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PRE-TRIAL CHAMBER II

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

SITUATION IN KENYA

THE PROSECUTOR

v.

FRANCIS KIRIMI MUTHAURA

UHURU MUIGAI KENYATTA &

MOHAMMED HUSSEIN ALI

Public

**Public Redacted version of Final Written Observations of the Defence Team of
Ambassador Francis K. Muthaura on the Confirmation of Charges Hearing**

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I. Introduction

1. Pursuant to the direction of the Pre-Trial Chamber (“PTC”),¹ the Defence for Ambassador Muthaura (“Defence”) hereby submits its written observations.
2. In addition to these observations, the Defence adopts and relies upon its oral submissions at the Confirmation Hearing, its List of Evidence (“LoE”)² and In-depth Analysis Chart (“IDAC”).³ In the present filing, the Defence underscores certain essential points and addresses what it maintains are factual and legal errors and fundamental misconceptions that beset the Office of the Prosecutor’s (“OTP”) Amended Document Containing the Charges⁴ (“Amended DCC”), their oral presentations during the Confirmation Hearing and their Final Written Submissions (“Written Submissions”) filed on 28 October.⁵ For the reasons given herein and during the Confirmation Hearing, the Defence respectfully submits that the OTP have failed to discharge their burden of proof and as such, the PTC should decline to confirm the charges preferred against Ambassador Muthaura.

II. Standard and Purpose of Confirmation Hearing

3. The legal standard and the purpose of confirmation is well established and should be without controversy. At the Confirmation Hearing, the OTP must present “concrete and tangible proof that demonstrates a clear line of reasoning underpinning its specific allegations.”⁶
4. Importantly, the purpose of the hearing is “*limited to committing for trial only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought.*”⁷ Further, the Confirmation Hearing “*is designed to*

¹ ICC-01/09-02/11-T-15-Red-ENG WT 05-10-2011, page 88, lines 14-19.

² ICC-01/09-02/11-301-AnxA.

³ ICC-01/09-02/11-301-Anx B.

⁴ ICC-01/09-02/11-280-AnxA.

⁵ ICC-01/09-02/11-361 (“OTP Written Submissions”).

⁶ ICC-01/04-01/06-803-tENG, para. 39, which has been cited with approval in all other cases that have reached the confirmation stage at the International Criminal Court.

⁷ ICC-02/05-02/09-121-Corr-Red, para.31 reiterating the decision in Lubanga contained in ICC-01/04-01/06-803-tEN, para.37

*protect the rights of the Defence against wrongful and wholly unfounded charges”.*⁸

5. In its Written Submissions, the OTP turned away from the settled jurisprudence of the ICC in favour of jurisprudence that it considers more favourable to its case.⁹ Put simply, to adopt the OTP submissions regarding the purpose of the Confirmation Hearing would be to emasculate a hearing which is intended to be an important filter preventing unmeritorious cases going to trial. The Defence submit that the OTP’s submissions in this regard amount to an attempt to lower the standard of scrutiny required at this stage of the proceedings. The Defence submit that this attempt provides an unintended indicia of the lack of evidence and confidence that the OTP actually have in their case and their ability to meet the confirmation standard so clearly applied in previous cases before the ICC.¹⁰

6. The OTP contend that the Confirmation Hearing is “primarily based on documentary evidence”.¹¹ The Defence submits that this submission is fundamentally flawed. The OTP have the burden of proof at all stages of a criminal case, including at confirmation. Article 61(5) of the Statute provides that the OTP shall support each charge with sufficient evidence, permits the OTP to rely on documentary or summary evidence, and states that the OTP need not call witnesses expected to testify at trial. It is for the OTP to decide what evidence to adduce consistent with their obligation to discharge the burden of proof. The OTP took the decision not to call *viva voce* evidence. Accordingly, the OTP cannot now hide behind their own decision to rely upon documentary evidence, summary evidence or anonymous witness evidence in order to shield their case from proper and rigorous scrutiny. The OTP repeatedly assert that this is not the stage at which the credibility of evidence is to be tested. This is belied by the OTP’s own conduct in asking Defence Witnesses questions focussed on issues of credibility,

⁸ Decision on Confirmation of Charges, ICC-01/04-01/06-803, 29 January 2007, para. 37. This was reiterated with approval in ICC-01/04-01/07-717, para.63 and ICC-01/04-01/07-611.

⁹ For example, see OTP Written Submissions, para. 6 (ICTY and ICTR practice in relation to Rule 98*bis*) and para. 7 (national practices).

¹⁰ PTC 1 rejected this attempt by the OTP in the *Abu Garda* case; see ICC-02/05-02/09-267 at paras. 8-10.

¹¹ OTP Written Submissions, para. 19.

which demonstrates the centrality and importance of witness credibility and reliability issues at the confirmation of charges stage of proceedings.¹²

III. Assessment of Evidence

(a) Anonymous Summaries

7. From the very first case before the Court, *Lubanga*, chambers have recognised that “non-disclosure of the identity of witnesses on whom the Prosecution intends to rely at the confirmation hearing (i) could affect the ability of the Defence to fully challenge the evidence and the credibility of those witnesses and (ii) has an impact on the rights of the Defence pursuant to Articles 61 (3) and (6) and 67(1)(b) of the Statute.”¹³ Relying on Article 61(5) of the Statute, the OTP submit that they are entitled to rely on summaries for the limited purpose of the confirmation hearing, a position acknowledged by the Defence to the extent that the use of those summaries are not inconsistent with the rights of the suspects.

8. Additionally, the OTP rely on the *Banda and Jerbo* case to argue that anonymous summaries are sufficient to confirm charges.¹⁴ Whilst expressing disagreement with the *Abu Garda* Confirmation Decision, the OTP argue that PTC I relied on the same anonymous summaries considered insufficient in *Abu Garda*¹⁵ to confirm the *Banda and Jerbo* case.¹⁶ The OTP’s submissions at paragraph 28 of their Written Submissions are misconceived. First, whether the OTP “disagrees” with a decision of a chamber on the manner in which evidence is to be weighed and evaluated is irrelevant. The *Abu Garda* Decision is persuasive and the Defence respectfully submits a compelling authority on the probative value of evidence at confirmation. It follows and builds upon the *Bemba* Jurisprudence in this regard.¹⁷

¹² For example: ICC-01/09-02/11-T-9-CONF-ENG, page 96, line 7 to page 99, line 20.

¹³ ICC-01/04-01/06-108-Corr, para. 30.

¹⁴ OTP Written Submissions, para. 16, pointing out that PTC I did not reject summaries because they are anonymous in nature in that case.

¹⁵ OTP Written Submissions, para. 16.

¹⁶ OTP Written Submissions, para. 28.

¹⁷ ICC-01/05-01/08-424, para. 50, applied in the *Abu Garda* case; ICC-02/05-02/09-243-Red paras 50-52.

9. Both PTC I in *Abu Garda*¹⁸ and this Chamber in the *Bemba* case¹⁹ applied the same principles. In *Bemba*, this Chamber held that "... the probative value of anonymous witness statements and summaries is lower than the probative value attached to statements of witnesses whose identity is known to the Defence."²⁰ The charges against Messrs Banda and Jerbo were confirmed following a joint submission by the OTP and the Defence of agreed facts.²¹ This is the reality of the *Banda and Jerbo* case which distinguishes it from the instant case and the *Abu Garda* case, where the Defence is challenging the entirety of the OTP's case.²²

(b) The Chamber should assess credibility and reliability of witnesses

10. The OTP's submission that the Chamber should not engage in assessing inconsistencies and contradictions in the evidence at confirmation defies belief and is unsupported by law.²³ The OTP's submission is inconsistent with Article 69(4), which is applicable by virtue of Rule 122(9) of the Rules and also defies the established jurisprudence of this Chamber and should be disregarded. This question is not novel and was considered in the *Bemba* Confirmation Decision, wherein this Chamber held that "*the Chamber carefully assesses each and every potential inconsistency and factors it into its assessment of the probative value of the evidence for each issue to be proven. It should be noted that inconsistencies do not lead to an automatic rejection of the piece of evidence, and do not bar the Chamber from using it. Rather, in order to define probative value, the Chamber assesses whether the inconsistencies cast doubt on the overall credibility and reliability of the evidence.*"²⁴

(c) The Chamber should not admit into evidence anonymous summaries and statements obtained by entities other than the OTP

¹⁸ ICC-02/05-02/09-243-Red, para. 52.

¹⁹ ICC-01/05-01/08-424, para. 50.

²⁰ ICC-01/05-01/08-424, para. 50.

²¹ ICC-02/05-03/09-80, para. 5.

²² Confirmation Decision in the *Banda and Jerbo* case is contained in ICC-02/05-03/09-121-Corr.

²³ OTP Written Submissions, para. 27.

²⁴ ICC-01/05-01/08-424, para. 55.

11. The Defence restates its position at the Confirmation Hearing that the OTP cannot rely on anonymous summaries and statements from sources other than the OTP.²⁵ In the *Lubanga* Confirmation Decision, PTC I excluded witness statements due to the fact that the OTP had failed to obtain the consent of the witnesses to use their statements at the confirmation hearing.²⁶ The principles informing PTC I's decision are based on three issues: (a) prior consent of the witness to be a witness in the OTP's case including the OTP's reliance on the witness's evidence/statement;²⁷ (b) the principle of not allowing a party to rely on evidence at confirmation that it has no reasonable expectation of being able to rely upon at trial;²⁸ and (c) protection of witnesses.²⁹ PTC I's principled approach to evidence is a guarantee against the principle of anonymous accusation, especially in circumstances where an anonymous witness does not know and consent to the fact that his evidence would be used in criminal proceedings against the suspects.

IV. Alibi

12. "Alibi" has been defined as "a defense based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time or the fact or state of having been elsewhere when an offense was committed."³⁰ As set out below, the Defence opposes the OTP's submission that the Defence failed to provide a notice of *alibi* (Rule 79(1)(a)). Even if the OTP's contention was correct, Rule 79(3) nonetheless provides that a failure by the Defence to provide such notice of *alibi* shall not limit its right to raise matters pertaining to *alibi* and to present evidence. In addition, to the extent that the OTP was prejudiced, Rule 79(2) affords them the opportunity to seek an adjournment to enable them to conduct investigations into the *alibi* defence. Finally, the OTP had an opportunity to raise an objection before the hearing on the merits in accordance with Rule 122(3). The OTP neither sought an

²⁵ ICC-01/09-02/11-T-4-ENG-ET-WT 21-09-2011, p.33, lines 14-25 and p.34, lines 1-24.

²⁶ ICC-01/04-01/06-803, para. 59.

²⁷ *Ibid.*

²⁸ This principle was restated by PTC I in ICC-01/04-01/07-412, pps 7-8.

²⁹ *Ibid.*

³⁰ Black's Law Dictionary (9th Ed. 2009).

adjournment nor did it raise an objection before the hearing and for these reasons, their submissions on this issue should be disregarded.

13. Even setting aside Rule 79(3), the Defence, in accordance with Rule 121(6) and the Chamber's order,³¹ served its List of Evidence on the OTP 15 days before the commencement of the Confirmation Hearing. In relation to *alibi*, the Chamber ordered the Defence to notify the OTP of its intention to raise *alibi* sufficiently in advance to enable the OTP to prepare adequately and to respond.³² The Chamber set no specific time-line. However, the relevant batch of OTP evidence dealing with the alleged meetings at the Nairobi Member's Club ("NMC") that Ambassador Muthaura supposedly attended on the same day was disclosed only on 19 August 2011.³³ Prior to that disclosure, the relevant OTP evidence pointed to a different venue, the Nairobi Safari Club ("NSC").³⁴
14. The OTP's late disclosure regarding this essential allegation against the Ambassador significantly changed the direction of the evidence that the Defence needed to address and required fresh Defence investigations. Consequently, the Defence served on the OTP evidence related to both the NMC and NSC 15-days prior to the Confirmation Hearing. The nature of the Defence evidence disclosed primarily indicates the whereabouts of the Ambassador on 3rd January 2008 as well as evidence of witnesses from both the NMC and the NSC speaking to events at those venues on 3rd January – thereby undermining key OTP allegations.
15. Furthermore, the Defence evidence served on the OTP in accordance with Rule 121(6) cannot be properly construed as evidence of *alibi* because the OTP's evidence contains allegations of other meetings held in late December 2007 and mid-January 2008 in furtherance of the common plan. Accordingly, the evidence disclosed by the Defence would not give rise to "a physical impossibility" that

³¹ ICC-01/09-02/11-64, para. 22.

³² ICC-01/09-02/11-64, para. 22. No specific date was set by the Chamber for the provision of notice of *alibi*.

³³ The evidence was served in Pre-Trial INCRIM batch 13 on 19 August 2011.

³⁴ EVD-PT-OTP-00004 was disclosed on 3rd June 2011. This is the CIPEV Report which makes reference to planning meetings at NSC in pages 0495-0496.

Ambassador Muthaura committed the crimes alleged, only that it would be physically impossible to have attended the particular meeting held on 3 January at the NMC or NSC, if such a meeting took place at all.

V. Annexes to Submission

16. Annexes A and B are filed confidentially in compliance with the protective measures ordered by the PTC. Annex A sets out victim accounts of the events in Naivasha and Nakuru. Annex B compares the evidence of Prosecution Witness 4, setting out 40 inconsistencies and contradictions in the evidence of this witness.³⁵

VI. The Prosecution's evidence is insufficient to satisfy the confirmation standard

17. In this section, the Defence critically analyses the OTP's core evidence of witnesses 1 to 12 upon which the OTP rely to have the present charges against Ambassador Muthaura confirmed. The Defence submits that a review of this evidence discloses that the OTP has patently failed to present a consistent case with a "clear line of reasoning" capable of establishing substantial grounds to believe that Ambassador Muthaura is responsible for the crimes alleged. The Defence will address each of these OTP witnesses in turn.

(a) Prosecution Witness 1 ("PW 1")

18. Prosecution Witness ("PW") 1 is an anonymous witness whose evidence is contained in a half-page summary.³⁶ The summary of PW 1's statement provides no details of any meetings in terms of dates, locations, attendees and discussions that took place. There is no information about what role Ambassador Muthaura supposedly played in any alleged meeting. The summary contains a one sentence bare assertion that "alleges that both Uhuru Kenyatta and Francis Muthaura were

³⁵ Annex B reproduces the actual contents of the different statements of PW 4 and compares the different accounts provided by the witness on each theme covered in his different statements. An analysis of the inconsistencies and contradictions of the different versions is contained in the last column.

³⁶ EVD-PT-OTP-00572 at p. 0026.

involved in these meetings”, nothing more. There is nothing in the brief summary about the basis of the witness’s knowledge for any of the assertions he makes. The Defence submits that the evidence of anonymous PW 1 is wholly unreliable.

(b) Prosecution Witness 2 (“PW 2”)

19. PW 2 is an anonymous witness who provides evidence largely in relation to the events in Naivasha.³⁷ At no point does PW 2 mention the Ambassador. PW 2 is a resident of Naivasha and was a direct witness to the violence in the town. PW 2 described the atmosphere in Naivasha immediately prior to the violence as “very tense it just [needed] a mad person to light a match and everything would blow up”.³⁸ This atmosphere resulted from the influx of Kikuyu IDPs from North Rift coupled with several rumours of attack on the Kikuyu from Kalenjin warriors and the Mungiki.³⁹ Following these conditions, a curfew was immediately imposed.⁴⁰
20. PW 2 states that during the PEV police engaged the attackers attempting to disperse the crowds, but the people would regroup.⁴¹ All police vehicles and officers were out patrolling and trying to contain the violence.⁴² PW 2 did not witness any free-zone created by the police as alleged, but instead worked with the police to rescue victims believing that the police would defeat the gangs.⁴³ PW 2 explained that the roads were being blocked because the gangs were trying to block the access of the police from getting to the gangs, but when the District Commission and the police were passing, they would force the people to remove stones.⁴⁴ PW 2 says victims of the violence fled to the police station for safety.⁴⁵

³⁷ PW 2’s evidence is contained in EVD-PT-OTP-00135 to EVD-PT-OTP-00142 and EVD-PT-OTP-00236 to EVD-PT-OTP-00247.

³⁸ EVD-PT-OTP-00236 at 0011 lines 297-298

³⁹ EVD-PT-OTP-00236 at 0010 line 281 to 0011 line 290

⁴⁰ EVD-PT-OTP-00236 at 0011 line 298; EVD-PT-OTP-00240 at 1577

⁴¹ EVD-PT-OTP-00236 at 0025 lines 819-825; EVD-PT-OTP-00238 at 0062 line 669; EVD-PT-OTP-00241 at 0183 line 541, at 0188 line 701; EVD-PT-OTP-00242 at 0235 lines 243-252; EVD-PT-OTP-00244 at 0347 line 135

⁴² EVD-PT-OTP-00237 at 0041 line 367-374, at 0042 line 428

⁴³ EVD-PT-OTP-00236 at 00237 at 0037 line 218, at 0038 line 268; EVD-PT-OTP-00237 at 0047, at 0052 lines 296-298;

⁴⁴ EVD-PT-OTP-00241 at 0187 line 688-689 and 693,

21. Whereas PW 11 and PW 12 claim Naivasha MP Hon. Mututho was one of the intermediaries financed and used by Uhuru Kenyatta to execute crimes in Naivasha,⁴⁶ PW 2 testified that he was with Hon. Mututho in Naivasha on 27th Jan 2008 when Mututho addressed the people to dissuade them from violence and that the residents were unhappy because they felt that their new MP, unlike Jane Kihara, did not have the courage to evict the Luos.⁴⁷

22. PW 2 also stated that the attackers were an uncontrollable crowd. Some were drunk and nobody listened to anybody.⁴⁸ PW 2 identified them as local Kikuyu, mostly from matatus and hawkers, attacking their Luo neighbours.⁴⁹ They were armed with sticks, pangas and pieces of metal.⁵⁰ PW 2 knew some as neighbours who offered him/her safe passage because of their history.⁵¹ The Defence submits that as the police were being openly defied by the local population, and as they were in fact rescuing and saving lives of the Luos, it is clear that they were not working in cahoots with those engaged in violence. A witness in the position of PW 2 would have surely known if Mungiki had been transported to Naivasha, about alleged oathing and whether someone with the profile of the Ambassador was involved. PW 2 did not see anyone in Naivasha that he/she could definitely say was Mungiki.⁵² Save for rumours which led the witness to speculate on Ndura Waruinge and Jane Kihara's possible involvement,⁵³ there is nothing in PW 2's testimony providing credible support to the OTP's theory of the case.

(c) Prosecution Witness 3 ("PW 3")

⁴⁵ EVD-PT-OTP-00237 at 0037 line 218, at 0038 line 268, at 0039 line 283; EVD-PT-OTP-00238 at 0066 line 821

⁴⁶ EVD-PT-OTP-00308 at 1314-1315 lines 375-390; EVD-PT-OTP-00066 at 0419 lines 516-517

⁴⁷ EVD-PT-OTP-00241 at 0213-0214

⁴⁸ EVD-PT-OTP-00236 at 0012

⁴⁹ EVD-PT-OTP-00237 at 0033; EVD-PT-OTP-00240 at 0158 lines 1487-1492; EVD-PT-OTP-00241 at 0172 lines 146-159

⁵⁰ EVD-PT-OTP-00237 at 0037 line 229; EVD-PT-OTP-00241 at 0196 lines 1009-1018

⁵¹ EVD-PT-OTP-00238 at 0050 line lines 228, 250

⁵² EVD-PT-OTP-00242 at 0232 lines 109-133

⁵³ EVD-PT-OTP-00239 at 0102 lines 833-835; EVD-OTP-PT-00241 at 0201 line 1190; EVD-PT-OTP-00244 at 0359 lines 558-560, at 0366 lines 784-786, at 0372 lines 1015-1021, at 0373 lines 1032-1059

23. PW 3 does not providing any incriminating information against Ambassador Muthaura.⁵⁴

(d) Prosecution Witness 4 (“PW 4”)

24. PW 4 is presented as a key OTP witness.⁵⁵ As demonstrated below and brought out in greater detail in the Chart attached as ANNEX B to this submission, the evidence of this witness is inherently unreliable and inconsistent – his version of events and venues of meetings repeatedly evolves in significant respects.

25. With regard to the alleged 26 November 2007 State House meeting, PW 4 presents inconsistent accounts regarding his attendance and with whom he attended,⁵⁶ the organisation and planning of the meeting,⁵⁷ the content of the meeting discussions,⁵⁸ the funds allegedly distributed at the meeting,⁵⁹ as well as who was present.⁶⁰ Similarly, PW 4’s evidence regarding the alleged 3 January 2008 meeting is plagued by inconsistencies as to the organisation of the meeting,⁶¹ the meeting venue,⁶² his travel to the meeting,⁶³ who spoke at the meeting and what was discussed at the meeting.⁶⁴ Importantly, PW 4 in his statement to the Waki Commission stated that it was the President’s personal assistant (who the witness identified as “Murage”⁶⁵) who had made the alleged telephone call to the Police Commissioner – not Ambassador Muthaura.⁶⁶ This being the earlier account and

⁵⁴ PW 3’s evidence is contained in EVD-PT-OTP-00224 to EVD-PT-OTP-00235.

⁵⁵ The evidence of PW 4 comprising of various statements are contained in EVD-PT-OTP-00041, EVD-PT-OTP-00084, EVD-PT-OTP-00248, EVD-PT-OTP-00302, EVD-PT-OTP-00569 and EVD-PT-OTP-00628.

⁵⁶ PW 4’s statement in EVD-PT-OTP-00041 at p. 0491 is inconsistent with EVD-PT-OTP-00248 at p. 0031.

⁵⁷ PW4’s account is contained in EVD-PT-OTP-00041 at p. 0490. He provides a different account in EVD-PT-OTP-00248 at p. 0030 paras 142 – 147.

⁵⁸ EVD-PT-OTP-00041 at pgs. 0491-0492 is inconsistent with his account in EVD-PT-OTP-00248 at p. 0033, para. 156. In the latter account, PW 4 provides an expanded role for Ambassador Muthaura, whilst in the earlier account, PW4 said that Ambassador Muthaura merely introduced the youths.

⁵⁹ EVD-PT-OTP-00041 at pgs. 0491-0492 is inconsistent with his account contained in EVD-PT-OTP-00248 at p. 0036, paras 175-178. Further version of PW4’s account is contained in EVD-PT-OTP-00302 at 1057, para. 49.

⁶⁰ EVD-PT-OTP-00041 at p. 0491 is inconsistent with his account in EVD-PT-OTP-00248 at p. 0032, para. 154.

⁶¹ EVD-PT-OTP-00041 at p. 0493 is inconsistent with his account in EVD-PT-OTP-00248 at p. 0038, paras.188-189.

⁶² EVD-PT-OTP-00041 at p. 0493 is inconsistent with his account in EVD-PT-OTP-00248 at p. 0038, para. 189.

⁶³ EVD-PT-OTP-00041 at p. 0494 is inconsistent with his account in EVD-PT-OTP-00248 at p. 0038, para. 190.

⁶⁴ EVD-PT-OTP-00041 at p. 0494 is inconsistent with his account in EVD-PT-OTP-00248 at pgs. 0039, para. 194 and 0040, para. 199.

⁶⁵ EVD-PT-OTP-00041 at p. 0491.

⁶⁶ EVD-PT-OTP-00041 at p. 0494.

closer in time to the events in question, it is reasonable to expect that PW 4's memory would have been more vivid and that he would have provided a more accurate recollection than in an account given 2 years later to the OTP.

26. In addition, the Defence point out that the meeting PW 4 claims to have attended at State House on 26 November 2007 was **ONE WEEK before** the Uhuru Park meeting.⁶⁷ The Uhuru Park meeting, which is a matter in the public domain and which several witnesses have spoken to, occurred on 25 November 2007.⁶⁸ PW 4, however, claims that the President told the attendees of the alleged 26 November meeting that the Uhuru Park meeting was to take place a week later. The persons PW 4 claims went with him to State House and the NMC (D12-37 and D12-48) categorically deny having gone with him.⁶⁹ Further, PW 4 was never a member of the Mungiki. Known Mungiki members D12-37 and D12-48, whom PW 4 claimed to have been interacting with, both stated he was never a member of the Mungiki.⁷⁰ Attendees named by PW 4 deny going to the meetings he alleges occurred.⁷¹ The video, photographs and lists of participants at a meeting that did take place at State House on 26 November do not show PW 4 being present.⁷² None of the participants to this State House meeting name PW 4 as having been present.⁷³ Mr. Kenyatta testified that he did not have any contact or a meeting with Ambassador Muthaura in November to December 2007, nor in January 2008.⁷⁴

⁶⁷ EVD-PT-OTP-00248 at p. 0033.

⁶⁸ Several witnesses and video materials speak to the Uhuru Park meeting having been held on 25 November 2007. See for example; EVD-PT-D12-00208 at p.0019, paras.19-22. See also video of Uhuru Park Rally contained in EVD-PT-D12-00187.

⁶⁹ EVD-PT-D12-00054 at pgs. 0418, para.31 and 0419, paras. 42-45 and EVD-PT-D12-00201 at pgs. 0075, para.18 and 0076, para. 22.

⁷⁰ EVD-PT-D12-00054 at p. 0416, para. 24 and EVD-PT-D12-00201 at p. 0075, paras 16 and 18. It is unsurprising therefore that the Witness's description of initiation in the Mungiki Sect differs significantly from those given by known members of the Sect. See different account of Mungiki initiation contained in EVD-PT-D12-00201 at p. 0075, para. 16.

⁷¹ See EVD-PT-D12-00054 at p. 0418, para. 31, 0419, paras 42-45 and EVD-PT-D12-00201 at p. 0075, para.18 and 0076, para.22.

⁷² EVD-PT-D12-00187. See also EVD-PT-D12-00230.

⁷³ EVD-PT-D12-00051 at pps. 0381-0382, paras.14-18; EVD-PT-D12-00108 at p. 0125, para.54; EVD-PT-D12-00039 at p.0310 para 17-20.

⁷⁴ ICC-01/09-02/11-T-11-CONF-ENG ET 29-09-2011, p. 86, lines 4-14, lines 18-21 and p.90, lines 2-5 and lines 12-13.

(e) Prosecution Witness 5 ("PW 5")

27. PW 5 is an anonymous witness.⁷⁵ Crucially, this witness's evidence controverts the OTP's theory that the Commissioner of Police, General Ali, reported to the Head of the Public Service.⁷⁶ This witness states categorically that under Kenyan law, the Commissioner of Police is the head of the Kenya police.⁷⁷ According to the witness, General Ali reported to the Minister of Provincial Administration and Internal Security through the Permanent Secretary. In addition, Ali reported to the President.⁷⁸ In particular, PW 5 discussed reporting lines between the Police and the Minister and Permanent Secretary, Provincial Administration and Internal Security and never placed Ambassador Muthaura in this chain.⁷⁹

(f) Prosecution Witness 6 ("PW 6")

28. PW 6 is also an anonymous witness and is not a Mungiki member.⁸⁰ Significantly, the witness does not make any mention of Ambassador Muthaura. PW 6's anonymous summary amounts to nothing more than generic hearsay. It provides no dates and times for the alleged State House meetings, and the basis of the witness's knowledge is itself an anonymous source.⁸¹

(g) Prosecution Witness 7 ("PW 7")

29. PW 7 is another anonymous witness whose evidence is provided in summary form.⁸² The witness makes no mention of Ambassador Muthaura.⁸³ PW 7's evidence is based entirely on hearsay evidence from anonymous sources that she interviewed and from media reports.⁸⁴

(h) Prosecution Witness 8 ("PW 8")

⁷⁵ EVD-T-OTP-00571 at pgs. 0021 to 0024.

⁷⁶ OTP Written Submissions, paras. 40-41.

⁷⁷ EVD-PT-OTP-00571, at p. 0021, para.4.

⁷⁸ EVD-PT-OTP-00571 at p. 0022, para. 2.

⁷⁹ EVD-PT-OTP-00571 at p. 0024.

⁸⁰ EVD-PT-OTP-00570 at p. 0018.

⁸¹ EVD-PT-OTP-00570 at pgs. 0018 to 0019.

⁸² EVD-PT-OTP-00617.

⁸³ Nowhere in the Witness's anonymous summary, EVD-PT-OTP-00617, is Ambassador Muthaura mentioned.

⁸⁴ EVD-PT-OTP-00617 at p. 0036.

30. PW 8 does not mention Ambassador Muthaura and his statement does not advance the case of the OTP against the Ambassador in any significant manner.⁸⁵

(i) Prosecution Witness 9 ("PW 9")

31. PW 9, another anonymous witness, is a Mungiki insider who was interviewed by the OTP between 2nd and 5th April 2011 in 15 sessions, totalling 15 hours, during which he did not mention Ambassador Muthaura even once. He was allegedly close to the Mungiki top leadership and had free access to information within the group.⁸⁶ He further testified that the communication system within the Mungiki is very efficient and that all members were promptly made aware of all Mungiki activities.⁸⁷ Therefore, the witness should have been aware of key events and theories in the OTP's case such as the alleged State House and NMC meetings, the cease-fire with the government and the free zone. Critically, PW 9 neither mentions Ambassador Muthaura, nor does he provide evidence of any relationship between the Ambassador and the Mungiki.⁸⁸ Further, PW 9's evidence contradicts the OTP's case. The witness states categorically that Mungiki did not get uniforms and weapons from the Police.⁸⁹ He says that members of parliament provided weapons to the Mungiki.⁹⁰ The Defence note that Ambassador Muthaura is not an MP. In any event, PW 9 neither discloses the identities of these MPs nor does he explain the basis for this allegation. He never witnessed or saw anyone providing money or weapons to the Mungiki.⁹¹ Additionally, contrary to the OTP's case, the witness states that attacks in Nakuru and Naivasha were not organised. He says that during the PEV the people on the ground were controlling themselves and that if they decided to burn a specific

⁸⁵ Nowhere in PW 8's Statement, EVD-PT-OTP-00219, is Ambassador Muthaura mentioned.

⁸⁶ EVD-PT-OTP-00645 at p. 0304, lines 527-547 and 0305, lines 548-554.

⁸⁷ EVD-PT-OTP-00641 at p. 0218, lines 673-691.

⁸⁸ Nowhere in the Witness's evidence did he mention Ambassador Muthaura in relation to the Mungiki.

⁸⁹ EVD-PT-OTP-00644 at p. 0275 lines 377-381 and EVD-PT-OTP-00643 at p. 0263 lines 911-912.

⁹⁰ EVD-PT-OTP-00641 at p. 0214 lines 510-514.

⁹¹ EVD-PT-OTP-00641 at pgs. 0216, lines 582 to 596; EVD-PT-OTP-00642 at p. 0225 lines 82-84,; EVD-PT-OTP-00640 at p. 0196, lines 641-645.

place or kill particular people, they did so. He explained that this happened throughout the country beginning mid-January 2008⁹².

32. PW 9 also contradicts other OTP witnesses by stating that all the meetings he attended and heard about were held only in hotels.⁹³ This piece of evidence conflicts with the evidence of OTP witnesses who allege that meetings between the Government and the Mungiki were held at State House.⁹⁴ PW 9 further states that the police were targeting the Mungiki prior to the election⁹⁵ and concludes that the relationship between the Mungiki and the police did not change at the height of the PEV.⁹⁶ He also concludes that the Police did not target any particular ethnic community during the PEV.⁹⁷

(j) Prosecution Witness 10 ("PW 10")

33. PW 10 is an anonymous witness who claims to be a member of the Mungiki.⁹⁸ His evidence relates principally to the alleged planning meeting in late January 2008 and preparatory events at State House in Nairobi for the attack on Naivasha⁹⁹ as well as events on the ground in Naivasha.¹⁰⁰ The Defence relies upon its submissions in relation to PW 10's evidence in paragraphs 63-66 below which demonstrate that PW 10 is a witness incapable of belief.

(k) Prosecution Witness 11 ("PW 11")

34. PW 11 is another anonymous witness who claims to be a member of the Mungiki.¹⁰¹ The critical evidence provided by this witness is of a hearsay nature and based on anonymous sources. PW 11 provides hearsay evidence relating to

⁹² EVD-PT-OTP-00642 at p. 0228, lines 192-221.

⁹³ EVD-PT-OTP-00638 at p. 0152, lines 203 to 207.

⁹⁴ PW 4's evidence on alleged State House meeting is contained in EVD-PT-OTP-00248 at pgs. 0031-0034, paras 149-166 and PW 11's account is contained in EVD-PT-OTP-00322 at pgs. 1513 to 1514.

⁹⁵ EVD-PT-OTP-00638 at 0155 lines 318 - 341.

⁹⁶ EVD-PT-OTP-00644 at p. 0276.

⁹⁷ EVD-PT-OTP-00644 at p. 0288 lines 853-856..

⁹⁸ EVD-PT-OTP-00674 at p. 0550.

⁹⁹ EVD-PT-OTP-00674 at pgs. 0551 to 0552.

¹⁰⁰ EVD-PT-OTP-00674 at pgs. 0552 to 0553.

¹⁰¹ EVD-PT-OTP-00304 at pgs. 1238 to 1240.

alleged meetings between the Government and the Mungiki at State House,¹⁰² the alleged link between Ambassador Muthaura and the Mungiki¹⁰³ and the events on the ground in different geographical locations, including Nakuru and Naivasha.¹⁰⁴ In fact, none of the evidence provided by the witness in relation to Ambassador Muthaura is based on a direct, first-hand account.¹⁰⁵ The witness does not state Ambassador Muthaura was present or in any way involved in any meetings at State House.¹⁰⁶ Similarly, despite providing a wide array of evidence covering different geographical locations in the country, the witness, when confronted as to his whereabouts during the relevant period, states that he was based in Nairobi in the weeks leading up to the elections and during the PEV.¹⁰⁷

35. The witness alleges that D12-47 was used to secure release of Mungiki who were arrested by the police.¹⁰⁸ Referring to an incident in November 2007 in Muranga as an example of such assistance, PW 11 provides two different accounts in his statement. In the first version, he says that when Mungiki were arrested, D12-47 would intervene to secure their release.¹⁰⁹ He later amended this account to say that D-12-47 intervened through Ambassador Muthaura to secure the release of the Mungiki arrested.¹¹⁰ There is no evidence with respect to the basis of the witness's knowledge for these facts.¹¹¹ Indeed, PW 11 *does not* have direct knowledge of these facts.¹¹² PW 11 is merely able to speculate on why he believes Ambassador Muthaura was involved in securing the release of the Mungiki.¹¹³ Quite apart from his speculating on the person Ambassador Muthaura would

¹⁰² EVD-PT-OTP-00322 at pgs. 1513-1514. PW 11 alleges that several meetings were held at State House between Government Officials and Mungiki, but when questioned by the Investigator, he stated that the first meeting was held in November and the second was held either the day before election results were announced or the day on which election results were announced.

¹⁰³ EVD-PT-OTP-00320 at pgs. 1475 to 1476 and also EVD-PT-OTP-00323 at pgs. 1524 to 1525.

¹⁰⁴ EVD-PT-OTP-00320 at p. 1481.

¹⁰⁵ When asked as to his source of knowledge, the witness consistently provided sources which were anonymous or claimed his sources to be Mungiki and people on the ground (EVD-PT-OTP-00327 at p. 1594, lines 140-148).

¹⁰⁶ See EVD-PT-OTP-00322 at pgs. 1513 to 1514; EVD-PT-OTP-00322 at p. 1513 to 1515.

¹⁰⁷ EVD-PT-OTP-00327 at p. 1594.

¹⁰⁸ EVD-PT-OTP-00320 at pgs. 1475 to 1476.

¹⁰⁹ EVD-PT-OTP-00320 at p. 1476.

¹¹⁰ EVD-PT-OTP-00320 at p. 1476.

¹¹¹ EVD-PT-OTP-00320 at p. 1476.

¹¹² EVD-PT-OTP-00323 at p. 1525, lines 74 to 75

¹¹³ EVD-PT-OTP-00320 at p. 1476.

have called to order that the Mungiki be released, the OTP cannot escape the reality that PW 11 was simply not present at either end of these alleged conversations.¹¹⁴

36. The witness also claims that Mr. KIMEMIA, the Permanent Secretary for Provincial Administration and Internal Security, provided Administration Police (“AP”) uniforms and weapons to the Mungiki from State House in Nakuru through the Commandant of the AP.¹¹⁵ When asked whether Ambassador Muthaura would have provided weapons given his senior position in Government, the witness *speculated* that Ambassador Muthaura would have been involved given that he was the boss of Francis Kimemia.¹¹⁶ This evidence is contradicted by the very clear structure of the government and the fact that Witness D12-5 was the Permanent Secretary of the Ministry of Provincial Administration and Internal Security and not Francis Kimemia. Further, during the relevant period Francis Kimemia reported to D12-5, who in return reported to the Minister. Ambassador Muthaura is not the boss of either D12-5 or Francis Kimemia.¹¹⁷

37. As illustrated above, PW 11 provides no concrete basis for his allegation on the delivery of AP uniforms and weapons. The witness never saw the uniforms¹¹⁸ and guns and has no direct knowledge of these matters.¹¹⁹

38. PW 11 also states that the Mungiki were not organised during the PEV because they had no national platform to discuss retaliatory attacks.¹²⁰

¹¹⁴ Despite this, PW 11 states the precise nature of the instruction Ambassador Muthaura would have provided: “Release that person” (EVD-PT-OTP-00320 at p. 1476, line 279).

¹¹⁵ EVD-PT-OTP-00320 at p. 1471 lines 68-79.

¹¹⁶ EVD-PT-OTP-00320 at p. 1470, lines 32 to 36.

¹¹⁷ ICC-01/09-02/11-T-9-CONF-ENG, page 24, lines 9-17.

¹¹⁸ EVD-PT-OTP-00320 at p. 1471, lines 54-55.

¹¹⁹ EVD-PT-OTP-00327 at p. 1594, lines 135 to 164.

¹²⁰ EVD-PT-OTP-00309 at p. 1308 lines 127-129.

39. For all the reasons outlined above, the evidence of PW 11 is simply not credible or in fact contradicts the OTP's theory. Even setting aside the inconsistencies, assumption, speculation and factual errors that permeates PW 11's evidence, additional factors render his account highly unlikely: (a) Despite the OTP's submission contained in paragraph 47 of its Written Submissions as to the secrecy of the Mungiki-Government relations before the 2007 elections, PW 11 states that in November 2007, prior to the elections, 10,000 Mungiki held a public ceremony at Uhuru Park during which the *guthera* ritual was administered;¹²¹ (b) For PW 11, every known Kikuyu leader (business and political) is a Mungiki;¹²² (c) Witness D12-47 denies emphatically having had any contact with Ambassador Muthaura;¹²³ (d) Francis Kimemia states that he does not know D12-47 and was not involved in any way in distributing weapons or uniforms to Mungiki;¹²⁴ (e) Similarly, the commandant in charge of the AP, D12-17, denies issuing AP uniforms and weapons to Mungiki and denies receiving instructions from Ambassador Muthaura or Francis Kimemia;¹²⁵ and (f) Witness D12-24, the Security Officer in charge of security for all State Houses and lodges, denies having received instructions from Mr. KIMEMIA for the issuance of weapons to Mungiki from State House in Nakuru, and explains in detail that access to State Houses and Lodges are highly regulated.¹²⁶

(l) Prosecution Witness 12 ("PW 12")

40. PW 12 is yet another anonymous witness. The Defence submits that the OTP's submissions in paragraph 44 of its Written Submissions in relation to the content of the evidence of PW 12 is inaccurate. It is not the witness's evidence that he was present only *when* the violence actually subsided but rather he states that he was

¹²¹ EVD-PT-OTP-00307 at pgs. 1279-1282.

¹²² EVD-PT-OTP-00305 at pgs. 1250-1252, wherein the witness outrageously suggests that a huge number of members of parliament from Kikuyu and other tribes were initiated into Mungiki sect.

¹²³ EVD-PT-D12-00228 at p. 0019, paras. 31-32.

¹²⁴ EVD-PT-D12-00220 at pgs. 0006-0007, paras 3 and 5 to 12.

¹²⁵ EVD-PT-D12-00081 at p. 0171, paras 30-33.

¹²⁶ EVD-PT-D12-00082 at p. 0176-0177, paras 18-19.

there *until* the violence subsided and that he only left Nakuru “after the army quelled the violence”.¹²⁷

41. The Defence challenge to PW 12 was not that he had limited knowledge of the crimes in Nakuru. The Defence submissions were quite the contrary and the OTP distorts the record of proceedings in which the Defence clearly submitted that PW 12 claims to have full knowledge of what happened in Nakuru and categorically states “*nothing so much happened in Nakuru*”.¹²⁸ The Defence submissions, as reflected in the record of the proceedings, is that PW 12 provides information on what he personally witnessed in relation to the crimes and states in very clear terms that: (i) civilians were not killed in Nakuru¹²⁹; (ii) there was no arson perpetrated by Kikuyus in Nakuru; and (iii) that the premises that were attacked in fact belonged to the Kikuyus. PW 12 further testifies that: (iv.) the Kikuyu do not burn property, whereas the Kalenjins do; (v.) the most a Kikuyu would do is loot¹³⁰; (vi) Kalenjin and Luo women were not raped in Nakuru; and (vii) the Mungiki do not rape women.¹³¹ As previously submitted, the Defence, unlike PW 12, does not dispute that the Kikuyu burnt civilian property and killed civilians. The Defence in fact submitted evidence in support of this allegation.¹³²

42. Additionally, in relation to the events that took place on the ground in Nakuru, PW 12 states that: (i) the only crimes committed in Nakuru were the mounting of roadblocks;¹³³ (ii) men were not circumcised in Nakuru or in Naivasha;¹³⁴ and (iii) in relation to the police response in Nakuru, PW 12’s complaint is that the police

¹²⁷ EVD-PT-OTP-00666 at p. 0407, lines 44-51.

¹²⁸ ICC-01/09-02/11-T-15-ENG, page 48, lines 11-13; EVD-PT-OTP-00665 at p. 0395, lines 353-355.

¹²⁹ ICC-01/09-02/11-T-15-ENG, page 48, lines 11-13; EVD-PT-OTP-00665 at p. 0395, lines 357-364.

¹³⁰ ICC-01/09-02/11-T-15-ENG, page 48 lines 14-15; EVD-PT-OTP-00665 at p. 0396, lines 379-392.

¹³¹ ICC-01/09-02/11-T-15-ENG, page 48, lines 16-17; EVD-PT-OTP-00665 at p. 0398, lines 486-491; EVD-PT-OTP-00662 at p. 0343, lines 671-674.

¹³² ICC-01/09-02/11-T-15-ENG, page 49, lines 1-5; EVD-PT-D12-00065 at paras 28, 32 and 34.

¹³³ EVD-PT-OTP-00665 at p. 0398, lines 481.

¹³⁴ EVD-PT-OTP-00665 at p. 0399, lines 497-499.

did not effectively respond to protect the Kikuyu against Kalenjin attacks – nothing is said about the converse.¹³⁵

43. In relation to the events that took place in Naivasha, PW 12 again purports to provide an eyewitness account¹³⁶ of the incident described in paragraph 70 of the Amended DCC. The witness states that the attack was carried out by the general Kikuyu population in the area and not Mungiki.¹³⁷ In relation to this incident, the OTP allegation is again contradicted by its own evidence cited in the Amended DCC¹³⁸. The evidence cited in fact demonstrates that the loss of lives during that incident was unintentional. The Report reproduces the evidence of an eye-witness who states that: *“The house was surrounded by a mob. You can’t tell who lit the fire, there were too many people surrounding the place and watching. But I saw boys go in and take the kids out of the house before the place was set on fire with the man left in there. But they did not know that in the back room were hiding more people. In fact 19 people were hiding in the back room including women and children and two infants under two years old. They all burned to death.”*

44. PW 12 further contradicts the OTP allegations in paragraph 67 of the Amended DCC that “Mungiki [...] set up barricades and checkpoints to block transit and request people to identify themselves in Kikuyu language. They began to target and kill perceived ODM supporters.” According to the evidence of this witness, it was the general Kikuyu population of Naivasha and not the Mungiki who did this.¹³⁹

45. PW 12 provides two different accounts in relation to the alleged intervention of Ambassador Muthaura to secure the release of Mungiki arrested in Muranga. In an earlier account, PW 12 stated that D12-47 called Ambassador Muthaura to

¹³⁵ EVD-PT-OTP-00666 at p. 0406, lines 29-36.

¹³⁶ EVD-PT-OTP-00664 at p. 0380, lines 539-542.

¹³⁷ EVD-PT-OTP-00652 at p. 0119, lines 250-254.

¹³⁸ EVD-PT-OTP-00002 at pgs. 0293 and 0296-0297, cited in footnote 183 of the Amended DCC.

¹³⁹ EVD-PT-OTP-00664 at p. 0384, lines 688-694.

secure the release of the Mungiki arrested, while in a subsequent account, he relates that D12-47 called MICHUKI, who directed D12-47 to call Ambassador Muthaura to discuss the matter.¹⁴⁰

46. The witness also alleges that the orders issued by MICHUKI (not Ambassador Muthaura) to the Mungiki in relation to Kibera (and not Naivasha or Nakuru), were to scare people and not to kill them.¹⁴¹ The witness further states that Mungiki were not sent to predominantly Kikuyu areas. Instead, according to PW 12, Kikuyus, who were fighting Luos, were sent to areas with a Luo concentration – i.e. predominantly places where Luos live in large numbers.¹⁴² From the evidence presented to the Chamber, the majority of the population in Naivasha were Kikuyus.¹⁴³

VII. Prosecution's reference to events outside the scope of the charges

47. The OTP has sought to include as part of its case, allegations concerning an alleged telephone conversation between Ambassador Muthaura and General Hussein Ali with regards to the events that took place in Kibera.¹⁴⁴ The OTP application to have a summons issued in relation to events in Kisumu and Kibera was rejected by the PTC. In so determining, the Chamber held that *"the material presented by the Prosecutor does not provide reasonable grounds to believe that the events which took place in Kisumu and/or in Kibera can be attributed to Muthaura, Kenyatta and/or Ali under any mode of liability embodied in article 25(3) of the Statute."*¹⁴⁵ Any reference to allegations concerning Kibera are furthermore prejudicial and inadmissible. The OTP cannot rely on this evidence to supplement or make up for the paucity of its evidence in relation to the charges before the PTC concerning Naivasha and Nakuru.

¹⁴⁰ EVD-PT-OTP-00661 at p. 0310.

¹⁴¹ EVD-PT-OTP-00662 at p. 0337.

¹⁴² EVD-PT-OTP-00662 at p. 0331.

¹⁴³ Testimony of D12-25 (ICC-01/09-02/11-T-8-Red-ENG WT 26-09-2011, p. 62, lines 10-12).

¹⁴⁴ ICC-01/09-02/11-280 AnxA, para 54; ICC-01/09-02/11-T-5-ENG, page 40, lines 3-8.

¹⁴⁵ Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11-01, para 32.

48. The OTP have not explained the relevance or purpose for its repeated reference to alleged events relating to Kibera. It has been left to the Defence to speculate that the OTP is perhaps seeking to demonstrate that Ambassador Muthaura has a *propensity* to commit the crimes as charged in the Amended DCC. Such evidence is not only without merit and contrary to the finding of the PTC, it is also prejudicial and inadmissible. The Appeals Chamber of the ICTR has held that: *“The Trial Chamber correctly stated that evidence of prior criminal acts of the Accused is inadmissible for the purpose of demonstrating ‘a general propensity or disposition’ to commit the crimes charged. The Trial Chamber emphasised that ‘this does not preclude the introduction of such evidence for other valid purposes.’ The Trial Chamber found that the Prosecutor failed to show that the proposed testimony had any relevance beyond showing that the Accused committed crimes on previous occasions, which was not directly relevant to the crimes charged in the Indictments. Thus, the Trial Chamber correctly excluded the evidence because it had a low probative value but a substantial prejudicial effect.”*¹⁴⁶

49. Furthermore, the evidence of PW 12 concerning this allegation is, in any event, unreliable and contradictory. The witness was not asked, even once, what was the basis of his knowledge regarding the alleged telephone conversation between Ambassador Muthaura and General Ali in relation to events in Kibera. One thing is for sure – the witness was not present because he states that he has never met Ambassador Muthaura or General Ali right up to the time he was being interviewed by the OTP.¹⁴⁷ The fact that the witness has never met Ambassador Muthaura personally should have informed the OTP sufficiently and to have required them to have inquire, at every stage, as to the basis of this witness’s knowledge of any fact or information he provided. To this extent, the Defence agrees with the submissions of the OTP in their “Written Submissions Following the Hearing on the Confirmation of Charges” in the *Ruto et al case*¹⁴⁸ where their

¹⁴⁶ *Prosecutor v. Bagosora et. al*, ICTR-98-41-AR93 & ICTR-98-41-AR93.2, DECISION ON PROSECUTOR’S INTERLOCUTORY APPEALS REGARDING EXCLUSION OF EVIDENCE, 19 December 2003, para 14.

¹⁴⁷ EVD-PT-OTP-00671 at p. 0506, lines 236-237.

¹⁴⁸ ICC-01/09-01/11-345.

stated position was that *“the Chamber can look to additional factors to determine the reliability, and thus assign the appropriate probative value, of evidence from anonymous sources. [...] For transcripts, additional factors may include:[...] Whether, and how, the questioners probe the witness’ information and veracity.”*¹⁴⁹ In addition, PW4 contradicts the evidence of PW 12 on Michuki being in a meeting with Mungiki.¹⁵⁰ Rather, PW4 states that *“Only one person in the government did not want to hear about the Mungiki or negotiate with them. That person was John Michuki”*. Michuki’s antipathy towards Mungiki and his efforts to eradicate the Mungiki threat is consistent with Michuki’s own evidence.¹⁵¹

50. As demonstrated in the above analysis, the OTP rely almost exclusively on anonymous witnesses who provided mainly hearsay testimony from anonymous sources. The OTP evidence generally derives from largely unreliable and inherently weak sources. In addition to the contradictions, inconsistencies and improbability of the core evidence presented by the OTP, it is clear that the evidence presented is not sufficient to establish substantial grounds to believe that Ambassador Muthaura is responsible for the crimes alleged.

VIII. Prosecution allegations against Ambassador Muthaura are unsupported by the prosecution’s own evidence and lacks independent corroboration

(a) The November 2007 Muranga Meeting

51. Despite the differing hearsay accounts of anonymous Prosecution Witnesses 11¹⁵² and 12¹⁵³ (as well as the fact that both accounts are hearsay evidence from anonymous sources) on the supposed Muranga meeting in which Ambassador Muthaura is alleged to have secured the release of Mungikis who were arrested, the OTP did not place before the Court any independent evidence supporting this

¹⁴⁹ ICC-01/09-01/11-345, para. 27.

¹⁵⁰ EVD-PT-OTP-00661 at p. 0322, lines 808-837 (PW 12’s account).

¹⁵¹ EVD-PT-D12-00088 at para. 9.

¹⁵² PW 11’s account of the Muranga incident is contained in EVD-PT-OTP-00320 at p. 1476.

¹⁵³ PW 12’s account of the Muranga incident is contained in EVD-PT-OTP-00661 at p. 0310.

allegation. The Defence refers to its analysis of the evidence of PW 11 and PW 12 in paragraphs 34 to 46 above.

(b) The 26 November 2007 Meeting

52. In paragraph 20 of its Amended DCC, the OTP alleged that prior to the elections Mr. KENYATTA facilitated a series of meetings beginning in November 2007 to solicit the assistance of the Mungiki in supporting the Government during the December 2007 elections. The OTP relied on PW 4, PW 1 and PW 11 to support its allegations.¹⁵⁴ The OTP's attempt to use the evidence of PW 11 to corroborate PW 4's account of the 26 November State House meeting is unsupported by the facts, and more particularly for the reasons set out below. The Defence submissions in paragraph 18 above in relation to PW 1's evidence demonstrate that he does not provide any information in relation to this meeting.

53. While the Youth Meeting with the President at State House on 26 November 2007 was a matter in the public domain,¹⁵⁵ the 26 November State House meeting described by PW 4 differs from that described by PW 11. In the different versions of his statement to the OTP, PW 4 alleges that he attended a meeting at State House with the President, Ambassador Muthaura, George THUO, Hyslop IPU and Uhuru KENYATTA in a tent on State House grounds.¹⁵⁶ PW 4 further claims that he attended the meeting together with D12-37, D12-48 ("████") and Maina DIAMBO.¹⁵⁷ The witness also states that the President was meeting other youth groups when they arrived at State House for the meeting.¹⁵⁸ However, PW 11 when providing a hearsay account of an alleged Statehouse meeting does not mention PW 4 nor that the meeting took place in a tent with Mungiki in Statehouse.¹⁵⁹ Similarly, the hearsay evidence provided by PW 1¹⁶⁰ and PW 6¹⁶¹

¹⁵⁴ See footnotes 37 and 38 of the Amended DCC, ICC-01/09-02/11-280-AnxA.

¹⁵⁵ EVD-PT-D12-0018 (Video of 26 November State House Youth Meeting) and EVD-PT-D12-00235 (Press Release on Meeting and photograph of President with participants) at the 26 November meeting.

¹⁵⁶ EVD-PT-OTP-00248 at pgs. 0031 to 0034, paras 149 to 166.

¹⁵⁷ EVD-PT-OTP-00248 at p. 0031, para. 149.

¹⁵⁸ EVD-PT-OTP-00248 at p. 0031, para. 150.

¹⁵⁹ EVD-PT-OTP-00322 at pgs. 1513 to 1514. PW 11 does not recall the date of the Nov. statehouse meeting.

regarding alleged meetings at State House does not corroborate the account of PW 4.

54. In fact, the clear and uncontroverted evidence including: (a) the list of participants to the meeting, (b) the pictures of the attendees, (c) the video showing the commencement of the meeting, (d) the report/press release relating to the meeting and (e) the highly consistent statements of unchallengeable attendees to the meeting, when put together, show quite clearly that PW 4's account of this meeting cannot be believed.

(c) The 30 December 2007 meeting at the Nairobi Statehouse

55. The OTP allege that one of the **key** preparatory meetings was held at Statehouse, Nairobi on 30 December 2007 and that Ambassador Muthaura participated in this meeting.¹⁶² The OTP have put forward PW 11's statement as evidence of this alleged meeting.¹⁶³

56. In footnote 106 of the Amended DCC, the OTP cite portions from the transcripts of the OTP interview of PW 12 as supporting the allegations concerning this meeting. The Defence note that the portions referred to¹⁶⁴ are redacted in their entirety. Accordingly, there is absolutely no information from PW 12 concerning the alleged meeting of 30 December 2007 at the Statehouse, let alone Ambassador Muthaura being present at any such meeting.

57. The OTP during the Confirmation Hearing submitted that PW 6 provides independent corroboration of this alleged meeting.¹⁶⁵ The Defence submits that this is another instance where the OTP misstates clear and unequivocal evidence.

¹⁶⁰ EVD-PT-OTP-00572 at p. 0026.

¹⁶¹ EVD-PT-OTP-00570 at p. 0019.

¹⁶² ICC-01/09-02/11-280-AnxA, para. 50; ICC-01/09-02/11-T-4-ENG, page 51, lines 22-25 to page 52, lines 1-15; ICC-01/09-02/11-T-5-ENG, page 12, lines 8-19.

¹⁶³ ICC-01/09-02/11-280-AnxA, footnote 106; ICC-01/09-02/11-T-5-ENG, page 12, lines 13-19; page 13, lines 23-10.

¹⁶⁴ EVD-PT-OTP-00067 at pgs. 0425 to 0431.

¹⁶⁵ ICC-01/09-02/11-T-5-ENG, page 12, lines 11-19.

PW 6 purports to provide information on two meetings. The witness states “*the first meeting took place before the elections and the second during the post election violence*”¹⁶⁶ The date 30 December 2007 is neither before the elections nor is it within the period that can be fairly described as being during the PEV. What is more, PW 6 never mentions Ambassador Muthaura in his entire account. The Defence submits that PW6 does not corroborate the alleged 30 December 2007 meeting at Statehouse.

58. The Defence notes that the portions of evidence cited by the OTP in the Amended DCC in relation to PW 11 do not even mention Ambassador Muthaura being present at the alleged meeting at Statehouse.¹⁶⁷

59. What emerged in the OTP’s oral submissions was a brand new allegation that Ambassador Muthaura held a meeting in the office of John Michuki (who was the Minister for Provincial Administration and Internal Security at the material time) in Nairobi on 30 December 2007 concerning the deployment of Mungiki to Kibera. The OTP submitted that Mungiki and Party of National Unity (“PNU”) officials were in attendance at this meeting. The OTP supported this allegation with the portions of the evidence of PW 12.¹⁶⁸ In the course of the hearing, at the instigation of the Defence,¹⁶⁹ the OTP effectively conceded that this allegation is an error and confirmed to the court that in fact PW 12 does not state that Ambassador Muthaura was present at this alleged meeting.¹⁷⁰

(d) The 3 January Meeting at the Nairobi Members Club

60. PW 4’s account of the alleged 3rd January 2008 meeting at the Nairobi Member’s Club¹⁷¹ remains uncorroborated. The OTP have not submitted a single piece of evidence, be it testimonial or documentary, to corroborate the contended account

¹⁶⁶ EVD-PT-OTP-00570 at p. 0018.

¹⁶⁷ EVD-PT-OTP-00322 at 1513-1515

¹⁶⁸ ICC-01/09-02/11-T-5-ENG, page 39, lines 18-25 and page 40, lines 1-2.

¹⁶⁹ ICC-01/09-02/11-T-11-ENG, page 88, lines 4-25, page 89, lines 1-25 and page 90, lines 1-13.

¹⁷⁰ ICC-01/09-02/11-T-11-ENG, page 93, lines 19-22.

¹⁷¹ EVD-PT-OTP-00248 at pgs. 0038 to 0042, paras. 188 to 208.

of PW 4. Crucially, the members of staff at the NMC denied that this meeting ever took place there.¹⁷²

(e) The mid-January 2008 meetings

61. In paragraph 50 of the Amended DCC, the OTP allege that one of the preparatory meetings was in mid-January 2008. The evidence cited in support of this allegation is found at footnote 108.¹⁷³ A plain reading of the relevant excerpt of the evidence cited discloses that there is no mention of Ambassador Muthaura. Rather, reference is only made to several other individuals none of whom have been shown to have any relationship whatsoever to the Ambassador.

(f) The late January meeting at State House alleged by PW 10

62. The Defence expresses its gravest concern and discomfort in the approach of the OTP in misrepresenting very clear and unambiguous written, verbatim records of proceedings. It is not a matter of alternative interpretation of these records, but a case of blatant distortion by the OTP.

63. The OTP submit at paragraph 46 of their Written Submissions that the Defence “challenged Prosecution witness 0010 because in his statement he could not recall the exact date of the Naivasha attack or the title/rank of two police officers”. This is simply wrong. The portions of the transcripts referenced by the OTP in footnote 66 do not support this submission. Rather, the transcripts discloses that the Defence challenged the reliability and credibility of PW 10 on the basis that: (i) the witness states that the attack in Naivasha took place on a Saturday in mid-January 2007¹⁷⁴ whereas the OTP allegation is that the attack took place on 27 January 2008, which is a Sunday;¹⁷⁵ (ii) the witness states that amongst those present at the alleged Mungiki gathering/meeting at Statehouse was Joseph Kamau who the

¹⁷² EVD-PT-OTP-00184; EVD-PT-OTP-00219; EVD-PT-OTP-00106

¹⁷³ EVD-PT-OTP-00065 at p. 0053, para. 226.

¹⁷⁴ EVD-PT-OTP-00674 at pgs. 0551-0552.

¹⁷⁵ ICC-01/09-02/11-T-7-ENG, page 36, lines 10-15.

witness says was the Nairobi CID Director¹⁷⁶ whereas the Defence presented conclusive evidence demonstrating that Joseph Kamau had in fact retired on 27 November 2006¹⁷⁷; (iii) the witness states that another person present at this meeting was the PPO of Nairobi by the name of Kimuri Mwangi, whereas the Defence presented conclusive evidence demonstrating that the witness even got the name of the concerned person wrong. The person's name is in fact King'ori Mwangi and not Kimuri Mwangi, and whilst he was the PPO of Nairobi at one time, he held this position only until December 2006 when he was transferred to PPO for Coast Province stationed in Mombasa – a position he held through July 2009¹⁷⁸ and not as stated by PW 10¹⁷⁹; and (iv) the witness states very clearly that Ambassador Muthaura was not present at this meeting and goes on to speculate that despite their absence government ministers (including Ambassador Muthaura) “must have been” involved simply because the alleged gathering/meeting took place in Statehouse.¹⁸⁰ In their witness statements, both Mr. MWANGI and Mr. KAMAU deny having been at Statehouse during the PEV period.¹⁸¹

64. The Defence reiterates that PW 10 is a witness incapable of belief. This witness's account of the alleged Mungiki meeting at Statehouse is uncorroborated. He is the only witness who speaks about this alleged meeting. In any event, the witness states that Ambassador Muthaura was not even present at this meeting and that the Mungiki Spokesman who was allegedly addressing the more than 100 Mungiki members did not even mention the name of Ambassador Muthaura.

65. PW 10's account of Mungiki being ferried to Naivasha after a meeting at Statehouse Nairobi on the day of the attacks in Naivasha in January 2008 is

¹⁷⁶ EVD-PT-OTP-00674 at p. 0551.

¹⁷⁷ ICC-01/09-02/11-T-7-ENG, page 36, lines 24-25 and page 37, lines 6-16.

¹⁷⁸ EVD-PT-D12-00214; EVD-PT-D12-00215; EVD-PT-D12-00216; EVD-PT-D12-00217 and EVD-PT-D12-00218.

¹⁷⁹ ICC-01/09-02/11-T-7-ENG, page 35, lines 25 to page 37, lines 1-2 and page 38, lines 1-19.

¹⁸⁰ EVD-PT-OTP-00674 at p. 0551; ICC-01/09-02/11-T-7-ENG, page 37, lines 17-25 and page 38, line 1.

¹⁸¹ EVD-PT-D12-00214 at p. 0073, paras. 16-17 and EVD-PT-D12-00203 at p. 0083, para. 18.

further contradicted by the evidence of PW 11 who states that *“the only Mungiki that moved from one location to another [on 27 January 2008, in relation to the Naivasha attacks] were the Mungiki which moved after that meeting at the Blue Post Hotel”*¹⁸² and these Mungiki moved from the Thika and Limuru area.¹⁸³ Furthermore, according to PW 11, Nakuru and Naivasha are areas where Mungiki had a strong presence¹⁸⁴ and in such circumstances, it defies logic that 30 or 40 Mungiki would have to be ferried all the way from Nairobi in the public eye, when the alleged Mungiki resources were readily available from within Naivasha and Nakuru.

66. The Defence presented credible evidence to demonstrate the impossibility of the events taking place as alleged by the witness including that: (i) about 350 people who hail from different parts of the country live and work at State House and any such meeting as alleged would not have escaped their notice¹⁸⁵ – evidence that is confirmed by President KIBAKI in his statement;¹⁸⁶ (ii) Witness D12-8, the official responsible for hosting receptions at State House, explained that such a meeting would not have taken place without the involvement of his department and confirms that no such Mungiki meeting took place;¹⁸⁷ (iii) Witness D12-8 further clarifies that alcoholic drinks are not served at State House Gardens;¹⁸⁸ and (iv) Witness D12-12 states that it would have been impossible for the Kenyan Military to be involved in the alleged operation.¹⁸⁹

67. Accordingly, the OTP have patently failed to adduce sufficient evidence to establish substantial grounds to believe that there was such a meeting as they so allege.

¹⁸² EVD-PT-OTP-00309 at 1308 lines 130 -132

¹⁸³ EVD-PT-OTP-00309 at 1311 lines 211-213 and at 1312 lines 270 and EVD-PT-OTP-00309 at 1489 lines 76-78.

¹⁸⁴ EVD-PT-OTP-00315 at p. 1391, lines 128-156.

¹⁸⁵ EVD-PT-D12-00226 at p. 0004, para. 17.

¹⁸⁶ EVD-PT-D12-00062 at p. 0450, para. 24.

¹⁸⁷ EVD-PT-D12-00089 at p. 0207, paras 23-24.

¹⁸⁸ EVD-PT-D12-00089 at p. 0208 at para. 24.

¹⁸⁹ EVD-PT-D12-00037 at p. 0299, paras. 6 and 7.

68. Furthermore, according to PW 12, apart from the two instances when he refers to Ambassador Muthaura making telephone calls to the police in relation to the incident at Muranga and to General Ali in relation to the Kibera violence, he states that Ambassador Muthaura was not involved in any other meetings.¹⁹⁰ This is a witness who claims that his Mungiki networks remain strong till this day, and for this reason he is well informed of all their activities.¹⁹¹ If the meetings in December 2007 or January 2008 in fact took place, according to his own account PW 12 would have known about them.

IX. The Prosecution's Investigative Failings in this Case impact on the Sufficiency of the Evidence

69. In the *Abu Garda* Confirmation Decision, PTC I found that the Defence's objections to the manner in which the OTP's investigations were conducted may have an impact on the Chamber's assessment of whether the OTP's evidence as a whole has met the "substantial grounds to believe threshold".¹⁹²

70. The Defences submits that the OTP failed to conduct adequate and impartial investigations to establish the truth. The investigative failures identified by the Defence impact on the sufficiency of the evidence in this case. This was a recurring theme of the submissions advanced by all three Defence teams during the Confirmation Hearing. The Defence incorporates the same herein.

(a) The Prosecution failed to investigate exonerating evidence

71. Pursuant to Article 54(1) of the Statute, the OTP have a statutory duty to investigate incriminating and exonerating evidence equally in order to establish the truth. The OTP cannot ignore evidence that is inconvenient to their theory of the case. The Defence made extensive submissions during the confirmation hearing on the failure of the OTP to properly investigate potentially exonerating

¹⁹⁰ EVD-PT-OTP-00662 at p. 0339, lines 525-527.

¹⁹¹ EVD-PT-OTP-00652 at p. 0123, lines 409-411.

¹⁹² ICC-02/05-02/09-243-Red, para. 48.

(PEXO) evidence and further that the PEXO evidence that is collected must guide and inform the conduct of OTP investigations.

72. The Defence has submitted evidence demonstrating that the OTP did not even make an attempt to conduct the necessary and most basic investigations.¹⁹³

X. The Prosecution failed to establish the necessary elements of individual criminal responsibility for Ambassador Muthaura

73. The OTP's case against Ambassador Muthaura is based on a common plan allegedly made on 3rd January 2008 to carry out retaliatory attacks against perceived Orange Democratic Movement ("ODM") supporters in Nakuru and Naivasha. The OTP allege that Ambassador Muthaura contributed to the execution of the crimes as described in paragraph 81 of the Amended DCC. The Defence submits that the OTP failed to establish every single allegation, as detailed below.

(a) The Prosecution failed to establish the adoption or existence of a common plan allegedly hatched at a meeting on 3rd January 2008 at the Nairobi Members Club

74. The Defence refers to its submissions above with respect to this meeting. During the Confirmation Hearing, the Defence presented video, witness and documentary evidence to establish that: (i) Ambassador Muthaura was present with the President when His Excellency addressed the nation on 3 January 2008; (ii) that Ambassador Muthaura had spent considerable hours during the day preparing the speech for the President; (iii) that authenticated NSAC minutes establish that Ambassador Muthaura was at an NSAC session at Harambee House in the morning of the alleged 3 January 2008 meeting; and (iv) telephone

¹⁹³ Some examples: EVD-PT-D12-00063 at para. 2; EVD-PT-D12-00062 at para. 13; EVD-PT-D12-00088 at para. 2; EVD-PT-D12-00054 at para. 6; EVD-PT-D12-00053 at para. 5.

records of Ambassador Muthaura establish that no calls were made to General Ali by him on that day.¹⁹⁴

(b) The Prosecution failed to establish that Ambassador Muthaura and Mr. Kenyatta jointly procured the services of Mungiki leaders and directed them to implement the alleged common plan

75. The OTP allege that Mr. Kenyatta and Ambassador Muthaura¹⁹⁵ mobilised the Mungiki to implement the common plan. It again relied on PW 4, who provided information on alleged conversations between Mr. Kenyatta and a Mungiki at the NMC during the alleged 3rd January 2008 meeting.¹⁹⁶ In assessing the cogency and reliability of the OTP evidence on this issue, it is highly pertinent to note that the Prosecutor himself failed to put a single question to Mr. Kenyatta regarding an alleged common plan between himself and Ambassador Muthaura.

76. In assessing the allegations concerning the various Statehouse meetings, regard must be had to the fact that OTP evidence states that the National Security Intelligence Service (“NSIS”) had investigated allegations of meetings at State House with Mungiki in attendance and found these allegations to be unsubstantiated rumours or otherwise false.¹⁹⁷

77. The OTP seeks to rely on other meetings, such as that alleged to have occurred at Blue Post Thika,¹⁹⁸ as evidence of the mobilisation of Mungiki. Again,

¹⁹⁴ ICC-01/09-02/11-T-7 at page 27, line 11 to page 31, line 23; EVD-PT-D12-000186; EVD-PT-D12-00184 at p. 0041, paras 12-14; EVD-PT-D12-00219 at p. 0003, para. 9; EVD-PT-D12-00009 at p. 0056; ICC-01/09-02/11-T-4-Red-ENG ET WT-21-09-2011, page 74., lines 10-15; EVD-PT-D12-00106 at pgs.0112-0113, paras 11-14; EVD-PT-D12-00184 at p. 0041, paras 12-14; EVD-PT-D12-00219 at p. 0003, para. 9; EVD-PT-D12-00211 at pgs. 0037-0039, paras 34-42; EVD-PT-D12-00183 (telephone records and Statement of Witness D12-42 at EVD-PT-D12-00205, p. 0002, paras 4-6); EVD-PT-D12-00106 at p. 0112-0113, paras 11-14; EVD-PT-D12-00184 at p. 0041, paras 12-14; EVD-PT-D12-00219 at p. 0003, para. 9; EVD-PT-D12-00236 at p. 0010; EVD-PT-D12-00234 at p. 0005, para.18; EVD-PT-D12-00009 at p. 0059.

¹⁹⁵ The OTP did not present any evidence to show that Ambassador Muthaura is a member of a criminal organization or the Mungikis, nor has it shown evidence of any relationship between Ambassador Muthaura and the Mungikis. Nor did the OTP present evidence to show that Ambassador Muthaura is a member of the PNU.

¹⁹⁶ EVD-PT-OTP-00248 at p. 0040, paras 196-199.

¹⁹⁷ EVD-PT-OTP-00066 at p. 0062.

¹⁹⁸ EVD-PT-OTP-00666 at p. 0410.

Ambassador Muthaura was NOT present at this alleged meeting and the OTP has established no link between the alleged participants and Ambassador Muthaura.

78. The allegation that Ambassador Muthaura mobilised Mungiki is also without foundation and not supported by any evidence presented before the Chamber.

(c) The Prosecution failed to establish that Ambassador Muthaura provided logistical support to the Mungiki operations

79. The OTP allege that Ambassador Muthaura provided logistical support, including the supply of AP uniforms and funds to the Mungiki through his subordinates.¹⁹⁹ In support of its allegation, the OTP relied on the statements of PW 11, who stated that through PNU Liaison 1 uniforms and weapons were provided to the Mungiki in January,²⁰⁰ and the evidence of PW 12.

(d) Provision of Uniforms and guns to Mungiki

80. The Defence relies upon its submissions in paras 36 – 37 above in relation to the evidence of PW 11. With regards to Nakuru, PW 12 alleges that weapons were procured from State House Nakuru and Turkana,²⁰¹ but does not mention Ambassador Muthaura as being involved in obtaining these weapons.

81. The OTP again misstates the evidence they put forward as being in support of their allegations. The evidence of PW 12 cited in footnote 222 of the Amended DCC does not relate to the provision of logistics by Ambassador Muthaura through any alleged subordinates in relation to the violence in Naivasha and Nakuru.²⁰² The OTP have instead referenced the evidence of the witness in relation to alleged Mungiki attacks in Kibera during which the Mungiki were dressed in GSU (not AP) uniforms.²⁰³ With regards to Kibera, the witness states

¹⁹⁹ ICC-01/09-02/11-280- AnxA (Amended DCC), para. 81.

²⁰⁰ EVD-PT-OTP 00310 at pgs. 1326-1327; EVD-PT-OTP-00320 at p. 1482.

²⁰¹ EVD-PT-OTP-00665 at p. 0390.

²⁰² EVD-PT-OTP 00652 at p. 0127, lines 563-571.

²⁰³ EVD-PT-OTP 00660 at p. 0296, lines 814-840.

that Michuki, not Ambassador Muthaura, ordered that guns and uniforms be given to the Mungiki for use in Kibera.²⁰⁴

82. The OTP once more cites PW 12 to support its allegations in paragraph 78(3) of the Amended DCC in relation the provision of finances, weapons and logistical support to the direct perpetrators for the attacks in Naivasha and Nakuru. None of the references to PW 12 in footnote 209 of the Amended DCC implicate or mention in any way Ambassador Muthaura. The witness in fact contradicts the OTP case. He states that no guns were used in Naivasha and that only crude weapons and petrol bombs were used.²⁰⁵ PW 9 states that he is privy to all information within the Mungiki²⁰⁶ and that there were no guns or uniforms supplied to the Mungiki during the PEV.²⁰⁷

83. None of the OTP witnesses or any of the 249 applications²⁰⁸ to participate as victims submitted in the present proceedings state that any of the attackers in Naivasha or Nakuru were carrying guns or wearing AP uniforms. The OTP witnesses from Nakuru and Naivasha, including PW 2, describe the attackers as carrying sticks, pangas, other pieces of metal and stones. This is consistent with the Defence evidence.²⁰⁹ Other public reports cited by the OTP, including those of CIPEV, Human Rights Watch's *Ballots to Bullets*, and the Kenya National Commission on Human Rights' ("KNCHR") *On the Brink of the Precipice*, do not provide any evidence that Mungiki wearing AP uniforms and/or carrying guns were involved in attacks in Naivasha and Nakuru.

²⁰⁴ EVD-PT-OTP-00661 at p. 0318.

²⁰⁵ EVD-PT-OTP-00664 at p. 0379, lines 488-489.

²⁰⁶ EVD-PT-OTP-00641 at p. 218, lines 673-691; EVD-PT-OTP-00645 at pgs. 304-305, lines 527-547 and 548-554.

²⁰⁷ EVD-PT-OTP-00644 at p. 0275, lines 377-382; EVD-PT-OTP-00643 at p. 0263, lines 911-912.

²⁰⁸ Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 26 August 2011, ICC-01/09-02/11-267, para. 24.

²⁰⁹ EVD-PT-OTP-00237 at p. 0037, lines 226-231; EVD-PT-D12-00054 at p. 0420, para. 46. See also EVD-PT-D12-00201 at p. 0077, para. 31; EVD-PT-D12-00105 at p. 0107, para. 16.

(e) Provision of funds to Mungiki

84. In relation to funds, the OTP have not provided any evidence to support the assertion that Ambassador Muthaura was involved in the provision of funds to Mungiki. In fact, the OTP once again misstate the evidence. The OTP have relied on PW 12 in footnote 124 of the Amended DCC as supporting its allegations in paragraph 55 of the Amended DCC that one of Ambassador Muthaura's subordinates delivered a significant amount of money in cash to the Mungiki leader in preparation for the **Naivasha** attack. The evidence cited in footnote 124 relates to sums of money being given to the Mungiki leader – by persons unconnected with Ambassador Muthaura – for the alleged Kibera attack and not the Naivasha attack.

85. Furthermore, the following items of Defence evidence clearly show that the allegation by OTP Witnesses 11 and 12 are mere fabrications based on rumours and conjecture and not fact: EVD-PT-D12-00088 at page 0197, paragraphs 9-12; EVD-PT-D12-00220; EVD-PT-D12-00081 at pages 0164 and 0171, paragraphs 30-33; EVD-PT-D12-00082 at pages 0176 to 0177, paragraphs 18 to 19; EVD-PT-D12-00223 at pages 0019 and 0021, paragraph 13; EVD-PT-D12-00054 at page 0420, paragraph 46; EVD-PT-D12-00201 at page 0077, paragraph 31; and EVD-PT-D12-00105 at page 0107, paragraph 16.

(f) The Prosecution failed to establish that Ambassador Muthaura used his position to create a free-zone to allow the Mungiki and pro-PNU youths to operate with impunity

86. The OTP allege in paragraph 38 of the Amended DCC that Ambassador "Muthaura exercised **both** *de jure* and *de facto* authority over the various Kenyan Security agencies, including the Kenya Police, Administration Police and the Intelligence Service ("NSIS"); Muthaura therefore exercised direct authority over Ali, the Commissioner of Police [...]" The sources cited in support of the allegation at footnote 75 of the Amended DCC do not support the allegation that

Ambassador Muthaura exercised any authority over the Kenya security apparatus, including the Kenya Police, in any capacity, including as National Security Advisory Committee (“NSAC”) chairman.²¹⁰ One of the sources cited is a presentation authored by the NSIS.²¹¹ However, the Director of the NSIS, who provides the “best evidence” on the matter, states that “the diagram is not to be interpreted to mean that NSAC has command and control over the [Provincial Security and Intelligence Committee] PSIC and DSIC [District Security and Intelligence Committee]”.²¹²

87. At paragraph 83 of the Amended DCC, the OTP allege that “by virtue of his position in the government and the National Security Committee, Muthaura exercised direct authority over ALI and the Kenya Police.” The sources cited in support of the allegation at footnote 232 of the Amended DCC do not make any reference to Ambassador Muthaura or his alleged authority over the Kenya security apparatus (including the Kenya Police) in any capacity.²¹³ In fact, the evidence cited states that he did not possess such authority.²¹⁴

88. The OTP have not put forward a single piece of evidence that demonstrates that Ambassador Muthaura had any authority whatsoever over the Kenya Security Agencies in general or over the Commissioner of Police in particular. Significantly, the evidence submitted by the OTP overwhelmingly establishes that Ambassador Muthaura was not the person who had authority over the Kenya Police.

²¹⁰ EVD-PT-OTP-00004 at p. 0740.

²¹¹ EVD-PT-OTP-00014 at pgs. 0178-0179.

²¹² EVD-PT-D12-00053 at p. 0407, para. 21.

²¹³ EVD-PT-OTP-00004 at pgs. 0733-0734; EVD-PT-OTP-00219 at p. 0218, paras 63-64.

²¹⁴ EVD-PT-OTP-00161 at p. 0183 (cited at footnote 232 of the Amended DCC), has nothing to do with Ambassador Muthaura’s authority over the police and in fact states: “*Technically all public servants-including senior State House officials –are supposed to report to the Head of the Public Service, Mr. Francis Muthaura. However, because of the fact that they work directly under the President, they can circumvent the pecking order in Public Service hierarchy*”.

89. Additionally, the OTP have disregarded the thrust of their own evidence that the Commissioner of Police reports to the President of the Republic – either directly or through the Ministry of State for Provincial Administration and Internal Security.²¹⁵ The Defence evidence corroborates the OTP evidence to this extent and provides the best evidence to demonstrate that Ambassador Muthaura does not possess any authority over the Kenya Security Agencies including the Kenya Police, the Police Commissioner and the NSIS.²¹⁶

90. The fact that Ambassador Muthaura is a senior government official does not place him in charge of the national security apparatus just as it would not the Minister for Tourism, for example, who is more senior than Ambassador Muthaura within the structure of government. To this extent, the OTP submissions in paragraph 39 of their Written Submissions are inconsequential and misconceived. The Defence submits that the OTP submissions in paragraph 40 of their Written Submissions constitute a misrepresentation of the testimony of Witness D12-1. The very portions referred to by the OTP in fact have the witness saying: *“Your Honour, that does not change my testimony that from the point of view of structure and reporting structures the police commissioner reports to the minister for internal security.”*²¹⁷ As far as Witness D12-1 is concerned, there cannot be any dispute as to the substance of his testimony on this issue, which remained consistent throughout. When the witness was asked pointedly for his reaction to the evidence that General Ali had to report to Ambassador Muthaura, the witness responded as follows:²¹⁸

Q. And so if I put it to you then that Mr. Ali had to report to Ambassador Muthaura based on his evidence, what would be your reaction?

²¹⁵ EVD-PT-OTP-00571 at p. 0021; EVD-PT-OTP-00020 at p. 0290; EVD-PT-OTP-00006 at p. 0925, para 18; EVD-PT-OTP-00216 at p. 0011.

²¹⁶ EVD-PT-D12-00062 at paras 8,10 and 18; EVD-PT-D12-00036 at paras 7 and 19; EVD-PT-D12-00053 at paras 7, 16, 17 and 22; EVD-PT-D12-00103 at paras 20-23; EVD-PT-D12-00063 at paras 17-20; EVD-PT-D12-00088 at paras 4-8; Testimony of Witness D12-1 (ICC-01/09-02/11-T-9-CONF-ENG, page 23, lines 9-25, page 24, lines 1-25, page 25, lines 1-13, page 57, lines 7-11, page 58 lines 8-25 and page 64, lines 9-17; EVD-PT-D12-00038 at paras 5-6 and 9.

²¹⁷ ICC-01/09-02/11-T-9-CONF-ENG, page 76, lines 18-25.

²¹⁸ ICC-01/09-02/11-T-9-CONF-ENG, page 77, lines 15-25.

Your Honours, Commissioner Ali is appointed by the president. Commissioner Ali reports to the minister for foreign affairs -- for internal security. And he also, as he, I'm sure is expected, reports to the president.

Q. So would it be your evidence then that Commissioner Ali could not be given any directives by anyone else other than his minister?

On operational issues, I don't believe he would be given directives by anybody. On matters of administration, on matters of policy, yes, he would be given directives by the minister.

91. Similarly, the fact that Ambassador Muthaura is the senior most permanent secretary,²¹⁹ as submitted in paragraph 41 of the OTP's Written Submissions, does not vest him with executive powers over the security apparatus of Kenya – including the Kenya Police – and the submissions to this extent are likewise inconsequential and misconceived. The OTP has failed to appreciate the extent of Ambassador Muthaura's authority over public servants. The only piece of evidence the OTP was able to cite in support of this allegation – contained in paragraph 4 of the Amended DCC – is an internet media article.²²⁰ Even this piece of evidence contradicts the OTP's theory as it states: *"Technically all public servants-including senior State House officials –are supposed to report to the Head of the Public Service, Mr. Francis Muthaura. However, because of the fact that they work directly under the President, they can circumvent the pecking order in Public Service hierarchy."*

92. This item of OTP evidence demonstrates that Ambassador Muthaura's authority as the senior most public servant is in fact limited. This is further made clear by the testimony of Witness D12-1, who stated during cross-examination that:

"Functionally, each Ministry has its own mandates, and the permanent secretaries have

²¹⁹ The OTP's contention, at paragraph 41 of its Written Submissions, that Ambassador Muthaura holds a command position vis-à-vis all civil servants in all departments and ministries in the Republic of Kenya is patently false and wholly unsupported by evidence. See statement of D12-3, who states that the "main role of the [Head of Public Service] is to coordinate government", that the "Head of Public Service does not instruct Permanent Secretaries [who are] [...] are answerable to the President", and that the "Head of Public Service does not have any authority over police officers". (EVD-PT-D12-00090 at p. 0212, paras 8, 10, 11). See also testimony of D12-1 at ICC-01/09-02/11-T-9-CONF-ENG, page 89, lines 22-25 and page 90, lines 1-8.

²²⁰ EVD-PT-OTP-00182 at p. 0183.

*very clear competencies and based on the docket and based on the portfolio. However organically, the head of the public service is a coordinator of government affairs, and on that role, yes, organically he stands a step ahead of others, but he doesn't direct or compel anything other than being a coordinator. Even posting officers. This is carried out by a committee."*²²¹

93. The Defence incorporates by reference its submissions during the Confirmation Hearing in relation to the misunderstanding of the OTP of the structure of the Kenyan government and the actual positions, authority and non-political affiliations of Ambassador Muthaura.²²²

94. The OTP's submissions in paragraph 40 of its Written Submissions that NSAC minutes record Ambassador Muthaura issuing instructions to Ali on operational matters is based simply on the use of the word "instructed" in those particular minutes. This is nothing more than nomenclature and cannot be the basis to attribute responsibilities or authorities not otherwise in existence, and which is controverted by credible evidence from both the OTP and Defence that Ambassador Muthaura does not exercise *de jure* or *de facto* authority over the Kenya Police.

95. Additionally, even if for the sake of argument an "instruction" was issued to Gen. Ali by NSAC, such an instruction cannot be attributed to Ambassador Muthaura. As Chairman of NSAC, Ambassador Muthaura does not possess any authority over its other members. Further, Ambassador Muthaura is not the executive head of NSAC. Indeed, **Amos WAKO**, the Former Attorney General of Kenya and also member of NSAC, states that: "*NSAC reaches its recommendations by consensus. Members in NSAC sit in equal capacity as government functionaries. The role of the Chairman of NSAC, Ambassador MUTHAURA is to facilitate through discussions and*

²²¹ ICC-01/09-02/11-T-9-CONF-ENG, page 89, lines 22-25 and page 90, lines 1-8.

²²² ICC-01/09-02/11-T-15-CONF-ENG ET, page 42, lines 18 to page 46, line 18.

to ensure that recommendations made by NSAC are transmitted to the CSC, if it warrants their attention and the relevant government department for action. The Chairman of NSAC cannot impose a decision on its membership because he does not have the statutory authority to do so. Quite apart, the membership is large and reflect different opinions from different branches of government and clearly in these circumstances, it is impossible for the Chairman of NSAC to impose his own personal decision on the membership.”²²³

He further states that NSAC *“is not an executive body. The members are civil servants. As such it is not a decision making or an implementing body and its role is to provide advice to government on matters of national security for action....NSAC is not an executive decision making body within the civil service structure of Kenya.”²²⁴*

96. Hon. John MICHUKI, the former Minister of Provincial Administration and Internal Security at the time of the PEV, and a man who joined Kenya’s civil service in 1957, states that: *“NSAC is an advisory body in which all heads of the respective security agencies are members. As chairman of NSAC, Muthaura did not have a decision-making role. Muthaura’s role was a coordinator of government business. As Chairman of NSAC Muthaura did not have any authority over any of the security agencies including the police. There are clear lines of responsibility in government and that is clear from the governing laws of Kenya.”²²⁵*

97. The OTP allege at paragraph 91 of the Amended DCC that: *“As Commissioner of Police during the period of the PEV Ali routinely reported to Muthaura.”* It supports this allegation by relying on a portion of the testimony of General Ali to the WAKI Commission ²²⁶ instead of considering his entire testimony to the Commission. The very evidence relied on by the OTP in fact has General Ali testifying that the Kenya Police and its management derives its mandate and

²²³ EVD-PT-D12-00103 at p. 0096, para. 14.

²²⁴ EVD-PT-D12-00103 at p. 0096, para.13.

²²⁵ EVD-PT-D12-00088 at p. 0199, para. 17.

²²⁶ EVD-PT-OTP-00338 at p. 1980 (cited at footnote 91 of the Amended DCC).

authority from the governing law and that with regards to operational matters the Police Commissioner does not take any instructions from anyone.²²⁷ The Defence adopts the submissions of the Defence Team of General Hussein Ali in this regard in its entirety.²²⁸

98. The OTP have failed to appreciate the structure, role and mandate of the National Security Advisory Committee. Significantly, the OTP did not even attempt to interview any NSAC member. The role of NSAC is ADVISORY, as its name suggests, and even in abbreviating the name of the committee the OTP chose to drop the word “Advisory”.²²⁹ The Defence evidence consisting of the testimony of NSAC members is consistent that NSAC is an advisory body with no executive powers, that decisions are made by consensus of all members and that Ambassador Muthaura, as Chairman of NSAC, does not possess any decision making authority and does not have any powers.²³⁰

99. The OTP, in footnote 58 of its Written Submissions, disputes the authenticity of the NSAC Minutes submitted by the Defence. The Defence submits that not only has it established the provenance of these Minutes through Witness D12-7²³¹ and Witness D12-1²³², but that the OTP failed to take the opportunity to challenge Witness D12-1 on the authenticity of these documents. The OTP had a duty to put its case to the witnesses who were present. After turning away from the opportunity to properly question the authenticity of the minutes through a witness who attests to the same, they have no legal basis to make this bold assertion without a scintilla of evidence to controvert the Defence’s submissions and evidence. In this regard, it must be noted that Kenya is a founding state party

²²⁷ EVD-PT-OTP-00338 at p. 1980-1981.

²²⁸ ICC-01/09-02/11-T-15-CONF-ENG, page 76, lines 1-25, page 77, lines 1-25 and page 78, lines 1-9.

²²⁹ Amended DCC, para. 4.

²³⁰ EVD-PT-D12-00036 at paras 11,15,16, 18 and 19; EVD-PT-D12-00053 at paras 9,11,13,14,16 and 17; EVD-PT-D12-00103 at paras 12-14, 18 and 19; EVD-PT-D12-00063 at paras 6, 8-11 and 13; ICC-01/09-02/11-T-9-CONF-ENG, page 28, lines 6-20, page 29, lines 19- 25, page 30, lines 1-25, page 31, lines 1-12, page 32, lines 6-25, page33, lines 1-4, page 34, lines 11-25, page 35, lines 1-18, page 43, lines 1-21; EVD-PT-D12-00038 at paras 9-11.

²³¹ EVD-PT-D12-00001 para 13.

²³² ICC-01/09-02/11-T-9-CONF-ENG, page 41, lines 11-17 and 24-25, page 42, lines 1-15.

to the Rome Statute and the International Court, it has cooperated with the court, and averments by its state officials cannot be rejected simply because they are inconvenient for the OTP or indeed because they controvert a central plank of their case against Ambassador Muthaura.

100. The Defence has additionally demonstrated through overwhelming independent evidence from the Victims who applied to participate in this case that the police did everything they could to prevent crimes and to protect life and property in Nakuru and Naivasha²³³.

(g) The Prosecution failed to establish that Ambassador Muthaura exercised control over the Mungiki organisation

101. The OTP allege at paragraph 83 of the Amended DCC that Ambassador Muthaura held coordination and planning meetings with the Mungiki leadership and as such was at the top of the Mungiki hierarchy. The Defence refers to its submissions above where it has established that the OTP evidence in this regard is fundamentally flawed.

102. In assessing the deficiency of the OTP evidence, the Defence respectfully urges the PTC to have significant regard to the evidence of the Director General of NSIS who states that: “... NSIS routinely have fairly accurate information on activities and contacts between Mungiki sect members and MPs, politicians, prominent personalities and candidates contesting the 2007 elections. I am therefore able to attest and swear that there was no information at all about Ambassador MUTHAURA having any links whatsoever with the Mungiki sect and its members. If there were any such contacts, I can assure you NSIS would have known. There was almost nothing the Mungiki could do that the service would not know due to the level of monitoring of the Mungiki sect activities given the threat it poses to national security. Throughout, be it prior to, during or immediately after the PEV, the Government continued in its efforts to eradicate the

²³³ See Annex A; see also ICC-01/09-02/11-T-15-CONF-ENG at page 32, line 25 to page 40, line 22.

*Mungiki menace. These Government efforts continue till now. There was never a policy of the Government to turn a blind eye to Mungiki activity."*²³⁴

103. In addition, other evidence suggests that Ambassador Muthaura did not have any control over the Mungiki as an organization as it lacked a functioning leadership structure:

(i) The Blue Post Hotel meeting demonstrates that there was no organisational control

104. While OTP attempts to present this meeting as one where the alleged organisational policy was implemented by sending Mungiki to Naivasha, the account given of the meeting itself by PW 11 discloses a complete lack of any organisational control over the Mungiki by either Mr. Kenyatta or Ambassador Muthaura. In the first place, the Ambassador was not present at the meeting and there is no evidence at all that he had any links with those present or played any role in convening the meeting.

105. Second, PW 12 states that many of the Mungiki who received money in Thika to participate in the Naivasha attacks ran away after receiving the funds and were not interested in fighting.²³⁵ PW 12 further adds that George THUO had problems with the Mungiki he was trying to recruit.²³⁶ PW 12, who was not even present, says that he heard that those mobilised went "straight to the ground"²³⁷ but does not know if they ever got to Naivasha and what they did there.²³⁸ Based on this testimony it is clear that Ambassador Muthaura, who was not even present at the meeting, could not be in control of this amorphous group whose identity, composition and departure to and arrival in Naivasha is in serious doubt.²³⁹

²³⁴ EVD-PT-D12-00053 at p. 0409, para. 35.

²³⁵ EVD-PT-OTP-006664 at p. 0376, lines 380-385.

²³⁶ EVD-PT-OTP-00666 at p. 0412, lines 230-233.

²³⁷ EVD-PT-OTP-00666 at p. 0412, lines 247-252.

²³⁸ EVD-PT-OTP-00666 at p. 0412, lines 257-263, EVD PT-OTP-00666 at p. 414, lines 334-337.

²³⁹ PTC I has held that inconsistent ambiguous or contradictory evidence may result in the Chamber reaching a decision not to confirm the charges. *Abu Garda*, Confirmation Decision, ICC-02/05-02/09-243-red, para 43.

(ii) The Mungiki had no national leader through whom its activities as a group were coordinated

106. PW 11 stated that the Mungiki was split at the time of the 2007 elections and during the PEV. The Mungiki had no identifiable national leader who was able to issue instructions to the Mungiki membership at the time. The Mungiki's recognized leader – Maina Njenga – was in jail. The OTP has not identified any particular individual who was acting in his place. Indeed, PW 11, on whose evidence the OTP rely to prove that the Mungiki was hierarchically organised, suggests that as a group it was hard for them to get a 'green light' from their leaders.²⁴⁰

(iii) Members of the Mungiki participated in the PEV in their individual capacities and not as part of the Mungiki organisation

107. PW 11 stated that individual members of the Mungiki, and not the Mungiki as a whole, participated in the PEV. Individual members of the Mungiki decided to answer the request to help in the retaliatory attack. As an illustration of the division and lack of cohesion and leadership within the Mungiki, PW 11 also suggested that only a small group of Mungiki – 17 or 20 – moved from one location to another to help others.²⁴¹ This evidence, when viewed in light of the alleged hundreds of thousands who were members of the Mungiki, demonstrates that the organisation had no cohesion or ability to act in a concerted manner at the time of the PEV.

(iv) The Mungiki had no national forum for planning the PEV

108. PW 11 additionally explains, in the context of discussing the retaliatory attack, that there was no national forum where the Mungiki leadership sat down and planned the attacks; instead, small groups of Mungiki would plan these retaliatory attacks in their own way.²⁴²

²⁴⁰ EVD-PT-OTP-00309 at p. 1307, lines 60-65.

²⁴¹ EVD-PT-OTP-00309 at p. 1308, lines 124-132.

²⁴² EVD-PT-OTP-00309 at p. 1308, lines 126-129.

(v) Most Mungiki supported ODM

109. Most Mungiki supported ODM during the election and PEV. However, several OTP and Defence witnesses indicate that a minority of Mungiki were supporting the PNU during the elections and the voting. The declarations of the Mungiki leader Maina Njenga that he supported the ODM and not the PNU during the 2007 elections is not the only evidence demonstrating that the Mungiki were supporting the ODM and the candidacy of Raila Odinga for President. In addition, Maina Njenga's wife ran for parliamentary elections on the ticket of a party affiliated with the ODM against a PNU candidate.²⁴³ This fact is corroborated by the evidence of PW 12²⁴⁴, PW 4,²⁴⁵ PW 11,²⁴⁶ by other OTP evidence²⁴⁷ and by other defence evidence.²⁴⁸

XI. The Prosecution failed to establish that the crimes were committed pursuant to or in furtherance of a state or organisational policy to commit such attacks as required by Article 7(2) of the Statute

110. The Defence put the OTP to strict proof with regards to all jurisdictional, legal and evidential elements of the charges. The Defence submits that the evidence adduced by the OTP does not satisfy the criteria for "organizational policy" put forward by the majority in the summons decision.²⁴⁹ In this regard, the Defence of Ambassador Muthaura joins the submissions of the Defence Team of Mr. Kenyatta²⁵⁰ in its challenge to the sufficiency of the evidence adduced by the OTP on this issue.²⁵¹ In short, for the reasons given therein, the Defence submits that the OTP have failed to establish that the crimes alleged were committed pursuant

²⁴³ EVD-PT-OTP-00307 at p. 1283, lines 271-279.

²⁴⁴ EVD-PT-OTP-00652 at p. 0115; EVD-PT-OTP-00655 at p. 0191; EVD-PT-OTP-00656 at p. 0199; EVD-PT-OTP-00668 at p. 0458.

²⁴⁵ EVD-PT-OTP-00248 at p. 0028, para 130.

²⁴⁶ EVD-PT-OTP-00307 at 1285 lines 341-346.

²⁴⁷ EVD-PT-OTP-00178 at p. 03341; EVD-PT-OTP-00013 at p. 0058, para 256; EVD-PT-OTP-00677; EVD-PT-OTP-00676; EVD-PT-OTP-00591 at p. 0073.

²⁴⁸ EVD-PT-D12-00054 at 0420, para.53

²⁴⁹ Pre-Trial Chamber II, The Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2011, ICC-01/09-19-Corr, para. 93.

²⁵⁰ Defence Submissions on behalf of Uhuru Kenyatta Following the Confirmation of Charges Hearing, ICC-01/09-02/11-372, paras 40-58.

²⁵¹ *Ibid*

to or in furtherance of a state or organisational policy to commit such attacks as required by Article 7(2) of the Statute.

XII. The Prosecution failed to establish that Ambassador Muthaura intended to commit the crimes alleged or was even aware that that the crimes would occur

111. In paragraphs 88 to 90 of the DCC and in its presentation,²⁵² the OTP argued that Ambassador Muthaura intended that the crimes charged be committed and knew that they would occur in the ordinary course of events. The Defence submits that nothing is further from the truth.

112. The OTP's allegations remain unsupported by any evidence. The OTP cite PW 12 in footnote 221 of the Amended DCC as supporting the allegations in paragraph 81 of the Amended DCC which claim that Ambassador Muthaura used his position to ensure that the main perpetrators escaped punishment for the crimes committed. The portion of PW 12's evidence cited by the OTP in footnote 221 refers to Kibera and not Naivasha or Nakuru. The OTP again cite PW 12 in footnote 255 to support their allegations in paragraph 89 of the Amended DCC that Ambassador Muthaura used his position to ensure that the police failed to intervene to prevent the retaliatory attacks. The portion of the evidence cited in footnote 255 does not refer to Naivasha or Nakuru. It all pertains to Kibera.

113. The actions taken by Ambassador Muthaura throughout the relevant period establishes that he did his utmost to ensure that no violence occurred and such violence that did occur was mitigated to the extent possible.²⁵³

114. The Defence submits that the OTP's submissions in paragraph 47 are untenable. Importantly, the OTP's own evidence demonstrates that government

²⁵² ICC-01/09-02/11-T-5-CONF-ENG p. 64, lines 20-25.

²⁵³ EVD-PT-D12-00009 at p. 0058; EVD-PT-D12-00016 at p. 0109; EVD-PT-D12-00157; EVD-PT-D12-00019 at p. 0135; EVD-PT-D12-00021 at p. 0149; EVD-PT-D12-00021 at p. 0058; EVD-PT-D12-00022 at pgs. 0157-0159.

initiatives to curb the criminal activities of the Mungiki gang started from about 2003,²⁵⁴ long before the PEV period.²⁵⁵ The Defence has submitted evidence to corroborate OTP evidence that the Government's efforts to eradicate the Mungiki menace continued before, during and after the PEV period.²⁵⁶

115. The Defence has attempted throughout these proceedings to present conscientiously the best available evidence to the PTC in the hope that the correct position would be presented. Whatever the merits or otherwise of the Defence investigations, one thing is clear: the burden of proof resides at all time with the OTP. The Defence respectfully submits that the confirmation of charges stage of proceedings is an important safeguard to prevent unmeritorious cases from going to trial. No attempt to whittle it down should be entertained. The Defence submits that the OTP has singularly failed to present sufficient evidence to establish substantial grounds to believe that Ambassador Muthaura committed the crimes charged. Accordingly, it is the respectful submission of the Defence that the PTC decline to confirm the charges against Ambassador Muthaura.

Respectfully Submitted,



Mr. Karim A. A. Khan QC
Lead Counsel for Ambassador Francis K. Muthaura

Dated this 2nd Day of December 2011
The Hague, The Netherlands

²⁵⁴ EVD-PT-OTP-00306 at pgs. 1264, lines 53-58 and 1265, lines 124 -127.

²⁵⁵ EVD-PT-OTP-00248 at p. 0012, paras 48-49; EVD-PT-OTP-00009 at p. 1093: "Mungiki was in disarray following a mid-2007 crackdown by the security forces [...]"; EVD-PT-OTP-00036 at p. 0947: "Government banned 18 of these groups in March 2002...the most notorious are the Mungiki. [...]Following a 2007 police crackdown, the KNHRC reported that about five hundred Kikuyu youths were allegedly subjected to extra-judicial killings and disappearances upon suspicion of Mungiki membership"; EVD-PT-OTP-00081 at pgs. 0033, 0037, 0038; EVD-PT-OTP-00148 at p. 0186; EVD-PT-OTP-00166; EVD-PT-OTP-00171 at p. 0264; EVD-PT-OTP-00177 at pgs. 0309-0310; EVD-PT-OTP-00178 at pgs. 0320 and 0333-0336, 0340-0341; EVD-PT-OTP-00306 at p. 1273, lines , lines 399 to 1273, 453; EVD-PT-OTP-00178 at pgs. 0333, 0339; KEN-OTP-0053-0002 at p. 0008; EVD-PT-OTP-00306 at 1267 lines 198-213 ; EVD-PT-OTP-00306 at 1267 lines 192-195

²⁵⁶ EVD-PT-D12-00053, para 40; and EVD-PT-D12-00062 para 22.