICC-01/09-02/11-T-14-CONF-ENG, p. 27:5-11.

⁹⁰ ICC-01/09-02/11-T-14-CONF-ENG, p. 88:15-25.

⁹¹ EVD-PT-OTP-00002 at 0312.

⁹² Compare EVD-PT-D14-00080 at 0146-52 with EVD-PT-OTP-00065. The case docket consists of 36 pages (not the 6 OTP has) detailing the progress and issues of the case.

⁹³ OTP Observations, para. 97.

⁹⁴ ICC-01/09-02/11-T-14-CONF-ENG, p. 27:5-9; *see also* EVD-PT-D14-00080. As Witness D14-01 testified, the threshold of evidence for the felonies exceeded police capabilities in the midst of the PEV. In fact, charging perpetrators with a lesser offence was intended so as to hold more perpetrators responsible. ICC-01/09-02/11-T-14-Red-ENG, p. 30:20 to p. 31:8.

⁹⁵ ICC-01/09-02/11-T-14-CONF-ENG, p. 27:13 to p. 28:14.

⁹⁶ EVD-PT-D14-00002 at 0045-46, paras. 33 & 37, at 065-66, para. 122(2) *read with* EVD-PT-OTP-00198 at 0598-90, paras. 72(1)(e) and 72(4).

OCPD asked the Prosecutor to challenge bail based on the current situation, *but the Magistrate denied the application.*⁹⁷

51. Two months into the PEV, over 6,000 cases had been or were being investigated.⁹⁸

Given the magnitude of the ongoing violence across Kenya, investigators confronted many daunting obstacles, including unavailability of witnesses and victims' fear of reporting crimes.⁹⁹ In many instances, by the time police arrived at the crime scene, all usable evidence had often been destroyed. One house fire in Naivasha resulted in the tragic deaths of 19 people.¹⁰⁰ While the police did, in fact, carry out investigations, no one witness ever came forward to testify about this heinous crime, and the fire destroyed all key physical evidence before the police could retrieve it.¹⁰¹

52. Even as he fought to curtail violence, General Ali also investigated allegations of police misconduct. When U.S. Ambassador Ranneberger presented General Ali with serious allegations of police officers using deadly force against political protesters, General Ali responded immediately. His 28 January 2008 letter denied any such orders, stressed the importance of "immediate investigation[s]" and requested all "information, and evidence if possible, to enable me to take immediate disciplinary and/or legal steps."¹⁰² General Ali received no response, despite having sent two follow-up letters in May 2008.¹⁰³ This conduct is hardly consistent with someone attempting to shield his subordinates from scrutiny.

F. Investigations into Rape and Gender-Based Crimes

53. General Ali's vigilant investigation of gender-based crimes and rapes is a matter of record. General Ali appointed a special Task Force during the PEV to

⁹⁷ EVD-PT-D14-00080 at 0162.

⁹⁸ ICC-01/09-02/11-T-14-CONF-ENG, p. 28:24 to p. 29:2.

⁹⁹ ICC-01/09-02/11-T-14-CONF-ENG, p. 29:4-25; EVD-PT-D14-00052 at 0006.

¹⁰⁰ EVD-PT-D14-00046 at 0057; EVD-PT-D14-00050 at 0073.

¹⁰¹ EVD-PT-D14-00050 at 0078.

¹⁰² EVD-PT-D14-00012 at 0106.

¹⁰³ EVD-PT-D14-00013 at 0107-08; EVD-PT-D14-00014 at 0109-10.

investigate issues of rape and other gender-based crimes,¹⁰⁴ and this Task Force investigated 379 cases of sexual abuse and gender-based violence.¹⁰⁵

54. OTP concedes that this task force was established,¹⁰⁶ but persists in arguing that the efforts of the entire Kenya Police are suspect because one witness stated that the gender desk at the Naivasha police station was not manned during the PEV.¹⁰⁷ With its limited view of the testimony, OTP clearly grossly misconstrues Witness D14-02's statements. In the same testimony, Witness D14-02 stressed that the gender desk was not manned "*on that day*" but *was* manned throughout the PEV period.¹⁰⁸ The Defence does not deny that reporting may have been difficult on 27 January 2008, as the witness put it, *because the Police were out saving lives*.¹⁰⁹ This same witness stated that the situation improved and victims were later able to report crimes to the police.¹¹⁰

55. Allegations that General Ali and the Kenya Police failed to proactively investigate gender-based crimes and rapes are likewise unfounded. On 28 and 29 January 2008, women reported to the Naivasha Police that they were being harassed for wearing trousers in public. The police carried out an impromptu sting operation to arrest people harassing women, resulting in the arrest of all perpetrators.¹¹¹ At least one arrest resulted in the imposition of a significant criminal sentence.¹¹²

V. VICTIM APPLICATIONS CONFIRM POSITIVE POLICE INTERVENTION

56. Victim statements also confirm resolute Police action to save victims in Naivasha and Nakuru, and that no "free zone" existed for Mungiki. Over 100 of the 229 victims attested to direct help by the police during the PEV in Naivasha and

¹⁰⁴ ICC-01/09-02/11-T-14-CONF-ENG, p. 53:21 to p. 54:3.

¹⁰⁵ ICC-01/09-02/11-T-14-CONF-ENG, p. 93:11-17.

¹⁰⁶ OTP Observations, para. 97.

¹⁰⁷ *Ibid*, para. 97.

¹⁰⁸ ICC-01/09-02/11-T-13-ENG, p. 175:25 [emphasis added].

¹⁰⁹ ICC-01/09-02/11-T-13-ENG, p. 175:23 to p. 176:9 [emphasis added].

¹¹⁰ ICC-01/09-02/11-T-13-ENG, p. 176:6-9.

¹¹¹ EVD-PT-D14-00050 at 0075.

¹¹² EVD-PT-D14-00073 at 0094.

Nakuru;¹¹³ many attesting to being saved by Kenya Police officers responding to their distress calls.

57. Other victims provided accounts of the deployment of police reinforcements such as the Administration Police or the Kenya Army.¹¹⁴ Victims also testified to being rescued by Kenya Police and army officers, and transported safely to police stations and prison grounds by police and prison officers.¹¹⁵ Other victims reported that the police dispersed attackers by firing in the air and warned victims of impending danger.¹¹⁶ These accounts are consistent with the pattern of police conduct throughout the PEV, when the police routinely safeguarded life and property from harm.

58. By not acknowledging the effective assistance many victims received from the Kenya Police, the Victim's Representative has not accurately represented the point of view of many victims. Victims of heinous crimes have every right to relief, but confirming charges against General Ali would be contrary to the clear testimonies of his clients.¹¹⁷ It is curious that Victims' Representative arrived at a conclusion that the charges be confirmed, and yet he is not privy to all the evidence.

VI. DUBIOUS PHONE CALL "EVIDENCE"

59. OTP's charges against General Ali rest entirely on its claim that Ambassador Muthaura telephoned General Ali "to instruct him to ensure that pro-PNU youth

¹¹³ See generally statements of Victims KEN: a/8501/11; a/8531/11; a/8533/11; a/8535/11; a/8538/11; a/8590/11; a/8624/11; a/8669/11; a/8687/11; a/8794/11; a/9059/11; a/9060/11; a/9068/11; a/9076/11; a/9080/11; a/9084/11; a/9085/11; a/9086/11; a/9088/11; a/9108/11; a/9110/11; a/9111/11; a/9137/11; a/9138/11; a/9139/11; a/9140/11; a/9141/11; a/9143/11; a/9153/11; a/9186/11; a/9208/11; a/9221/11; a/9224/11; a/9229/11; a/9230/11; a/9249/11; a/9275/11; a/9276/11; a/9279/11; a/9280/11; a/9283/11; a/9285/11; a/9294/11; a/9297/11; a/9298/11; a/9334/11; a/9342/11; a/9372/11; a/9378/11; a/9388/11; a/9391/11.

¹¹⁴ Victims KEN: a/9213/11; a/9220/11; a/9249/11; a/9338/11; a/9398/11.

¹¹⁵ Victims KEN: a/8452/11; a/8506/11; a/8509/11; a/8532/11; a/8542/11; a/8547/11; a/8549/11; a/8609/11; a/8610/11; a/8613/11; a/8619/11; a/8670/11; a/8671/11; a/8672/11; a/8673/11; a/8674/11; a/8689/11; a/8691/11; a/8792/11; a/8796/11; a/9061/11; a/9064/11; a/9065/11; a/9067/11; a/9074/11; a/9075/11; a/9090/11; a/9097/11; a/9106/11; a/9136/11; a/9145/11; a/9189/11; a/9191/11; a/9213/11; a/9219/11; a/9220/11; a/9224/11; a/9227/11; a/9228/11; a/9249/11; a/9256/11; a/9277/11; a/9279/11; a/9280/11; a/9285/11; a/9287/11; a/9288/11; a/9289/11; a/9294/11; a/9295/11; a/9297/11; a/9298/11; a/9331/11; a/9335/11; a/9337/11; a/9338/11; a/9372/11; a/9382/11; a/9388/11; a/9389/11; a/9390/11; a/9392/11; a/9398/11.

¹¹⁶ Victims KEN: a/9084/11; a/9289/11; a/9331/11; a/9334/11.

¹¹⁷ Legal Representative's Final Observation, paras. 36-37.

would not be prevented from going into the Rift Valley.”¹¹⁸ This alleged phone call, which by all credible accounts is pure fiction, is the *only* link between General Ali and the common plan alleged by the OTP. Absent this call, there simply are no grounds for the charges against General Ali.

60. OTP’s evidence here fails to meet even the lowest threshold of proof. As to allegations of a “first phone call,” Witness 4 claims he overheard a phone conversation between Muthaura and General Ali on the morning of 3 January 2008, telling General Ali that “our youth will be going into the Rift Valley and we do not want them to be disturbed.”¹¹⁹ What OTP claims to be a second phone call is both *irrelevant* and *anonymous hearsay*. Witness 12, claims he was told by a third party that Muthaura instructed General Ali not to interfere with Mungiki activities in Kibera.¹²⁰ Neither phone call took place, and as explained below, any argument to the contrary does not withstand scrutiny.

A. Alleged “First Phone Call”

61. Regarding the alleged “first phone call,” Ambassador Muthaura’s Defence Team has demonstrated that the Ambassador was attending an NSAC meeting at a separate location at the time of the alleged meeting at the Nairobi Members Club.¹²¹ *Furthermore, Ambassador Muthaura’s cellular phone records confirm that no phone call was made between 08:03 and 14:07 on 3 January 2008, to General Ali or to anyone else.*¹²² Ambassador Muthaura’s security personnel¹²³ and Nairobi Members Club employees¹²⁴ verify that he never visited that location in January 2008.

¹¹⁸ EVD-PT-OTP-00248 at 0040.

¹¹⁹ *Ibid.*

¹²⁰ EVD-PT-OTP-00660 at 0295-96.

¹²¹ EVD-PT-D12-00009 at 0055; OTP never logically explains how Ambassador Muthaura could have convened a Nairobi Members Club meeting at 9:00 am, engaged in discussions claimed by Witness 0004, called General Ali, driven through Nairobi morning rush hour traffic, cleared security at Harambee House and arrived at the NSAC meeting before it started at 9:50 am. ICC-01/09-02/11-T-15-CONF-ENG, p. 14:9-21.

¹²² EVD-PT-D12-00183 at 0036-38; EVD-PT-D12-00207 at 0012-14.

¹²³ EVD-PT-D12-00068 at 0026-27; EVD-PT-D12-00069 at 0031-32.

¹²⁴ EVD-PT-D12-00184 at 0041; EVD-PT-D12-00219 at 0003.

62. OTP's witness claims to have heard only one side – Ambassador Muthaura's side – of this alleged "first phone call." Yet even that version in no way defines any agreement between Ambassador Muthaura and General Ali. Allegedly, Ambassador Muthaura said: (1) "How is your news, Ali"; (2) "Our youth will be going to the Rift Valley and we do not want them to be disturbed"; and (3) "It is okay, we will talk later".¹²⁵ Witness 4 admits to having no knowledge of General Ali's alleged response. More importantly, OTP has provided this Court no evidence of any "meeting of the minds" or agreement to do anything. No evidence exists that General Ali received this call, that he took Muthaura's words as an instruction or that he agreed to implement them. Yet OTP urges this Chamber to infer an agreement between Ambassador Muthaura and General Ali.

B. Credibility of Witness 4

63. The sole source describing this alleged call is Witness 4. By way of background, Witness 4 is a known Mungiki member who has openly expressed his utter contempt for the police. He claims to have been [REDACTED], arrested more than once [REDACTED].¹²⁶

64. OTP relies on Witness 4's statement about an alleged 3 January 2008 meeting as its principal evidence that General Ali was instructed and agreed to contribute to the alleged "common plan."¹²⁷ OTP took this statement in late September 2010, *almost three years after the PEV* and long after three other completely inconsistent statements authored by Witness 4.

65. On 16 January 2008, Witness 4 gave his first statement, this time to KNCHR, alleging that some meeting took place.¹²⁸ According to Witness 4's second

¹²⁵ EVD-PT-OTP-00248 at 0040, para. 199.

¹²⁶ *Ibid* at 0007.

¹²⁷ *Ibid* at 0038-40.

¹²⁸ *Ibid* at 0054.

statement, [REDACTED]

[REDACTED].¹²⁹ The OTP has failed to produce this statement.

66. On 27 January 2008, Witness 4 gave his second statement, purporting to “supplement” his first statement and included a letter describing two alleged meetings.¹³⁰ The first of these meetings, according to Witness 4, occurred three weeks before the elections,¹³¹ and apparently refers to an alleged 26 November 2007 meeting the Nairobi State House. During the Hearing, Defence Counsel convincingly established through fully corroborated evidence that this alleged “Mungiki planning meeting” was nothing of the sort and was instead actually a youth meeting with the Kenyan President.¹³²
67. According to Witness 4’s 27 January 2008 story, the alleged second meeting took place after the election results were announced.¹³³ However, Witness 4 gave no indication that he was present at any such meeting, and his story appears to be based solely on hearsay.¹³⁴
68. In his third statement, *given eight months later* on 2 September 2008 to a CIPEV investigator, Witness 4 related a new story about an alleged phone call made to General Ali by the President’s “personal assistant.”¹³⁵ In this version, Witness 4 stated that the personal assistant “called [General Ali] by his name...asking what is happening in the Rift- what were the police doing.”¹³⁶ As the evidence reflects, considerable violence plagued the Rift Valley in early January 2008. More importantly, however, Witness 4 contradicted his previous statement by claiming for the first time that he was actually present at the meeting and was an eyewitness.¹³⁷ OTP has carefully avoided any explanation for this profound change in Witness 4’s account.

¹²⁹ *Ibid.*

¹³⁰ EVD-PT-OTP-00084 at 0532-33.

¹³¹ *Ibid.*

¹³² ICC-01/09-02/11-T-7-ENG, p. 4:11 to p. 8:13.

¹³³ EVD-PT-OTP-00084 at 0533.

¹³⁴ *Ibid* at 0532-33.

¹³⁵ EVD-PT-OTP-00041 at 0494.

¹³⁶ *Ibid.*

¹³⁷ *Compare* EVD-PT-OTP-00041 at 0494 and EVD-PT-OTP-00084 at 0533.

69. In late September 2010, Witness 4 gave his fourth statement, this time to OTP. Containing the most detailed and inventive version to date of the alleged 3 January 2008 meeting, this story *yet again differs dramatically* from the three prior accounts.
70. Not only are Witness 4's September 2010 allegations inconsistent with his previous accounts, they also are refuted on key points by other evidence. As discussed above, the evidence places Ambassador Muthaura at an NSAC meeting from 9:50 to 12:00 on 3 January 2008, at the same time that the alleged meeting with Mungiki was taking place.¹³⁸ Additionally, Uhuru Kenyatta, an extremely well-known figure in Kenya, was completely unmentioned in Witness 4's first three accounts of the 3 January 2008 meeting. In the September 2010 revision, Witness 4 claimed that Mr. Kenyatta was both present and active in the meeting.¹³⁹ Notably, Mr. Kenyatta has testified before this court that he never attended any such meeting.¹⁴⁰
71. Witness 4's September 2010 statement also changes the identity of the person who allegedly called General Ali. Instead of alleging that the call was made by the President's personal assistant (as he did in his 2 September 2008 statement), Witness 4 maintains that the call was made by Ambassador Muthaura.¹⁴¹
72. The most glaring revision in Witness 4's new story is the complete change in the content of the alleged phone call. In his third statement, Witness 4 claimed that the President's personal assistant asked General Ali what was "happening in the Rift."¹⁴² In his September 2010 statement, however, Witness 4 now alleged that Ambassador Muthaura, not the personal assistant, instructed General Ali not to disturb our youth going into the Rift Valley.¹⁴³

¹³⁸ ICC-01/09-02/11-T-7-ENG, p. 28:11-21; EVD-PT-D12-00009 at 0055 (noting EVD-PT-D12-00001 at 0003-05 for the procedures used to signed and certify the minutes of the NSAC meetings).

¹³⁹ EVD-PT-OTP-00248 at 0040; ICC-01/09-02/11-T-10-ENG, p. 21:15 to p. 23:16.

¹⁴⁰ ICC-01/09-02/11-T-11-CONF-ENG, p. 34:4 to 35:3.

¹⁴¹ EVD-PT-OTP-00248 at 0040.

¹⁴² EVD-PT-OTP-00041 at 0494.

¹⁴³ EVD-PT-OTP-00248 at 0040.

73. Witness 4 had at least three distinct opportunities to correct or amend his wildly contradictory statements, and on several points, did so. Specifically, Witness 4 said that he confused the Safari Club with the Nairobi Member's Club, and corrected the date of the statement.¹⁴⁴ Witness 4 also attempted to clarify why it "seemed" like he was not present at the 26 November 2007 meeting.¹⁴⁵ Yet Witness 4 never resolved any of the other aforementioned conflicts. Instead, Witness 4 confirmed that he had "nothing to add to the above statement nor do I have anything to clarify."¹⁴⁶ Clearly this is not the case; Witness 4's contradictions and inconsistencies fatally undermine his factual allegations, all of which are central to OTP's case.

74. Yet OTP urges this Chamber to accept these conflicting, biased and uncorroborated accounts as "substantial grounds" for the charges against General Ali. As explained, Witness 4's testimony is completely unreliable and of no probative value. That OTP so heavily relies on Witness 4 is both disturbing, and revealing. This unreliable evidence must be completely rejected by this Chamber and should not be used to support the confirmation of proposed charges.

C. Use of Uncorroborated Statements

75. The wholly uncorroborated statements of OTP Witnesses 4 and 12 are fraught with internal inconsistencies. Because the case against General Ali depends entirely upon these witnesses, confirming charges against General Ali based on their fatally inconsistent statements would constitute a gross miscarriage of justice.¹⁴⁷

76. The uncorroborated statements of Witnesses 4 and 12 are also seriously contradicted by other evidence; a factor the Chamber in *Abu Garda* deemed fatal to OTP's case, which led to the Chamber's decision not to confirm charges. There,

¹⁴⁴ *Ibid* at 0038.

¹⁴⁵ *Ibid* at 0054-55.

¹⁴⁶ *Ibid* at 0064.

¹⁴⁷ In *Abu Garda*, the Court declined to confirm charges, in material part because "inconsistent, ambiguous or contradictory evidence may result in the Chamber reaching a decision not to confirm the charges." *Abu Garda* Confirmation, para. 43, 171-173 and 223-225.

the Chamber held that certain information “[was] not corroborated or supported by any other evidence, including the statements of those witnesses who allegedly participated in the attack.”¹⁴⁸ Similarly, no other evidence supports the inconsistent accounts of Witnesses 4 and 12; accordingly their testimony and statements are insufficient to support any charges against General Ali.

D. Alleged “Second Phone Call”

77. As to an alleged “second phone call,” Witness 12 claims based on hearsay that General Ali, while allegedly in Kibera, was instructed by Ambassador Muthaura to “keep off” the Mungiki.¹⁴⁹ No other testimony, record, government document, newspaper article, photograph, radio broadcast or report exists to place General Ali in Kibera at the operative time. Witness 12 admitted that he did not witness either side of this alleged phone call, but instead heard about it from an anonymous third party. Furthermore, insofar as this testimony relates to Kibera, it is beyond the scope of this case. It cannot therefore be used as proof or corroborate any aspects of this case.¹⁵⁰

78. No credible witness or other evidence supports OTP’s allegations that (1) Ambassador Muthaura ever telephoned instructions to General Ali (2) General Ali ever received any such instructions, (3) General Ali ever took any action in furtherance of such phantom instructions, (4) anyone within General Ali’s chain of command ever received any instructions consistent with such alleged direction or (5) anyone anywhere in the chain of command ever acted in a way so as to reflect such a policy. OTP has provided no basis to conclude that any alleged telephone conversations between Ambassador Muthaura and General Ali ever took place. Given these facts, confirming charges against General Ali on any

¹⁴⁸ *Abu Garda*, para. 177. *With respect to anonymous statements in particular see also Katanga Evidentiary Decision*, para. 18; *Bemba Confirmation*, paras. 50-51 (stating that “while there is no requirement *per se* that summaries of the statements of anonymous witnesses are corroborated in order for them to be admissible, the Chamber is of the view that lack of support or corroboration from other evidence in the record of the proceedings could affect the probative value of those summaries or statements.”).

¹⁴⁹ EVD-PT-OTP-00661 at 0324 line 879-885.

¹⁵⁰ *See generally Bemba Confirmation*, paras. 48-51.

conjecture stemming from Witness 4 or Witness 12 would be improper and grossly unjust.

E. Credibility of Witness 12

79. Based solely on a *single* hearsay statement by Witness 12, OTP alleges that General Ali went to Kibera to “quell” violence against Luos,¹⁵¹ and that while in Kibera, General Ali allegedly called John Michuki, the former Minister for Internal Security, to find out why the Mungiki were wearing police uniforms.¹⁵² Witness 12 also claims that Muthaura later called General Ali back and told him that “those are our guys” and to “keep off.”¹⁵³
80. By his own admission, Witness 12 was not present at any meeting that he described to OTP. He relies on his unnamed “brothers” whom he claims were allegedly present,¹⁵⁴ and professed to know “because the people who were used there...they told me.”¹⁵⁵ Nor does Witness 12 identify these “people.” Interestingly, even the OTP Investigator was surprised by Witness 12’s uncorroborated statements, stating that “[t]his bit, in relation to Kibera and everything is quite, is new to me, and it’s not something that you’ve mentioned in the screening.”¹⁵⁶
81. Witness 12’s testimony likewise fails to support the OTP’s proposition of a “mid-January call.” In the DCC, OTP claimed that during an alleged “mid-January call,” Ambassador Muthaura called General Ali and ordered him not to arrest members of Mungiki.¹⁵⁷ As discussed, the alleged first call was supposedly on 3 January, and the alleged second call was supposedly made in mid-January 2008.¹⁵⁸ However, Witness 12’s statement contradict OTP’s assertion, stating that

¹⁵¹ EVD-PT-OTP-00660 at 0295, lines 802-803.

¹⁵² EVD-PT-OTP-00661 at 0323, lines 871-872.

¹⁵³ EVD-PT-OTP-00660 at 0296, lines 814-822.

¹⁵⁴ EVD-PT-OTP-00661 at 0317 (From his statement, it is not clear whether the witness means his familial or Mungiki brothers).

¹⁵⁵ EVD-PT-OTP-00660 at 0296, lines 820-822.

¹⁵⁶ *Ibid* at 0298, lines 878-884.

¹⁵⁷ DCC, para. 54.

¹⁵⁸ *Ibid*.

the alleged phone call took place in the beginning – not the middle – of January.¹⁵⁹ This is confirmed by his comment that it was “immediately in 2008 when the fight erupted in Kibera.”¹⁶⁰ The timelines offered by Witness 12 and by OTP simply do not match and certainly do not support OTP’s proposition of a mid-January phone call.

82. In summary, Witness 12’s testimony is internally inconsistent and directly refuted by the rest of the evidence before this Chamber. Like Witness 4’s testimony, the testimony of Witness 12 is hopelessly unreliable and devoid of any probative value.

F. Credibility of Witness 11

83. OTP also cites to Witness 11, who by his own admission was not present at any of the meetings to which he testifies, and who in no way implicates General Ali in the PEV. Witness 11’s testimony relates primarily to attempts by Mungiki to wear Administration Police (not Kenya Police uniforms) during the PEV as a way to confuse the Kenya Police.¹⁶¹ Further, Witness 11 does not substantiate any connection between the Kenya Police and the Mungiki. In fact, Witness 11 affirmed that because so many Kenya Police officers were Kalenjin and Luos, the Kenya Police could never be trusted to work with Mungiki to attack their own people.¹⁶²

84. As to any alleged phone call to General Ali, Witness 11 was only able to guess that such a call may have happened. An OTP Investigator drew this out, asking Witness 11 “*So you believe, but you don’t know?*” With no firsthand knowledge, Witness 11 responded: “*I believe.*”¹⁶³ A statement, based only on one’s belief, must be considered by the Chamber as having no probative value.

¹⁵⁹ EVD-PT-OTP-00660 at 0296, lines 814-40.

¹⁶⁰ *Ibid*, lines 837-38.

¹⁶¹ EVD-PT-OTP-00319 at 1468, lines 638-660.

¹⁶² *Ibid*, lines 650-660.

¹⁶³ EVD-PT-OTP-00320 at 1486, lines 664-668.

85. Witness 11 is an unreliable storyteller whose “belief” provides no foundation upon which to confirm charges against General Ali. Like Witnesses 4 and 12, the Witness 11 testimony fails the minimum standards of this or any other court, and has no probative value.

G. Use of Anonymous Witnesses

86. Like many OTP witnesses, Witnesses 11 and 12 are anonymous, their statements are heavily redacted, and they are unavailable for the Chamber’s scrutiny or cross-examination.¹⁶⁴ The same applies to a number of OTP’s summary witness statements.

87. Because the use of anonymous witnesses and summary statements seriously disadvantages the accused, such untested evidence is accorded “low probative value,” and must be “evaluated on a case-by-case basis, depending on whether the information contained therein is corroborated or supported by other evidence.”¹⁶⁵ Moreover, “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.”¹⁶⁶ OTP’s heavy reliance on such “evidence” speaks volumes to the weakness of its unsupported allegations.

88. The Chamber in *Banda and Jerbo* commented that “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.”¹⁶⁷ When the Chamber determines that the probative value of an item of evidence or portions thereof is so affected, the

¹⁶⁴ *Bemba Confirmation*, para. 50. Witnesses for General Ali, by contrast, are fully identified; furthermore, General Ali’s two *viva voce* witnesses were cross-examined before this Chamber.

¹⁶⁵ *Bemba Confirmation*, para. 50; *Banda and Jerbo*, para. 41; OTP cites *Prosecutor v. Banda and Jerbo* in its Written Submissions Following the Hearing on the Confirmation of Charges, para. 16, as support for the proposition that anonymous statements and summaries have been found sufficient for confirmation. In fact, and as OTP notes in FN 23, *Banda and Jerbo* did not challenge any of the material facts alleged in the DCC for the purposes of the confirmation hearing, and suggested that the Pre-Trial Chamber “consider such alleged facts to be proven”. Although the Chamber still performed an analysis of OTP’s evidence, the fact that the Defence failed to allege any inconsistencies, presented the Court with a very different situation than the one here.

¹⁶⁶ OTP Observations, para. 13; See *Katanga Evidentiary Decision*, para. 90, 133.

¹⁶⁷ *Banda and Jerbo*, para. 41.

Chamber should “*exercise caution*” in using such evidence to affirm or reject any assertion made by OTP.¹⁶⁸

89. OTP’s anonymous witness evidence is of a far “lower probative value” than that proffered by the Defence, and OTP’s ability to discharge its evidentiary burden of proving “substantial grounds to believe” is thereby been seriously diminished. It is respectfully submitted that OTP’s evidence, analysed in its totality, fails to meet that burden and therefore, charges cannot be confirmed.

VII. AMBASSADOR MUTHAURA’S LACK OF BOTH *DE JURE* AND *DE FACTO* AUTHORITY OVER GENERAL ALI

90. OTP argues that Ambassador Muthaura exercised authority over General Ali. However, Muthaura had neither *de facto* nor *de jure* authority to issue instructions to General Ali.¹⁶⁹ OTP’s claims to the contrary defy the evidentiary record and common sense.¹⁷⁰

91. For Ambassador Muthaura to have had *de facto* authority over General Ali, he would need to have exercised “effective control” over the General.¹⁷¹ Mere ability to influence, even substantially, is insufficient,¹⁷² and “substantial influence” that does not constitute “effective control” is not a sufficient basis for imputing criminal liability.¹⁷³ Rather, “effective control” is the manifestation of a superior-subordinate relationship,¹⁷⁴ and equates to the material ability to prevent and

¹⁶⁸ *Katanga Confirmation*, para. 70.

¹⁶⁹ ICC-01/09-02/11-T-10-CONF-ENG, p. 23:19-23.

¹⁷⁰ In fact, such assertions violate Kenyan Law (EVD-PT-D14-00004).

¹⁷¹ *Bemba Confirmation*, para. 413-419 (explaining that “the term ‘effective control’ certainly reveals ‘effective authority’” and that it is “confined to showing that the suspect had the power to prevent, repress and/or submit the matter to the competent authorities for investigation”).

¹⁷² *Bemba Confirmation*, para. 415.

¹⁷³ *Prosecutor v. Delalic*, No.IT-96-21-A, *Judgement* (20 February 2001) at para 266, 300; *Prosecutor v. Blagojevic & Jokic*, No.IT-02-60-T, *Judgement* (17 January 2005) at para.791; *Prosecutor v Halilovic*, No.IT-01-48-T, *Judgement* (16 November 2005) at para. 59; *Prosecutor v. Limaj et al.* No. IT-03-66-A, *Judgement* (27 September 2007) at para. 273; *Prosecutor v Karera*, No.ICTR-01-74-T, *Judgement and Sentence* (07 December 2007) at para. 568 (a “Prefect” had no *de jure* or *de facto* control over military personnel. If they acted pursuant to his instructions, it was due to personal influence rather than effective control over them and therefore could not be held liable for failing to prevent or punish their crimes).

¹⁷⁴ The Chamber in *Bemba* found that “effective control” is generally a manifestation of a superior-subordinate relationship in a *de jure* or *de facto* hierarchical relationship. *Bemba Confirmation*, paras. 412-419.

punish the commission of offences.¹⁷⁵ In short, Muthaura had no *de facto* authority over the actions of General Ali.

92. Likewise, Muthaura did not exercise *de jure* authority or General Ali. As Chairman of NSAC, which is a consensus-based¹⁷⁶ advisory body that issues recommendations on security,¹⁷⁷ Ambassador Muthaura coordinated and facilitated NSAC meetings. He had no legal authority to instruct or give orders to the heads of NSAC agencies.¹⁷⁸ Every NSAC witness confirms that Muthaura lacked *de jure* authority to issue orders of any kind to the Police Commissioner.¹⁷⁹
93. In an effort to argue to the contrary, OTP distorts General Ali's testimony before CIPEV, where General Ali stated that he relayed or "reported" information to the Head of Public Service. Taking this statement completely out of context, OTP would have the Chamber believe that Muthaura was empowered to issue instructions and orders to General Ali.¹⁸⁰ OTP completely disregards the entirety of General Ali's testimony, which conclusively confirms that the *Kenya Police and its management did not take operational instructions from anyone outside the Police*.¹⁸¹
94. OTP's charge that Muthaura had authority over General Ali and the Kenya Police is not only factually unsupportable, but also directly refuted by witness statements and government documents.¹⁸² To argue that Muthaura exercised *de facto* or *de jure* authority over General Ali therefore is simply incorrect, and forms no basis to support the proposed charges.

¹⁷⁵ *Bemba Confirmation*, paras 416-419.

¹⁷⁶ OTP Observations, para. 40-41.

¹⁷⁷ ICC-01/09-02/11-T-9-CONF-ENG, p. 29:22 to p. 30:5 and, p. 33:14 to p. 34:6.

¹⁷⁸ ICC-01/09-02/11-T-9-CONF-ENG, p. 33:14 to p. 34:6.

¹⁷⁹ EVD-PT-D12-00036 at 0294; EVD-PT-D12-00053 at 0405; EVD-PT-D12-00062 at 0446; EVD-PT-D12-00088 at 0199, paras. 17-18.

¹⁸⁰ EVD-PT-D12-00088 at 0199, para. 18; EVD-PT-D12-00063 at 0003-04; EVD-PT-D12-00053 at 0405-06, paras. 16-17; EVD-PT-D12-00045 at 0338; EVD-PT-D12-00036 at 0294, paras. 18-19.

¹⁸¹ ICC-01/09-02/11-T-6-ENG, p. 40:8-12.

¹⁸² EVD-PT-OTP-00338 at 1980-81.

¹⁸³ ICC-01/09-02/11-T-10-CONF-ENG, p. 18:12-23 and p. 20:23 to p. 21:23 and p. 23:12-23; EVD-PT-D12-00088 at 0199, para. 18; EVD-PT-D12-00063 at 0003-04; EVD-PT-D12-00053 at 0405-06, paras. 16-17; EVD-PT-D12-00045 at 0338; EVD-PT-D12-00036 at 0294, paras. 18-19; EVD-PT-D12-00004.

VIII. RESPONSE TO OTP'S MISCELLANEOUS ALLEGATIONS

95. OTP alleges that Ali orchestrated a police failure to act, thereby creating a “free zone” to facilitate Mungiki violence. Contrary to OTP's allegations, the evidence makes it clear that the Kenya Police officers in both Nakuru and Naivasha worked around the clock¹⁸³ to clear roads and disperse demonstrators,¹⁸⁴ arrested those engaging in violence,¹⁸⁵ took effective action to shelter thousands of IDPs in police stations¹⁸⁶ and fed IDPs with food from their own homes.¹⁸⁷

A. Alleged Use of Police Uniforms and Ferrying of Mungiki

96. OTP has completely misrepresented the Defence's evidence in its desperate attempt to buttress its claims that (1) Kenya Police and Administration Police uniforms were worn by Mungiki, and (2) that Mungiki were ferried into Naivasha and Nakuru.¹⁸⁸

i. No Evidence of Mungiki Use of Police Uniforms

97. First, the Administration Police [AP] Commandant does not receive NSIS reports and intelligence from the Police Commissioner, rather he receives them from the Permanent Secretary for Provincial Administration and Internal Security.¹⁸⁹ Under Kenyan Law, the Kenya Police and AP are two distinct forces under different command structures.¹⁹⁰ Arguing that General Ali “failed” to give Witness D12-17 these intelligence reports deceptively misrepresents a relationship between these starkly different entities.¹⁹¹

¹⁸³ EVD-PT-OTP-00332 at 1741; EVD-PT-D14-00060 at 0032; EVD-PT-D14-00052 at 0006; EVD-PT-D14-00054 at 0012; EVD-PT-00004 at 0655.

¹⁸⁴ EVD-PT-OTP-00290 at 0508; EVD-PT-D14-00064 at 0045.

¹⁸⁵ EVD-PT-OTP-00627 at 0116.

¹⁸⁶ ICC-01/09-02/11-T-8-CONF-ENG, p. 53:19-24; p. 24:6-16; EVD-PT-OTP-00332 at 1741; EVD-PT-OTP-00239 at 0105.

¹⁸⁷ EVD-PT-OTP-00239 at 0105.

¹⁸⁸ OTP Observations, para. 94.

¹⁸⁹ EVD-PT-D12-00053 at 0407.

¹⁹⁰ *See generally* EVD-PT-D14-00004; EVD-PT-D14-00005 (showing the AP Commandant neither reports to nor receives orders from the Police Commissioner).

¹⁹¹ EVD-PT-D12-00081 at 0170-71.

98. Second, OTP does not challenge the evidence that General Ali acted upon the intelligence on the allegation of Mungiki wearing AP uniforms in Nakuru nor does it challenge Defence testimony to the effect that these allegations were unfounded. Defence witnesses denied that any Mungiki were ever issued, wore or left the Nakuru State House wearing AP uniforms.¹⁹² One Defence witness expounded upon the claim that Mungiki were ferried in from other areas in uniforms and hid in “the forests” surrounding Naivasha.¹⁹³

I have heard allegations about people being escorted in military trucks to Naivasha wearing police uniforms, I say this, entry into Naivasha right from its border with central [sic] province (Naivasha is in Rift Valley) on the main Nakuru-Nairobi highway is so open that one cannot conceal movement of such vehicles. There are equally no forests as one drives into Naivasha from any other direction, i.e, Kinamba, Kongoni, Maai Mahiu, Nakuru that would have been used for the purpose as alleged.¹⁹⁴

99. Witness D14-01 testified that police investigated these claims and found them to be invalid.¹⁹⁵ During the Hearing, OTP never even questioned Witness D14-01 about these baseless allegations.

ii. No Evidence of the Ferrying of Mungiki

100. OTP also wrongly alleges that Mungiki were ferried into Naivasha and Nakuru in Army trucks.¹⁹⁶ No credible evidence exists as to Mungiki being ferried from Nairobi to Naivasha in Army trucks or any other mode of transport.¹⁹⁷ Witness D14-01 confirmed that he received no information of Mungiki or anyone else being ferried into Naivasha to cause mayhem.¹⁹⁸ Another police investigator categorically stated that those arrested during this period hailed from within

¹⁹² EVD-PT-D14-00066 at 0054; EVD-PT-D14-00064 at 0045, EVD-PT-D14-00036 at 0018, EVD-PT-D14-00048 at 0065.

¹⁹³ DCC, para. 66.

¹⁹⁴ EVD-PT-D14-00046 at 0059-60.

¹⁹⁵ ICC-01/09-02/11-T-14-CONF-ENG, p. 84:11-24.

¹⁹⁶ OTP Observations, para. 94.

¹⁹⁷ EVD-PT-D14-00048 at 0065; EVD-PT-D14-00034 at 0012; EVD-PT-D14-00041 at 0034; EVD-PT-D14-00044 at 0047; *but see* EVD-PT-OTP-00163 at 0186-87 (only anonymous direct OTP statement to this alleged occurrence).

¹⁹⁸ ICC-01/09-02/11-T-14-CONF-ENG, p. 24:1-17.

Naivasha.¹⁹⁹ Moreover, Witness D12-43 categorically denied allegations that Mungiki were escorted from the Nairobi State House to Nakuru in military trucks and uniforms.²⁰⁰

101. Contrary to the case advanced by OTP, the Kenya Police took all reports on the Mungiki very seriously, and took immediate action whenever actionable intelligence was received. As discussed above, on 10 January 2008, Witness D14-01 received actionable intelligence from General Ali that Mungiki were to hold a meeting at the Stem Hotel in Nakuru.²⁰¹ Witness D14-01 personally led a contingent of policemen to raid Stem Hotel and arrest the perpetrators. Despite this intelligence, nothing was found but an empty conference room.²⁰²

102. No evidence exists of any orders from General Ali to any police officer to allow Mungiki or anyone else to have free rein in Nakuru and Naivasha during the PEV because no such orders were ever given. Additionally, rumours of unauthorized persons wearing police, AP, military or any other uniforms were never substantiated by a single witness.

B. The Withdrawal of Prison Warders

103. As further support for its fictional “free zone” theory, OTP accuses the police of withdrawing prison warders from Naivasha to provide free passage to Mungiki.²⁰³ OTP appears to attribute this withdrawal to General Ali.²⁰⁴ Contrary to OTP’s selective analysis of its own evidence, General Ali *did not* make the decision to withdraw prison warders. That decision was made by the District Commissioner Katee Mwanza after careful consideration, and in direct response to pleas by the residents of Naivasha.²⁰⁵

¹⁹⁹ EVD-PT-D14-00050 at 0077, para. 13.

²⁰⁰ EVD-PT-D12-00208 at 0022.

²⁰¹ ICC-01/09-02/11-T-14-CONF-ENG, p. 44:14-23; EVD-PT-OTP-00105 at 0438.

²⁰² ICC-01/09-02/11-T-14-CONF-ENG, p. 44:14 to p. 45:8.

²⁰³ OTP Observations, para. 87; ICC-01/09-02/11-T-6-ENG, p. 48:6-8.

²⁰⁴ OTP Observations, para. 87.

²⁰⁵ EVD-PT-OTP-00332 at 1710; EVD-PT-D14-00046 at 0056.

104. Pursuant to NSIS reports²⁰⁶ and in response to the marked increase in the number of IDPs arriving in Naivasha,²⁰⁷ the District Security Intelligence Committee (DSIC) initially deployed prison warders on 9 January 2008²⁰⁸ to assist the Police with night patrols only.²⁰⁹ The prison warders had no effect on daytime security.
105. District Commissioner Mwanza's decision to withdraw the warders was made at the behest of the people of Naivasha on 27 January and had no demonstrable impact on security in Naivasha. Indeed, security forces in Naivasha were increased when Mwanza requested reinforcements from the Kenya Army,²¹⁰ AP and Anti-Stock Theft Unit (ASTU)²¹¹ to assist the Kenya Police to restore law and order.²¹² In addition to reinforcements, police officers normally assigned to office duties assisted officers in the streets.²¹³ These combined forces collaborated in clearing roads, dispersing armed and violent groups of protestors and rescuing people in danger.²¹⁴ During this time, the withdrawn prison warders remained active at the prisons, where they cared for and assisted over 10,000 IDPs.²¹⁵
106. The foregoing factual and documentary evidence is not consistent with a criminal intent to create a "free zone." The rioting crowds were extremely hostile to the police, throwing stones at security officers.²¹⁶ In fact, an ASTU policeman was shot in the leg with an arrow.²¹⁷ In Nakuru, rioters threw petrol bombs at

²⁰⁶ EVD-PT-OTP-00004 at 0496.

²⁰⁷ ICC-01/09-02/11-T-8-CONF-ENG, p. 24:6-22.

²⁰⁸ EVD-PT-OTP-00332 at 1691-92; ICC-01/09-02/11-T-8-Red-ENG, p. 111:2-5.

²⁰⁹ EVD-PT-OTP-00332 at 1691-92.

²¹⁰ EVD-PT-OTP-00163 at 0187; EVD-PT-D14-00046 at 0058; ICC-01/09-02/11-T-8-Red-ENG, p. 54:2-5.

²¹¹ EVD-PT-D14-00056 at 0018-20; EVD-PT-D14-00043 at 0041; EVD-PT-D14-00045 at 0052; EVD-PT-D14-00046 at 0056; EVD-PT-D14-00047 at 0063; EVD-PT-D14-00049 at 0068; EVD-PT-D14-00050 at 0074; EVD-PT-D14-00057 at 0023; EVD-PT-D14-00063 at 0040; EVD-PT-D14-00063 at 0040; EVD-PT-D14-00059 at 0028-29; EVD-PT-D14-00051 at 0003.

²¹² EVD-PT-D14-00059 at 0029.

²¹³ EVD-PT-D14-00062 at 0035; EVD-PT-D14-00058 at 0026.

²¹⁴ EVD-PT-D14-00064 at 0045; KEN: a/9213/11; a/9389/11; a/9338/11; a/9298/11; a/9220/11.

²¹⁵ EVD-PT-OTP-00333 at 1777; EVD-PT-OTP-00332 at 1746-47.

²¹⁶ EVD-PT-D14-00062 at 0036.

²¹⁷ EVD-PT-D14-00055 at 0016.

police who were attempting to disperse them,²¹⁸ and many hardworking police officers were injured during the PEV.²¹⁹

107. Characterizing the removal of prison warders as evidence of a grand conspiracy, OTP unjustly distorts the truth in a disingenuous attempt to discredit police action. OTP provides no causal link to support its claim that removing the prison warders was undertaken with any intent to create a “free zone” for Mungiki violence.²²⁰

C. Alleged Extra Judicial Killings

108. In paragraph 98, OTP refers to testimony on extra-judicial killings alleged to have occurred before the witness was elected into parliament in December 2007, which is outside of this case.²²¹ More important, however, the witness conceded that the information he received of this allegation was untrustworthy, rumour, double or triple hearsay and totally unconfirmed.²²²

IX. DEFENCE CHALLENGES TO JURISDICTION

109. Contrary to OTP’s allegations,²²³ General Ali’s Defence *does* challenge the pre-conditions for the exercise of jurisdiction. OTP has failed to allege or establish the requisite legal elements of jurisdiction *ratione materiae*,²²⁴ including the existence of any “organization” or “organizational policy.”

A. Absence of Any Discernable “Organization”

110. OTP seems to believe that its suggestion that an “organization” existed under Article 7 renders further jurisdictional scrutiny unwarranted.²²⁵ Focusing solely

²¹⁸ EVD-PT-OTP-00004 at 0476.

²¹⁹ EVD-PT-D14-00024 at 0286.

²²⁰ ICC-01/09-02/11-T-6-ENG, p. 47:1 to p. 48:12.

²²¹ ICC-01/09-02/11-T-12-CONF-ENG, p. 54:3-8.

²²² ICC-01/09-02/11-T-12-CONF-ENG, p. 92:3 to 93:8.

²²³ Prosecution’s Response to the Defence Challenges to Jurisdiction, ICC-01/09-02/11-356, para. 10 [“OTP’S JURISDICTIONAL RESPONSE”].

²²⁴ Defence Challenge to Jurisdiction, Admissibility, and Prosecution’s Failure to Meet the Requirements of Article 54, ICC-01/09-02/11-338, para. 1(i) [“DEFENCE’S JURISDICTIONAL CHALLENGES”]

²²⁵ OTP’s Jurisdictional Response, para. 14.

on the proper legal interpretation of an “organization,”²²⁶ OTP argues that any analysis of the requisite elements of jurisdiction *ratione materiae* falls “outside the category of cases that this Court is authorized to try.”²²⁷ But no matter how OTP characterises Article 7, both the existence of a definable “organization” and the existence of an “organizational policy” are prerequisites to jurisdiction *ratione materiae*.

111. OTP does not allege the existence of any definable “organization” that would establish jurisdiction *ratione materiae*.²²⁸ OTP has actually brought forth three distinct “organization” theories: 1) the Mungiki, 2) the DCC’s group of miscellaneous entities, and 3) the *ad hoc* group described during the Hearing. Under any reading of the proposed charges, OTP has failed to reconcile its vague, undefined references to “organization” in the DCC with its Mungiki “organization.”²²⁹ Further, nowhere does OTP explain or even acknowledge that its third choice, the “*ad hoc* organization,” differs dramatically from its DCC “organization.”²³⁰ OTP not only fails to explain why it rejects the Chamber-authorized “organization” in the decision on the summonses;²³¹ it also fails to define the membership of its “organization,” explain its *ad hoc* nature or provide any applicable legal standard by which its “*ad hoc* organization” should be evaluated. Simply put, OTP adduced no evidence of *any* linkage, criminal or otherwise, between the suspects and any direct perpetrators.

112. OTP now attempts to join two separate entities, the Kenya Police and Mungiki, in an *ad hoc* organization led by Muthaura and Kenyatta, with General Ali’s assistance, and coordinated with one another to work against ODM supporters.²³² This allegation was raised for the first time during the Hearing,²³³ where the phrase “*ad hoc*” was introduced. It is not in the DCC, nor does the DCC

²²⁶ OTP’s Jurisdictional Response, paras. 17-34.

²²⁷ OTP’s Jurisdictional Response, para. 12.

²²⁸ Defence’s Jurisdictional Challenges, paras. 17-21.

²²⁹ Defence’s Jurisdictional Challenges, paras. 17-19.

²³⁰ ICC-01/09-02/11-T-5-CONF-ENG, p. 9:25 to p. 10:4.

²³¹ Pre-Trial Chamber II, *Prosecutor v. Muthaura et al.*, Decision on the Prosecutor’s Application for Summonses to Appear ICC-01/09-02/11-01, et passim. [“SUMMONSES DECISION”].

²³² ICC-01/09-02/11-T-5-Red-ENG, p. 9:25 to p. 10:4.

²³³ *Ibid.*

suggest that the Police make up part of some alleged “*ad hoc* organization.” What the DCC states is that the organization members include Mungiki,²³⁴ the PNU,²³⁵ the “pro-PNU youth”²³⁶ and local businessmen.²³⁷ By altering its argument to include the Kenya Police, OTP is rehashing a state policy theory this Chamber rejected in its Summonses Decision.²³⁸

113. OTP also incorrectly contended that the existence of an “organization” predicated solely on whether a defined group is capable of carrying out acts that infringe upon basic human values.²³⁹ Whether an organization is capable of carrying out attacks is just only one of many factors the Court may consider,²⁴⁰ beyond the mere capability for wrongdoing. To demonstrate that an organization exists, OTP must demonstrate that the group:²⁴¹

- a. is under a responsible command, or has an established hierarchy;
- b. possesses, in fact the means to carry out a widespread or systematic attack against a civilian population;
- c. exercises control over part of the territory of a State;
- d. has criminal activities against the civilian population as a primary purpose;
- e. articulates, explicitly or implicitly, an intention to attack a civilian population; and
- f. is part of a larger group, which fulfils some or all of the abovementioned criteria.²⁴²

114. OTP has proved none of these elements, and also has failed to prove that the police and the Mungiki, together, were under “a responsible command” or “established hierarchy.”²⁴³ OTP argues the existence of a hierarchy because

²³⁴ DCC, para. 86.

²³⁵ *Ibid*, para. 18.

²³⁶ *Ibid*, para. 27.

²³⁷ *Ibid*, para. 27.

²³⁸ Summonses Decision, para. 24

²³⁹ ICC-01/09-02/11-T-5-Red-ENG, p. 17:14-16.

²⁴⁰ Pre-Trial Chamber II, *The Situation in the Republic of Kenya*, ICC-01/09-19-Corr, paras. 92-93 [“ARTICLE 15 AUTHORIZATION”].

²⁴¹ Note that while the characteristics of an organization may still be flexible, we suggest that at a minimum, some such construction of factors exists.

²⁴² Article 15 Authorization, para. 93.

²⁴³ *Ibid*.

Kenyatta allegedly “could influence and rely on the Mungiki²⁴⁴ and Muthaura allegedly “exercised *de facto* authority” over General Ali, who had *de facto* authority over the Kenya Police.²⁴⁵ In OTP’s attempt to wed two historically implacable enemies - the Kenya Police and the Mungiki - OTP presents highly dubious “evidence” of a series of fictional links, connecting Mungiki to Kenyatta, Kenyatta to Muthaura, Muthaura to Ali, and hence Ali and the Kenya Police to the hated Mungiki. OTP’s own evidence, which coincides with all other evidence, demonstrates conclusively that these two entities never worked in unison.²⁴⁶

115. In an attempt to join the two, OTP further argues that Mungiki, as one discrete unit, are organized,²⁴⁷ and that the Kenya Police, another discrete unit, are also organized.²⁴⁸ However, at no point does OTP allege or describe a hierarchy or command of its alleged *ad hoc* organization. OTP has presented no evidence, much less evidence sufficient, to show that any “*ad hoc* organization” with any command structure or capacity to conduct a united mission existed.

116. OTP also has failed to prove that its “*ad hoc* organization” exercised any control over any part of Kenyan territory. The standard for whether a group has control over territory, drawn from Additional Protocol II of the 1949 Geneva Conventions,²⁴⁹ is defined as control which “enable[s] [the party] to carry out sustained and concerted...operations.”²⁵⁰ Neither the Mungiki nor the alleged *ad hoc* “organization” had any capability even remotely approaching this standard.

117. OTP has not alleged, much less provided evidence to show that the primary purpose of some *ad hoc* organization was to perpetrate violence against the civilian population. And OTP’s sweeping allegations as to the purpose of the Mungiki attacks²⁵¹ fail to connect General Ali to either the Mungiki or to any such alleged purpose. Nor does OTP allege or prove that its so-styled, *ad hoc*

²⁴⁴ ICC-01/09-02/11-T-5-CONF-ENG, p. 19:6-8.

²⁴⁵ ICC-01/09-02/11-T-5-CONF-ENG, p. 10:8-10.

²⁴⁶ EVD-PT-OTP-00320 at 1470, 1475, 1477; EVD-PT-OTP-00327 at 1593.

²⁴⁷ ICC-01/09-02/11-T-5-CONF-ENG, p. 19:6-9.

²⁴⁸ ICC-01/09-02/11-T-5-CONF-ENG, p. 21:9-14.

²⁴⁹ Article 15 Authorization, para. 93.

²⁵⁰ Article 1(1) of the Protocol II Additional to the Geneva Conventions of 12 August 1949, 8 June 1977.

²⁵¹ DCC, para. 21.

organization articulated, explicitly or implicitly, any intention to attack a civilian population.²⁵² This criterion goes wholly unaddressed by OTP; instead, OTP asserts that the alleged and undefined “group” intentionally targeted civilians based on their political affiliation.²⁵³

B. Lack of Any Evidence of an “Organizational Policy”

118. OTP fails to demonstrate any definable “organization,” and also fails to allege the existence of any definable organizational policy.²⁵⁴ OTP concedes that a “‘policy to commit such an attack’ requires that the State or organization actively promote or encourage such an attack against a civilian population,” but never supports its claim that some “organizational policy” exists.²⁵⁵ The law is clear that such a policy must “follow a regular pattern”²⁵⁶ and must be “planned, directed or organized.”²⁵⁷ Indeed, OTP concedes that these elements, as set forth in *Katanga* and *Bemba*, should guide the Chamber’s determination here.²⁵⁸

119. Yet OTP has failed (1) to allege that attacks by its undefined, theoretical organization followed a “regular pattern,” (2) to allege any “planning, direction or organization” which General Ali was a part of or that he supported and (3) to provide support for its contention that the attacks in question involved any planning whatsoever, and were not in fact outbreaks of generalised mob violence.²⁵⁹

120. The Defence does not merely argue that the “organization alleged cannot, as a matter of law, be capable of devising an organizational policy.”²⁶⁰ OTP has failed to allege, much less prove, the existence of any definable “organization” and has failed to allege the existence or nature of any organizational policy. This claim requires proof that an organization “actively promoted or encouraged” such

²⁵² Article 15 Authorization, para. 93.

²⁵³ DCC, count 10.

²⁵⁴ Defence’s Jurisdictional Challenges, paras. 40-42.

²⁵⁵ Defence’s Jurisdictional Challenges, paras. 40-42.

²⁵⁶ Defence’s Jurisdictional Challenges, para. 40, (*citing* ICC, Elements of Crimes, intro., para. 3).

²⁵⁷ Defence’s Jurisdictional Challenges, para. 40, (*citing Bemba Confirmation*, para. 81).

²⁵⁸ OTP’s Jurisdictional Response, para. 30.

²⁵⁹ Defence’s Jurisdictional Challenges, para. 41.

²⁶⁰ OTP’s Jurisdictional Response, para. 14.

attacks²⁶¹, that the attacks followed a “regular pattern”²⁶² and evidence of “planning, direction or organization”²⁶³ among organization members. OTP has established none of these three requisite elements.

121. In failing to establish the substance of any organizational “policy,” OTP alleges that the policy was conceived and formulated over the course of four meetings: at the Yaya Centre in Nairobi in mid-November 2007,²⁶⁴ at the State House on 26 November 2007,²⁶⁵ at the State House on 30 December 2007,²⁶⁶ and at the Nairobi Members Club on 3 January 2008.²⁶⁷ *General Ali attended none of these alleged meetings.*

122. To support its alleged “policy” argument, OTP maintains that on 3 January 2008, Ambassador Muthaura telephoned General Ali and allegedly instructed that “our youth will be going to the Rift Valley and we do not want them disturbed.”²⁶⁸ However, the sole evidence for this, Witness 4, never even heard what, if anything, General Ali may have said.²⁶⁹

123. As demonstrated above, this phantom telephone call never took place. With no link between General Ali and any organization, *ad hoc* or otherwise, there was not before and is not now enough “material presented by the Prosecutor [to] provide reasonable grounds to believe that Ali participated in the common plan.”²⁷⁰ OTP has provided nothing that would or could show that General Ali ever participated in any so-called organizational policy.

²⁶¹ ICC Elements of Crimes, Intro, para. 3.

²⁶² *Bemba Confirmation*, para. 81.

²⁶³ *Bemba Confirmation*, para. 81.

²⁶⁴ EVD-PT-OTP-00248 at 0030 para 144.

²⁶⁵ EVD-PT-OTP-00248 at 0031-0037.

²⁶⁶ EVD-PT-OTP-00322 at 1514; EVD-PT-OTP-00057 at 0019.

²⁶⁷ EVD-PT-OTP-00248 at 0039.

²⁶⁸ ICC-01/09-02/11-T-5-Red-ENG, p. 16:11-13.

²⁶⁹ EVD-PT-OTP-00248 at 0040, paras. 198-199.

²⁷⁰ Summonses Decision, para. 38.

X. DEFENCE CHALLENGES TO ADMISSIBILITY

124. The crimes charged by OTP are “not of sufficient gravity to justify further action” by this Chamber.²⁷¹ Article 17, for sound reasons, reserves this Court’s consideration to “the most serious crimes of international concern,” those “unimaginable atrocities” that “deeply shock the conscience of humanity”²⁷² and that are especially grave.²⁷³

125. The Chamber in *Lubanga* identified three questions in determining whether a case is of sufficient gravity pursuant to Article 17(1)(d).²⁷⁴ OTP rebukes the Defence for having “misstate[d] and then promptly ignore[d]” the Appeals Chamber’s decision,²⁷⁵ but OTP must acknowledge that the Appeals Chamber provided no alternate test.²⁷⁶ Hence, no court in the interim has addressed what gravity threshold should be used.

126. OTP urges, in lieu of *Lubanga*’s three questions, that the Court instead rely upon the sentencing guidelines cited by the Court in its 31 March 2010 decision.²⁷⁷ Even if applied, one of these guidelines, which relates to “the nature of the unlawful behaviour or of the crimes allegedly committed,”²⁷⁸ is wholly unsatisfied here.

127. Whether this Chamber applies the *Lubanga* test or the sentencing guidelines, the “nature” of the crimes alleged does not satisfy gravity requirements that quite properly circumscribe the purview of this Court. OTP alleges crimes here that do not constitute crimes against humanity within the meaning of Article 7. Nor do the charges against General Ali meet the Article 25 standards for establishing

²⁷¹ Rome Statute, Article 17(1); Pre-Trial Chamber I, *Prosecutor v. Lubanga*, Lubanga Warrant for Arrest, ICC-01/04-01/06-2 para. 42.

²⁷² Rome Statute, Preamble, para. 2, Rome Statute, Articles 6,7,8.

²⁷³ Lubanga Arrest Warrant Decision, para. 46.

²⁷⁴ *Ibid.*, para. 64.

²⁷⁵ Quite to the contrary, the Defence fully recognizes that the appellate reversal of the *Lubanga* Chamber decision was reversed on appeal. See Defence’s Jurisdictional Challenges, para. 60, FN 74, 75 and 81. OTP neglects to note that the decision was reversed on other grounds.

²⁷⁶ *Prosecutor v. Ntaganda Dyilo, Judgment on the Prosecutor’s Appeal Against the Decision of the Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58”*, ICC-01/04-169.

²⁷⁷ Article 15 Authorization, para. 62.

²⁷⁸ *Ibid.*

contribution within the Statute. Nor has OTP satisfied the Article 7 requirements for defining an “organization” or articulating an “organizational policy,” which is basic. Finally, OTP provided no more than a very dubious inference²⁷⁹ in support of its claim that Ali “orchestrat(ed) a police failure.”²⁸⁰

XI. OTP MISINTERPRETS ARTICLE 25(3)

133. OTP urges that General Ali’s jurisdictional arguments be disregarded because they are predicated “on an argument that (i) the evidence does not support the role attributed to [General] Ali under Article 25(3)(d); and (ii) OTP has not provided sufficient notice.”²⁸¹ In essence, OTP asks the Chamber to overlook the jurisdictional requirements and confirm the charges.

134. In authorizing the Kenya investigation, this Chamber ruled that Article 25(3), *inter alia*, means that a person charged “shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court” only upon meeting the requirements in that section.²⁸² Article 25 not only covers jurisdiction over natural persons under Article 25(1), but also other previously-referenced jurisdictional requirements that include, but are not limited to, *ratione materiae* and *ratione personae*.²⁸³ OTP’s failure to offer allegations even minimally responsive to these Article 25(3) requirements constitutes a fatal flaw in its case.

135. In attempting to narrow General Ali’s position, OTP cites the ICTY *Gotovina* Appeals Chamber to argue that interpretations of the *actus reus* element of certain crimes should be argued before the Trial Chamber.²⁸⁴ Unlike the *Gotovina* appellant, the statutory interpretation of a defined crime is not the focus of General Ali’s argument. Here, OTP here has failed, under any definition of the

²⁷⁹ DCC, para. 45. (“The abstention element of the policy can be inferred from the ease with which the Mungiki and pro-PNU youth were transported in large numbers from outside the Rift Valley to Naivasha and Nakuru...”)

²⁸⁰ *Ibid*, para. 35.

²⁸¹ OTP’s Jurisdictional Response, para. 39.

²⁸² Rome Statute, Article 25.

²⁸³ Article 15 Authorization, para. 36.

²⁸⁴ OTP’s Jurisdictional Response, para. 15, (*citing* ICTY Appeals Chamber, *Prosecutor v. Ante Gotovina*, Decision on Ante Gotovina’s Interlocutory Appeal against decision on several motions challenging jurisdiction, 06 June 2007, para. 15).

crimes charged against General Ali, to establish the jurisdictional elements needed to confer competency on this Chamber.

136. Even if, as OTP argues, certain arguments relate to legal interpretations, such arguments are proper in a jurisdictional motion. The *Hadzihasanovic* case held that “whether or not international humanitarian law...included command responsibility for crimes committed in internal armed conflicts may...be considered as a challenge to the jurisdiction of the Tribunal.”²⁸⁵ The ICTY in *Karadzic* ruled that interpretational questions can be central to the subject matter jurisdiction inquiry, because the “approach to subject matter jurisdiction now focuses on whether the crime charged is envisioned by the statute, and whether the mode of liability upholds the principle of individual criminal responsibility.”²⁸⁶

137. The Defence’s arguments are not “dependent on the particular facts of this case regarding the nature of the charged organization,”²⁸⁷ but turn instead on the gross insufficiency of OTP’s allegations, and OTP’s complete failure to substantiate its claims for jurisdictional purposes. As the ICTY put it in *Delic*,²⁸⁸ our prior challenge to jurisdiction related not only to the “sufficiency of the evidence” but also to the “sufficiency of the indictment,” and therefore is clearly jurisdictional in nature.

138. In addition, the Defence reiterates Counsel’s submissions on the mode of liability advanced during the Hearing, and maintains that OTP incorrectly interprets the mode of liability in charging General Ali under Article 25(3)(d).

139. As the late Professor Cassese explained, Article 25(3)(d) is intended only to cover those *persons* who are not “linchpins” and do not belong to the inner circle

²⁸⁵ *Prosecutor v. Enver Hadzihasanovic, et al.*, Decision on Challenge to Jurisdiction, 07 December 2001

²⁸⁶ *Prosecutor v. Radovan Karadzic*, Decision on Radovan Karadzic’s Motions Challenging Jurisdiction, 25 June 2009, para. 35.

²⁸⁷ OTP’s Jurisdictional Response, para. 16.

²⁸⁸ *Prosecutor v. Delic*, Decision on Interlocutory Appeal Challenging the Jurisdiction of the Tribunal, 8 December 2005, para. 11.

of the criminal common purpose, but make contributions from without.²⁸⁹ Perhaps because it must grope with trying to navigate around overwhelming evidence of General Ali's concerted efforts to end violence, it is impossible from OTP's charges to define OTP's theory of potential liability.

140. In its tortured effort to criminalise the innocent, OTP blurs the distinction between Article 25(3)(d)(i) and Article 25(3)(d)(ii), and in so doing fails to give even minimal notice of its theory of liability. In the face of OTP's amorphous attack, General Ali is left to guess how the OTP maintains that he violated the law. Accordingly, this matter should be dismissed for the complete failure to meet jurisdictional requirements under Articles 7 and 25.

141. OTP must prove all required elements and define the mode of liability charged with the alleged role played by each suspect. Clearly, OTP's failure to do so is grounded in the deficiencies of its case, *i.e., there are no facts to support any mode of liability*. Such a failure is fatal to OTP's case and accordingly the charges shall not be confirmed.

XII. CONCLUSION

142. Ultimately, OTP has failed to support *any* of its charges with "sufficient evidence to establish substantial grounds to believe that the person committed the crime charged." Specifically, OTP's case against General Ali fails to meet this important standard in four ways :

- a. OTP has provided *no grounds*, much less substantial grounds, to believe that General Ali ever received any instructions, via telephone or otherwise, to "orchestrate failure" or permit violence.
- b. OTP has provided *no grounds*, much less substantial grounds, to believe that General Ali or the Kenya Police ever implemented any such instructions.
- c. OTP has provided *no grounds*, much less substantial grounds, to believe that the Kenyan Police failed to oppose the violence by creating a "free zone" to

²⁸⁹ A. Cassese, *International Criminal Law*, New York: Oxford University Press 2nd ed. 2008, at 213; *see also* Ohlin, Joint Criminal Confusion, 12 New Crim. L. Rev. 406 2009, p. 411.

facilitate violence. Indeed, OTP has failed to investigate and acknowledge the overwhelming evidence that General Ali and the Police worked diligently to prevent/suppress the violence.

- d. OTP makes *no attempt* to reconcile the countless acts of bravery by police – many of whom paid the ultimate price with their lives – with its theory of attributing criminal acts to General Ali and the Kenya Police.

143. Even construing the evidence as broadly as possible in favour of OTP, under applicable law, no evidence exists to find that General Ali ever did, or failed to do anything to “orchestrate the failure” of the Kenya Police, and thereby facilitate a “free zone” for committing violent crimes against Kenyan civilians.

144. To the contrary, the evidence overwhelmingly supports the conclusion that throughout the PEV, General Ali served his country honourably, just as he had for decades: with dedication, with fairness, and with integrity. His strong, uniform and undisputed stance against the criminal Mungiki, before, during and after the 2007-08 PEV, often in the face of overwhelming opposition, completely undermines OTP’s theory. While OTP frequently frames its allegations in political terms (particularly in terms of the two parties, ODM and PNU), not one shred of evidence has been or could be introduced to tie General Ali to either party. Quite to the contrary, General Ali, a devoted public servant to the people of Kenya for more than thirty years, has been, is now and always will be assiduously apolitical.

145. OTP offers this Chamber a record devoid of any credible grounds upon which to attribute the crimes of the Mungiki or anyone else to General Ali. To brand General Ali with the heinous acts of criminals against whom he so diligently fought is not only irrational, it is unimaginable, unconscionable, and grossly unjust.

146. **WHEREFORE**, General Ali respectfully requests the Chamber to decline to confirm any of the charges advanced by OTP and dismiss all remaining matters before the Chamber as they may relate to General Ali.

Respectfully Submitted,

Two handwritten signatures in black ink. The signature on the left is 'Evans Monari' and the signature on the right is 'Gershom Otachi Bw'omanwa'.

Evans Monari and Gershom Otachi Bw'omanwa
On behalf of Mohammed Hussein Ali

Dated this 1st day of December 2011

At Nairobi, Kenya