

Public

Annex A



Original: **English**

No.: ICC-01/09-02/11
Date: **2 September 2011**

PRE-TRIAL CHAMBER II

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

SITUATION IN THE REPUBLIC OF KENYA

Public

DOCUMENT CONTAINING THE CHARGES

Source: Office of the Prosecutor

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

The Office of the Prosecutor

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

Counsel for the Defence

Counsel for Francis Kirimi Muthaura:

Karim Khan and Kennedy Ogetto

Counsel for Uhuru Muigai Kenyatta:

Steven Kay QC and Gillian Higgins

Counsel for Mohammed Hussein Ali:

Gregory Kehoe, Evans Monari, Gershom Otachi and John Philpott

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

Other

REGISTRY

Ken Ogetto

Registrar & Deputy Registrar

Silvana Arbia, Registrar
Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Pursuant to Article 61(3)(a) of the Rome Statute, the Prosecutor of the International Criminal Court charges:

FRANCIS KIRIMI MUTHAURA

UHURU MUIGAI KENYATTA AND

MOHAMMED HUSSEIN ALI

with **CRIMES AGAINST HUMANITY**, set forth below:

I. THE PERSONS CHARGED

A. Francis Kirimi MUTHAURA

1. Francis Kirimi MUTHAURA (MUTHAURA) was born on 20 October 1946 in Mariene, Meru, Central District, Eastern Province in the Republic of Kenya (Kenya). He is of Meru ethnicity and married with three children.¹
2. MUTHAURA attended secondary school in Eastern Province, and completed his University education at the University of Nairobi.²
3. MUTHAURA began his career in the civil service under President Moi's regime, and was subsequently promoted to various high profile diplomatic positions.³
4. In 2003, MUTHAURA was appointed head of the Public Service and Secretary to the Cabinet in Kenya.⁴ As such, all public servants report to him.⁵ At all times relevant to the crimes charged, MUTHAURA has served as the Chairman of the National Security and Advisory Committee ("National Security Committee").⁶

¹ KEN-OTP-0033-0660 at 0660 and 0661; ICC-01/09-02/11-T-1-ENG at page 4, lines 3, 4, 8.

² KEN-OTP-0033-0660 at 0660.

³ KEN-OTP-0033-0660 at 0660 and 0661.

⁴ KEN-OTP-0033-0668 and KEN-OTP-0033-0672 at 0673.

⁵ KEN-OTP-0033-0182 at 0183.

⁶ KEN-OTP-0002-0172 at 0178 and 0179; KEN-OTP-0005-8505 at 8513.

B. Uhuru Muigai KENYATTA

5. Uhuru Muigai KENYATTA (KENYATTA) was born on 26 October 1961 in Nairobi, in Kenya.⁷ He is the son of Kenya's first President, Jomo Kenyatta.⁸ He is married with three children.⁹ He is of Kikuyu ethnicity.¹⁰
6. He was educated in Kenya and the United States.¹¹
7. He began his political career in 1992, when he joined the Kenya African National Union ("KANU").¹² He was elected KANU National Vice Chairman in March 2001.¹³ In January 2005, he was elected KANU National Chairman.¹⁴
8. In December 2006 and June 2007, respectively, following his loss of the KANU Chairmanship and a subsequent court challenge, he was reinstated as the party's leader and Chairman by two Kenya High Court decisions.¹⁵
9. From January to April 2008, before the grand coalition political agreement between the Party of National Unity ("PNU") and the Orange Democratic Movement ("ODM"), KENYATTA served as the Minister for Local Government.¹⁶ Between April 2008 and January 2009, he held the positions of Deputy Prime Minister and Minister for Trade as a PNU representative in the grand coalition Cabinet.¹⁷
10. From January 2009 till this date, he serves as Deputy Prime Minister and Minister for Finance.¹⁸

⁷ KEN-OTP-0046-0103 at 0103; ICC-01/09-02/11-T-1-ENG at page 4, lines 20, 21.

⁸ KEN-OTP-0046-0103 at 0103.

⁹ KEN-OTP-0033-0467 at 0467, 0468;

¹⁰ KEN-OTP-0033-0467 at 0467; KEN-OTP-0001-0248 at 0263; KEN-OTP-0028-0017 at 0020; KEN-OTP-0033-0471 at 0471.

¹¹ KEN-OTP-0033-0467 at 0467; KEN-OTP-0046-0054 at 0054.

¹² This is one of the parties in the PNU coalition of parties.

¹³ KEN-OTP-0033-0274 at 0275.

¹⁴ KEN-OTP-0033-0295 at 0295; KEN-OTP-0046-0079 at 0082-0083; KEN-OTP-0046-0064 at 0064.

¹⁵ KEN-OTP-0033-0483 at 0483; KEN-OTP-0033-0485 at 0486.

¹⁶ KEN-OTP-0033-0475 at 0475; KEN-OTP-0033-0485 at 0485; KEN-OTP-0046-0067 at 0067.

¹⁷ KEN-OTP-0033-0473 at 0473; KEN-OTP-0033-0485 at 0485; KEN-OTP-0041-0646 at 0647, para. 3.

¹⁸ KEN-OTP-0033-0471 at 0471; KEN-OTP-0051-0003 at 0021; ICC-01/09-02/11-T-1-ENG at page 4, lines 23-25.

C. Major General Mohammed Hussein ALI

11. Major General Mohammed Hussein ALI (ALI) was born in 16 February 1956 in Eldoret, Rift Valley Province in the Republic of Kenya.¹⁹ He is an ethnic Somali and married with children.
12. He studied in Busia District and joined the Kenyan Armed Forces in 1977. He was promoted to Brigadier in 2003 and Major General in 2005.²⁰
13. In 2004, he was appointed to the position of Commissioner of the Kenya Police.²¹ The regular Kenyan police force is under the command and direction of the Commissioner of Police.²² ALI held the position of Commissioner of Police throughout the period of the post election violence.²³
14. On 8 September 2009, ALI was transferred to the position of the Chief Executive of the Postal Corporation of Kenya.²⁴

II. STATEMENT OF FACTS

Background

15. The Rift Valley is one of Kenya's eight provinces.²⁵ In December 2007 through January 2008, the Rift Valley was the epicentre of violence following the 2007 general election (commonly referred to as the "PEV").²⁶ Compared with other provinces, the Rift Valley suffered the greatest number of victims, including over

¹⁹ KEN-OTP-0033-0352 at 0352; ICC-01/09-02/11-T-1-ENG at page 5, lines 9-11.

²⁰ KEN-OTP-0033-0352 at 0352.

²¹ KEN-OTP-0028-0170 at 0184.

²² KEN-OTP-0001-0910 at 0925, para. 18, referring to Article 108 of the Constitution; KEN-OTP-0003-0290 at 0290; KEN-OTP-0039-0005 at 0011.

²³ KEN-OTP-0013-0427 at 0432; KEN-OTP-0013-0441 at 0447; KEN-OTP-0013-0481 at 0487; KEN-OTP-0013-0497 at 0502; KEN-OTP-0052-1953 at 1959; KEN-OTP-0002-0774 at 0775; KEN-OTP-0002-0827.

²⁴ KEN-OTP-0033-0178 at 0178-0179; KEN-OTP-0030-0002 at 0002; KEN-OTP-0033-0233 at 0233; KEN-OTP-0033-0246 at 0255; KEN-OTP-0047-0007 at 0007; KEN-OTP-0051-0003 at 0014; KEN-OTP-0053-0021 at 0021; KEN-OTP-0033-0185.

²⁵ KEN-OTP-0001-1057 at 1070.

²⁶ KEN-OTP-0001-0364 at 0715; KEN-OTP-0046-0508 at 0508; KEN-OTP-0047-0042, track 02.

700 deaths,²⁷ the largest share of injuries, and approximately 400,000 forcibly displaced persons.²⁸

16. In December 2007, Kenya held presidential and parliamentary elections.²⁹ On 30 December 2007, the Electoral Commission of Kenya (“ECK”) declared the incumbent, President Mwai Kibaki, presidential candidate for the PNU, as the winner of the presidential election.³⁰ The announcement triggered one of the most violent periods in Kenya’s history.³¹ The circumstances of President Kibaki’s victory were immediately contested by ODM party members.³²
17. Following the announcement of the election results, a network of perpetrators consisting of ODM supporters executed attacks against perceived PNU supporters in the Uasin Gishu and Nandi Districts, which are known to densely populated by the Kikuyu, Kamba and Kisii who are perceived to be PNU supporters.³³
18. In response to the attacks by the ODM supporters, MUTHAURA and KENYATTA, as the Principal Perpetrators, ALI, Mungiki leaders and other prominent PNU supporters agreed to pursue an organizational policy to keep the PNU in power through every means necessary, including orchestrating a police failure to prevent the commission of crimes.³⁴
19. To implement the policy, the Principal Perpetrators devised a common plan to commit widespread and systematic attacks against perceived ODM supporters by

²⁷ KEN-OTP-0001-1527 at 1527; KEN-OTP-0001-0364 at 0683; KEN-OTP-0001-0331 at 0345; KEN-OTP-0001-0248 at 0285.

²⁸ KEN-OTP-0001-0248 at 0252 and 0285; KEN-OTP-0015-0393 at 0395; KEN-OTP-0001-0331 at 0345; KEN-OTP-0047-0038, track 01; KEN-OTP-0053-0223 at 0223.

²⁹ KEN-OTP-0001-0002 at 0018, para. 3; KEN-OTP-0001-1057 at 1064.

³⁰ KEN-OTP-0001-0002 at 0018, para. 3.

³¹ KEN-OTP-0001-0002 at 0018, paras. 3-4; KEN-OTP-0001-1516 at 1518.

³² KEN-OTP-0001-0002 at 0018, paras. 3-4; KEN-OTP-0001-1057 at 1064.

³³ KEN-OTP-0026-4968 at 4997; KEN-OTP-0001-1076 at 1092; KEN-OTP-0001-0002 at 0081, paras. 271-272, 0095, para. 322, 0184, 0186; KEN-OTP-0001-0002 at 0013, paras. 3-5; KEN-OTP-0001-1057 at 1064-1065; KEN-OTP-0049-0052 at 00:05:22 to 00:05:58.

³⁴ KEN-OTP-0053-0026; KEN-OTP-0060-0550, at 0551-0552; KEN-OTP-0060-0272 at 0294-0298, lines 744-853; KEN-OTP-0060-0325 at 0327-0328 lines 62-108.

i) penalizing them through retaliatory attacks, and ii) deliberately failing to take action to prevent or stop the retaliatory attacks.³⁵

20. Prior to the election, KENYATTA, taking on the role of mediator between the PNU and the Mungiki criminal organization,³⁶ facilitated a series of meetings from November 2007 involving MUTHAURA, other senior PNU government officials, politicians, businessmen and Mungiki leaders.³⁷ Initially, the meetings were to solicit the assistance of the Mungiki in supporting the government in the December 2007 elections.³⁸
21. After the election, KENYATTA in conjunction with MUTHAURA facilitated the meetings with the Mungiki with a view to organizing retaliatory attacks against perceived ODM supporters in the Rift Valley.³⁹ The primary purpose of the attacks was to strengthen the PNU's hold on power after the swearing in of the President.
22. KENYATTA (who had associated with the Mungiki since 2000)⁴⁰ along with MUTHAURA mobilized the Mungiki and pro-PNU youth to attack perceived ODM supporters in Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province) from the last week of January 2008.⁴¹

³⁵ KEN-OTP-0052-1317 at 1319, lines 45-64.

³⁶ KEN-OTP-0046-0128 at 0130; KEN-OTP-0046-0274 at 0274.

³⁷ KEN-OTP-0052-1305 at 1308, lines 116-132; KEN-OTP-0053-0026 at 0026; KEN-OTP-0053-0015 at 0018-0019; KEN-OTP-0052-2176 at 2180; KEN-OTP-0043-0002 at 0030-0032, para.142, 147-155.

³⁸ KEN-OTP-0053-0015 at 0018-0019; KEN-OTP-0043-0002 at 0031, para.145; KEN-OTP-0052-1276 at 1287, lines 440-454.

³⁹ KEN-OTP-0052-1305 at 1308-1310, lines 130-199; KEN-OTP-0053-0015 at 0018-0019; KEN-OTP-0053-0026 at 0026; KEN-OTP-0043-0002 at 0039, para.192-196.

⁴⁰ KEN-OTP-0060-0047 at 0056, lines 291-298; KEN-OTP-0033-0437 at 0458; KEN-OTP-0046-0277 at 0312; KEN-OTP-0043-0002 at 0041, para.204; KEN-OTP-0052-1244 at 1246, lines 72-83; KEN-OTP-0052-1262 at 1263, lines 25-29; KEN-OTP-0052-1372 at 1381, lines 346-369; KEN-OTP-0052-1387 at 1401, lines 554-563.

⁴¹ KEN-OTP-0053-0015 at 0018-0019; KEN-OTP-0043-0002 at 0039, para.192-196; KEN-OTP-0060-0365 at 0370, lines 153-156 at 0371, lines 213-232, at 0372, lines 265-269, at 0373, lines 270-277, at 0374, lines 324-332, 337-340, at 0375, lines 341-345, 363-373, at 0376, lines 374-385, 399-412, at 0377, lines 413-419, 423-435, at 0378, lines 448-452, 456-473; KEN-OTP-0060-0385 at 0398-0399, lines 473-522; KEN-OTP-0052-1487 at 1489-1490, lines 70-84, 104-117; KEN-OTP-0002-0015 at 0048-0049, para. 199, at 0059, para. 264; KEN-OTP-0026-4968 at 5018.

23. Relying on a network of loyal pro-PNU government officials, businessmen and local politicians, MUTHAURA and KENYATTA provided funding,⁴² transportation, accommodation, uniforms, weapons and logistical support to the Mungiki and pro-PNU youth to carry out coordinated attacks in specific locations.⁴³
24. In carrying out the attacks, the Mungiki and pro-PNU youth killed over 150 perceived ODM supporters. The attacks also resulted in the rape, forcible displacement, forcible circumcision and penile amputation, looting and destruction of the properties of perceived ODM supporters.⁴⁴ The Mungiki and pro-PNU targeted civilians in a number of ways, including by going from door to door in search of perceived ODM supporters and setting up roadblocks for intercepting vehicles and identifying perceived ODM supporters.⁴⁵
25. Furthermore, MUTHAURA in his capacity as Chairman of the National Security Committee, with the support of ALI, who as Commissioner of Police was a member of the Committee,⁴⁶ provided safe passage for the attacks to be carried out. MUTHAURA and ALI ensured that the Kenya Police did not intervene before, during or after the attacks, despite having prior knowledge of the attacks. The Kenya Police failed to prevent the attacks or punish its main perpetrators.⁴⁷

⁴² KEN-OTP-0052-1331, at 1333, lines 46-48.

⁴³ KEN-OTP-0059-0222 at 0232, line 368-387; KEN-OTP-0052-1305 at 1308, lines 110-129; KEN-OTP-0052-1469 at 1484, lines 592-600; KEN-OTP-0052-1487 at 1488-1489 lines 18-52; KEN-OTP-0060-0112 at 0118-0119, lines 185-197, lines 205-221, at 0126, lines 525 -536; KEN-OTP-0060-0272 at 0287, lines 487-505; KEN-OTP-0060-0365 at 0371, lines 213-232, at 0373, lines 270-277, at 0374, lines 324-332, 337-340, at 0375, lines 341-345, 363-373, at 0376, lines 374-385, 399-409; KEN-OTP-0060-0385 at 0389-0390, lines 138-150, lines 151-154, 159-162, 169-170, 183-186, at 0394-0395, lines 307-348, at 0396, lines 410-412; KEN-OTP-0060-0511 at 0515, lines 128-183, 188-189, at 0517, lines 201-221, 229-231, at 0518, lines 233-257, at 0519, lines 282-296; KEN-OTP-0043-0002 at 0039-0042, para.192-208 and at 0043-0046, para.218-229; KEN-OTP-0053-0015 at 0018; KEN-OTP-0060-0550 at 0552; KEN-OTP-0002-0015 at 0077; KEN-OTP-0001-0002 at 0094, paras. 316-318, at 0098, 0099 paras. 337-340, at 0227, para. 165, at 0231, 0232, paras. 178-179; KEN-OTP-0046-0110 at 0110.

⁴⁴ KEN-OTP-0060-0365 at 0379, lines 488-497, 507-515; KEN-OTP-0060-0385 at 0398, 0399, lines 479-522; KEN-OTP-0042-0228 at 0237, 0238, lines 305-356; KEN-OTP-0053-0038 at 0038; KEN-OTP-0001-0331 at 0345; KEN-OTP-0053-0170 at 0170.

⁴⁵ KEN-OTP-0042-0044 at 0046-0047, lines 74-97, at 0060, lines 602-622; KEN-OTP-0042-0228 at 0249-0250, lines 752-757, at 0262, lines 1194-1214; KEN-OTP-0052-2176 at 1278-1279.

⁴⁶ KEN-OTP-0053-0021 at 0022. See also KEN-OTP-0002-0172 at 0178-0179.

⁴⁷ KEN-OTP-0060-0511 at 0515-0516, lines 128-183, 188-189, at 0517, lines 201-221, 229-231, at 0518, lines 232-257, at 0519, lines 282-296; KEN-OTP-0060-0385 at 0394, 0395, lines 307-348; KEN-OTP-0043-0002 at 0040, para.198-200, at 0047-0048, para.237-244; KEN-OTP-0052-1590 at 1593, lines 89-97.

26. The contributions of MUTHAURA and KENYATTA to the implementation of the common plan included (1) adopting the plan; (2) soliciting the support and contribution of local politicians⁴⁸ and businessmen;⁴⁹ (3) mobilizing and authorizing the Mungiki and pro-PNU youth to implement the common plan;⁵⁰ and (4) providing the Mungiki and pro-PNU youth with logistical and other support.⁵¹ MUTHAURA and ALI made the following additional contributions: (1) securing the non-intervention of the Kenya Police in the implementation of the common plan;⁵² and (2) failing to punish the main perpetrators of the attacks.⁵³

27. Sections IV, V and VI below are incorporated by reference. These sections set forth the Article 7 chapeau including the time and place of the crimes, their factual basis and the modes of liability for MUTHAURA, KENYATTA and ALI (the “Suspects”).

III. TERRITORIAL, TEMPORAL AND MATERIAL JURISDICTION

28. All crimes alleged occurred in the Republic of Kenya, a state party to the Rome Statute since 2005.

29. All crimes alleged occurred on or about 30 December 2007 through 31 January 2008.

⁴⁸ KEN-OTP-0046-0271 at 0271.

⁴⁹ KEN-OTP-0001-0002 at 0094, paras. 316-318, 0096-0099, paras. 327-340; KEN-OTP-0002-0015 at 0054, para. 154; KEN-OTP-0001-0248 at 0296

⁵⁰ KEN-OTP-0059-0222 at 0232, lines 368-387; KEN-OTP-0052-1305 at 1308, lines 110-129; KEN-OTP-0052-1469 at 1484, lines 592-600; KEN-OTP-0052-1487 at 1488-1489, lines 18-52; KEN-OTP-0060-0112 at 0118-0119, lines 185-197, lines 205-221, at 0126, lines 525-536; KEN-OTP-0060-0272 at 0287, lines 487-505; KEN-OTP-0060-0365 at 0371, lines 312-232, at 0373, lines 270-277, at 0374, lines 324-332, 337-340, at 0375, lines 341-345, 363-373, at 0376, lines 374-385, 399-409; KEN-OTP-0060-0385 at 0394-0395, lines 307-348, at 0396, lines 410-412, at 0389, 0390, lines 138-150, lines 151-154, 159-162, 169-170, 183-186; KEN-OTP-0060-0511 at 0515, lines 128-183, 188-189, at 0517, lines 201-221, 229-231, at 0518, lines 232-257, at 0519, lines 282-296; KEN-OTP-0043-0002 at 0030, para.142, at 0031, para.145-146 and 149, at 0038-0040, para.188-200 and at 0043-0045, para.218-225; KEN-OTP-0053-0015 at 0018; KEN-OTP-0060-0550 at 0552; KEN-OTP-0002-0015 at 0077; KEN-OTP-0001-0002 at 0094, paras. 316-318, at 0098-0099, paras. 337-340, at 0231-0232, paras. 178-179, at 0227, para. 165.

⁵¹ KEN-OTP-0052-1331 at 1333, lines 43-57.

⁵² KEN-OTP-0053-0160 at 0160.

⁵³ KEN-OTP-0052-1590 at 1593, lines 89-97; KEN-OTP-0043-0002 at 0040, para.198-200 and at 0047-0048, para.237-244.

30. Murder, forcible transfer of population, rape and other forms of sexual violence, other inhumane acts and persecution are crimes against humanity as defined in Article 7 of the Statute.

IV. FACTS RELEVANT TO THE ARTICLE 7 CHAPEAU ELEMENTS

A. Widespread or Systematic Attack

31. The crimes alleged occurred in the context of a widespread or systematic attack against members of the civilian population, within the meaning of Article 7(1) of the Statute. The Suspects are responsible for coordinated attacks that were perpetrated by the Mungiki and pro-PNU youth in different parts of Nakuru and Naivasha and encouraged and abetted by the failure of the Kenya Police to intervene.⁵⁴ The direct perpetrators implemented the common plan of the Principal Perpetrators by subjecting perceived ODM supporters to systematic acts of violence, including rapes, killings, looting, burning and destruction of their properties. These attacks were not random occurrences but were targeted at perceived ODM supporters using a variety of means of identification such as lists, physical attributes, roadblocks and language.⁵⁵

32. The attacks affected a large number of civilian victims over a large geographical area.⁵⁶ As a result, approximately 112 people were killed⁵⁷ and thousands displaced⁵⁸ in or around Nakuru town between 24 and 27 January 2008. At least 359 cases of injuries were reported in Nakuru hospitals during this period.⁵⁹ These injuries included wounds sustained from the use of sharp objects and burns.⁶⁰ Nakuru also recorded 29 cases of rape, including gang rape,⁶¹ perpetrated

⁵⁴ KEN-OTP-0042-0272 at 0281-0282, lines 329-336; KEN-OTP-0042-0304 at 0321, lines 561-570.

⁵⁵ KEN-OTP-0059-0265 at 0285-0286, lines 744-771.

⁵⁶ KEN-OTP-0045-0205 at 04:19-04:51 and 12:20-12:38.

⁵⁷ KEN-OTP-0001-0364 at 0481.

⁵⁸ KEN-OTP-0001-0248 at 0252 and 0285; KEN-OTP-0014-0302 at 0302; KEN-OTP-0046-0506 at 0506; KEN-OTP-0015-0393 at 0402; KEN-OTP-0001-0002 at 0143, paras. 548-549; KEN-OTP-0045-0002 at 0009; KEN-OTP-0001-0364 at 0422-0424; KEN-OTP-0001-0973 at 0982.

⁵⁹ KEN-OTP-0001-0364 at 0707.

⁶⁰ KEN-OTP-0001-0364 at 0480-0481; KEN-OTP-0045-0205 at 00:15:00-00:15:10.

⁶¹ KEN-OTP-0001-0364 at 0481.

on both male and female victims,⁶² as well as six cases of male penile amputation and traumatic circumcision.⁶³

33. In or around Naivasha town, the Mungiki and pro-PNU youth killed over 50 people, including women and children,⁶⁴ and displaced over 9,000 civilians in the last week of January 2008.⁶⁵ In Kabati Estate within the town, 19 women and children were burnt to death in a house in which they had sought refuge during the attacks.⁶⁶ The direct perpetrators injured over 53 civilians, including 37 injured by sharp pointed objects,⁶⁷ and destroyed at least 300 houses and businesses believed to belong to ODM supporters. At least four cases of traumatic circumcision were reported during the period notwithstanding the gross under-reporting of cases of rape and other forms of sexual violence in Kenya⁶⁸.

34. MUTHAURA, KENYATTA and ALI knew that their conduct was part of, or intended for their conduct to be part of, a widespread or systematic attack.

B. The Existence of an Organizational Policy

35. The Principal Perpetrators, together with ALI, Mungiki leaders and other prominent PNU supporters, agreed to pursue an organizational policy to keep the PNU in power through every means necessary, including by orchestrating a police failure to prevent the commission of crimes.⁶⁹ To implement the policy, the Principal Perpetrators devised a common plan to commit widespread and systematic attacks against perceived ODM supporters by (1) penalizing them

⁶² KEN-OTP-0001-0364 at 0611-0613, 0618, 0632; KEN-OTP-0002-0197 at 0315.

⁶³ KEN-OTP-0001-0364 at 0481 and 0632; KEN-OTP-0001-1516 at 1521.

⁶⁴ KEN-OTP-0042-0405 at 0431, lines 858-882.

⁶⁵ KEN-OTP-0001-0364 at 0494; KEN-OTP-0045-0217 at 0252, paras. 113-114.

⁶⁶ KEN-OTP-0042-0078 at 0081-0083, lines 98-144; KEN-OTP-0042-0228 at 0237-0238, lines 320-356; KEN-OTP-0003-0513 at 0515, para.13.

⁶⁷ KEN-OTP-0001-0364 at 0707.

⁶⁸ KEN-OTP-0001-0364 at 0493; KEN-OTP-0042-0228 at 0243, lines 504-531.

⁶⁹ A policy by abstention is recognized under the Rome Statute: "Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack." See footnote 6 of paragraph 3 of the Introduction to Article 7 Crimes Against Humanity of the Elements of Crimes.

through retaliatory attacks, and (2) deliberately failing to take action to prevent or stop the retaliatory attacks.⁷⁰

36. To achieve their goals, the Principal Perpetrators activated and utilized pre-existing structures, such as the Mungiki to perpetrate the widespread and systematic attacks and the Kenya Police to ensure that the Mungiki operations were not interfered with.

(i) The Principal Perpetrators

37. Since 2000, KENYATTA has been closely associated with the Mungiki.⁷¹ In 2002, in preparation for the general election of that year, KENYATTA's candidacy for the Office of the President was publicly endorsed by the Mungiki.⁷² At all times relevant to the crimes charged, KENYATTA had the capacity to mobilize and influence Mungiki members who in turn received protection and patronage from him.⁷³ KENYATTA had control over the Mungiki, in part due to his wealth and privileged background.⁷⁴

38. At all times relevant to the crimes charged, MUTHAURA was the Chairman of the National Security Committee and Secretary to the Cabinet Security Committee, the highest decision making body of the Kenyan security and intelligence machinery. MUTHAURA exercised both *de jure* and *de facto* authority over the various Kenyan security agencies, including the Kenya Police, Administration Police and the National Security and Intelligence Service ("NSIS"). MUTHAURA therefore exercised direct authority over ALI, the

⁷⁰ KEN-OTP-0052-1317 at 1319, lines 45-64; KEN-OTP-0046-0503 at 0504.

⁷¹ KEN-OTP-0060-0047 at 0056, lines 292-298; KEN-OTP-0033-0437 at 0458; KEN-OTP-0046-0277 at 0312; KEN-OTP-0043-0002 at 0041, para.204.

⁷² KEN-OTP-0033-0231 at 0232.

⁷³ KEN-OTP-0053-0015 at 0018; KEN-OTP-0052-1506 at 1465-1466 lines 547-585.

⁷⁴ KEN-OTP-0052-1506 at 1513-1515, lines 272-333; KEN-OTP-0043-0002 at 0041, lines 204-205; KEN-OTP-0059-0126 at 0143, lines 622-625.

Commissioner of Police, who was during the period of the PEV, a member of the National Security Committee.⁷⁵

(ii) The Mungiki and pro-PNU youth

39. The Mungiki, a criminal organization, is under the leadership of its founder and patron, Maina Njenga.⁷⁶ KENYATTA himself is alleged to be a Mungiki leader.⁷⁷ The Mungiki is organized into local and regional branches,⁷⁸ the leaders of which are directly below the national coordinating committee in the Mungiki structure.⁷⁹ The local leader is the executive of the local branch and is also vested with judicial powers in the locality he oversees.⁸⁰ All local leaders are bound by the general rules of the Mungiki as well as by instructions issued by the patron.⁸¹ The Mungiki used meetings and mobile phones as their primary means of communication and communicated in Kikuyu language.⁸²

40. The Mungiki has a political wing known as the Kenya National Youth Alliance, a political party.⁸³ It also has a militant wing, sometimes referred to as the Mungiki Defence Council, with radical members who are trained to carry out violent operations, including killings.⁸⁴ In order to enforce discipline, dissidents within the organization are severely dealt with. Traitors and defectors are persecuted and killed.⁸⁵

41. Up until the time of the PEV, the Mungiki controlled the public transport system, provided power through illegal electricity connections, demanded a fee for

⁷⁵ KEN-OTP-0001-0364 at 0740; KEN-OTP-0002-0172 at 0178-0179; KEN-OTP-0060-0675 at 0684; KEN-OTP-0002-0172 at 0178-0179.

⁷⁶ KEN-OTP-0033-0297 at 0303; KEN-OTP-0046-0121 at 0121-0123; KEN-OTP-0043-0002 at 0012-0013, paras. 50 and 52; KEN-OTP-0002-0015 at 0069, para. 321.

⁷⁷ KEN-OTP-0052-1372 at 1382-1385, lines 375-530. See also KEN-OTP-0046-0056 at 0057; KEN-OTP-0053-0026 at 0026; KEN-OTP-0060-0550 at 0550.

⁷⁸ KEN-OTP-0046-0277 at 0306; KEN-OTP-0033-0297 at 0303.

⁷⁹ KEN-OTP-0046-0274 at 0274; KEN-OTP-0043-0002 at 0015, para. 65.

⁸⁰ KEN-OTP-0043-0002 at 0018-0019, para. 81.

⁸¹ KEN-OTP-0043-0002 at 0015, para. 65.

⁸² KEN-OTP-0043-0002 at 0013 and 0016, paras. 52 and 67-68.

⁸³ KEN-OTP-0046-0128 at 0144; KEN-OTP-0033-0297 at 0303.

⁸⁴ KEN-OTP-0059-0708 at 0709-0711, lines 20-97; KEN-OTP-0033-0297 at 0303; KEN-OTP-0046-0116 at 0118; KEN-OTP-0043-0002 at 0017, paras. 73-75.

⁸⁵ KEN-OTP-0033-0150 at 0169-0170; KEN-OTP-0046-0116 at 0118.

accessing public toilets and sold water to residents in the poorest parts of Central Province and Nairobi.⁸⁶ It also provided protection services to businesses⁸⁷ and was enlisted by politicians to intimidate opponents.⁸⁸

42. Different sources estimate the number of active Mungiki members to be around 20,000 to 30,000, and 500,000 “oathed” or inactive members or supporters.⁸⁹ During the PEV, the Mungiki mobilized additional human resources among local pro-PNU youth through aggressive recruitment before and after the elections.⁹⁰

(iii) ALI and the Kenya Police

43. As Commissioner of Police during the period of the PEV, ALI routinely reported to MUTHAURA.⁹¹ ALI had the power to appoint, remove or exercise disciplinary control over officers below the rank of Assistant Inspector.⁹² By his own admission, ALI had sole responsibility for all matters concerning Kenya Police operations.⁹³ ALI changed the decision-making structure within the Kenya Police by introducing a more militaristic and centralized approach at the time he became the Commissioner.⁹⁴ ALI therefore exercised *de jure* and *de facto* control over the Kenya Police.

(iv) Policy involving common plan to commit widespread and systematic attacks

44. The existence of an organizational policy, including by abstention, can be inferred from the numerous activities carried out by the Principal Perpetrators at the central and local levels to adopt and implement the common plan and the

⁸⁶ KEN-OTP-0001-0364 at 0568; KEN-OTP-0002-0015 at 0149-0150, para. 719; KEN-OTP-0046-0128 at 0136; KEN-OTP-0033-0297 at 0306-0307; KEN-OTP-0046-0116 at 0118.

⁸⁷ KEN-OTP-0033-0150 at 0168; KEN-OTP-0001-0364 at 0568; KEN-OTP-0053-0026 at 0026.

⁸⁸ KEN-OTP-0002-0774 at 0824; KEN-OTP-0033-0437 at 0458-0460; KEN-OTP-0033-0150 at 0165; KEN-OTP-0033-0514 at 0522-0523.

⁸⁹ KEN-OTP-0033-0317 at 0329; KEN-OTP-0033-0297 at 0303-0304.

⁹⁰ KEN-OTP-0001-0364 at 0497; KEN-OTP-0002-0015 at 0069-0070 and 0080-0081, para.321 and 362.

⁹¹ KEN-OTP-0052-1953 at 1980.

⁹² KEN-OTP-0033-0539 at 0623-0624. According to the same section, the Public Service Commission may delegate its powers to the Commissioner of Police to appoint, remove and exercise disciplinary control over officers of the rank of Assistant Inspector and above.

⁹³ KEN-OTP-0052-1953 at 1981-1982 and 1992; KEN-OTP-0028-0170 at 0190; KEN-OTP-0030-0307 at 0355.

⁹⁴ KEN-OTP-0041-0209 at 0218-0219, para.63-65; KEN-OTP-0030-0307 at 0355; KEN-OTP-0026-4968 at 4998.

systematic nature of the attacks perpetrated against perceived ODM supporters. These activities include preparatory meetings and other activities to mobilize, instruct, incite, arm and supply the Mungiki as well as to finance, coordinate and provide logistical support for their operations during the PEV. Section V.A is incorporated here by reference.

45. The abstention element of the policy can be inferred from the ease with which the Mungiki and pro-PNU youth were transported in large numbers from outside the Rift Valley to Naivasha and Nakuru despite the presence of numerous police checkpoints along the way⁹⁵. Another indication of the policy by abstention is the grossly inadequate police response to the retaliatory attacks in Naivasha and Nakuru. Section V.B is incorporated by reference.
46. Other indicia of the existence of a policy include: the deliberate failure by MUTHAURA and ALI to act to prevent the attacks despite adequate prior warning; the grant of impunity by MUTHAURA and ALI to the main perpetrators of the attacks; and the later killings orchestrated by the Kenya Police under ALI's leadership of Mungiki leaders who were directly involved in PEV planning meetings with KENYATTA and other prominent PNU politicians.⁹⁶
47. As Chairman and a member of the National Security Committee, MUTHAURA and ALI received NSIS situation reports warning of planned attacks and the high risk of significant violence around the 2007 election⁹⁷. ALI additionally received daily intelligence reports prepared by the NSIS.⁹⁸ Six days before the Naivasha incident, the NSIS warned of an impending attack on the Maasai, Luhya and Luo in Naivasha by "Kikuyu youth".⁹⁹ A day before the Nakuru incident, the NSIS

⁹⁵ KEN-OTP-0060-0550 at 0552; KEN-OTP-0052-1486 at 1489, lines 70-192.

⁹⁶ KEN-OTP-0052-1469 at 1475-1477, lines 222-313; KEN-OTP-0052-1487 at 1492-1494, lines 195-253; KEN-OTP-0043-0002 at 0038-0041, paras. 188-206, at 0043-0044, at 0047, para.218-219 and 238.

⁹⁷ KEN-OTP-0001-0364 at 0736.

⁹⁸ KEN-OTP-0052-2036 at 2308.

⁹⁹ KEN-OTP-0002-0015 at 0052, para.219.

reported that the Mungiki were organizing to attack non-Kikuyu residing in the town.¹⁰⁰

48. On the issue of impunity, ALI failed to implement the recommendations of the Naivasha District Security Committee to arrest and prosecute some of the main local organizers of the violence in Naivasha.¹⁰¹ Although 37 people, including a former KANU MP, were arrested in Nakuru after the PEV,¹⁰² they were immediately released on bail and the Prosecution is not aware that there has been any follow-up on their case.

49. Since the end of the PEV, the Kenya Police under ALI's leadership is reported to have killed several Mungiki leaders.¹⁰³ There are substantial grounds to believe that the perpetrators of these killings (1) specifically targeted Mungiki leaders with knowledge of the involvement of KENYATTA and other PNU politicians in the planning of the PEV, and (2) reported to senior Kenya Police officers, including ALI.¹⁰⁴

V. FACTS RELEVANT TO INDIVIDUAL CRIMES CHARGED

A. Preparatory Meetings and Activities

50. From on or about 30 December 2007 to the end of January 2008, MUTHAURA, KENYATTA and other members of the common plan participated in a series of activities, including preparatory meetings, to mobilize, coordinate, finance and provide logistical support for the Mungiki during the PEV.¹⁰⁵ The key preparatory meetings include those held in Nairobi on or about 30 December 2007 (at the State

¹⁰⁰ KEN-OTP-0002-0015 at 0045, 0048-0049, para. 199, 0053, 0057, 0059, 0065, 0069, 0070, paras. 174, 175, 226, 254, 264, 304, 321, 324.

¹⁰¹ KEN-OTP-0012-0196 at 0197; KEN-OTP-0042-0078 at 0094, lines 543-551.

¹⁰² KEN-OTP-0001-0248 at 0302-0303 and 0310-0311; KEN-OTP-0043-0002, at 0041, para. 203 and 206.

¹⁰³ KEN-OTP-0053-0057 at 0057; KEN-OTP-0053-0059 at 0059; KEN-OTP-0053-0061 at 0061; KEN-OTP-0053-0062 at 0062-0063; KEN-OTP-0053-0064 at 0064; KEN-OTP-0053-0065 at 0066-0067; KEN-OTP-0053-0069 at 0070; KEN-OTP-0060-0470 at 0472, lines 56-77; KEN-OTP-0043-0002 at 0014-0015, para. 60-61.

¹⁰⁴ KEN-OTP-0060-0130 at 0142, lines 414-429; KEN-OTP-0052-1317 at 1328, lines 412-419; KEN-OTP-0053-0243 at 00:46:23-00:48:00 and 01:03:50-01:04:04.

¹⁰⁵ KEN-OTP-0060-0405 at 0407, lines 61-77 and at 0408, lines 78-86, 90-111, 113 and 117 and at 0409, lines 125-134, and at 0410, lines 157-159, 161-165, 170-172 and at 0411, lines 194-205, 209-210, 214, 225-229 and at 0412, lines 230-259 and at 0414, lines 328-339, and at 0415, lines 350-354, 362-377 and at 0417, lines 448-454 and at 0418-488 and at 0419, lines 510-518 and at 0422, lines 608-619; KEN-OTP-0002-0015 at 0069-0070, para.321.

House)¹⁰⁶ and in early,¹⁰⁷ mid¹⁰⁸ and late January 2008.¹⁰⁹ There were also preparatory meetings in Central Province on or about 31 December 2007,¹¹⁰ in Nakuru in early to mid January 2008¹¹¹ and in Naivasha in late January 2008.¹¹²

51. In the meetings they attended, including the one at the Nairobi Members' Club on or about 3 January 2008, KENYATTA and MUTHAURA enlisted the services of Mungiki leaders and concluded plans for the launching of retaliatory attacks in the Rift Valley.¹¹³ After the eruption of violence targeting perceived PNU supporters in the Rift Valley, KENYATTA and MUTHAURA put in place concrete plans to ensure the smooth initiation and success of retaliatory operations to be carried out by the Mungiki and pro-PNU youth.¹¹⁴

52. The recruitment, mobilization and payment of pro-PNU youth to participate in the retaliatory attacks in Naivasha and Nakuru were carried out in offices belonging to KANU, headed by KENYATTA.¹¹⁵ KENYATTA specifically tasked a former KANU MP to organize the Nakuru operations, thereby placing the Mungiki under a responsible command.¹¹⁶ He directly provided funding for Mungiki operations during the PEV or provided information as to where to

¹⁰⁶ KEN-OTP-0052-1506 at 1513-1515, lines 272-333; KEN-OTP-0060-0426, at 0060-0427, lines 28, 29, 0428, lines 39-43, 58-75, 0429, lines 77-79, 89-91, 93, 96, 100, 101, 108, 0430, lines 119, 124, 125, 127, 131, 132, 0431, lines 154-156, 179-182, 0432, lines 199-205, 209-215, 0433, lines 243-246.

¹⁰⁷ KEN-OTP-0043-0002 at 0040-0041, paras.201-202; KEN-OTP-0051-1045 at 1054, para.36 and 1057-1058, paras.50-54.

¹⁰⁸ KEN-OTP-0002-0015 at 0053, para.226.

¹⁰⁹ KEN-OTP-0060-0550 at 0551-0553.

¹¹⁰ KEN-OTP-0060-0405 at 0408, lines 78-117.

¹¹¹ KEN-OTP-0060-0093 at 0096, lines 100-109; KEN-OTP-0002-0015 at 0048-0049, para.199 and 0064, para.299 and 0077, para.349; KEN-OTP-0001-0002 at 0227; KEN-OTP-0010-0332 at 0333.

¹¹² KEN-OTP-0042-0115 at 0118, lines 79-109; KEN-OTP-0060-0426 at 0448, lines 773-781; KEN-OTP-0001-0002 at 0099, para 340; KEN-OTP-0042-0078 at 0107-0108, lines 1045-1090.

¹¹³ KEN-OTP-0060-0112 at 0127, lines 556-578; KEN-OTP-0060-0405 at 0408, lines 78-117 and at 0419, lines 491-518; KEN-OTP-0043-0002 at 0040, para.198-200; KEN-OTP-0052-1305 at 1308, lines 118-132; KEN-OTP-0053-0026 at 0026; KEN-OTP-0053-0015 at 0018-0019; KEN-OTP-0052-2176 at 2180; KEN-OTP-0053-0026 at 0026; KEN-OTP-0043-0002 at 0038-0041, para.188-206; KEN-OTP-0053-0052 at 0052.

¹¹⁴ KEN-OTP-0060-0112 at 0127, lines 556-578; KEN-OTP-0060-0405 at 0408, lines 78-117 and at 0419, lines 491-518; KEN-OTP-0043-0002 at 0040, para.198-200; KEN-OTP-0052-1305 at 1308, lines 118-132; KEN-OTP-0053-0026 at 0026; KEN-OTP-0053-0015 at 0018-0019; KEN-OTP-0052-2176 at 2180; KEN-OTP-0053-0026 at 0026; KEN-OTP-0043-0002 at 0038-0041, para.188-206; KEN-OTP-0053-0052 at 0052.

¹¹⁵ KEN-OTP-0059-0177 at 0188-0189, lines 391-438 and 0191, lines 485-496.

¹¹⁶ KEN-OTP-0060-0112 at 0126, lines 525-533; KEN-OTP-0043-0002 at 0041, paras.202-206.

secure funding.¹¹⁷ In preparation for the attacks, KENYATTA was also responsible for arming and providing transportation for pro-PNU youth.¹¹⁸

53. By the time of the PEV, MUTHAURA had also developed particularly close links with the Mungiki through his subordinates.¹¹⁹ MUTHAURA once intervened to secure the release of Mungiki members who had been arrested by the police at a Mungiki gathering prior to the 2007 election.¹²⁰

54. At the Nairobi Members' Club on or about 3 January 2008, MUTHAURA requested Mungiki leaders to deploy their members to the Rift Valley to carry out retaliatory attacks. MUTHAURA also assured the Mungiki leaders that the police would not interfere with their work. During the meeting, he placed a phone call to ALI to instruct him to ensure that pro-PNU youth would not be prevented from going into the Rift Valley.¹²¹ During another phone conversation with ALI in mid January 2008, MUTHAURA reminded ALI that the Mungiki were working with them and ordered him not to arrest them.¹²²

55. In preparation for the Naivasha attack, one of MUTHAURA's subordinates provided Administration Police uniforms to the Mungiki,¹²³ and another delivered a significant amount of money in cash to a Mungiki leader.¹²⁴

56. The evidence demonstrates that the common plan was duly executed at local level. It shows that the Kenya Police had indeed received instructions not to interfere with the movement of pro-PNU youth into the Rift Valley.¹²⁵ Subsequent preparatory meetings took place in the Rift Valley, particularly in Nakuru and

¹¹⁷ KEN-OTP-0043-0002 at 0040-0041, para.198-199 and 201-202; KEN-OTP-0060-0112 at 0126-0129, lines 525-541, 556-578, 587, 589, 597, 610-613, 616, 618; KEN-OTP-0052-1292 at 1302-1304, lines 407-511.

¹¹⁸ KEN-OTP-0038-0105 at 0105-0106; KEN-OTP-0001-0002 at 0134, 0187, para.509; KEN-OTP-0026-4968 at 5018; KEN-OTP-0060-0550 at 0552.

¹¹⁹ KEN-OTP-0052-1451 at 1464-1465, lines 479-546.

¹²⁰ KEN-OTP-0060-0299 at 0304-0305, lines 159-179, 184-187, 200-220; KEN-OTP-0060-0272 at 0294, lines 744-766.

¹²¹ KEN-OTP-0043-0002 at 0040, paras.198-201.

¹²² KEN-OTP-0060-0272 at 0295-0296, lines 798-825.

¹²³ KEN-OTP-0052-1523 at 1535, lines 419-445.

¹²⁴ KEN-OTP-0060-0325 at 0333, lines 265-298 and at 0334, lines 299-317.

¹²⁵ KEN-OTP-0060-0511 at 0515, 0516, lines 128-183, at 0517, lines 201 to 221, 229-231, at 0518, lines 232-257, at 0519, lines 282-296; KEN-OTP-0060-0385 at 0394-0395, lines 307-348; KEN-OTP-0043-0002 at 0040, para.198-200; KEN-OTP-0033-0186 at 0186-0187; KEN-OTP-0060-0272 at 0295-0296, lines 798-825.

Naivasha, with the active participation of local members of the common plan. In these meetings, prominent local PNU supporters planned and organized operations in pursuance of the common plan.¹²⁶ They mobilized additional financial resources, distributed weapons and arranged means of transport.¹²⁷

57. The attacks entailed a high level of coordination between different Mungiki groups as well as between local and non-resident Mungiki members and pro-PNU youth. The attacks involved the: (1) distribution of weapons to direct perpetrators;¹²⁸ (2) transportation of foreign Mungiki and pro-PNU youth from Central Province and Nairobi to the Rift Valley;¹²⁹ (3) identification of perceived ODM supporters by local pro-PNU youth;¹³⁰ (4) non-interference by the police;¹³¹ and (5) perpetration of acts of violence by groups of attackers moving together.¹³²

B. The Attacks

INCIDENT 1 - Mungiki/pro-PNU youth attacks in Nakuru (Nakuru District, Rift Valley Province)

58. The Principal Perpetrators, a former KANU MP¹³³ and other Mungiki leaders were responsible for planning and coordinating the attacks in Nakuru.¹³⁴ A large sum of money and police uniforms were distributed to the Mungiki from the State House in Nakuru.¹³⁵ Pro-PNU youth were recruited and registered at the local KANU offices and funds were made available to them as a down payment

¹²⁶ KEN-OTP-0052-1469 at 1484, lines 592-600; KEN-OTP-0060-0112 at 0118, lines 190-197; KEN-OTP-0001-0002 at 0094 paras. 316-318; KEN-OTP-0016-0299 at 0415; KEN-OTP-0002-0015 at 0048-0049, para. 199.

¹²⁷ KEN-OTP-0052-1469 at 1484, lines 592-600; KEN-OTP-0060-0385 at 0389, 0390, lines 138-150, lines 151-154, 159-162, 169, 170, 183-186, at 0396, lines 410-412; KEN-OTP-0060-0365 at 0375, lines 341-345, at 0376, lines 399 to 409; KEN-OTP-0001-0002 at 0094, para.316-318, at 0227, para.165, at 0231, para.178; KEN-OTP-0016-0299 at 0415; KEN-OTP-0002-0015 at 0077, para.349.

¹²⁸ KEN-OTP-0060-0550 at 0552.

¹²⁹ KEN-OTP-0060-0550 at 0552.

¹³⁰ KEN-OTP-0060-0550 at 0552-0553.

¹³¹ KEN-OTP-0060-0550 at 0553.

¹³² KEN-OTP-0060-0550 at 0552.

¹³³ KEN-OTP-0002-0015 at 0048-0049, para.199.

¹³⁴ KEN-OTP-0043-0002 at 0040-0041, para.201-202, 204-206.

¹³⁵ KEN-OTP-0002-0015 at 0043; KEN-OTP-0043-0002 at 0036, para.176, at 0040-0041, para.201-202, at 0048, para.241; KEN-OTP-0013-0497 at 0499; KEN-OTP-0053-0015 at 0018.

for the attacks to be launched.¹³⁶ A former Mungiki National Coordinator spearheaded the Mungiki mobilization and organized oath-taking ceremonies to initiate newly recruited Mungiki members to participate in the fighting.¹³⁷

59. The most serious wave of violence in Nakuru town erupted during the night of 24 January and lasted until 27 January 2008.¹³⁸ The evidence suggests that this wave of violence was launched by the Mungiki and pro-PNU youth.¹³⁹ Among the attackers were large groups of pro-PNU youth who came from outside Nakuru town.¹⁴⁰ They were armed with machetes (called *pangas*), knives and petrol bombs. They were deployed to various parts of Nakuru, including Kaptembwa, Kwarhoda, Mwariki, Free Area and Kiti¹⁴¹ where they went from house to house rounding up and forcibly circumcising Luo men using *pangas* and broken bottles.¹⁴² Some of those who resisted were beheaded.¹⁴³

60. Available evidence indicates that the Mungiki and pro-PNU youth attacked in a well-organized and regimented manner.¹⁴⁴ They communicated in Kikuyu and mainly targeted perceived ODM supporters.¹⁴⁵ The target of the attacks was further made obvious by attackers who stated that “all Luos should go back to Nyanza”.¹⁴⁶ In some instances, they shot their victims and then mutilated their bodies to conceal the gunshot wounds.¹⁴⁷ This was reported in Kaptembwa,

¹³⁶ KEN-OTP-0059-0177 at 0188-0189, lines 391-438 and 0191, lines 485-496; KEN-OTP-0052-1292 at 1304, lines 506-510; KEN-OTP-0052-1305 at 1315, lines 388-421; KEN-OTP-0059-0200 at 0216 lines 576-607; KEN-OTP-0059-0239 at 0243, lines 131- 156, at 0245, lines 205-226.

¹³⁷ KEN-OTP-0002-0015 at 0069 to 0070, para.321; KEN-OTP-0052-1292 at 1304, lines 506-510; KEN-OTP-0052-1305 at 1315, lines 388-421; KEN-OTP-0052-1387 at 1388, lines 25-39; KEN-OTP-0052-1469 at 1478, lines 355-361.

¹³⁸ KEN-OTP-0001-0364 at 0473 and at 0476; KEN-OTP-0001-0248 at 0300 to 0301.

¹³⁹ KEN-OTP-0001-0364 at 0473 and at 0476; KEN-OTP-0001-1057 at 1066; KEN-OTP-0002-0015 at 0045-0046, para.173-174.

¹⁴⁰ KEN-OTP-0053-0054 at 0054.

¹⁴¹ KEN-OTP-0001-0364 at 0476; KEN-OTP-0001-0248 at 0300 to 0301.

¹⁴² KEN-OTP-0046-0368 at 0368; KEN-OTP-0001-0364 at 0476; KEN-OTP-0001-0248 at 0300 to 0301.

¹⁴³ KEN-OTP-0001-0002 at 0093, para.314-315 and at 0098, para.335; KEN-OTP-0001-0248 at 0301

¹⁴⁴ KEN-OTP-0001-0248 at 0300 to 0301; KEN-OTP-0001-0002 at 0098, para.335; KEN-OTP-0001-0364 at 0473 and at 0476.

¹⁴⁵ KEN-OTP-0053-0168 at 0168; KEN-OTP-0001-0002 at 0098, para.335.

¹⁴⁶ KEN-OTP-0001-0248 at 0300-0301; KEN-OTP-0053-0158 at 0158.

¹⁴⁷ KEN-OTP-0053-0156 at 0156; KEN-OTP-0001-0002 at 0098, para.335.

Sewage, Ponda Mali, Barut and Kapkures.¹⁴⁸ The attacking pro-PNU youth were paid or rewarded according to their performance.¹⁴⁹

61. As part of their contribution to the attacks, the Kenya Police granted Mungiki members and pro-PNU youth being transported from other provinces unhindered passage into Nakuru town.¹⁵⁰ The response by the Kenya Police to the attacks was notably weak and inadequate.¹⁵¹ This is despite having prior knowledge of the attacks, Mungiki deployment plans and the identities of the sponsors and leaders of the attacks.¹⁵² In furtherance of the common plan, the Kenya Police were slow to respond to the violence and in many cases, they refused to enforce the law or respond to calls to help victims.¹⁵³

62. Throughout the PEV, between 161 and 213 people were killed in Nakuru, including 48 people killed during the night of 26 January alone. At least 359 people were injured.¹⁵⁴ The majority of killings and injuries were caused by sharp objects or instruments. Based on a list of reported deaths compiled by the CIPEV, at least 90 perceived ODM supporters out of approximately 112 people were killed in Nakuru town between 24 and 27 January.¹⁵⁵ During the violence, the attacking Mungiki and pro-PNU youth severely injured hundreds of ODM supporters and forcibly displaced thousands from their homes into IDP camps.¹⁵⁶

63. Between 24 and 27 January 2008, the Mungiki and pro-PNU youth also committed rape and other forms of sexual violence against perceived ODM

¹⁴⁸ KEN-OTP-0001-0002 at 0098, para.335; KEN-OTP-0001-0364 at 0476.

¹⁴⁹ KEN-OTP-0001-0002 at 0098, para. 335; KEN-OTP-0001-0248 at 0295-0296.

¹⁵⁰ KEN-OTP-0043-0002 at 0040, para.198-199; KEN-OTP-0033-0186 at 0187.

¹⁵¹ KEN-OTP-0001-0364 at 0482-0483; KEN-OTP-0053-0054 at 0054.

¹⁵² KEN-OTP-0001-0364 at 0477 and 0479; KEN-OTP-0002-0015 at 0080-0081, para 362 (18 December 2007), 0065, para 306 (9 January 2008), 0064, para 299 (10 January 2008), 0059, para 264 (14 January 2008), 0048 to 0049, paras 195, 199 (21 January 2008), 0045, paras 173 to 174 (25 January 2008); KEN-OTP-0013-0441 at 0444.

¹⁵³ KEN-OTP-0001-0364 at 0482-0484; KEN-OTP-0001-0002 at 0101, paras. 349-350; KEN-OTP-0053-0170 at 0170.

¹⁵⁴ KEN-OTP-0053-0044 at 0044; KEN-OTP-0001-0002 at 0093, para.315.

¹⁵⁵ KEN-OTP-0041-0679 at 0681 to 0690 and 0733; KEN-OTP-0001-0364 at 0480-0481, 0476 and 0707; KEN-OTP-0001-0248 at 0302.

¹⁵⁶ KEN-OTP-0001-0364 at 0480-0481; KEN-OTP-0001-0248 at 0302; KEN-OTP-0043-0002 at 0040, para.198-199; KEN-OTP-0046-0364, Track 1 at 00:00-01:15; KEN-OTP-0005-0482 at 0482; KEN-OTP-0001-0002 at 0093, para 315.

supporters in Nakuru.¹⁵⁷ Forty-five cases of sexual violence were reported during this period, including forced male circumcision and rapes.¹⁵⁸ Six people were treated at the Provincial General Hospital of Nakuru for traumatic circumcision and penile amputation; 29 rape cases were also treated at the same hospital.¹⁵⁹ In Nakuru, a number of women were gang raped – often in the presence of their husbands – maimed and killed.¹⁶⁰ Others were made to watch as the attackers killed their husbands and children.¹⁶¹

INCIDENT 2 – Mungiki/pro-PNU youth attacks in Naivasha (Naivasha District, Rift Valley Province)

64. The attacks in Naivasha were launched in an orderly and well planned manner on the morning of 27 January 2008.¹⁶² Mungiki members in Nairobi who had been earmarked to carry out the attacks were mobilized through text messages requesting them to report at specific locations in Nairobi from where they were picked up by Citi Hoppa buses and transported through secret routes to the State House in Nairobi. Upon arrival at the State House, the Mungiki members were addressed by a Mungiki leader in the presence of senior government officials.¹⁶³
65. The Mungiki members were then transported from the State House to Naivasha in the backs of military trucks by men wearing Kenyan army uniforms.¹⁶⁴ The trucks contained brand new machetes as well as wooden clubs which the Mungiki were instructed to use for the battle in Naivasha. The Mungiki were broken up into groups of ten fighters each to be commanded by an experienced Mungiki member of the military wing.¹⁶⁵

¹⁵⁷ KEN-OTP-0054-0036 at 0036-0037.

¹⁵⁸ KEN-OTP-0001-0364 at 0476 and 0481; KEN-OTP-0001-1288 at 1505; KEN-OTP-0001-0248 at 0300-0301.

¹⁵⁹ KEN-OTP-0001-0364 at 0481; KEN-OTP-0052-2176 at 2179-2180.

¹⁶⁰ KEN-OTP-0053-0158 at 0158; KEN-OTP-0053-0168 at 0168.

¹⁶¹ KEN-OTP-0001-1527 at 1546.

¹⁶² KEN-OTP-0001-0364 at 0490-0491; KEN-OTP-0042-0003 at 0010-0011, lines 279-292, at 0027, lines 895-906; KEN-OTP-0052-1680 at 1686.

¹⁶³ KEN-OTP-0060-0550 at 0551.

¹⁶⁴ KEN-OTP-0053-0154 at 0154; KEN-OTP-0060-0550 at 0552.

¹⁶⁵ KEN-OTP-0060-0550 at 0552.

66. The strategy employed by the attacking Mungiki and pro-PNU youth was to (1) deploy secretly through the forests on the outskirts of town;¹⁶⁶ (2) mix with the other local Kikuyus to swell the numbers available for the fighting;¹⁶⁷ (3) deploy simultaneously in different places in town;¹⁶⁸ (4) monopolize the attention of the authorities and efforts of the Kenya Police;¹⁶⁹ and (5) demand the lifting of a curfew within the town and withdrawal of a unit of deployed prison guards¹⁷⁰ who they accused of harassing the local population and supporting the ODM.¹⁷¹
67. Despite knowing that there was a shortage of policemen, the Naivasha District Commissioner lifted the curfew and directed the withdrawal of the prison guards.¹⁷² Following the District Commissioner's actions, groups of Mungiki and pro-PNU youth deployed immediately to immobilise local transport and set up barricades and checkpoints to block transit and request people to identify themselves in Kikuyu language.¹⁷³ They began to target and kill perceived ODM supporters.¹⁷⁴ They conducted door to door searches in a manner suggesting that they had pre-identified targets.¹⁷⁵ The attackers burnt several perceived ODM supporters to death and chased others down before hacking them to death with machetes and clubs.¹⁷⁶
68. The Mungiki members worked with pro-PNU youth burning, destroying and/or looting the property and businesses of perceived ODM supporters.¹⁷⁷ They

¹⁶⁶ KEN-OTP-0060-0550 at 0552-0553.

¹⁶⁷ KEN-OTP-0060-0550 at 0552.

¹⁶⁸ KEN-OTP-0001-0364 at 0492.

¹⁶⁹ KEN-OTP-0001-0364 at 0500.

¹⁷⁰ The prison guards had been deployed as additional officers to assist the Kenya Police. See KEN-OTP-0052-1660 at 1675 and 1667.

¹⁷¹ KEN-OTP-0042-0003 at 0013, lines 381-394; KEN-OTP-0001-0364 at 0500; KEN-OTP-0001-0002 at 0101, para. 351.

¹⁷² KEN-OTP-0042-0167 at 0176, lines 285-293; KEN-OTP-0052-1763 at 1774-1775.

¹⁷³ KEN-OTP-0005-4283 at 4287; KEN-OTP-0042-0167 at 0187, lines 687 to 689; KEN-OTP-0042-0044 at 0047, lines 80 to 92; KEN-OTP-0001-0002 at 0095, para. 319; KEN-OTP-0001-0364 at 0492-0493; KEN-OTP-0027-0010 at 0010; KEN-OTP-0027-0014 at 0014;

¹⁷⁴ KEN-OTP-0042-0003 at 0026-0027, lines 850-893; KEN-OTP-0042-0044 at 0058, lines 541 to 546; KEN-OTP-0001-1076 at 1092; KEN-OTP-0001-0364 at 0497-0498.

¹⁷⁵ KEN-OTP-0042-0003 at 0013, 0023-0024, lines 381-398, 758-778; KEN-OTP-0001-0002 at 0095, para. 319; KEN-OTP-0001-0248 at 0298; KEN-OTP-0053-0166 at 0166; KEN-OTP-0052-1557 at 1572, lines 595-603.

¹⁷⁶ KEN-OTP-0001-0002 at 0095, para. 319; KEN-OTP-0053-0166 at 0166; KEN-OTP-0053-0221 at 0221.

¹⁷⁷ KEN-OTP-0001-1076 at 1093; KEN-OTP-0001-0002 at 0089; KEN-OTP-0053-0164 at 0164; KEN-OTP-0053-0221 at 0221; KEN-OTP-0027-0020 at 0025.

targeted and vandalized the houses of persons believed to be hosting or housing ODM supporters.¹⁷⁸ The attackers forced other PNU supporters to join in the attacks and accused them of supporting the enemy when they refused.¹⁷⁹

69. The attackers used slogans saying all Luos should leave Naivasha and that they were going to “finish” the Luo.¹⁸⁰ They forcibly circumcised Luo men.¹⁸¹ In one incident, a perceived ODM supporter was ambushed by a group of pro-PNU youth who cut off his testicles and placed them in his hands before cutting off his penis and putting it in his mouth. The next day, the victim’s headless body was found lying on the road. The attackers had mutilated his body in front of his five-year old son.¹⁸²

70. In another incident, the Mungiki and pro-PNU youth targeted a house in Naivasha where a perceived ODM supporter was known to live. The targeted tenant had fled his house as soon as he saw the approaching attackers. In fleeing the house, he left women and children alone locked inside. The attackers poured petrol on the house, set it on fire and completely destroyed it. All 19 people who sought refuge inside, including two babies, were killed.¹⁸³

71. The attacks lasted until 28 January 2008. The evidence shows that the Kenya Police under ALI’s leadership obeyed instructions to ensure that the Police did not interfere with pro-PNU youth being transported to the Rift Valley.¹⁸⁴ As in the Nakuru incident, the Police response was inadequate.¹⁸⁵ This is despite having

¹⁷⁸ KEN-OTP-0042-0044 at 0058, lines 531 to 539; KEN-OTP-0053-0166 at 0166.

¹⁷⁹ KEN-OTP-0001-0002 at 0095 and 0099, paras 319 and 340; KEN-OTP-0053-0221 at 0221.

¹⁸⁰ KEN-OTP-0042-0030 at 0034-0035, lines 117-173; KEN-OTP-0053-0174 at 0174.

¹⁸¹ KEN-OTP-0042-0078 at 0084 to 0085, lines 192-212; KEN-OTP-0042-0228 at 0232-0236, lines 138-280; KEN-OTP-0001-0364 at 0632.

¹⁸² KEN-OTP-0001-0364 at 0494-0495.

¹⁸³ KEN-OTP-0001-0002 at 0095, para.319; KEN-OTP-0042-0078 at 0081-0083, lines 86-175; KEN-OTP-0042-0228 at 0238, lines 322-356; KEN-OTP-0001-0248 at 0293 and 0296-0297; KEN-OTP-0033-0108 at 11:50-15:28; KEN-OTP-0052-1680 at 1708.

¹⁸⁴ KEN-OTP-0043-0002 at 0040, para.198-199; KEN-OTP-0033-0186 at page 0186-0187.

¹⁸⁵ KEN-OTP-0001-0364 at 0500-0501; KEN-OTP-0001-0248 at 0299.

had prior knowledge of the attacks and being well-informed of the situation on the ground.¹⁸⁶

72. Although one of the local organizers of the violence publicly admitted that the Mungiki was used during the attacks in Naivasha, the Prosecution is not aware of any of the main organizers having been prosecuted for the attacks.¹⁸⁷ On 31 January 2008, the Naivasha District Security Committee held a special meeting and requested the immediate arrest and prosecution of 12 individuals involved in organizing and financing the Naivasha attacks.¹⁸⁸

73. The National Security Committee, chaired by MUTHAURA, did not enforce this request. None of these individuals was arrested but instead they were allowed to continue to fuel and incite violence.¹⁸⁹ Only 19 people were arrested during the height of the PEV in Naivasha.¹⁹⁰ They were charged with preparation to commit a felony and released on bail of 3,000 Kenyan Shillings. None were thereafter convicted; indeed, there is no evidence even that the Kenya Police followed up on warrants of arrest issued against them.¹⁹¹

74. As of 31 January 2008, at least 50 people had been killed during the PEV in Naivasha.¹⁹² Among them, the majority were ODM supporters.¹⁹³ Twenty-three victims, including 13 children, were burnt to death.¹⁹⁴ Six were killed by gunshot and 16 by crude weapons, mostly machetes, but also local clubs called *rungus*, pieces of metal and spiked clubs.¹⁹⁵ Another 53 people were injured during the attacks, including 37 injured by sharp pointed objects.¹⁹⁶ Four cases of forcible

¹⁸⁶ KEN-OTP-0001-0364 at 0495-0498; KEN-OTP-0002-0774 at 0825.

¹⁸⁷ KEN-OTP-0042-0078 at 0104-0106, lines 944-1012; KEN-OTP-0053-0040 at 0040.

¹⁸⁸ KEN-OTP-0012-0196 at 0197; KEN-OTP-0033-0240 at 0241; KEN-OTP-0042-0343 at 0363-0365.

¹⁸⁹ KEN-OTP-0002-0015 at 0016, para. 4, at 0020, para. 36, at 0023, para. 60 and at 0036, para. 125.

¹⁹⁰ KEN-OTP-0042-0078 at 0092 to 0094, lines 478-553.

¹⁹¹ KEN-OTP-0042-0078 at 0092 to 0094, lines 478-553.

¹⁹² KEN-OTP-0001-0364 at 0494; KEN-OTP-0041-0679 at 0679 to 0681; KEN-OTP-0053-0233 at 0233.

¹⁹³ KEN-OTP-0001-0364 at 0494; KEN-OTP-0001-0002 at 0151.

¹⁹⁴ KEN-OTP-0042-0044 at 0077, lines 1216-1223; KEN-OTP-0001-0002 at 0151; KEN-OTP-0042-0078 at 0083, lines 153-175.

¹⁹⁵ KEN-OTP-0042-0078 at 0083, lines 153-175.

¹⁹⁶ KEN-OTP-0001-0364 at 0707; KEN-OTP-0053-0042 at 0042.

circumcision were reported.¹⁹⁷ It is suggested that many other cases of rape and other forms of sexual violence went unreported due to the trauma caused by such crimes and societal stigma.¹⁹⁸

75. Additionally, about 9,000 perceived ODM supporters were forced to seek refuge in the Naivasha Police Station where they stayed under dire conditions, with no water, food or proper sanitation.¹⁹⁹

VI. MUTHAURA and KENYATTA's criminal responsibility pursuant to Article 25(3)(a) and ALI's criminal responsibility pursuant to Article 25(3)(d) of the Rome Statute

Article 25(3)(a): Indirect co-perpetration

76. MUTHAURA and KENYATTA bear individual criminal responsibility, pursuant to Article 25(3)(a) of the Rome Statute, for crimes against humanity as defined in Article 7 of the Statute. MUTHAURA and KENYATTA are criminally responsible for committing the crimes charged as indirect co-perpetrators.

(i) Existence of an agreement or a common plan between two or more persons

77. The Principal Perpetrators, together with ALI,²⁰⁰ Mungiki leaders and other prominent PNU supporters, agreed to pursue an organizational policy to keep the PNU in power through every means necessary, including by orchestrating a police failure to prevent the commission of crimes.²⁰¹ The root of this policy was criminal and implemented through a common plan to commit widespread and systematic attacks against perceived ODM supporters²⁰² by (1) penalizing them

¹⁹⁷ KEN-OTP-0001-0364 at 0493.

¹⁹⁸ KEN-OTP-0042-0228 at 0243, lines 504-531.

¹⁹⁹ KEN-OTP-0042-0044 at 0065 to 0066, lines 809-840; KEN-OTP-0001-0364 at 0494; KEN-OTP-0001-0002 at 0095, para. 320; KEN-OTP-0053-0174 at 0174.

²⁰⁰ KEN-OTP-0001-0002, at 0188.

²⁰¹ KEN-OTP-0001-0002 at 0033, para. 63; KEN-OTP-0016-0526 at 0526; KEN-OTP-0028-0017 at 0019-0021.

²⁰² KEN-OTP-0001-0002, at 0038, para 79.

through retaliatory attacks,²⁰³ and (2) deliberately failing to take action to prevent or stop the retaliatory attacks.²⁰⁴

78. The Principal Perpetrators, together with ALI,²⁰⁵ prominent PNU supporters and Mungiki leaders, shared the policy.²⁰⁶ The Principal Perpetrators further espoused the common plan as evidenced by (1) their participation in multiple meetings held by MUTHAURA and KENYATTA among others to activate the Mungiki and pro-PNU youth by placing the organization under a central authority and to coordinate the implementation of the common plan;²⁰⁷ (2) the mobilization and coordination of direct perpetrators who were loyal to, or under the authority of, members of the common plan in order to implement the plan;²⁰⁸ (3) the provision of finances, weapons and logistical support to the direct perpetrators;²⁰⁹ (4) the concerted and consistent implementation of the common plan by its members and the direct perpetrators who were loyal to or under the authority of the members of the common plan;²¹⁰ and (5) a systematic pattern of crimes against perceived ODM supporters.²¹¹

²⁰³ KEN-OTP-0001-0248 at 0255 and 0293; KEN-OTP-0028-0031 at 0033; KEN-OTP-0052-1317 at 1319, lines 45-64.

²⁰⁴ KEN-OTP-0046-0503 at 0504; KEN-OTP-0001-0364 at 0733-0734; KEN-OTP-0001-0002 at 0014, paras. 10-12, 14, at 0092, para. 311; KEN-OTP-0001-0248 at 0277, 0299 and 0312; KEN-OTP-0039-1325 at 1325-1466; KEN-OTP-0026-4968 at 5023; KEN-OTP-0028-0002, at 0004.

²⁰⁵ KEN-OTP-0001-0002, at 0188.

²⁰⁶ KEN-OTP-0001-0248 at 0293; KEN-OTP-0033-0186 at 0186-0187; KEN-OTP-0028-0002 at 0003;

²⁰⁷ KEN-OTP-0001-0002 at 0134 para.509 and at 0187; KEN-OTP-0001-0248 at 0295-0296; KEN-OTP-0001-0364 at 0476; KEN-OTP-0041-0209 at 0218-0219, para.63-64; KEN-OTP-0033-0186 at 0186-0187.

²⁰⁸ KEN-OTP-0001-0248 at 0299.

²⁰⁹ KEN-OTP-0059-0222 at 0232, lines 368-387; KEN-OTP-0052-1305 at 1308, lines 110-129; KEN-OTP-0052-1487 at 1488 and 1489 lines 18-52; KEN-OTP-0060-0112 at 0118-0119, lines 185-197, lines 205-221, lines 245-258 and at 0126, lines 525-536; KEN-OTP-0060-0272 at 0287, lines 487-505; KEN-OTP-0060-0365 at 0371, lines 213-232, at 0373, lines 270-277, at 0374, lines 324-332, 337-340, at 0375, lines 341-345, 363, 373, at 0376, lines 374-385, 399-409; KEN-OTP-0060-0385 at 0389, lines 138 to 150, at 0390, lines 151 to 154, 159 to 162, 160-170, 183 to 186, at 0394, 0395, lines 307-348, at 0396, lines 410-412, at 0397, lines 416 to 436; KEN-OTP-0060-0511 at 0517, lines 211-221, at 0519, lines 282-296; KEN-OTP-0043-0002 at 0040, para. 198-200; KEN-OTP-0053-0015 at 0018; KEN-OTP-0060-0550 at 0552; KEN-OTP-0002-0015 at 0077; KEN-OTP-0001-0002 at 0094, para.316, 318, at 0098-0099, para.337, 338, 339, 340, at 0227, para.165, at 0231, 0232, para.178-179; KEN-OTP-0001-0248 at 0255 and 0295-0296; KEN-OTP-0033-0240 at 0241; KEN-OTP-0053-0162 at 0162; KEN-OTP-0059-0177 at 0184, lines 240-243; KEN-OTP-0059-0200 at 0216, lines 576-607; KEN-OTP-0059-0239 at 0243, lines 131- 156, at 0245, lines 205-226.

²¹⁰ KEN-OTP-0060-0550 at 0551-0553; KEN-OTP-0001-0248 at 0296-0301.

²¹¹ KEN-OTP-0001-0248 at 0296-0300; KEN-OTP-0027-0020 at 0020-0046.

79. MUTHAURA additionally espoused the common plan as evidenced by his failure to intervene through the Kenya Police or other security agency under his control to prevent or stop the retaliatory attacks.

(ii) Coordinated essential contribution by each co-perpetrator resulting in the realisation of the objective elements of the crime

80. MUTHAURA and KENYATTA had essential tasks in the implementation of the common plan, the execution of which resulted in the realization of the objective elements of the crimes charged.²¹² It is not alleged that they physically carried out any of the crimes.²¹³ Instead, they contributed by conceiving the idea of the coordinated attacks against ODM supporters;²¹⁴ mobilizing the Mungiki and pro-PNU youth and encouraging them to work with the Kenya Police;²¹⁵ recruiting pro-PNU youth as direct perpetrators and, providing them with logistical and other support;²¹⁶ directing the perpetrators to implement the common plan; and by MUTHAURA instructing the Kenya Police not to intervene in the attacks.²¹⁷

81. MUTHAURA's contributions included securing non-interference by members of the Kenya Police and their coordination with the Mungiki in the implementation of the common plan.²¹⁸ In particular: (1) MUTHAURA and other members of the common plan met with Mungiki leaders in early January 2008 in Nairobi to plan and organize attacks against ODM supporters;²¹⁹ (2) MUTHAURA used his position to ensure that the Kenya Police did not interfere with the work of the Mungiki and pro-PNU youth in the Rift Valley and in the Nairobi slums;²²⁰ (3)

²¹² KEN-OTP-0033-0240 at 0241.

²¹³ *Prosecutor v. Lubanga*, Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-803-tEN, para. 347. The essential character of a task is not linked to its performance at the execution stage of the crime (*ibid.*, para. 348).

²¹⁴ KEN-OTP-0043-0002 at 0038-0041, paras. 190-207; KEN-OTP-0052-1506 at 1513-1515, lines 272-333.

²¹⁵ KEN-OTP-0001-0248 at 0295; KEN-OTP-0033-0186 at 0186-0187.

²¹⁶ KEN-OTP-0001-0248 at 0299; KEN-OTP-0033-0240 at 0241.

²¹⁷ KEN-OTP-0001-0002 at 0014, para. 10-12, 14; KEN-OTP-0033-0186 at 0186-0187; KEN-OTP-0033-0240 at 0241; KEN-OTP-0026-4968 at 5023; KEN-OTP-0053-0172 at 0172; KEN-OTP-0059-0312 at 0314-0316, lines 59-138.

²¹⁸ KEN-OTP-0001-0248 at 0299.

²¹⁹ KEN-OTP-0052-1506 at 1514-1515, lines 301-333; KEN-OTP-0043-0002 at 0038-0041, paras. 188-207; KEN-OTP-0053-0026 at 0026; KEN-OTP-0053-0015 at 0018; KEN-OTP-0001-0364 at 0495-0496.

²²⁰ KEN-OTP-0001-0364 at 0733-0734 and 0738; KEN-OTP-0001-0248 at 0255.

MUTHAURA further used his position to ensure that the main perpetrators escaped punishment for the crimes committed;²²¹ and (4) through his subordinates, MUTHAURA provided other forms of support to the Mungiki, including the supply of Administration Police uniforms and funds.²²²

82. KENYATTA's contributions included securing the support and cooperation of and funding for the Mungiki for the implementation of the common plan. In particular: (1) KENYATTA played an active role in securing the support of the Mungiki for the PNU and the implementation of the common plan by organizing and facilitating meetings between the Mungiki and the other members of the common plan during the PEV;²²³ (2) KENYATTA mobilized, armed and financed the Mungiki and pro-PNU youth for the purpose of carrying out operations in the Rift Valley during the PEV;²²⁴ (3) through a series of meetings held in Nairobi between the end of December 2007 and end of January 2008, KENYATTA organized and financed retaliatory attacks by the Mungiki against perceived ODM supporters in the Rift Valley;²²⁵ (4) in one particular meeting with Mungiki leaders in Nairobi in early January 2008, KENYATTA gave the Mungiki some operational directions for the retaliatory attacks;²²⁶ and (5) at the local level in Nakuru, KENYATTA specifically tasked a former KANU MP to coordinate the retaliatory attacks.²²⁷

(iii) Control over the organization

83. In using existing structures in the Mungiki and Kenya Police, MUTHAURA and KENYATTA (1) put them under a responsible command;²²⁸ (2) MUTHAURA and KENYATTA participated in meetings with other members of the common plan to

²²¹ KEN-OTP-0060-0325 at 0329, lines 118 to 129; KEN-OTP-0052-1469 at 1475, lines 231 to 247 and at 1476, lines 248 to 290; KEN-OTP-0053-0026, at 0026.

²²² KEN-OTP-0052-1292 at 1303, 1.437-442; KEN-OTP-0052-1317 at 1326, 1.354-358, at 1327-1328, 1.401-408; KEN-OTP-0052-1451 at 1465-1466, 1.547-583; KEN-OTP-0060-0112 at 0127, 1.563-571; KEN-OTP-0060-0272 at 0296, 1.814-840.

²²³ KEN-OTP-0001-0002 at 0134, para.509 and at 0187.

²²⁴ KEN-OTP-0033-0240 at 0241; KEN-OTP-0026-4968 at 5018; KEN-OTP-0060-0193 at 0208, lines 540-541; KEN-OTP-0060-0171 at 0180, lines 298-301.

²²⁵ KEN-OTP-0001-0002 at 0134, para. 509 and 0187; KEN-OTP-0033-0186 at 0186.

²²⁶ KEN-OTP-0043-0002 at 0040-0041, para.201-202 and 204-206.

²²⁷ KEN-OTP-0033-0240 at 0241.

²²⁸ KEN-OTP-0041-0209 at 0218, paras. 63-64.

ensure that they understood and espoused the common plan;²²⁹ (3) as KANU Chairman, KENYATTA utilized a former KANU MP to mobilize and control newly recruited pro-PNU youth in Nakuru;²³⁰ (4) through the involvement of Mungiki leaders in the common plan, MUTHAURA and KENYATTA exercised control over Mungiki members and pro-PNU youth and ensured that they were recruited and instructed to perpetrate the attacks;²³¹ (5) by virtue of his position in the government and National Security Committee, MUTHAURA exercised direct authority over ALI and the Kenya Police;²³² (6) in coordination with wealthy PNU supporters, KENYATTA exercised control over the financial aspects of the common plan.²³³

(iv) Existence of an organised and hierarchical apparatus of power

84. The Mungiki and Kenya Police were hierarchically organized.²³⁴ By virtue of their positions, MUTHAURA and ALI were at the top of the hierarchical structure of the Kenya Police. In procuring the services of Mungiki leaders and securing their participation in the common plan, MUTHAURA and KENYATTA also placed themselves on top of the Mungiki hierarchy.²³⁵ Their authority and control over the Mungiki and pro-PNU youth is augmented by their status, wealth and/or position as senior party or government officials. Both the Mungiki and Kenya Police had a functioning internal structure with features such as centralization of

²²⁹ KEN-OTP-0001-0002 at 0134, para. 509 and at 0187.

²³⁰ KEN-OTP-0001-0002 at 0227, para. 165; KEN-OTP-0033-0483 at 0483; KEN-OTP-0033-0484 at 0484; KEN-OTP-0033-0485 at 0486.

²³¹ KEN-OTP-0026-4968 at 5018.

²³² KEN-OTP-0001-0364 at 0733-0734 and 0738; KEN-OTP-0033-0182 at 0183; KEN-OTP-0041-0209 at 0218, para. 63-64.

²³³ KEN-OTP-0038-0105 at 0105-0106.

²³⁴ KEN-OTP-0059-0290 at 0301-0302, lines 412-450; KEN-OTP-0052-1419 at 1422, lines 97-113; KEN-OTP-0052-1433 at 1435, lines 38-71; KEN-OTP-0052-1451 at 1453, lines 42-73; KEN-OTP-0052-1545 at 1555, lines 352-396; KEN-OTP-0052-1228 at 1230, lines 42-85, at 1231, lines 86-127 and at 1232, lines 128-129; KEN-OTP-0052-1211 at 1225, lines 527-537; KEN-OTP-0052-1842 at 1847, 1848, 1849, 1850.

²³⁵ KEN-OTP-0052-1469 at 1475, lines 231-244 and at 1476, lines 248-251, 253-280; KEN-OTP-0052-1523 at 1525, lines 39-50, 59-72; KEN-OTP-0052-1574 at 1586, lines 465-483; KEN-OTP-0060-0272 at 0295-0296, lines 796-825; KEN-OTP-0052-2184 at 2185.

the taking of important decisions and the existence of an effective disciplinary system.²³⁶

85. The power hierarchy of the Kenya Police and the Mungiki and pro-PNU youth was reinforced by the capacity of MUTHAURA and/or KENYATTA to (1) establish a functioning command structure by making use of existing structures of the Kenya Police and the Mungiki;²³⁷ (2) establish a localized level of subordinates among local PNU politicians who were responsible for geographical areas familiar to them, allowing for maximum control over attacks on specific locations;²³⁸ (3) provide money, weapons and logistical support to the physical perpetrators of the crimes;²³⁹ (4) use meetings to communicate with other members of the common plan to ensure that they acted in concert towards the implementation of the common plan;²⁴⁰ and (5) impose order through existing disciplinary regimes of the Kenya Police and the Mungiki.²⁴¹

(v) Execution of the crimes through compliance by the subordinates with the orders given by the leaders

86. The Mungiki and pro-PNU youth, including the direct perpetrators of the crimes and the Kenya Police were all linked through the organizational policy described above and the superiors of the direct perpetrators, including ALI, were linked with MUTHAURA and KENYATTA through the common plan. As a result of the structure and size of the Mungiki and pro-PNU youth, MUTHAURA and KENYATTA were assured that the direct perpetrators would comply with their instructions. MUTHAURA and ALI were also assured that the Kenya Police would follow instructions issued to them by their superiors.

²³⁶ KEN-OTP-0060-0299 at 0320, lines 741 to 771; at 0321, lines 772-792, at 0324 lines 879-885; KEN-OTP-0056-0108 at 0108; KEN-OTP-0056-0143, at 0144; KEN-OTP-0056-0159, Track 01, at 00:00:01 to 00:17:19; KEN-OTP-0059-0060 at 0063-0064, lines 72-115; KEN-OTP-0059-0097 at 0117, lines 696-730 ; KEN-OTP-0006-3386 at 3392; KEN-OTP-0059-0017 at 0021 to 0023 lines 153 to 219;

²³⁷ KEN-OTP-0053-0026 at 0026; KEN-OTP-0033-0719 at 0719-0720; KEN-OTP-0059-0032 at 0044-0046, lines 424-527; KEN-OTP-0060-0346 at 0353, lines 222-243 and at 0355, lines, 287-288, 294-299.

²³⁸ KEN-OTP-0052-1574, at 1585, lines 417 to 434 and at 1586, lines 442 to 464; KEN-OTP-0052-1292, at 1300, lines 302 to 333.

²³⁹ KEN-OTP-0053-0176 at 0176; KEN-OTP-0038-0105 at 0106; KEN-OTP-0026-4968 at 5018; KEN-OTP-0042-0343 at 0373, lines 1038-1041 and 1047-1056.

²⁴⁰ KEN-OTP-0053-0026 at 0026.

²⁴¹ KEN-OTP-0053-0026 at 0026.

87. The interchangeable nature of the perpetrators is evidenced by the following facts: (1) the perpetrators did not act alone but attacked in groups composed of between ten and hundreds of persons;²⁴² (2) the superiors of the direct perpetrators understood and agreed with the objectives of the common plan;²⁴³ (3) despite a decentralized structure, the most important decisions of the Mungiki were taken centrally;²⁴⁴ (4) the Mungiki is known to offer its support on a willing seller, willing buyer basis;²⁴⁵ (5) the Mungiki enforced a brutal and efficient disciplinary regime;²⁴⁶ (6) the Kenya Police had a functioning command structure and disciplinary regime with highly centralized decision making;²⁴⁷ (7) KENYATTA and other members of the common plan provided economic or financial inducements.²⁴⁸

(vi) MUTHAURA and KENYATTA fulfil the subjective elements of the crime charged

88. MUTHAURA and KENYATTA intended to bring about the objective elements of the crimes or were aware that the objective elements of the crimes would occur in the ordinary course of events.²⁴⁹ They also knew that their conduct was part of a widespread and systematic attack against a civilian population pursuant to or in furtherance of an organizational policy.²⁵⁰ As the leaders of the organizational

²⁴² KEN-OTP-0001-0002 at 0066, para 211; See *Prosecutor v. Katanga and Ngudjolo*, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, page 188, para. 546.

²⁴³ KEN-OTP-0002-0015 at 0028, para.96 and at 0077; KEN-OTP-0052-1305 at 1314, lines 374-379; KEN-OTP-0052-1487 at 1488, lines 33-39 and at 1489, lines 40-42; KEN-OTP-0060-0112 at 0126, lines 525-539; KEN-OTP-0001-0002 at 0094, para.316 and 318; KEN-OTP-0033-0240 at 0241; KEN-OTP-0052-1487 at 1494, lines 254-279; KEN-OTP-0001-0364 at 0497; KEN-OTP-0002-0015 at 0087, para. 385; KEN-OTP-0042-0343 at 0359, lines 533-568, at 0362, lines 664-675, at 0363, lines 676-710, at 0364, lines 711-743.

²⁴⁴ KEN-OTP-0059-0097 at 0117, lines 696-730; KEN-OTP-0060-0250 at 0260, lines 361-375, at 0261, lines 396 to 415 and at 0262 lines 416 to 432.; KEN-OTP-0060-0074 at 0089, lines 541-549.

²⁴⁵ KEN-OTP-0001-0364 at 0401; KEN-OTP-0059-0126 at 0129, lines 82-100; KEN-OTP-0060-0074 at 0089, lines 541-549.

²⁴⁶ KEN-OTP-0052-1372 at 1380, lines 288 to 332, at 1381, lines 333 to 371;

²⁴⁷ KEN-OTP-0028-0170 at 0190, para.3; KEN-OTP-0001-0910, at 0925, paras. 18-19; KEN-OTP-0003-0290, at 0290, para.1.2; KEN-OTP-0041-0209, at 0218, para. 63-64 and at 0219.

²⁴⁸ KEN-OTP-0052-1292, at 1296, lines 129 to 153.

²⁴⁹ *Prosecutor v. Katanga and Ngudjolo*, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para.529. Note that in this decision, the Pre-Trial Chamber did not enter specific factual findings on this element, but limited its findings to two subsequent subjective elements (*ibid*, para.562-569).

²⁵⁰ KEN-OTP-0053-0026 at 0026.

group and the architects of the common plan, they had full knowledge that their actions will bring about the objective elements of the crimes charged.²⁵¹

89. MUTHAURA and KENYATTA (1) shared the common plan;²⁵² (2) held meetings and discussions to activate the Mungiki and pro-PNU youth and to implement the common plan;²⁵³ and (3) used their positions and took concerted action together with the Mungiki and pro-PNU youth to implement the common plan.²⁵⁴ MUTHAURA additionally ensured that the Kenya Police failed to intervene to prevent the retaliatory attacks knowing fully well that the Mungiki and pro-PNU youth would thereby be given a free rein during the attacks.²⁵⁵

(vii) MUTHAURA and KENYATTA and the other co-perpetrators were mutually aware and mutually accepted that implementing their common plan may result in the realization of the objective elements of the crimes

90. MUTHAURA and KENYATTA and other co-perpetrators were aware and accepted that implementing the common plan would, in the ordinary course of events, result in direct perpetrators attacking the locations identified and committing the crimes charged.²⁵⁶

91. This can be inferred for all members of the common plan from the following facts:

- (1) they were aware of the political tension and fear that prevailed at the time;²⁵⁷
- (2) they played a central role in the development of the operational plans of the

²⁵¹ KEN-OTP-0001-0002 at 0134 para.509.

²⁵² KEN-OTP-0053-0026, at 0026.

²⁵³ KEN-OTP-0053-0026, at 0026; KEN-OTP-0001-0002 at 0134 para. 509 and 0187; KEN-OTP-0059-0146 at 0150 to 0151, lines 146-190, at 0152, lines 203 to 228, and at 0153, lines 229 to 231.

²⁵⁴ KEN-OTP-0060-0550 at 0551 to 0553; KEN-OTP-0052-1451 at 1465, lines 529 to 556 and at 1466, lines 557 to 583.

²⁵⁵ KEN-OTP-0060-0299, at 0321, lines 772 to 807, at 0323, lines 851 to 878, at 0324, lines 879 to 889; KEN-OTP-0060-0325, at 0326, lines 24 to 36, at 0327, lines 39 to 64.

²⁵⁶ KEN-OTP-0001-0364 at 0737 and 0740; KEN-OTP-0013-0497 at 0498 to 0502.

²⁵⁷ KEN-OTP-0001-0364 at 0733-0734, 0737, 0738 and 0740; KEN-OTP-0013-0497 at 0498 to 0502; KEN-OTP-0013-0441 at 0441 to 0447; KEN-OTP-0013-0427 at 0427 to 0432; KEN-OTP-0013-0410 at 0410 to 0416; KEN-OTP-0013-0350 at 0350 to 0356; KEN-OTP-0012-0196 at 0196 to 0198; KEN-OTP-0010-0332 at 0332 to 0333; KEN-OTP-0002-0774 at 0775; KEN-OTP-0060-0499, at 0503, lines 119 to 125 and 134 to 149, at 0504, lines 150 to 153.

Mungiki and pro-PNU youth and the Kenya Police;²⁵⁸ (3) they procured weapons for the direct perpetrators knowing that the weapons would be used for non-peaceful purposes;²⁵⁹ (4) they met or otherwise discussed the implementation of the common plan by sharing information on the planning, organization, logistics and other details of the attacks;²⁶⁰ (5) it was publicly known that the Mungiki was a proscribed, violent and criminal organization;²⁶¹ (6) they were aware that the inaction of the Kenya Police during the attacks would significantly contribute to the crimes;²⁶² and (7) through local and international media during the PEV, they were aware of the commission of crimes resulting from the implementation of the common plan.²⁶³

92. The awareness and knowledge of MUTHAURA and KENYATTA is further demonstrated by the following facts: (1) by virtue of their positions, MUTHAURA had privileged access to relevant intelligence and security information;²⁶⁴ (2) due to their official capacities and/or past interactions, MUTHAURA and KENYATTA had detailed inside knowledge of the structure and the prior criminal activities of the Mungiki;²⁶⁵ and (3) KENYATTA and MUTHAURA participated in meetings intended to implement the common plan and played a central role in those meetings by directing the activities of the Mungiki and pro-PNU youth, and in the case of MUTHAURA, the Kenya Police through ALI.²⁶⁶

²⁵⁸ KEN-OTP-0052-1469, at 1475, lines 231 to 247 and at 1476, lines 248 to 290; KEN-OTP-0053-0026, at 0026; KEN-OTP-0001-0002 at 0134, para 509

²⁵⁹ KEN-OTP-0001-0002 at 0134, para 509 and 0187, para. 511; KEN-OTP-0052-1292, at 395 to 428 and at 1303, lines 437 to 442.

²⁶⁰ KEN-OTP-0001-0248 at 0299 to 0300; KEN-OTP-0001-0002, at 0134, para.509.

²⁶¹ KEN-OTP-0001-0248 at 0294; KEN-OTP-0008-0029, at 0041.

²⁶² KEN-OTP-0052-2018 at 0220 KEN-OTP-0060-0325, at 0329, lines 118 to 129

²⁶³ KEN-OTP-0033-0186 at 0186-0187; KEN-OTP-0033-0056 at 0056; KEN-OTP-0029-0316 at 0318; KEN-OTP-0002-0015 at 0048-0049 and 0052; KEN-OTP-0046-0510 at 0510-0511; KEN-OTP-0046-0506 at 0506; KEN-OTP-0046-0503 at 0504; KEN-OTP-0046-0508 at 0508-0509.

²⁶⁴ KEN-OTP-0001-0364 at 0735 to 0737; KEN-OTP-0033-0182 at 0183.

²⁶⁵ KEN-OTP-0053-0015 at 0018 to 0019; KEN-OTP-0052-1262 at 1263, lines 22 to 40 and at 1264, line 41.

²⁶⁶ KEN-OTP-0060-0325, at 0329, lines 118-129; KEN-OTP-0052-1469, at 1475, lines 231 to 247 and at 1476, lines 248 to 290; KEN-OTP-0053-0026, at 0026.

(viii) MUTHAURA, KENYATTA and ALI are aware of the factual circumstances enabling them to exercise joint control over the crime

93. MUTHAURA and KENYATTA were aware of the factual circumstances that enabled them to exercise joint control over the crimes: (1) they were all aware of the authority that they had over the Mungiki and pro-PNU youth and the Kenya Police, as well as their leadership role in the implementation of the common plan;²⁶⁷ (2) they were aware of the key role that the Kenya Police played in the course of implementing the common plan by failing to act and that MUTHAURA had the authority to ensure that ALI and his subordinates in the Kenya Police supported the implementation of the common plan;²⁶⁸ (3) they were aware that through the involvement of Mungiki leaders in the common plan, the Mungiki would actively support its implementation by carrying out the attacks;²⁶⁹ (4) they were aware that the Mungiki and pro-PNU youth were well-funded, which ensured the smooth implementation of the common plan;²⁷⁰ (5) they were aware of the hierarchically organized structure of the Mungiki and pro-PNU youth and the Kenya Police;²⁷¹ (6) they were aware of the existence of effective local structures of the Mungiki;²⁷² and (7) they were aware of the circumstances allowing automatic compliance with their instructions, such as the size, composition and command structures of the Mungiki and the Kenya Police, and the disciplinary regime within the Kenya Police and the Mungiki.²⁷³

²⁶⁷ KEN-OTP-0053-0015 at 0018; KEN-OTP-0002-0172 at 0178-0179; KEN-OTP-0001-0364 at 0497; KEN-OTP-0001-0248 at 0255 and 0295.

²⁶⁸ KEN-OTP-0001-0364 at 0740; KEN-OTP-0043-0002 at 0040, para.198-200; KEN-OTP-0002-0172 at 0178-0179; KEN-OTP-0033-0186 at 0186-0187.

²⁶⁹ KEN-OTP-0053-0026 at 0026; KEN-OTP-0060-0550 at 0551-0552; KEN-OTP-0060-0272 at 0294-0297, lines 736-741, 779-797, 829-833, 868-877; KEN-OTP-0060-0325 at 0327-0328, lines 45-60 and 82-113; OTP-KEN-0059-0222 at 0223-0225, lines 18-99.

²⁷⁰ KEN-OTP-0053-0176 at 0176; KEN-OTP-0038-0105 at 0106; KEN-OTP-0026-4968 at 5018; KEN-OTP-0042-0343 at 0373, lines 1038-1041, 1047-1056; KEN-OTP-0033-0240 at 0241.

²⁷¹ KEN-OTP-0041-0209 at 0218-0219 and 0222; KEN-OTP-0033-0539 at 0623-0624; KEN-OTP-0052-1953 at 1959; KEN-OTP-0033-0297 at 0303.

²⁷² KEN-OTP-0002-0774 at 0775; KEN-OTP-0046-0116 at 0118.

²⁷³ KEN-OTP-0001-0364 at 0495; KEN-OTP-0001-0331 at 0346; KEN-OTP-0041-0209 at 0222; KEN-OTP-0060-0325 at 0326-0327, lines 24-59.

Article 25(3)(d): Contribution to a crime committed by a group of persons acting with a common purpose

94. ALI is individually criminally responsible pursuant to Article 25(3)(d) of the Statute for crimes against humanity as defined in Article 7 of the Statute. ALI's responsibility includes crimes carried out by a group of persons acting with a common purpose. ALI contributed to the commission of the alleged crimes by direct perpetrators from the Mungiki and pro-PNU youth.

(i) A crime within the jurisdiction of the Court is attempted or committed

95. Section V is incorporated by reference.

(ii) The crimes charged were carried out by a group of persons acting with a common purpose

96. The crimes charged were carried out through the Kenya Police²⁷⁴ and the Mungiki and pro-PNU youth²⁷⁵ by persons acting in pursuance of an organizational policy to keep the PNU in power through every means necessary, including by police failure to prevent the commission of widespread and systematic crimes.²⁷⁶ The policy was implemented by penalizing perceived ODM supporters through retaliatory attacks and deliberately failing to take action to prevent or stop the retaliatory attacks.

97. The means by which the Principal Perpetrators, ALI, Mungiki leaders and prominent PNU supporters implemented the policy amounts to a common purpose within the meaning of Article 25(3)(d). The common purpose was shared by the Principal Perpetrators, along with ALI, Mungiki leaders and prominent PNU supporters.

98. Section IV.B is incorporated by reference.

²⁷⁴ KEN-OTP-0033-0186 at 0186-0187.

²⁷⁵ KEN-OTP-0001-0364 at 0473 and 0476; KEN-OTP-0001-1057 at 1066; KEN-OTP-0002-0015 at 0020, 0045-0046, 0070, paras. 20, 173-174, 324.

²⁷⁶ KEN-OTP-0033-0240 at 0241; KEN-OTP-0001-0002 at 0187; KEN-OTP-0001-0364 at 0491.

(iii) The suspect contributed to the crimes charged

99. As the Commissioner of Police and a member of the National Security Committee, ALI's contributions to the commission of crimes by a group of persons acting with a common purpose were threefold: (1) ALI instructed the Kenya Police and other security forces that were under his effective control not to obstruct the movement of the Mungiki and pro-PNU youth into the Rift Valley in preparation for the attacks against perceived ODM supporters;²⁷⁷ (2) ALI ensured that the police response to the attacks in Naivasha and Nakuru were inadequate;²⁷⁸ and (3) ALI failed to arrest or initiate the prosecution of any of the main perpetrators of the attacks in Naivasha and Nakuru.²⁷⁹

(iv) The contribution of the suspect was intentional

100. ALI's intent is demonstrated by the following facts: (1) through NSIS daily and situation reports, ALI was aware of the potential for violence in Naivasha and Nakuru;²⁸⁰ (2) ALI was aware of the propensity for violence of the Mungiki given his past relationship with the group;²⁸¹ (3) through local and international media during the PEV, ALI was aware of the nature of crimes being committed across Kenya;²⁸² and (4) as the Commissioner of Police at the time, ALI must have known that he had a sworn duty to protect lives, especially in the context of organised post-election violence. ALI therefore had full knowledge that his contribution, being one of deliberate failure to act, would bring about the objective elements of the crimes charged. From that, it is necessarily inferable that he intended to make that contribution to the commission of those crimes.

²⁷⁷ KEN-OTP-0002-0172 at 0178-0179; KEN-OTP-0043-0002 at 0040 and 0047, para.198-200 and 238; KEN-OTP-0033-0186 at 0186-0187.

²⁷⁸ KEN-OTP-0001-0364 at 0482-0486 and 0785; KEN-OTP-0001-0248 at 0299; KEN-OTP-0053-0176 at 0176; KEN-OTP-0043-0002 at 0047 and 0055, paras. 237-253, 279-281.

²⁷⁹ KEN-OTP-0012-0196 at 0197, KEN-OTP-0042-0078 at 0092-0094, lines 478-55. See also KEN-OTP-0001-1516 at 1517; KEN-OTP-0001-0364 at 0483-0484.

²⁸⁰ KEN-OTP-0001-0364 at 0478, 0497, 0733, 0736.

²⁸¹ KEN-OTP-0046-0116 at 0118-0119; KEN-OTP-0001-0910 at 0919-0920 and 0925, para.10 and 19-21

²⁸² KEN-OTP-0043-0002 at 0047, para. 238.

(v) The suspects contributed to the crimes charged with the aim of furthering the criminal activity or criminal purpose of the group

101. ALI has admitted that he had knowledge of the violence carried out by the Mungiki during the PEV.²⁸³ Despite his admission, ALI failed to prosecute any of the main perpetrators of the attacks in Naivasha or Nakuru while he was the Commissioner of Police.²⁸⁴

102. Paragraph 100 is incorporated by reference. See previous section on ALI's intent.

VII. CHARGES

Count 1 (MUTHAURA and KENYATTA) Murder constituting a crime against humanity (Articles 7(1)(a) and 25(3)(a) of the Rome Statute)

From on or about 30 December 2007 to 31 January 2008, FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA as co-perpetrators, committed or contributed to the commission of crimes against humanity, namely the murder of civilian supporters of the Orange Democratic Movement political party in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(1)(a) and 25(3)(a) of the Rome Statute.

Count 2 (ALI) Murder constituting a crime against humanity (Articles 7(1)(a) and 25(3)(d) of the Rome Statute)

From on or about 30 December 2007 to 31 January 2008, MOHAMMED HUSSEIN ALI, as part of a group of persons, including FRANCIS KIRIMI MUTHAURA and

²⁸³ KEN-OTP-0052-1953 at 1963. KEN-OTP-0002-0774 at 0775.

²⁸⁴ In Kenya, the police have the power to prosecute criminal cases in the lower courts of record.

UHURU MUIGAI KENYATTA, acting with a common purpose committed or contributed to the commission of crimes against humanity, namely the murder of civilian supporters of the Orange Democratic Movement political party in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(1)(a) and 25(3)(d) of the Rome Statute.

Count 3 (MUTHAURA and KENYATTA)

Deportation or forcible transfer of population constituting a crime against humanity

(Articles 7(1)(d) and 25(3)(a) of the Rome Statute)

From on or about 30 December 2007 to 31 January 2008, FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA as co-perpetrators committed or contributed to the commission of crimes against humanity, namely the deportation or forcible transfer of civilian population supporting the Orange Democratic Movement political party in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(1)(d) and 25(3)(a) of the Rome Statute.

Count 4 (ALI)

Deportation or forcible transfer of population constituting a crime against humanity

(Articles 7(1)(d) and 25(3)(d) of the Rome Statute)

From on or about 30 December 2007 to 31 January 2008, MOHAMMED HUSSEIN ALI, as part of a group of persons, including FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA, acting with a common purpose committed or

contributed to the commission of crimes against humanity, namely the deportation or forcible transfer of civilian population supporting the Orange Democratic Movement political party in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(1)(d) and 25(3)(d) of the Rome Statute.

Count 5 (MUTHAURA and KENYATTA)

Rape and other forms of sexual violence constituting a crime against humanity

(Articles 7(1)(g) and 25(3)(a) of the Rome Statute)

From on or about 30 December 2007 to 31 January 2008, FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA committed or contributed to the commission of crimes against humanity, namely rape and other forms of sexual violence against civilian supporters of the Orange Democratic Movement political party in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(1)(g) and 25(3)(a) of the Rome Statute.

Count 6 (ALI)

Rape and other forms of sexual violence constituting a crime against humanity

(Articles 7(1)(g) and 25(3)(d) of the Rome Statute)

From on or about 30 December 2007 to 31 January 2008, MOHAMMED HUSSEIN ALI, as part of a group of persons, including FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA, acting with a common purpose committed or contributed to the commission of crimes against humanity, namely rape and other forms of sexual violence against civilian supporters of the Orange Democratic

Movement political party in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(1)(g) and 25(3)(d) of the Rome Statute.

Count 7 (MUTHAURA and KENYATTA)

Other inhumane acts constituting a crime against humanity

(Articles 7(1)(k) and 25(3)(a) of the Rome Statute)

From on or about 30 December 2007 to 31 January 2008, FRANCIS KIRIMI MUTHAURA and UHURU MUGAI KENYATTA as co-perpetrators committed or contributed to the commission of crimes against humanity, namely the inflicting of great suffering and serious injury to body or to mental or physical health by means of inhumane acts upon civilian supporters of the Orange Democratic Movement civilian supporters of the Orange Democratic Movement political party in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(1)(k) and 25(3)(a) of the Rome Statute.

Count 8 (ALI)

Other inhumane acts constituting a crime against humanity

(Articles 7(1)(k) and 25(3)(d) of the Rome Statute)

From on or about 30 December 2007 to 31 January 2008, MOHAMMED HUSSEIN ALI, as part of a group of persons, including FRANCIS KIRIMI MUTHAURA and UHURU MUGAI KENYATTA, acting with a common purpose, committed or contributed to the commission of crimes against humanity, namely the inflicting of great suffering and serious injury to body or to mental or physical health by means of

inhumane acts upon civilian supporters of the Orange Democratic Movement party in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(1)(k) and 25(3)(d) of the Rome Statute.

Count 9 (MUTHAURA and KENYATTA)

Persecution as a crime against humanity

(Articles 7(1)(h) and 25(3)(a) of the Rome Statute)

From on or about 30 December 2007 to 31 January 2008, FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA as co-perpetrators committed or contributed to the commission of crimes against humanity, namely persecution, when co-perpetrators and/or persons belonging to their group intentionally and in a discriminatory manner targeted civilians based on their political affiliation, committing murder, rape and other forms of sexual violence, other inhumane acts and deportation or forcible transfer, in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(1)(h) and 25(3)(a) of the Rome Statute.

Count 10 (ALI)

Persecution as a crime against humanity

(Articles 7(1)(h) and 25(3)(d) of the Rome Statute)

From on or about 30 December 2007 to 31 January 2008, MOHAMMED HUSSEIN ALI, as part of a group of persons, including FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA, acting with a common purpose, committed or contributed to the commission of crimes against humanity, namely persecution,

when co-perpetrators and/or persons belonging to their group intentionally and in a discriminatory manner targeted civilians based on their political affiliation, committing murder, rape and other forms of sexual violence, other inhumane acts and deportation or forcible transfer, in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(1)(h) and 25(3)(d) of the Rome Statute.