

1 International Criminal Court
2 Pre-Trial Chamber II - Courtroom I
3 Presiding Judge Ekaterina Trendafilova, Judge Hans-Peter Kaul and
4 Judge Cuno Tarfusser
5 Situation in the Republic of Kenya - ICC-01/09-02/11
6 In the case of the Prosecutor versus Francis Kirimi Muthaura,
7 Uhuru Muigai Kenyatta, and Mohammed Hussein Ali
8 Confirmation of Charges Hearing
9 Saturday, 24 September 2011
10 The hearing starts at 9.32 a.m.
11 (Open session)
12 COURT USHER: All rise. International Criminal Court is now in
13 session.
14 PRESIDING JUDGE TRENDAFILOVA: Good morning. Please be seated.
15 Good morning, everyone. I would ask now the Court Officer to
16 please call the case.
17 COURT OFFICER: Good morning, Madam President, your Honours.
18 This is the Situation in the Republic of Kenya, in the case of the
19 Prosecutor versus in the case of the Prosecutor v.
20 Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali,
21 case reference ICC-01/09-02/11. Thank you, Your Honours.
22 PRESIDING JUDGE TRENDAFILOVA: Thank you very much. I would ask
23 whether there are some new members of the teams. Ms. Adeboyejo.
24 MS. ADEBOYEJO: Good morning, Madam President, your Honours.
25 Yes, we have one more member of our team this morning. It's

1 Maria Elena Vignoli. Thank you.

2 PRESIDING JUDGE TRENDAFILOVA: Good morning. Welcome to the
3 courtroom.

4 I turn now to the Defence teams. You have some new members of
5 your teams joining us today?

6 MR. KHAN: Madam President, your Honours, good morning. Not new
7 members.

8 PRESIDING JUDGE TRENDAFILOVA: Good morning.

9 MR. KHAN: Not new members, but just to announce the return to
10 the courtroom of Essa Faal and Kennedy Ogetto, council in the case.

11 PRESIDING JUDGE TRENDAFILOVA: Thank you very much, Mr. Khan.
12 Mr. Kay?

13 MR. KAY: No, your Honour.

14 PRESIDING JUDGE TRENDAFILOVA: No.

15 And Mr. Monari or Kehoe?

16 MR. MONARI: No, your Honour.

17 PRESIDING JUDGE TRENDAFILOVA: No one else.

18 With Mr. Anyah?

19 MR. ANYAH: No, Madam President. Good morning, your Honours.

20 PRESIDING JUDGE TRENDAFILOVA: Good morning.

21 On behalf of the Chamber, we have Ms. Habiba Gani who is the
22 legal assistant to the Chamber.

23 Now we proceed with the presentation of the first Defence team
24 starting with the Defence team of Mr. Muthaura, Mr. Khan. I hope that
25 you could relax and you are fit now, because the whole day is yours.

1 Just before you start, Mr. Khan, I would like very shortly once again
2 without reiterating the -- what was already said with regard to the
3 presentations about the EVD numbers, the four digits and so on. I would
4 only reiterate our expectation that the parties are very cautious, very
5 conscientious when they are referring to a confidential piece of evidence
6 and anonymous witnesses. And if you would like to, in your
7 presentations, to analyse some of the witness statements, to challenge
8 some of the piece of evidence, please, we rely on your professional
9 assessment that you're going not to put the Chamber in this difficult
10 situation to -- to not to respect its own responsibility regarding the
11 safety and security of others on account of the activities of the court.
12 And if you need for the purposes of your presentations to -- to analyse
13 in-depth in a way that could reveal the identity of some of the
14 witnesses, please just inform the Chamber so that we switch into a
15 private or closed session. We are going to highly appreciate such an
16 approach. Thank you very much.

17 Having said this, Mr. Khan, the floor is over to you for the
18 three sessions, although we are going to cut half an hour. So we are
19 going to finish at around 3.30 without you being obliged to take all the
20 time if you're going to be concise, to the point, and make the most
21 important presentations of course upon your assessment.

22 MR. KHAN: Madam President, your Honours, good morning. One
23 always tries. It's always one's quest to be concise and relevant but
24 perhaps it's a quest that I've yet to fulfil, but I'll certainly try to
25 comply with the admonition and recommendation.

1 Madam President, your Honours, I will continue this morning with
2 the 26th of November meeting that I was discussing yesterday, and
3 your Honour has already seen, the Court has seen the video that was
4 played and the nature of the meeting at State House, and then the video
5 shot Ambassador Muthaura was seated to one side and his excellency
6 President Kibaki, of course, was chairing the meeting. Another
7 individual present was Ambassador Yvonne Khamati. She's a rising star of
8 Kenyan politics, only 29 years of age and has already been ambassador in
9 several locations and is the permanent representative of Kenya to the
10 United Nations office in Nairobi.

11 Now, your Honour, her statement is at EVD-PT-D12-00034 and this
12 is what ambassador Khamati has to say regarding the meeting at State
13 House on the 26th of November, 2007. Your Honour, at paragraph 49 - and
14 I'll read the section - ambassador Khamati, she says that:

15 "The meeting I attended did not discuss Mungiki and at no point,"
16 at no point, "was the word Mungiki even mentioned according to my memory.
17 That's the government, the PNU government would sit and discuss with an
18 outlawed sect is almost unimaginable. It is this government, I think,
19 that has done a lot in work in ensuring that the sect has been banned and
20 our stations, especially young people, especially working as touts, are
21 not being harassed and more by these gangs if we what we see in the media
22 is anything to go by. In fact, I'm quite aware that a few civil society
23 organisations are saying that the government are being too tough with the
24 Mungiki. I think there was even a time when a few members of the sect
25 were arrested and rounded up. So to say that this same government that

1 was negotiating with the Mungiki? No, I don't think that it is the
2 government that I serve and anybody saying that clearly does not know the
3 president of the republic."

4 Now, your Honour, there's also a very relevant statement that the
5 Defence have obtained, usual investigations, nothing to shout about, but
6 investigations that have apparently escaped the Office of the Prosecutor
7 that occupies this building, and I refer to EVD-PT-D12-00089 and at
8 paragraph 21, Michael Kagika, he's the administrative officer in charge
9 of all hospitality and events at State House, and this individual says,
10 regarding the 26th of November:

11 "There was no meeting in the garden. There were no tents pitched
12 in the garden that day. I'm certain of this because it was my
13 responsibility to coordinate arrangements for garden meetings, and I can
14 confirm that there were no meetings at State House grounds that day."

15 Now, your Honours I'm constantly surprised, in fact aghast, at
16 some of the propositions put forward by my learned friends opposite,
17 Ambassador Muthaura, you've seen him in court, jumping up as an animated
18 young man and shouting out in Kikuyu, losing his temper. I don't know if
19 this evidence will be sidelined and they'll say well, maybe
20 Ambassador Muthaura himself pitched the tents, but such -- such kind of
21 nonsense must be rejected before it even enters one's mind. This is
22 evidence that the Defence puts forward from the events manager who
23 rejects the presence of tents on that day. So accordingly, the one
24 meeting that is there is the meeting that we have shown in the video, and
25 we have in our submission explained very clearly, very simply what was

1 going on.

2 Now, your Honour, I refer also in passing to Witness Isaiya

3 Kabira. He's the head of the presidential press service,

4 EVD-PT-D12-00234. And, your Honour, he exhibits the video, in fact, that

5 we showed yesterday and also the press release with the photograph that

6 was shown yesterday. Your Honours, I'm not going to go belabour the

7 point, but the scale of the Defence investigations is quite thorough in

8 our respectful submission. Your Honours, of course, will decide

9 ultimately if we've put forward evidence that's worthy of consideration

10 or whether or not the Prosecution opposite have established and

11 discharged their burden of proof based on what we say is the one

12 discredited and unreliable evidence that they offer in order for this

13 case to go to trial, but your Honours I will refer to other Defence

14 witnesses: D12-0047, that's EVD-PT-D12-00228; Witness D12-0005,

15 EVD-PT-D12-00063; Ipu Hyslop, he's the comptroller of State House. He

16 has the office right next to the president and he's in charge of all

17 events, ultimately, at State House, and he also serves as the private

18 secretary of the president. Your Honour, I refer you to his statement at

19 EVD-PT-D12-000194 (* sic); Witness D12-0037, EVD-PT-D12-00054; and in

20 case I got the wrong EVD before for Mr. Ipu, it's 000194.

21 Your Honour, the people at this meeting - and your Honours, on

22 the statements we have detailed the ethnicity of all our witnesses

23 because of the type of case the Prosecution are putting forward - come

24 from all ethnicities. They're not just Kikuyus, and of course the

25 Prosecution evidence, they're relying upon witnesses that are really

1 tarnishing the good name. They may not like it, but in reality they're
2 tarnishing the good name of the Kikuyu people. Almost all Kikuyus are
3 viewed as, and I will justify it in a moment, all Kikuyus are said
4 almost, by their witnesses, to be Mungiki. It's like saying, you know,
5 all Irish are IRA or all Muslims are Al-Qaeda or all Germans are Nazis,
6 it's a phenomenally offensive proposition to put forward and yet this --
7 these are the witnesses that the Prosecution are relying upon. But
8 your Honour, Witness D12-0005 at that meeting he's Embu.
9 Witness D12-0006 is a Luhya. Witness D12-0036 is a Luo.
10 Minister Dr. Muhamed Kematti (* phon); the minister of youth, Akuti; and
11 you've got his statement, he's Barani; Hyslop Ipu is Pokomo; and
12 Ambassador Muthaura, of course, as you know he's Meru. So if this, even
13 at the barest cursory glance, does not wed well at all with the
14 Prosecution conjecture and assertion that somehow there was this Mungiki
15 party at State House organising some kind of rapprochement and use of
16 Mungiki group with all this huge number of people present that represent
17 the very rich mosaic of life and tribal custom and ethnicity that makes
18 up the Republic of Kenya.

19 Your Honour, we come down to one unavoidable reality, that the
20 Prosecution have one witness that they rely upon at this meeting, and
21 that witness, that witness, is uncorroborated and contradicted. And,
22 your Honour, that witness himself says he was not present. Yes, your
23 Honours, we say of course he is not present, and the reason we say he's
24 not present, D12-0037, is borne out by a number of indicia that we ask
25 for you to consider. You've got the video. He's not in the video, he's

1 not in the pictures. Witness -- one of the witness that is relied upon
2 by the Prosecution, Witness -- our Witness D12-0037, Witness D12-0037 is
3 there, and he says very clearly in his statement that that person, that
4 Prosecution witness was not there, and another Prosecution witness,
5 another Defence witness that we've put forward who the witness -- who the
6 Prosecution witness D4 -- Witness 0004 says is at State House says he was
7 not. So there's really no evidence that the Prosecution put forward
8 capable of belief. He's the invisible man. He's disappearing man. He
9 doesn't appear in videos. And all this talk of Mungiki blood drinking
10 not appearing in videos one really wonders what kind of evidence is being
11 put forward. But, your Honours, let's move on and look at the
12 preparation and alleged organisation of the criminal plan that the
13 Prosecution put forward as capable of belief.

14 But before we move in that direction it is highly pertinent in
15 our respectful submission to look at the totality of the evidence and the
16 background to how we got here. This was not virgin territory that the
17 Prosecutor entered. They are, and I mentioned it in the opening, they're
18 seeking to piggyback on aspects of the Waki report, and your Honours of
19 course will read that in due course or review it again in due course, but
20 perhaps there is a distinction between some of the factual findings of
21 Waki and some of the conclusions reached, but be that as it may, Waki
22 didn't purport to be the totality or the final word of investigations,
23 and the Prosecution do not have that right to say that they're going to
24 be the final word or their case is worthy of belief, because what they
25 have done is look away, look away from a massive, a massive amount of

1 evidence. Let me give you just but some examples as it comes to

2 Ambassador Muthaura.

3 Your Honour, Prosecution so-called, I mean this beggars belief,

4 Prosecution so-called incriminatory evidence EVD-PT-OTP-0001. Your

5 Honours, from 0179 to 2 -- 0240 is an annex to the Kenyan human rights

6 report, the Kenyan national human rights report. Two-hundred and

7 eighteen individuals, 218 individuals there in plain sight are referred

8 to. No the Ocampo six, not the three individuals in this court, 213

9 based upon what the Prosecution in other context say is reliable

10 evidence. But did it not occur to them that this is something perhaps to

11 consider?

12 Well, your Honours, one piece -- one document, okay. Maybe it's

13 flawed. Ambassador Muthaura is not mentioned. You can cast it aside,

14 forget about it, give it as pexo, but they have given it as incriminatory

15 evidence, but your Honours let's go on because there are six items like

16 this and I will take the Prosecution through it. It seems they haven't

17 looked at it, they haven't reviewed it. They certainly haven't had any

18 regard to it. Your Honours, EVD-PT-OTP-00029 at 0464 to 0467.

19 Twenty-eight names, 28 names listed, list and profile of adversely

20 mentioned persons. Twenty-eight names, Ambassador Muthaura's notably

21 absent.

22 EVD-PT-OTP-00030, at 0469 to 0471. This is a profile of key

23 persons named in the DISC, PSIC and police intelligence reports. 11

24 individuals named, Ambassador Muthaura not one of them.

25 Your Honour, Africa confidential EVD-PT-OTP-00169 from 0240 to

1 0249, nine names, Muthaura not mentioned.

2 Your Honour, I think that's -- one more. Your Honour, one more.

3 Your Honour, one more, there's EVD-PT-OTP-00297, at 05 -- 0350. And,

4 your Honour, this is a document, a capable regarding from class -- well,

5 apparently classified from the United States State Department listing

6 individuals -- just bear with me a moment. Just bear with me one moment.

7 Yes, naming individuals that were on the US travel ban. Eight names.

8 Once again, the United States government with all their intelligence

9 service, with all their abilities, Ambassador Muthaura not mentioned.

10 And this is not a weapons of mass destruction case where the Americans

11 have got it wrong and the OTP have it right, because here they're

12 supported by so many other independent sources.

13 Your Honours the last one EVD-PT-OTP-00212 was referred to by my

14 learned friend Mr. Adeniran yesterday. He referred to it in court,

15 page 22, line 2, of the transcript. Your Honour, I don't understand

16 actually how he referred to it in good conscience as somehow advancing

17 the Prosecution's case. I really for the life of me don't see it because

18 what this shows is Ambassador Muthaura is not mentioned as being involved

19 at all. So, your Honours, that's the starting point. All these

20 investigations, no mention of Ambassador Muthaura.

21 Now, I'm not saying that these are dispositive of the issue, but

22 what they required any prudent investigator should have had pause for

23 thought and said, "Have we got it right? Are we right?" Because our

24 abilities, our diligence, our efficiency, our capacity to know the law,

25 to know Kenya, not visit as tourists, but actually suddenly get to grips

1 with the constitution, get to grips with the administrative structures,
2 get to grips with the evidence, and actually get to the truth that all
3 these entities failed to do. Perhaps a reasonable prudent investigator
4 would have said let's show some caution here. Let's try to verify.
5 Let's try to make sure that evidence is corroborated. Let's try to speak
6 to the people that are mentioned but none of it, none of it has been done
7 by the Prosecution in this case.

8 Your Honours, that's the background that I would ask you to
9 consider when we move forward and look at the planning, and when we come
10 to the planning stage that has been put forward by the Prosecution, I
11 will start, and really it is a luxury of choice that we have. I will
12 start again with the words of the Prosecutor himself, play
13 EVD-PT-D12-00193.

14 (Video-clip played)

15 "People in the government have meetings to discuss what to do,
16 and the evidence we have is Mr. Kenyatta offered the support of the
17 Mungiki to attack, and Mr. Muthaura as a top responsible security gave
18 instructions to allow the Mungiki to do it, and that's the case the
19 Judges accepted.

20 "And that was pre-planned? Could that have been pre-planned?

21 "No, no. We have no information that this was pre-planned. We
22 have -- they reacted. This is a reaction. That's the information we
23 have."

24 MR. KHAN: Well, your Honours, he speaks for himself. The
25 Prosecution's case cannot change like the Dutch weather. It cannot. It

1 can't in one breath say there's no planning, it's spontaneous, and the
2 next breath come to the court attired in a robe and ask the Court to give
3 him credibility when he says that it's all planned and orchestrated in
4 the most fantastic and meticulous manner. He cannot have his cake and
5 eat it. He must be consistent, that's the minimum that a criminal trial
6 requires.

7 Your Honours, on this I accept this word, this particular
8 conclusion of the Prosecutor. It's a strange occurrence, because he's
9 corroborated by General Michael Gichangi, who is the director general of
10 the National Security Intelligence Service of the Republic of Kenya, a
11 hugely impressive man. If we were allowed more witnesses, he would have
12 been definitely one of the witnesses that we would like your Honours to
13 have heard from. He's somebody who the Prosecution have relied upon,
14 repeatedly, because the reports that they say point the finger at us come
15 from his office. He's been referred to by the Waki Commission. Their
16 own witness talks about professionalism of NSIS.

17 Now what does General Michael Gichangi say? Your Honour, NSIS
18 report EVD-PT-D12-00066 disclosed as pexo, and this refers to
19 General Michael Gichangi's testimony to the Waki Commission, and
20 Judge Waki asked him about these allegations that are being bandied about
21 regarding Mungiki at State House. Now this is not a case that NSIS did
22 not investigate. He says very clearly at 0062 that he had investigated
23 them and he had found no basis, the service had found no basis for the
24 rumours that were being pedaled as truth, and yet that is once again an
25 inconvenient truth that the Prosecution seek to put in a box marked pexo,

1 tape it up, and cart it off to the Defence to make of it what they will,
2 and this comes back to some comment we made earlier. In fact, it was a
3 witness from -- Witness Kimemia. He thought the Prosecutor's duty under
4 the Rome Statute was not to prosecute, not to get cases to trial at all
5 costs irrespective of the evidence, but to investigate, to inform himself
6 with an open mind under -- consistent with the oath of office to act
7 conscientiously as evidence comes in, and yet this case that should be
8 kept under continuous review, we say, has not. There are blinkers on.
9 We want this case to go to trial come what may. And, your Honours, this
10 is why at the outset I said an inquiry is needed when this case is over.
11 It is unconscionable. Whatever the flaws of the Prosecution case. At
12 the very least, once we gave them what they should have done, a prudent
13 Prosecutor could have said, okay, we've got it wrong. Step back. But,
14 your Honours, marching blindly on for God knows what reason is a matter
15 that you'll have to decide in due course.

16 Your Honours, the statement of Michael Gichangi is
17 EVD-PT-D12-00053. And I would like you to read two paragraphs,
18 paragraphs 30. And he says this:

19 "NSIS would routinely have fairly accurate information on
20 activities and contacts between Mungiki sect members and Members of
21 Parliament and politicians, prominent personalities, and operatives and
22 candidates contesting the 2007 elections. I am therefore able to attest
23 and swear --" he is not before your Honours, but he was willing, but
24 who -- he is attesting and swearing that "... there was no information at
25 all about Ambassador Muthaura having any links whatsoever with the

1 Mungiki sect."

2 And yet they say, they put forward a witness as a witness of
3 truth saying's he's a Mungiki despite the fact he's a Meru and despite
4 his service to the country.

5 "If there are any such contacts," the director general says, "I
6 can assure you, NSIS would have known. There was almost nothing that
7 Mungiki could do that the service would not know due to the level of
8 monitoring sect activities given the threat it poses to national
9 security. Throughout, be it prior to, during, or immediately after the
10 post-election violence, the government continued its efforts, continued
11 in its efforts to eradicate the Mungiki menace. These government efforts
12 continue till now. There was never a policy of the government to turn a
13 blind eye to the Mungiki activity."

14 Paragraph 31 he continues:

15 "In relation to Prosecution allegations that Ambassador Muthaura
16 was present and participated at the State House with Mungiki members, the
17 service has no information about such a meeting. I am also not aware of
18 any meeting that Ambassador Muthaura attended at Nairobi safari club or
19 Nairobi club (what is sometimes known as 'Nairobi Members Club') in 2007
20 or 2008 with Kikuyu businessmen and members of the Mungiki sect. If
21 there was such a meeting, NSIS would have known."

22 Now, your Honours he is not putting forward evidence. I mean
23 intelligence -- obtaining intelligence, they're based on rumour, on
24 gossip, on -- but verifiable intelligence, and this statement from
25 somebody, from an entity that the Prosecution rely upon cannot simply be

1 put under the table. To do that is really a travesty and it's something
2 that should really be a matter of grave, grave concern.

3 Your Honour, with your leave, I'm going to move now to the 30th
4 of December contention put forward by the Prosecution. Now, I'll start.
5 The Prosecution opened and said this is a critical meeting. This is the
6 point when there's been an evolution from the previous agreement on the
7 26th to a criminal plan. Now the criminal plan is hatched on the 30th.
8 This is the day it's born. That's what the Prosecution say.

9 Now, this important mention somehow escaped them in the
10 Article 58 application, and it's somehow escaped them in the DCC because
11 they don't give it that importance in those documents. In fact, we were
12 spending an awful lot of time on the 26th of November. So it seems to be
13 rather late in the day, but let's -- let's go ahead and analyse it with
14 your Honours' leave.

15 There's only one witness, only one witness that provides evidence
16 in relation to the 30th of December State House meeting, and he wasn't
17 even there. Now, the Prosecution -- and that's Witness 00011. The
18 Prosecution cannot rely upon Witness 00012 for a number of reasons. The
19 first is he is fed, absolutely fed, leading question by the investigator,
20 and I will read it; EVD-PT-OTP-00666 at 0418. And, your Honours, in due
21 course I would ask you to look at line 0478 to 0481, and I'll read it.
22 The investigator says this:

23 "Sorry, I know Muthutho, Thuo, Uhuro Kenyatta were all at the
24 meeting, at least one meeting on the 30th of December, when Uhuru banged
25 the table and says, 'We get people from the ground.'"

1 And the witness answers:

2 "Yes."

3 Now the rest of that, the rest of it, page after page is
4 redacted. I mean, there's no evidence. There is a leading -- absolutely
5 blatantly leading question and black redacted evidence. There's nothing.

6 So, your Honours, forget Witness -- forget witness -- I'm
7 grateful. Forget witness 0012. Now let's look at Witness 0011. Now his
8 testimony, and your Honours will review it, for example -- and before I
9 move on, even Witness 0012, he doesn't even say the meeting's at State
10 House. And surprisingly, despite the leading, even the investigator
11 doesn't lead him in that direction. He simply says, about a meeting
12 somewhere on the 30th. But going back then to the 30th of December
13 alleged meeting at State House.

14 The witness himself is not present. The witness says at
15 EVD-PT-OTP-00322 at 1514, line 301:

16 "I don't know who summoned them to State House."

17 So he don't know who called the meeting. And he's not even
18 specifically asked regarding his presence at the meeting, but what he
19 does say from his answers it's clear that he's not because at EVD, for
20 example, PT-OTP-00322, at 1514, line 283, he says and I quote:

21 "I believe that they were also there. I believe that they were
22 also there. There were also Mungiki people there also."

23 Your Honour, there's no -- you cannot somehow import into this
24 conjecture of I believe any suggestion of actual knowledge, any
25 discussion that he was there. He's a direct eyewitness, an anonymous

1 witness that doesn't give any basis to the basis of his information, who
2 doesn't actually even say Ambassador Muthaura was at the meeting. And
3 despite all of that, staring them in the face, the Prosecution opposite
4 say, Your Honours, don't look at the evidence. Come what may, send it to
5 trial. Your Honours, we can see why they don't want you to look at the
6 evidence.

7 Your Honour, regarding the -- the 30th of December, I refer to
8 another Defence witness. He's the spokesperson of the Republic of Kenya,
9 Dr. Alfred Matua. EVD-PT-D12-00180 at line -- at 24, paragraphs 1 and 2
10 and 25, paragraphs 3 to 6. And he says that he's with the ambassador.
11 He comes into State House on the 30th. He's with Ambassador Muthaura.
12 They leave for Harambee house to meet media editors and they come back
13 after a short while, and then they're joined with the Attorney General,
14 the Chief Justice, Honourable Michuki and other individuals.

15 Now, your Honours, the 30th of December is not a irrelevant date.
16 I mean, the 30th of December 2007 was not a forgettable date in Kenya.
17 That's the day when his excellency Mwai Kibaki was sworn in, and yet the
18 Prosecution say, well, despite that massive event, these senior members
19 of the government, senior civil servants, they're preoccupied with
20 meeting an outlawed criminal gang not in a hidden location but in State
21 House where the event is taking place, and they say this with a straight
22 face. They say it with a straight face, apparently expecting you to
23 swallow it hook, line, and sinker in the same way that they, we say, have
24 swallowed hook, line, and sinker the nonsense, the lies, the deceit, the
25 fabrications, and the absolutely contradictory evidence that they put

1 forward. This is evidence that should be kicked out of Court without a
2 moment's hesitation. Your Honour let me play, with your leave, another
3 video. EVD-PT-D12-00192. This is the event of the swearing in on the
4 30th of December at State House.

5 COURT OFFICER: Madam President, your Honours, while we wait for
6 the video to play, I just want to remind everyone that to be able to
7 watch this video we need to switch to the PC 1 channel thank you.

8 (Video-clip played)

9 "Is the presentation of the certificate -- 30th December 2007,
10 Francis Kirimi Muthaura hurriedly conducted at nightfall a swearing in
11 ceremony at State House following disputed presidential results."

12 MR. KHAN: Madam President, just for the sake of information, the
13 individuals one saw earlier were not Mungiki in dreadlocks or in goat
14 skins. Those were wigs and gowns. And this oath is the oath of office,
15 not a Mungiki oath. It's very clear what is going on here, and not a
16 Mungiki in sight.

17 Your Honour, of course, would have seen Ambassador Muthaura
18 himself at that meeting at that time.

19 Your Honour, I also refer to the statement of Dr. Ben -- sorry,
20 of Benson, Benson Githinji, EVD-PT-D12-00208 at 21, paragraph 32. Now,
21 he's the escort commander in charge of security at State House, and we
22 provide a list of people that came to State House on the 30th of
23 December. Again, evidence that one would think is quite important when
24 one was investigating a criminal plan at a location like this. And, your
25 Honours, I also rely upon -- I also rely upon EVD-PT-D12-00226, at

1 000223, at paragraphs 3 to 12 of Hyslop Ipu, again, who talks about what
2 actually happened at State House.

3 Your Honour, once again we're fortunate, the president himself
4 who mentioned a little degree of surprise that the Prosecutor who met him
5 came to his country and enjoyed the full protocol, almost to a head of
6 state, when he entered Kenya didn't speak to him about the allegations,
7 but what he does say, what he can put before your Honours is
8 EVD-PT-D12-000620 (* sic), and he says at paragraph 28, his excellency
9 says:

10 "30th of December 2007 was a very important day. The results of
11 the presidential election were announced that day. Muthaura was with me
12 all afternoon watching the election results being announced on
13 television. Muthaura remained with me all day until my swearing in as
14 president for the second term in the evening at about 6.00 p.m. The
15 ceremony lasted for about 30 minutes or so."

16 And, your Honour, you also have the statement of Dr. Alfred Matua
17 who talks about the ambassador's presence.

18 Your Honour, you also got the statement of Godhard Mburu Kamau,
19 EVD-PT-D12-00223 at 0022, paragraph 14 and 15, and also annex to his
20 statement, you have annex to his statement as the current commander of G
21 company that's in charge of State House and the current custodian of all
22 GSU, General Service Unit, records, documents that we say are relevant
23 regarding the visitors mentioned and that's -- the annex is
24 EVD-KEN-D12-0012 at 14. And, your Honours, those are all, of course, as
25 needed, authenticated and stamped.

1 So, your Honours, Witness's 11 account, we say brooks but one
2 conclusion: It didn't happen, it's unreliable, and it's concocted. And,
3 your Honours, all kind of credibility issues with Witness 0011, Witness
4 0012, that it may be that the other Defence team of Kenyatta, of
5 Uhuru Kenyatta, will mention. We have a statement of D12-0047 that may
6 also provide some background, but the idea that this was a secret
7 location is again rejected by a whole stream of Defence evidence and
8 common sense. In fact, some of these allegations didn't even require
9 Defence witnesses, but we have to show due diligence because the
10 Prosecution arguments defy common sense.

11 I mean, anybody who knows government, anybody who's been at
12 Downing Street or the White House, I mean, these are not private
13 locations. And we have statements, we have statements from officials
14 that there's 350 people or odd working every single day at State House,
15 all ethnicity. You know, nothing happens without people knowing, and
16 despite that the Prosecution says, No, no, you don't know. We say this
17 is a secret location. It's a very convenient place to have a secret
18 meeting with a criminal outlawed gang on the lawn of State House or in
19 some tents pitched somewhere by somebody in State House. This is
20 incredible evidence. Evidence incapable of belief, certainly evidence
21 that doesn't meet the standard required for confirmation.

22 Your Honour, as an aside, I think a paragraph of Dr. Matua's
23 statement, D12-00180, at page 26, paragraph 8, is -- at 0026, paragraph
24 8, is very relevant, and I'll -- I'll read that. He says:

25 "As an aside, I would point out that as of the 30th of December,

1 2007, there had not been --" he's a spokesperson, so he receives all the
2 information so he can brief the press.

3 "... as of the 30th of December, 2007, there had not been any
4 targeted violence to speak of in the country. Accordingly, the
5 suggestion that Mungiki met at State House on that day with
6 Ambassador Muthaura to plan retaliatory attacks is not only unrealistic,
7 untenable, but is in my view absolutely false."

8 Again, just looking at the time lines, 30th of December. One can
9 look at when the real violence started and say no, no, on the 30th
10 they're planning retaliatory attacks. Perhaps -- well, we haven't seen
11 the evidence of that.

12 Your Honours, Witness 0011 simply does not mention
13 Ambassador Muthaura. I think it was yesterday, 23rd of September, it
14 was -- it was just yesterday when they mentioned at page 20 of the
15 transcript, lines 16 to 17, that the Prosecution were seeking to support
16 the present -- presence of Ambassador Muthaura by EVD-PT-OTP-00322, at
17 page 1513 to 1515.

18 Your Honours, there's no magic. Sometimes there's danger, in all
19 honesty, with these list of evidence and charts and all this, you know,
20 sophistication, because it can hide nothing. I mean, it can hide the
21 absence of evidence, because you look at these charts and you see all
22 these EVD numbers, and the Prosecution have an obligation to tie in every
23 allegation to the evidence, and it looks wow, every charge, every element
24 made out. But you look at it and there's nothing, and what's worse in
25 this case - and we'll mention it more in our closing brief - the

1 Prosecution on numerous occasions -- you know, it should be -- it should
2 be a chance to check oneself. This process that the judiciary have
3 informed or required of the parties is also forcing us to do what is
4 required of us as officers of the court to check that we meet our
5 responsibilities, and yet -- and I will come to it, numerous occasions
6 they give footnotes, they give references, sometimes blanked out. They
7 rely upon evidence that's black, that's redacted. Other occasions they
8 put forward references that simply do not support the proposition that
9 they propose.

10 Your Honours, this is simply incredible and unsatisfactory.
11 Your Honour, I thought that was the end of it for the 30th of December,
12 but we were taken aback, actually, we were taken aback that the
13 Prosecution, and it was Ms. Adeboyejo who sits just there, she's said in
14 court that there was a meeting at the office Kagan House, the office of
15 the Honourable Michuki, on the 30th of December with Ambassador Muthaura
16 and the Honourable Uhuru Kenyatta regarding the deployment of Mungiki to
17 Kibira.

18 Now, of course, a bit of mention about -- Kibera's not in the
19 charges but it's relevant, well, leave all that aside, leave that all
20 aside, and leave aside the fact it's never been mentioned before. How
21 can you in a presentation raise an allegation like this for the first
22 time on your feet? What does Article 67 mean about the right to adequate
23 notice? And, your Honours, we are servants of the court. We put forward
24 our arguments sometimes as merit, sometimes they're weak and your Honours
25 expose the weaknesses, but we said that there was a lack of specificity

1 in the charges. We were struggling as -- you know, it's very difficult
2 to fight a phantom. You know, all this noise we're hearing in the press,
3 all this noise we're hearing from the Prosecution that they have this
4 strong evidence, but to find it and then to confront it when the stakes
5 are so high for a client is not an easy challenge. But for the
6 Prosecution to say in court now for the first time that there's a meeting
7 alleged on the 30th where Kenyatta and Muthaura met, in addition to the
8 allegation of the 30th State House, is absolutely unconscionable.
9 Absolutely unconscionable. No wonder that the Prosecutor is not in
10 court.

11 Your Honour, there have been numerous occasions, and I will
12 mention it in our -- in our brief. I will back everything up,
13 Prosecution -- you know, it's not about -- under domestic codes, and we
14 have our own code here, prosecutors -- and I'm lucky, I count myself as
15 very fortunate of being one, it's a duty -- a primary duty of a
16 prosecutor not to officiously try to get a conviction. You are more than
17 anybody else a servant of justice without a personal stake in the
18 outcome. What do they do? Your Honour, this flawed witness is relied
19 upon in paragraph 55 of the DCC, footnote 124, and it states the
20 allegation is that one of Muthaura's subordinates delivered a significant
21 amount of money in cash to the Mungiki leader in preparation for the
22 Naivasha attack. The evidence cited was that the money was given to
23 Mungiki leader, to persons unconnected with Muthaura for the Kibera
24 attack.

25 So you look at the evidence. It has nothing to do with Naivasha.

1 We say it's rubbish anyway, but it has nothing to do with Naivasha and
2 yet they're putting it forward with a straight face to say, Well,
3 actually it's relevant to Naivasha. But didn't they read their evidence
4 and didn't they say, Well, actually what is our evidence? This case,
5 what your Honours have done, what is before you, what needs to be decided
6 are the allegations for Nakuru and Naivasha. So what's our evidence for
7 Naivasha? They didn't do that. They just fill in the spaces and so what
8 you get, you're thinking, Ah, there must be something here. It's quite a
9 weighty document. It's not good enough, it's bad practice, and it's
10 dangerous.

11 Your Honours let's go back to the 30th of December meeting.
12 Your Honours, the references given by Ms. Adeboyejo on her feet is
13 another example. On her feet in court, transcript 22nd of September,
14 page 39 to 40, EVD-PT-OTP-00652 at 0120 and 0122. These are the EVD
15 numbers she gave. EVD-PT-OTP-00661 at 0315 to 0320 and EVD-PT-OTP-00662
16 at 0329 to 330.

17 That witness despite, you know, the fig leaf of EVD numbers that
18 are very difficult to say, despite the fig leaf of EVD numbers, it cannot
19 disguise the nakedness of this kind of practice because those references
20 do not support the proposition that Ambassador Muthaura was present at
21 that meeting at the honourable Michuki's office. In the entire narration
22 of that witness, in the entire narration of that witness, he doesn't
23 mention Ambassador Muthaura being mentioned at that meeting.

24 Now, your Honour, it's staggering. It is staggering. There's no
25 other word for it. This is not hyperbole. And this is not escape,

1 because all of us make mistakes, it happens, but this why at the outset I
2 said this case discloses serious, profound, systemic failures, and an
3 inquiry will be needed at the end of this day as to why a man like this
4 has been brought before this court and his respect and his own dignity
5 should not -- is to the court, is to your Honours, but it should not stop
6 very serious questions being asked about the party opposite and their
7 fulfilment of an oath of office that the assembly of State Parties and
8 the international communities not only request but require to be taken
9 seriously.

10 Your Honour, we know that Witness 0012 himself was not present at
11 that meeting, because he says he was not present. They look away from
12 that. EVD-PT-OTP-00652 at lines 121 -- sorry, at 121, lines 322 to 323.

13 Now, your Honour, I will move on to a statement of the Honourable
14 Michuki, because amongst the people listed as being present at this
15 meeting, of course, is not only the Honourable Michuki but his wife as
16 well. Now, your Honours I read the statement of the Honourable Michuki.
17 EVD-PT-D12-00088. And, your Honour, paragraph 15 he says, and he wasn't
18 spoken to by the Prosecution. He's not a suspect before the court, but
19 he's a witness and he's not spoken to. And he's somebody who survived,
20 and the Prosecution who mentioned Googling can see it on the internet, if
21 they say that's enough. He survived assassination attempts by the
22 Mungiki.

23 "I am not a member or supporter of the Mungiki. I have never
24 arranged for funded a Mungiki meeting in Muranga or anywhere else. I
25 have never funded that organisation or assisted it in any way. I have

1 not sought to have any alleged Mungiki member released directly or
2 through Muthaura or any other person. Indeed, to the contrary, Maina
3 Njenga was incarcerated during my tenure."

4 He's the man. Under his watch, Maina Njenga was locked up and
5 kept away from menacing or as an attempt to stopping him menacing the
6 people of Kenya.

7 "The Mungiki organisation was banned for a reason, and throughout
8 my tenure of office I attempted to tackle the law and order issues that
9 fell within my portfolio in accordance with my oath of office and the
10 laws of Kenya. I have never given money to or for the Mungiki
11 organisation. I have never given money to any person for the funeral of
12 the wife of Maina Njenga. My wife, Watiri, has never been present with
13 me during any meeting with Mungiki where plans were agreed to support
14 that organisation or plan any violence in Kenya or anywhere else. I find
15 that suggestion to be particularly vicious and offensive and I take great
16 exception to it. I've been married to my one wife for 52 years, and she
17 is a woman of the utmost character, and she has always carried herself
18 with great dignity. The attempt to drag my wife into a concocted account
19 is shocking and exceptionally unfair and could only be politically
20 motivated."

21 That's what the Honourable Michuki says. And your Honours with
22 the greatest of respect, it's beyond me to put it, even attempt to put it
23 any more eloquently than that. But, your Honours, perhaps in a
24 completely different way, the investigator for the Prosecution came
25 close, because trying to elicit this evidence that they rely upon, they

1 say at EVD-PT-OTP-00661, at 0316, line 619, that the information
2 regarding this meeting and how the interview was going was like a
3 plate -- like a plate of sick. Like a plate of vomit. That's what --
4 that's how the Prosecution were describing how the evidence was coming
5 out of the interview, and that, in fact, was one of the reasons why we
6 were asking for statements, because it really is exceptionally difficult
7 to make head and tail of what the Prosecution are saying. In fact, it
8 seems even the Prosecutor sometimes doesn't know what's saying on any
9 given moment on any given day. Your Honour, in due course I'd ask you to
10 consider also EVD-PT-D12-0023.

11 Your Honour, I'll move on to the 3rd of January meeting. I'm
12 sorry I'm taking time, but these are very important and profound matters
13 for Ambassador Muthaura and these are the core meetings that are alleged,
14 and I am also spending time with -- with intent on investigative
15 failures, because the issue of investigative failings in this case would
16 take up more time than we've got for all parties. It really would. One
17 doesn't know what to start and when to finish. But your Honours let's
18 move on to the 3rd of January this key -- key meeting that the
19 Prosecution are putting forward.

20 Only one witness again. We've come here on the basis once again,
21 3rd of January, one witness, Witness 0004, and my learned friend Mr. Faal
22 in due course will tell you a little bit about Witness 0004 and whether
23 or not he is capable of any belief whatsoever. No other witness except
24 Witness 0004 talks about, and Witness 0004, Mr. Faal will say, he changes
25 his account repeatedly, one moment saying it's Nairobi Safari Club, then

1 he says it's Nairobi Members Club, and all the rest of it. And we've got
2 witnesses D12-0041, D12-0039, D12-0051, that really, we say, expose the
3 blatant lie being put forward by this witness. But, your Honour the
4 burden is on the Prosecution in this case, despite the fact we've been
5 active, we've done our -- whatever the limitations, we've done our best
6 to put evidence before you, the burden is on them. But, your Honours,
7 let's look at some of the evidence that we've put forward.

8 But your Honours, I'm not going to go it -- I'm taking time, so
9 Alfred Matua. Very important. He I'll come to in a moment. D12-0016,
10 D12-0022, Hyslop Ipu, Isaiya Kabira. The list is very clear. But
11 regarding the 3rd of January, the evidence again couldn't be clearer. On
12 the 3rd of January, and your Honours, it can -- it can go on the screen,
13 in fact, EVD -- just the first page. EVD-PT-D12-00009. And,
14 your Honour, this is a minutes, the cover sheet only, of the minutes of
15 the National Security Advisory Committee, NSAC, and it shows that the
16 meeting starts at 9.15 in the morning. Your Honours will see in due
17 course at the last page it finishes at 12.50 p.m. Now, that's not the
18 end of the story because Alfred Matua -- and Ambassador Muthaura, of
19 course, is present and he's chairing it. Now, Alfred Matua has given a
20 statement that is before your Honours, and he says that he sees
21 Ambassador Muthaura at 9.00 in the morning.

22 PRESIDING JUDGE TRENDABILOVA: Mr. Khan, what is the level of
23 confidentiality of this document?

24 MR. KHAN: Your Honours, the cover sheet can be shown to all
25 parties and the public, it's -- because it's a cover sheet, but not the

1 rest of the document.

2 PRESIDING JUDGE TRENDAFILOVA: Mm-hmm. Yes. So it's
3 confidential. Okay. Just the cover sheet.

4 MR. KHAN: Your Honour -- but I can move on, if it takes time.
5 Let us move on.

6 Your Honour, Dr. Matua says that in the morning he comes in to
7 Harambee house where -- he comes into Harambee house and he sees
8 Ambassador Muthaura before the NSAC meeting, and then he also sees
9 Ambassador Muthaura after the NSAC meeting because, as is their custom,
10 he talks about this in his statement, he then goes together with
11 Ambassador Muthaura to State House. Now, at State House they're
12 preparing an important speech. It is a speech that is being given by the
13 president of the republic, the first speech after his second term in
14 which he deals with the post-election violence.

15 So we have NSAC minutes with all those individuals present
16 showing Ambassador Muthaura's location at that -- on at that day at that
17 time. We have a statement from Alfred Matua showing where he was in the
18 morning. We have a statement showing where he was in the afternoon. And
19 your Honours will see we have a video showing where he was that day as
20 well. And I'd ask that we play EVD-PT-D12-0009. Sorry, that's my fault.
21 EVD-PT-D12-000186.

22 (Video-clip played)

23 MR. KHAN: And your Honour will see on the screen behind his
24 excellency the president, Ambassador Muthaura there at Harambee house
25 there on the 3rd of January. Once again your Honours can see, clearly, I

1 hope, Ambassador Muthaura.

2 (Video-clip played)

3 "Ladies and gentlemen, I just have a short statement to make.

4 Fellow Kenyans, I am deeply disturbed by the senseless violence

5 instigated by some leaders in pursuit of their personal political agenda.

6 This is causing unnecessary loss of lives, destruction of property, and

7 displacement of innocent Walenje (* phon) from their homes, especially

8 women and children. As your president, I want to assure all of you that

9 the government is doing everything possible to ensure that security of

10 all Kenyans is maintained. Those who continue to violate the law will

11 face its full force. I urge the public to remain calm as the government

12 continues with its efforts to restore law and order."

13 MR. KHAN: Madam President, the whole video is in evidence, and

14 your Honours if you have time can -- if you wish, we'd ask you to look at

15 it and consider the same.

16 Your Honours, but that's not the end of the story, because the

17 Prosecution say that this conspiracy, this criminal plan, was conducted

18 by Ambassador Muthaura on the phone. So interesting idea. Perhaps phone

19 records could be obtained. Well, your Honours, they weren't obtained by

20 the Prosecution, but we've put them before you, and, your Honour, I would

21 ask you in due course to consider the statement of D12-0040 which is

22 EVD-PT-D12-00182, and then also the statement of D12-0042. Her EVD

23 number, EVD-PT-D12-00205.

24 Your Honours, we have the phone records of Ambassador Muthaura,

25 and we've put them before you. And not only that, we have put every

1 single call he made in that period, who was called. And, your Honours,
2 the reason we did that is so the Prosecution -- I mean, your Honours, the
3 burden is not on us, but I don't want the Prosecution to say he had
4 another phone. The evidence they put in is that, on their witness's own
5 account, is Ambassador Muthaura took his phone. That's their evidence.

6 But, your Honours, you'll see from the phone log he calls General
7 Kianga, Michael Gichangi, his secretary, his wife, his children. It
8 shows that this is his phone that he's using. And, your Honours, on the
9 3rd there is no phone call to General Ali. This -- again the burden's
10 not on us, but nothing really -- we can't do more. We show NSAC in the
11 morning, we show videos in the afternoon, we show telephone records,
12 we've done everything that the Prosecution in due diligence should have
13 done, particularly given this complete deafening silence from all these
14 other reports that I mentioned at the outset that didn't mention
15 Ambassador Muthaura. They have the burden of proof and the burden means
16 a burden of diligence, and that burden of diligence has not been complied
17 with, and I'm very sad to say it, but if they'd spent as much effort
18 trying to get phone records, trying to get corroboration as they did
19 rummaging around and trying to go through and get evidence from my
20 learned friend Ms. Alagendra and Mr. Faal in a desperate bid to
21 disqualify them, they would have served the victims far better. Your
22 Honours, I meant the e-mails of my learned friends. They would have
23 served the victims better.

24 This is not about showmanship. It's not about cheap theatrics.
25 It's not about drama. It's about the truth. It is about the truth, and

1 we say that the victims deserve better. It is very easy to pay
2 lip-service to suffering, to see it fleetingly on the television and say
3 terrible, terrible, but Ambassador Muthaura has spent 35 years not paying
4 lip-service but trying to the best of his ability to serve the people of
5 Kenya, and at the end of his career, at the time when he should be with
6 his children and retired, he has to come before the court. Well, he
7 voluntarily comes, but he comes before the court because the nightmare of
8 a terribly serious allegation that has kept his wife and kept him up,
9 awake has been raised against him. A nightmare.

10 And who brought that nightmare? Who brought that Christmas
11 present on the 15th of December just before the court was due to go into
12 court recess, dramatic theatrics? It was the Prosecutor who went ahead,
13 disinterested, we say, about basic decency and basic obligation that
14 investigations have. And your Honours I'll touch in the closing. This
15 is a matter of grave concern because States and State Parties that are
16 fortunately joining this court continuously express reservations in the
17 Rome Statute regarding the Prosecution, but for reasons I'll give we're
18 fortunate, despite the nay sayers, that there is a Chamber, a Pre-Trial
19 Chamber that can act as a filter to stop this flotsam and jetsam getting
20 into the stream of justice and polluting it.

21 Your Honours, I'll move on with your leave.

22 Your Honour, I must just deal with one issue lest the Prosecution
23 stand up and say to the contrary. My learned friend Mr. Adeniran said in
24 court that the alleged meeting at the Nairobi Members Club is
25 corroborated by Witness 0004, by Witness 0004. That's at

1 EVD-PT-OTP-00572, at 0026. In fact, he said this is corroborated by the
2 evidence of Prosecution witness 0001, I'm sorry, at 0012 -- at 0012 and
3 that's the reference, EVD-PT-OTP-00572 at 0026, who alleges that after
4 the outbreak of violence the Mungiki were recruited to retaliate against
5 perceived ODM supporters and that both Uhuru Kenyatta and
6 Francis Muthaura were involved in those meetings. And that's lines 11 to
7 15 of page 16 of the transcript. So that's the reference, that's the
8 background, that's the assertion that the Prosecution with a straight
9 face in good conscience put forward.

10 Now, let's look at Witness 0001, his anonymous statement. Well,
11 it's anonymous. We don't know his position in the Mungiki. We don't
12 know the basis of his assertions. We don't know the basis of what he
13 says, never mind whether or not it should be given any weight, but, your
14 Honours, leaving all that aside, just leaving that aside, there's not a
15 sentence, not a sentence in the anonymous statement that's been presented
16 to you by an officer of the court regarding any planning meeting except
17 from, and I quote, "the witness alleges that there were meetings that
18 took place between the Mungiki and the government; whereby, prior to the
19 elections the Mungiki were recruited to support the PNU," and he alleges
20 that both Uhuru Kenyatta and Francis Muthaura were involved in those
21 meetings.

22 How can one tie that in to the allegation of the 3rd of January?
23 How can one did it? It really it shocking, and the greatest of regret,
24 but one must call a spade a spade. It is disingenuous. It is
25 disingenuous. It's very regrettable, your Honours. Your Honours,

1 there's no dates or location of meetings, no details of the participants
2 in the meetings, nothing about what's discussed in the meetings, no
3 information even to test if he knew Ambassador Muthaura. No information
4 if he's -- information is based on summons or the Prosecutor's press
5 comments. And the date, well no, date either.

6 Now, your Honour, I did put a filing forward at the beginning of
7 these proceedings in which I did ask -- that I did ask the Prosecutor to
8 be restrained and at the very least to exercise caution and diligence
9 with his proclivity of appearing on television and speaking perhaps
10 inappropriately.

11 Now, your Honours, I'm not going behind that but perhaps it would
12 be relevant to cite paragraph 3 and 4 of what I said then -- of what the
13 team said then. Your Honour, it's the 30th of March filing, an
14 application for an order to the Prosecutor regarding extrajudicial
15 comments to the press, and we said at paragraph 3:

16 "The Prosecutor is put on notice that if he continues with his
17 casual - and it must be said rather inappropriate - approach of
18 extrajudicial comments, the Defence retains its right to make any
19 application challenging the credibility, probative value, and utility of
20 Prosecution witnesses who purportedly provide accounts on issues which
21 are subject of the Prosecution's comments to the press."

22 And paragraph 4 we attempted to make it a little clearer.

23 "In other words, the Defence submit that the Prosecutor's
24 comments have the potential to tarnish the integrity of its own
25 investigations. More damaging still, the Prosecutor's comments have the

1 potential to cause significant prejudice to the Defence as they have the
2 potential to pollute the witness pool in Kenya and expose them to a
3 one-sided narrative from the Prosecutor."

4 Your Honours, it continues. Well, your Honours, the Prosecutor
5 carried on, but we will say generally, and whilst redactions are
6 judicially ordered, we think it's -- in our submission it is unfortunate
7 that so many dates have been redacted to so many statements or the
8 statements as relied upon because the timing of statements is important,
9 particularly where you have a Prosecutor that speaks to the press quite a
10 lot about the matters that are *sub judice* before the court, and this is
11 why, your Honours, in one occasion, and I was very candid and I tried to
12 be straightforward in these matters, I said that Ambassador Muthaura
13 himself is an example of how to behave regarding the press, and
14 generally, actually, but I meant regarding the press. But, your Honours,
15 despite all of that, we don't know the basis of this evidence.

16 Your Honours I'm going to try to move on to my last component.
17 And I'm sorry I'm taking time. It's the allegation regarding mid to late
18 January. And it was staggering yesterday once again -- and these are one
19 of the reasons, these little issues, that we -- I wanted to start today
20 to double-check because what we try, because one only has credibility
21 once in life, it's very difficult to -- when one loses it to gain it
22 back. You want to try, despite failings, to -- to put forward assertions
23 that are founded in fact, but I was surprised when at page 29 of
24 yesterday's transcript, line 17, my learned friend Mr. Adeniran said that
25 mid to late January meetings at State House were alleged to be the same

1 day as the attack on Naivasha. Now, your Honours, it's the first, again,
2 first time we've heard that. Why keep this from the Defence? What harm
3 would it have done? Is this a game of conjurey of producing rabbits out
4 of a hat to somehow wrong the Defence and make life difficult and make
5 life difficult, or is this a serious business of trying to get to the
6 truth?

7 Now, your Honours let's look at the statement of the witness
8 concerned. Your Honours, that's KEN-OTP-0060 at 0550, and a number of
9 remarks can be made, but I'll be brief.

10 The first is -- it doesn't give a date. He simply says it was on
11 Saturday. The second thing is the Prosecution said yesterday, for the
12 first time, it happened on the 27th of January. Well, the 27th of
13 January is a Sunday. It takes two seconds to look at a calendar, look at
14 a diary, you realise there's a bit of a variance there. So they give us
15 in evidence saying it's on a Saturday and say in court it's on a Sunday,
16 but your Honours let's even move on from that. I mean, it's flimsy.
17 It's flimsy in every single sense. That's it. That's the evidence upon
18 which the Prosecution - and that's a decent one, we have some that are 18
19 lines or so - that's the evidence upon which the good name of
20 Ambassador Muthaura has been brought before this court. Unacceptable,
21 dangerous, and a matter of concern not just to the people of Kenya but,
22 in my submission, to the international community and all individuals that
23 have a belief and -- in justice.

24 Now, your Honours, this witness talks about Joseph Kamau as
25 Nairobi CID director, and he also talks at KEN-OTP-0060-0551 of a

1 Kenowri (* phon) -- Kenowri -- sorry, Kemuri Muyangi (* phon). These two
2 people are mentioned. Well, one would expect, one would hope, one would
3 pray that a reasonable Prosecutor trying to discharge an international
4 duty would speak to these people to verify in circumstance that I've
5 mentioned when nobody else points the finger at Ambassador Muthaura. Do
6 they? Not a bit of it. We have statements of -- let me deal with Joseph
7 Kamau first. Joseph Kamau, a statement -- let me just go to it,
8 actually. Joseph Kamau, EVD-PT-D12-00203. Now, they say -- the witness
9 says that this man was CID director in Nairobi during the period of
10 post-election violence. Your Honours will see from this statement he was
11 retired. He retired on the 27th of November, 2006, not fabricated, not
12 made up. Your Honours, look at EVD-PT-D12-00204. It's a
13 retirement of -- a retirement letter dated the 27th of November, 2006,
14 from the office of the president, the man that is disingenuous,
15 dangerous. Witness is alleging to have been in Nairobi in that capacity
16 was not even service at the time.

17 Your Honours -- your Honours, all the witness said is that -- at
18 0551 is that he believed that despite their absence government ministers
19 were involved due to the fact that the meeting took place at State House.
20 So he don't seen say Ambassador Muthaura was there. He doesn't say he
21 saw Ambassador Muthaura. He doesn't say somebody told him
22 Ambassador Muthaura was there. It's -- in fact, it's even -- it's even
23 worse. My learned friend tells me, she refreshes my memory. He says
24 Ambassador Muthaura was not there, and yet the Prosecution with a
25 straight face say, Your Honours, don't look at the evidence. Please send

1 it to trial. Save our face, send it to trial. But your Honours it's
2 even more terrible, more tragic than that because let's go to the
3 statement of King'ori Mwangi. EVD-PT-D12-00214.

4 Now, your Honours, this witness, Mr. Adeniran relies upon that
5 the -- Mr. Ocampo relies upon, says he's never been known as King'ori,
6 first point. Second point, he says that whilst he was the PPO of Nairobi
7 once upon a time, he was certainly not the PPO of Nairobi during the
8 post-election violence. He was actually at Coast Province. Your
9 Honours, the Prosecution may say, because they have been saying in the
10 press, Ambassador Muthaura sits like a colossus over Kenya, dipping his
11 hands and his toes into every single aspect of life, concoction, all the
12 rest of it, witness intimidation, all this nonsense against the good name
13 of Ambassador Muthaura.

14 Well, your Honours, let's look at the evidence. Your Honours
15 will see the transfer documents, for example, EVD-PT-D12-00215,
16 EVD-PT-D12-00216, EVD-PT-D12-00217 and 218. Clear evidence that what
17 Mr. Mwangi says is true. He'd been transferred to Coast Province and he
18 only came back to Nairobi as the deputy director of police reforms, only
19 came back in September 2010.

20 Now, your Honours, basic investigation is needed because without
21 it the administration of justice is brought into disrepute, the very
22 fabric of justice falls away, confidence in the rule of law erodes, and
23 miscarriages of justice happen. And on every single count the Prosecutor
24 has failed his oath of office, he's failed his obligations for the
25 reasons we've said, and one doesn't like saying it, but there's simply no

1 other way to put it.

2 Your Honours, in the time -- just one moment.

3 (Defence counsel confer)

4 MR. KHAN: Your Honour, the final matter I'll try to cover is
5 this regarding Witness 0012, and we'll deal with it in more detail in our
6 brief -- in our final brief, but you know, Witness 0012, you know
7 everybody's a Mungiki. Everybody's a Mungiki. He says
8 Ambassador Muthaura is Mungiki, Kibaki's a Mungiki. You know, and what's
9 the basis of that? The basis of President Kibaki being a Mungiki is
10 because EVD-PT-OTP-00660 to 00280 is because he's chairman of all the
11 elders. That's the alleged basis of President Kibaki who you saw being a
12 Mungiki. Michuki, why he's a Mungiki? Well, we don't know. They make
13 the assertion he's a Mungiki, the Prosecution receive it. They swallow
14 it hook, line, and sinker, or are indifferent to the veracity of that
15 assertion, Ah, yes, it will help us tick a box of the list of evidence
16 and the in-depth analysis chart without doing the most cursory and
17 shallow due diligence check. Why? If somebody says John Michuki is a
18 Mungiki, Karim Han (* phon) is a Mungiki, the normal question of a child,
19 never mind an investigator, would say why, Why do you say that? They
20 don't even do that. EVD-PT-OTP-00660 to 00279.

21 The present minister of internal security Saitoti, Mungiki.
22 EVD-PT-OTP-00660 to 0281. And honourable Saitoti is not even a -- he's
23 a half Kikuyu and half Maasai. Your Honour, you heard the reaction of
24 Mungikis themselves and former Mungikis themselves to these absurd,
25 offensive, convenient, opportunistic allegations, and it was risible

1 laughter. It was risible laughter. It was laughter about how a case
2 based upon such flimsy could come into what should be the hallowed
3 Chamber of justice. I mean, this issue -- my primary responsibility is
4 Ambassador Muthaura, but these issues are much bigger than any one
5 suspect.

6 Your Honour, let me go the allegation, and here it deals with
7 General Opandi, actually, we say. You know -- and I will tell you why,
8 because he's known to the court. He's known to His Honour
9 Judge Tarfusser. This witness says that the organisation, the tribal
10 group, the tribal elders, the Njuri Ncheke, the leadership of the Meru
11 community are Mungiki. Now, anybody who has done an internet search that
12 Mr. Adeniran mentioned is so easy would know what Njuri Ncheke is. I
13 mean, Africa has tribes. It has customs, but it's not a criminal gang.
14 It's a very well-known, very respected group of elders that does a lot
15 good work. I mean, basic investigations.

16 Now -- and that's EVD-PT-OTP-00661 to 0303. And they say
17 because -- because an oath is taken, somehow they're -- they're Mungiki.
18 Now, your Honours, we have a statement of Mr. Rutere from the Njuri
19 Ncheke community, and he tells you a little bit about what the
20 organisation is. Ambassador Muthaura was only elected or appointed to
21 the -- one of the elders of the Njuri Ncheke on the 11th of August, 2001,
22 and would I refer you in due course -- 2011, 2011, and I would refer you
23 in due course to EVD-PT-D12-00083 to 0182 at paragraph 23.

24 So many years, three years after the post-election violence he
25 actually becomes an elder to that community. But, your Honour, what they

1 say, it really defies credulity. Witness 12, whether you're Meru or
2 you're Kikuyu, member of any tribal group, any association, you're
3 Mungiki because an oath is taken. I mean, and that's not hyperbole.
4 Your Honour, look at EVD in due course. I would ask -- invite you to
5 look at EVD-PT-OTP-00660 to 0312 to 0313. Now, your Honours, even
6 Professor Wangari Maathai, who's Africa's first winner of the Nobel Peace
7 Prize -- first woman recipient of the Nobel Peace Prize is brought into
8 this nonsense. Nonsense. I mean, she won it for her contribution for
9 sustainable development, but because she happens to be in a church where
10 an oath is taken and the Njuri Ncheke are there, again imputations are
11 made or an inference can be made -- an imputation made upon her. It's
12 complete nonsense and it's not sufficient.

13 Now, your Honour --

14 PRESIDING JUDGE TRENDAFILOVA: Mr. Khan, I'm sorry but let us be
15 strict about the timing. Don't you yourself need a break in addition to
16 the interpreters?

17 MR. KHAN: Your Honour, may I have just two minutes, then I'll
18 finish, and then after the break my learned friend will start.

19 PRESIDING JUDGE TRENDAFILOVA: Yes, of course.

20 MR. KHAN: Your Honours, the last issue I will deal with deals
21 with this Witness 12 and he says -- Witness 0011, and he says at
22 EVD-PT-OTP-00308 at 1300 to 1301 that an organisation, Concerned Citizens
23 Initiative, is really a Mungiki front, is a Mungiki affiliate
24 organisation, and I would ask for the last two minutes perhaps we could
25 go into private session. Well -- well, I'll move on. I'm under

1 instructions to move on.

2 PRESIDING JUDGE TRENDAFILOVA: So this is not your that we
3 move into --

4 MR. KHAN: No, I think we'll just move on. You'll look in due
5 course to the evidence itself.

6 But they say, that we say, the Defence say, that what the witness
7 is actually referring to is our suggestion to the Bench. He's not
8 actually referring to the concerned citizens' initiative. He's referring
9 to the concerned citizens for peace, and the reason he's referring to
10 that is that that organisation gave a report that is exhibited by the
11 Defence, EVD-PT-D12-00048, your Honour, that mentions -- look at the
12 author that's mentioned there, and it bears a striking similarity to
13 another individual mentioned in these proceedings, and we say this
14 witness has been searching the internet, has been searching open sources,
15 has listening attentively to the Prosecution, and has actually got it
16 completely wrong, mistaken it for somebody he's trying to implicate to
17 pursue a particular agenda. And then say, Ah, this organisation is
18 Mungiki; whereas, this organisation was established by General Opandi
19 who's been before this court, one of the most decorated, one of the most
20 respected individuals in this area of law and in peacekeeping, and
21 it's -- it's replete -- this witness's evidence is replete with not any
22 contradictions but lies.

23 Your Honours, I'm grateful for the additional time. In short
24 those were -- some of the reasons that we may expand upon in our brief
25 why we say this case not only -- should not be committed for trial, but

1 what is more, it's reasons why we say that an inquiry will be needed in
2 due course. And to express to the Bench our dismay, that even at this
3 point when the Prosecutor has been told this, when the Prosecutor has
4 been given this evidence, why they march obliviously forward, blind and
5 blinkered, we say, to the interests of justice and their primary
6 responsibility to get to the truth.

7 Your Honours, I'm grateful for your time.

8 PRESIDING JUDGE TRENDABILOVA: Thank you very much, Mr. Khan, for
9 your presentation. I know it's sometimes very much annoying all the time
10 to remind about the time. It's annoying for myself equally, but this is
11 the task that I'm assigned with by the law. So let us make a break and
12 we shall reconvene our session at 11.30.

13 COURT USHER: All rise.

14 Recess taken at 11.03 a.m.

15 On resuming at 11.31 a.m.

16 (Open session)

17 COURT USHER: All rise.

18 PRESIDING JUDGE TRENDABILOVA: Please be seated.

19 We resume our hearing. We are in the second session of today,
20 and again the floor is over to the team of Mr. Muthaura. Now, who is to
21 speak on behalf of the Defence team.

22 MR. FAAL: Madam President, your Honours, thank you for giving me
23 the opportunity to once again appear before you.

24 Your Honours, this Prosecution's case is based mainly on four
25 material witnesses. In his presentation, Mr. Khan has dealt extensively

1 with these witnesses. I would also touch upon some of the material
2 issues which show or which give reason why your Honours should not
3 believe the testimony that's been given by these witnesses. But before
4 that, your Honours, the Prosecution advanced the theory that
5 Ambassador Muthaura committed these crimes for a particular reason, and
6 which is to keep the PNU in power. One wonders whether the Prosecution
7 has actually investigated this particular issue, but we have. We did so,
8 because it is important in a case of this nature to find out whether, in
9 fact, Ambassador Muthaura has any motive to commit this crime.

10 The first thing we wish to highlight is that Ambassador Muthaura
11 is a civil servant, and he's not a politician. Civil servants, they keep
12 their offices. Government comes, government goes. It does not
13 necessarily affect them. Why would he have a reason to want to keep PNU
14 in power by committing crimes?

15 Another thing is that Ambassador Muthaura does not belong to a
16 political party. You heard him yesterday. Why would he sacrifice his
17 everything, everything he's achieved in life, to enter into a criminal
18 plan just to keep the PNU in power, a party that he doesn't even belong
19 to? Does it make sense?

20 Your Honours, one may argue that perhaps he may have certain
21 personal benefits, but what benefits would accrue to Ambassador Muthaura
22 at this stage in life by engaging in a criminal plan just to keep the PNU
23 in power? It still does not make sense.

24 Ambassador Muthaura from the evidence severed both President Moi
25 and President Kibaki with distinction. Your Honours, we have provided

1 Witness statements from both of them, both a former president and a
2 current president of -- of Kenya, and they have only good things to say
3 about him. Why would he sacrifice all that and enter into a criminal
4 plan just to keep the PNU in power?

5 There was no motive. The position advanced by the Prosecution is
6 even further debunked by some of the actions Ambassador Muthaura took in
7 his capacity as chairman of NSAC. We clearly show that there certainly
8 was no plan or intention on his part to do anything to keep the PNU in
9 power, and for that, your Honours, we refer -- I refer you to
10 EVD-PT-D12-0006 at 0042. NSAC minutes at a meeting chaired by
11 Ambassador Muthaura on 18 December 2007, decided to come up with a plan
12 to swear in whichever party won the elections. For him, it didn't
13 matter. He was just doing his job as a civil servant. Therefore, there
14 is no motive. And not only that, he prepared the plans for the
15 swearing-in ceremony. It just so happened that on this particular
16 occasion President Kibaki was sworn in, but you saw Ambassador Muthaura
17 carrying out his official functions. There was no motive to keep the PNU
18 in power.

19 The Prosecution, in its submissions yesterday, suggested that
20 Naivasha is significant economically because of the flower, the flower
21 farms in Naivasha. Naivasha and Nakuru are not very, very important in
22 the grand scheme of things in Kenya for that matter. I mean, this is a
23 very big country and a very rich one. I have the privilege to have to --
24 to live there for a little while, and I know that these two places are
25 not very, very significant economically. But we investigated that

1 particular issue. We put the question to witnesses so as to be able to
2 have a basis for our assertions, and we interviewed
3 General Michael Gichangi, who is the director General of NSIS, the
4 person -- or the institution that the Prosecution relied on for a lot of
5 its evidence, and this is what he had to say:

6 "Ambassador Muthaura's Defence team has brought to my attention
7 the Prosecution's allegation that the violence by the members of the
8 Mungiki sect was perpetrated to keep the PNU in power. In my opinion,
9 this cannot be so."

10 Firstly, the government was already in power, and that is
11 critical. The PNU government was already in power before the violence in
12 Nakuru and Naivasha. As seen from the video, the president was sworn in
13 on the 30th of December. The violence broke out in Nakuru and Naivasha
14 in the third week of January. It doesn't add up. But he went on to say:

15 "Firstly --" excuse me. He went on to say:

16 "What would have assisted the government to stay in power, would
17 have been safeguarding the city of Mombasa because of its economic
18 significance and the city of Nairobi as the seat of government. To this
19 extent, therefore, Naivasha and Nakuru did not have such relevance in
20 keeping the PNU in power. The OTP got it patently wrong. The suggestion
21 that retaliatory attacks were carried out to keep PNU in power does not
22 hold any substance."

23 Your Honours, the Prosecution's theory in this case is one of
24 co-perpetration, and the Prosecution has given a very good description of
25 discussion of the law on that particular area, so I would not discuss

1 much of it, but this case really is more about the facts, what really
2 happened, and because of that I would discuss the contributions that
3 Prosecution attributed to Ambassador Muthaura. And they argued that
4 Ambassador Muthaura adopted the common plan. This is also something
5 rather interesting. Initially, he conceived the plan. It seems that may
6 have dropped through the cracks. Now it is he adopted the plan. But it
7 doesn't matter. We would address both issues.

8 The second point there is is that Ambassador Muthaura and
9 Kenyatta jointly procured the services of Mungiki leaders and directed
10 them to implement the common plan. And at that point, the true
11 subordinates, Ambassador Muthaura provided logistical support to Mungiki
12 operations and that he created a free zone to allow the Mungiki and
13 pro-PNU youths to carry out the retaliatory attacks with impunity.

14 I would now turn my attention to the issue of this plan. And the
15 Prosecution, in the opening did indicate that there are two critical
16 meetings, the 30th and the 3rd of January. 30 December and 3rd January.
17 My learned friend Karim Khan has adequately dealt with the meeting of
18 30th December, excuse me, 30 December and 3rd January.

19 And for the 3rd January meeting, the Prosecution is relying on
20 the testimony of Witness 0004. And the EVD for that witness is
21 EVD-PT-OTP-00248. But at 0039, this witness states:

22 "At breakfast, Francis Muthaura shouted from that -- from that
23 corner of the room to us. He told us in Kikuyu something like, 'The
24 youth, come here.' When we joined him, he said, 'It is good that the
25 youth have come.' Then he said that our community in the Rift Valley was

1 being finished and that we needed to revenge and retaliate." He used the
2 Kikuyu expression "*tu ares anna riya* (* phon)," that is pronounced
3 phonetically, which could mean either "revenge" or "retaliation" in
4 English. "He said we could not stay quiet while our people were being
5 killed. I could see that he was -- he was emotional and angry. He made
6 us feel like there was a sense of emergency.

7 This cannot be so for the following simple reasons:
8 Ambassador Muthaura is a Meru. He's not a Kikuyu. There is no evidence
9 that the Merus were being killed in the Rift Valley, so which community
10 would he be talking about? He is Meru. It was the Kikuyus that were
11 being killed. But significantly, Ambassador Muthaura does not speak
12 Kikuyu beyond saying hello. We have provided the statement of his
13 secretary, confidential secretary, with whom they've worked for years,
14 and it's at EVD-PT-D12-0005 at 002, at paragraphs 4 and 6.

15 Additionally, Ambassador Muthaura does not shout. These things
16 are not insignificant, because, your Honours, the witness talks about a
17 particular character of a person. You have seen Ambassador Muthaura for
18 yourselves. These little, little points will help you determine whether
19 this person was lying or not.

20 The Prosecution disputes the occurrence of this meeting. It did
21 not occur at all.

22 Your Honour, my colleagues have just provided me the -- a
23 document from Witness 0012, and it -- this brings into stark relief the
24 point that I was going to make. Witness 0004 described a completely
25 different person, an angry man who would be shouting at people and

1 ordering them to go and commit crimes, but let's see what Witness 0012,
2 an OTP witness has to say about Ambassador Muthaura. He says:
3 "Muthaura, I have not met him personally. He is an old man. He
4 has grey hair. He is slim. He is not tall. I'm even taller. He is
5 about that, but he does not talk much. He is Meru."

6 This -- let me get the EVD number. I believe it is EVD-PT --
7 EVD-PT-00671-0506 (* sic). This is not insignificant, your Honours. It
8 just shows that this Witness 0004 was describing a completely different
9 person. But we have better evidence to show that this meeting actually
10 did not occur at all and that Witness 0004 fabricated it.

11 The establishment at least where the meeting was alleged to have
12 been held would know if the meeting take place at their establishment,
13 the Nairobi Members' Club. The Prosecution did not interview anybody
14 from the Nairobi Members' Club in order to determine the veracity of this
15 witness's allegations. They did not. Well, we did it for them. We did
16 it for them, and we provided the statement of the manager, and it is
17 D12-0039, and EVD-PT-D12-00107. And he said he was not on duty that day,
18 but he asked his staff who were, and he provided the list of the staff,
19 and he was told that there was no such meeting at that place involving
20 Ambassador Muthaura and Uhuru Kenyatta. That is very important.

21 We didn't stop there. We didn't stop there. We interviewed two
22 other staff members of the said establishment, Witness D12-0041, and his
23 statement is EVD-PT-D12-00184. He said this meeting never occurred at
24 that place. He was on duty that day. He started work from 6.00. There
25 was no meeting at that place that day.

1 We also interviewed another staff member who was on duty on that
2 day. Their names were on the duty roster, and that is Witness 12-0051,
3 EVD-PT-D12-00219. Same information. He was on duty that day. There was
4 no such meeting. If there was any, he would have known.

5 There is no corroboration for the Prosecution's evidence. There
6 is no corroboration for the Prosecution's evidence. They tried to
7 stretch it by suggesting that Witness 0001 corroborated this evidence.
8 Well, corroboration has to be in every material particular. Apart from
9 suggesting that there was a meeting involving Ambassador Muthaura and
10 Honourable Kenyatta, the witness didn't say anything. No date, no place.
11 That can't be corroboration. My learned friend adequately dealt with
12 that.

13 There are other reasons to doubt the credibility of Witness 0004.
14 Perhaps for convenience, I would just start from the meeting of the 3rd
15 of January, but I would later go back to some of the meetings that he has
16 mentioned, such as the meeting of the 27 November -- 26 November. Excuse
17 me. I beg your pardon.

18 Your Honour, we have compared some of the statements that have
19 been provided by this witness. One is the letter to -- he sends to
20 either Kenyan National Commission for Human Rights or to Open Society.
21 The statement he has given to the Waki Commission on 2nd September, the
22 initial statement to the OTP on the 27th September, and the 3rd June 2011
23 clarification statement, and they differ in significant respects, and I
24 will point out a few of them.

25 Who told him that the meeting was arranged, or how -- what

1 information he was given? When he spoke to CIPEV, he said, and I quote:
2 On 2nd January, somebody called him and said that Muthaura and his people
3 who had met the president urgently needed to meet with them, and Muthaura
4 spoke in Kikuyu.

5 That is very, very important.

6 In the next statement, the one he gave to the OTP, he said on 2nd
7 January, 2008, around 11.00 p.m., somebody called him and asked him if he
8 was aware of what was going on in the Rift and da, da, da, da, then he
9 was told that the next day there will be a meeting. No mention of
10 Ambassador Muthaura having requested that they attend a meeting.

11 Another important thing is at what time did this meeting take
12 place? To CIPEV, it was 11.00 a.m. To the OTP it was breakfast,
13 8.30 a.m. Significant differences. I mean, this witness has over 40
14 material inconsistencies and contradictions in his statement. I would
15 waste a lot of time if I would go through them, so what we intend to do,
16 your Honours, is to file a document at the end of the confirmation
17 hearing as part of our final brief just to list out all these
18 inconsistencies. The witness even lied about the school that he attended
19 and when he finished. In the statement to Waki Commission, he said:

20 "I went to Pumwani High School in Nairobi. I left before I
21 finished form two."

22 And then to the OTP he said, I went to Karura Forest Primary
23 School. From Pumwani to Karura Forest Primary School. Completely
24 different. And then he said:

25 "I went to high school in Thika at the Krete (* phon) boys

1 school."

2 And then -- just give me a second, let me just find this. He
3 left school at Standard eight. Completely different. And there are
4 many.

5 One may say that some of these inconsistencies or contradictions
6 are insignificant. They are not, especially when the -- when you have
7 them all over the place. But there are certain things that a person
8 cannot simply forget.

9 The witness said he was a member of the Mungiki. He was
10 initiated and he described the initiation process and who initiated him.
11 It turned out to be false. He mentioned two individuals among those who
12 initiated him. Did the Prosecution interview them to find out the
13 veracity of this statement? No, they didn't, but we did it for them, and
14 obvious Witness D12-0037 debunked it.

15 "I know the person. I never initiated. He is not even a member
16 of the Mungiki."

17 The second witness, we interviewed him. The same story. He does
18 not even know Witness 0004, let alone initiate him.

19 And, your Honours, there's a lot of material in the record about
20 the Mungiki. One thing is for certain: The Mungiki's do not drink goat
21 blood during initiation, and the initiators do not wear goat skin, but
22 that is all what this witness said.

23 And, your Honour, this point just occurred to me. I don't have
24 the EVD number, but I'll just mention it for the sake it, and in our
25 filing we'll put the EVD number. The witness provided annexes to some of

1 his statement to reinforce his credibility. In one of the annexes he
2 delivered a paper at a meeting in Mathare and calling the Mungiki names.
3 They are extortionist. I don't think a Mungiki member would do that.
4 But there are lots of things in his statements which show that this
5 person is not Mungiki. He has never been. He just fabricated this
6 evidence for his own personal ends. There is no veracity to the
7 statement.

8 Perhaps I should even add further to that to reinforce the fact
9 that this witness should not be believed.

10 With regards to the 3rd January meeting, suddenly the individuals
11 changed. Initially, it was Ambassador Muthaura and Judge Thuo. The OTP
12 statement, it was Ambassador Muthaura and George Saitoti. Completely
13 different individuals. He cannot claim not to know these individuals
14 because he's described them almost accurately in his other statements.
15 But we would flesh all these issues in -- in another statement.

16 And another interesting thing is in his statement to the PEV,
17 Honourable Kenyatta was not present at that meeting. He cannot say that
18 he forgot Honourable Kenyatta. He cannot say that. Yet in the statement
19 to the OTP, suddenly Honourable Kenyatta appeared.

20 There are other important ones. Say, for instance, when was the
21 meeting at State House? When was he told about the meeting at State
22 House? In the first statement, it was the day before the meeting. In
23 the second statement, it was almost ten days later. He was told on the
24 17th for the meeting to occur on the 26th. In the first statement, he
25 was told the 25th for the meeting to occur on the 26th.

1 How did he get to the meeting on the 3rd? In the first statement
2 they drove in the car of one of their members. In the next statement, he
3 took a bus.

4 Your Honours, this is the quality of the witnesses whose
5 testimony we have to try to deal with, but this is the kind of evidence
6 on which your Honours are being asked to confirm serious charges against
7 innocent individuals.

8 Your Honour, I would now move on from this witness and look at
9 the OTP's other submissions, and the OTP suggest -- excuse me. The OTP
10 tried to find corroboration for this, and they suggested that NSIS issue
11 a report on 7 January which says that Mungiki sect leader has directed
12 sect coordinators to carry out the recruitment and oathing ceremonies in
13 preparation to joining the current skirmishes in some parts of the
14 country. Therefore, it corroborates that meeting. In what respect? In
15 what respect? It's by no stretch of the imagination can this piece of
16 evidence be viewed as corroboration for the meeting attended, allegedly,
17 by Ambassador Muthaura and Honourable Kenyatta. But the Defence observes
18 that the OTP relies extensively on NSIS, indeed, NSIS is a very good
19 intelligence institution, but only when it is convenient. Only when it
20 is convenient.

21 My learned friend has touched upon this point because we have
22 evidence suggesting that the director general of NSIS or his institution
23 has investigated the issue of these meetings, which is the centre of this
24 case. It is the bedrock. It is the anchor. If the OTP believed this
25 report or statement by general -- the director general Michael Gichangi,

1 this case would have been thrown out. This case must go on; therefore,
2 you push that aside and toss it as pexo. It's not good enough. It does
3 not -- it's not really good enough.

4 But one thing is important, General Michael told CIPEV that this
5 was all rumour. We have heard that rumour in this room. We have all
6 seen it.

7 Your Honours, the Kenyatta team played a video on the third -- on
8 the first day of the hearing. Let me -- let me try to get the EVD
9 number, Madam President. That video talks about exactly what this case
10 is about, on 3rd of January, 2008, but that's the case we face. It just
11 goes to show this is all a rumour that people have latched on to,
12 packaged it, sold it to the OTP, and they bought it, and that's why we
13 are here. There is no truth to it, no truth to it as the evidence will
14 further state.

15 On that day, on the 3rd of January, Ambassador Muthaura chaired a
16 NSAC meeting as my learned friend indicated, but there is something
17 important about that meeting that your Honours should know. On that day,
18 under his chairmanship, NSAC issued instructions to say, on
19 EVD-PT-D12-001 -- 0055 at page 0058, and this is what NSAC decided:

20 "To ensure prompt arrest of perpetrators of violence to face the
21 law. Where rowdy mobs kill security or other government official, the
22 response of the government should be swift and extraordinary, to serve,
23 to serve as a deterrent."

24 It goes on to say:

25 "The commissioner of police and commandant administration police

1 to mobilise more security personnel for peaceful -- from peaceful areas
2 to beef up security in areas affected by ethnic violence."

3 Important recommendations, important recommendations. And they
4 recommended as well to the permanent secretary, minister -- ministry of
5 state for provincial administration and internal security to convene a
6 meeting of elected and other political leaders from Nairobi to persuade
7 the Kikuyu community not to retaliate, to persuade the Kikuyu community
8 not to retaliate.

9 The documents speak for themselves. The minutes show that
10 Ambassador Muthaura chaired the meeting that day. This is what he was
11 doing, working for peace and not planning a crime with some random,
12 unknown Mungikis. This is what he was doing.

13 The Prosecution's case simply does not add up. It does not. It
14 does not. It simply does not make sense.

15 If this case is to be believed, it means one is prepared to
16 accept that Ambassador Muthaura is some two-faced person who is blue
17 today, he's green the next day. Maybe the Prosecution would try to
18 convince the Judges to believe that, but let us tell you what
19 Ambassador Muthaura's colleagues believe in. We will tell you.

20 His colleagues in NSAC, people with whom he has worked for a long
21 time, people who come from different political backgrounds, from
22 different ethnic groups in Kenya, this is what they think of him: On
23 that same day, the 3rd of January, that same day, NSAC members honoured
24 him. They passed judgement on his character, and it's on the record.
25 How did that happen? NSAC was recommending the setting up of a -- of a

1 coordinating reconciliation centre, but it needed people who were
2 neutral, people who were neutral. Who did they select? Who did they
3 select? Ambassador Muthaura was one of them. Ambassador Muthaura was
4 one of them. But another interesting thing is, another person who has
5 associated with the Prosecution office a few times was also, was also on
6 the list, an eminent man, but we asked him questions about this group.
7 He said, of course, the group did not get to start work, but -- I'll
8 quote what he said. I'll quote what he said.

9 "I would not be surprised if Ambassador Muthaura would have been
10 nominated to be a part of such a group as well given that I know him to
11 be a person who is politically neutral and impartial and who is -- and
12 who is a person," that's what's contained in the document so I have to
13 read it as it is, "and who is a person who is highly respected by the
14 public from all political and ethnic divides. Ambassador Muthaura is
15 known as a person motivated by the interest of the nation."

16 And this individual belongs to a different ethnic group, not a
17 Kikuyu. Well, my colleagues tell him I can name him. He's
18 General Opandi who has been an expert witness for the Prosecution in two
19 cases. He is a Luhya, and that is important.

20 I will move on to the next point, but I just -- your Honours,
21 these documents are important, and to have Ambassador Muthaura chair NSAC
22 that morning, pass those decision, and on the same day have his
23 colleagues pass such important judgement on him, opposite the theory the
24 Prosecution is trying to say. But there is also more to it on that
25 particular day. My learned friend showed this video, the video of the

1 3rd of January. The president gave a speech, his first speech to the
2 nation after inauguration. Critical time in Kenya, very important. On
3 that day, Ambassador Muthaura and his colleagues wrote the speech. How
4 could this man sit at NSAC, pass this important decision calling for the
5 arrest of those who were involved in committing crimes, asking for
6 security to be beefed up in areas where there is violence, have his
7 colleagues pass such important judgement about his character, went to
8 State House, wrote a beautiful speech calling for peace in the nation,
9 how could this person have done all that in that day and turn around and
10 have coffee and tea and breakfast with Mungiki and plan retaliatory
11 attacks with them?

12 Your Honour, it simply defies logic, but I would move on to
13 another point that Ambassador Muthaura employed several channels in
14 securing the services of the Mungiki to implement the common plan. My
15 colleague, my learned friend Karim dealt extensively with the reliability
16 of the witnesses who provide the alleged evidence, but what is clear is
17 that all these other meetings that have been mentioned,
18 Ambassador Muthaura was not present. He was not present.

19 Who is he linked with in the Mungiki? Who he is linked with? He
20 is linked with the Prosecution -- with a Defence witness. Did the
21 Prosecution attempt to interview this person, at least get some
22 clarification as to whether what the witness is saying is true? No.
23 Once he mentions Muthaura, let it go. It's good enough. But that's not
24 the way court works. That's not the way court works.

25 A person mentions Muthaura. What's your basis for knowledge?

1 Not asked. Were you present? Not asked. Did you see it? Not asked.

2 That's the kind of case you are being asked to confirm.

3 We've been told about this theory of PNU liaison, PNU Liaison I,
4 PNU Liaison II. Did the Prosecution interview them? No. We did, both
5 of them. One person said he saw Muthaura only once, never met him.
6 Never met him. The other person expressed his indignation at the
7 investigations and how it was conducted, because he was there. He could
8 have provided the information, but not asked, not asked.

9 So in this case, there is a lot of talk about millions of
10 shillings, lots of millions. I heard about Honourable Kenyatta is rich,
11 but all these millions, just to bandy them about like that, it's simply
12 unbelievable, it's simply unbelievable. But I believe it is Witness 0012
13 who talks about the meeting where Honourable Kenyatta gave millions to
14 each MP. Apparently a significant meeting. Ambassador Muthaura was
15 never there.

16 Since I started working on this case, something bugged me. The
17 first thing was the significant amount of money that Ambassador Muthaura
18 is -- was alleged to have distributed disappeared through the cracks now
19 is a new theory, now is a new theory.

20 We are being told that he is on top of an organisation comprising
21 of police, Mungiki, and what have you. He's never been to any meeting.
22 He's never contributed any money. What kind of leadership is that? I
23 think that should have prompted the Prosecution to revisit the situation,
24 but, no, they didn't and went ahead with this theory, and that's why it
25 will not pan out. But what is significant is the witnesses who talk

1 about contribution of money, uniforms, and guns. All these witnesses are
2 hearsay. In the first place, they are anonymous witnesses. They provide
3 hearsay testimony from anonymous sources. Triple jeopardy, triple
4 jeopardy. It simply will not fly, it simply will not fly. That
5 evidence -- that kind of evidence is not good enough, is not good enough.
6 More so, more so, when it relates to a place that is not charged in
7 the -- at least in the DCC. It relates to Kibera and has nothing to do
8 with Nakuru and Naivasha.

9 One other allegation is the issue of administration police
10 uniforms, that administration police uniforms were provided to -- to the
11 Mungiki through Ambassador Muthaura.

12 We would say that this witness who provides the information that
13 these meetings were held in Michuki's office, Karim read out the
14 statement of Michuki, so perhaps I will just move along and not deal with
15 that point, because it's been extensively dealt with and -- but it's
16 quite staggering that the Prosecution would accept this evidence without
17 attempting to interview any of the persons named by their own witnesses.
18 We tried to do so. Every single person named to have been, say, at the
19 State House meeting, we have tried to reach them. Every person named at
20 the Nairobi Members Club meeting we have tried to reach and interview,
21 but the Prosecution, no. Get one witness. It does not matter the
22 quality of testimony. Just so (* indiscernible). Get the person
23 indicted. The evidence will later follow. That's not good enough.
24 That's not good enough.

25 Your Honour, there are allegations about weapons having -- and

1 uniforms having been obtained from Nakuru State House. Did they
2 interview anybody for -- who works at Nakuru State House? No. Did they
3 interview the commandant of the police unit that is allegedly
4 responsible? No. But we did. We did. And we would refer -- we would
5 refer to the statement of Kinuthia Mbugua, EVD-PT-D12-0081 (* sic), at
6 0164, pages 0171, paragraphs 30 through 33. And this is what he has to
7 say:

8 "On the allegation that weapons were issued from the AP for the
9 purposes of the preparation of violence, the allegations fall short of
10 reality on the practical aspects. It is unimaginable in the context of
11 the administration police procedures and practices that any firearms
12 could be issued to criminal gangs. I am aware that the AP -- that in the
13 AP issuance of firearms is highly managed."

14 Your Honour, we have also taken a statement from person in charge
15 of security at Nakuru State House, and the person says:

16 "I have been informed of allegations that the permanent secretary
17 CPS in the ministry of internal security and provincial administration,
18 Francis Kimemia visited State House Nakuru in January 2008 and obtained
19 military uniforms and guns, which he gave to a Mungiki member."

20 He said these -- those allegations are false. No visitors are
21 allowed into any State House and lodges in the absence of the president.
22 Members of Parliament, permanent secretaries, provincial commissioners,
23 head of public service, ministers, Prime Minister, or any other person,
24 including the vice-president, cannot access a State House or lodge in the
25 absence of the president.

1 Your Honours, the witness provided the occurrence register for
2 State House Nakuru during that period, and we've made it available.

3 Your Honours, we have also interviewed a known Mungiki member, a
4 person who's been on top of the Mungiki hierarchy in Nairobi, and his
5 statement is contained at EVD-PT-D12-00201, and this is what he has to
6 say:

7 "It is not true that Mungikis were given administration police
8 uniforms and guns to go and attack Nakuru and Naivasha. The suggestion
9 is totally false. This is madness."

10 But this is a person who has a reason to know, unlike those
11 peripheral Mungikis who are not connected in any way to the Mungiki
12 hierarchy to talk about rumours, information that is contained in the
13 press and so forth. This person is saying this is madness.

14 Look at the statement of one of the -- no, excuse me. I'll just
15 leave that point and move on. I'll just leave that point.

16 Your Honour, we refer again with regards to this issue of guns in
17 Nakuru, to the statement of -- to the statement of a confidential witness
18 from Nakuru. His statement is contained in EVD-PT-D12-00105 at 0107, at
19 paragraph 16, and the witness said in Nakuru people were armed with
20 sticks and *pangas*. No mention of guns. No mention of guns.

21 One wonders, in fact, where have all these guns disappeared to,
22 because if guns came from Somalia, *pangas* were purchased from Nairobi,
23 from Somalia, from Naivasha, and yet there is no single OTP witness who
24 says, "I have seen a person with a new *panga*," because it's a rumour.

25 The OTP tried with Witness 0002. The OTP tried with Witness 0002 and

1 asked the person:

2 "What was the condition of these *pangas*?"

3 "Did you see a new *panga*?"

4 "No."

5 So where have all these new *pangas* disappeared to? But we would
6 come to that in our discussion of -- of Nairobi -- Nakuru and Naivasha.

7 I would now turn to the issue of instructions that were issued
8 and the authority that Ambassador Muthaura has or does not have over the
9 police and the Mungiki. It is surprising, at least to me, that the
10 source or the evidence, at least which has been relied on at the DCC, to
11 support the assertion that Ambassador Muthaura is on top of the civil
12 service is a standard newspaper article. It is a "Standard" newspaper
13 article, and this is what it says -- the EVD is EVD-PT-OTP-00161, 00182.
14 A "Standard" newspaper, and this is what it says:

15 "Technically, all public servants, including senior State House
16 officials, are supposed to report," supposed to report, "to the head of
17 public service, Ambassador Muthaura."

18 This person is not even sure. He's not even sure.

19 The Prosecution interviewed another witness, EVD-PT-OTP-0219, in
20 short, to get information about the key players and the leaders, and he
21 says:

22 "I am not able to identify key players during the PEV because it
23 was not in the task force mandate and we didn't look into the PEV. At
24 least ask a Kenyan."

25 And that is where the Prosecution's problems stem from, a gross

1 misunderstanding of the structures of Kenya and their relationship. That
2 is where the problems in this case stem from.

3 Being chairman of NSAC or head of public service does not confer
4 upon Ambassador Muthaura any authority over government ministries,
5 permanent secretaries, or the heads of relevant security institutions.

6 We interviewed Kenyans who worked in Kenyan institutions and had
7 first-hand knowledge about the mandates of Kenyan security institutions
8 and their relationships. Let us now examine what they have to say. And
9 we started with President Kibaki, and this is what he stated in
10 EVD-PT-D12-0062. He says:

11 "When I heard about the allegations against Muthaura by the
12 International Criminal Court, I was personally shocked. Muthaura does
13 not possess the authority of the kind that has been alleged."

14 We then interviewed the Attorney General. He is now former
15 Attorney General, and it is contained in EVD-PT-D12-000 -- 00103, and at
16 paragraph 96 -- at 96, rather, paragraph 14, this is what he has to say:

17 "NSAC reaches its recommendations by consensus. Members of NSAC
18 sit in equal capacity as government functionaries. The role of the
19 chairman of NSAC, Ambassador Muthaura, is to facilitate through
20 discussions and to ensure that recommendations made by NSAC are
21 transmitted to the CFC if it warrants their attention and the relevant
22 government department for action."

23 He stated further:

24 "The chairman of NSAC cannot impose a decision on its membership
25 because he does not have the statutory authority to do so. Quite apart,

1 the membership is large and reflect different opinions from different
2 branches of government, and clearly in these circumstances it is
3 impossible for the chairman of NSAC to impose his own personal decision
4 on the membership."

5 We also interviewed Major-General Michael Gichangi. He also
6 corroborated that view. It's contained in EVD-PT-D12-00053, 0401.

7 We also interviewed the head of another security institution,
8 General Kianga, he also corroborated that view. Cyrus Gituai, the former
9 provincial secretary for provincial administration and internal security.
10 He also confirmed that view. You would -- this relevant material is
11 contained in EVD-PT-D12-00036, 00 -- 0291 for Kianga and for Gituai,
12 EVD-PT-D12-0063 at 0003.

13 But we also interviewed the chairman of the public service
14 commission, someone who at least must know how government is organised,
15 and this is what he has to say at EVD-PT-D12-000 -- 00090, at 0212. And
16 he explains the role of the head of the public service within the
17 structure of the civil service of Kenya, and he states:

18 "The office of the head of the public Service serves as a link
19 between the policy makers and implementers. The main role of the office
20 is to coordinate government. Decisions of cabinet are communicated to
21 the permanent secretaries through the office of the head of the public
22 service. Issues requiring a national policy which emanate from the lower
23 cadres of the public service filter through the permanent secretaries to
24 the head of the public service. The head of the public service then
25 prepares them as agenda items for discussions at cabinet level."

1 In relation to NSAC, he states at the same page that the NSAC is
2 one of the inter-agency committees chaired by the head of public service.
3 It is a forum bringing together various security agencies, each of
4 which -- each with a specific mandate within the law. The role of the
5 head of the public service is to ensure co-ordination within the various
6 agencies as they execute their mandate. The head of the public service
7 does not have any authority over any of the other members of NSAC. Each
8 member has their own mandate to execute independent of the others.

9 Your Honours, this is the immediate past chairman of the public
10 service commission of Kenya. He joined the public service in 1976 and
11 retired after 35 years of service in the -- in the Kenya civil service.
12 One cannot know the structure, the roles and mandates of public officials
13 in Kenya better than him.

14 Your Honours, NSAC is an advisory body. It does not have
15 executive authority. It simply does not have it.

16 We interviewed the Attorney General, and he has this to say at
17 EVD-PT-D12-00103, 0093. He said at paragraph 13:

18 "NSAC's role is advisory. Based on informations and briefings
19 received from relevant departments, NSAC makes recommendations to
20 cabinet, the CSC, and to relevant departments for action. Apart from me
21 as Attorney General, all other NSAC members are civil servants,
22 operational personnel such as heads of key security institutions,
23 accounting officers, and permanent secretaries. It is not an executive
24 body. The members are civil servants. As such, it is not a
25 decision-making or an implementing body, and its role is to provide

1 advice to government on matters of national security for action. NSAC is
2 not an executive decision-making body within the civil service structure
3 of Kenya."

4 We interviewed also the then minister for provincial
5 administration and internal security, John Michuki, honourable. This is
6 a man who joined Kenya's civil service in 1957, 1957. That's when he
7 joined Kenya's civil service, so he knows what he's talking about. It is
8 contained in EVD-PT-D12-0088 to 0195, at 0199 at paragraphs 17. And he
9 states that:

10 "NSAC is an advisory body in which all heads of the respective
11 security agencies are members. As chairman of NSAC, Muthaura did not
12 have a decision-making role. As chairman of NSAC, Muthaura did not have
13 any authority over any of the security agencies, including the police."

14 This is a person who was minister for provincial administration
15 and internal security, a ministry under which the police fall. This is
16 what he has to say.

17 And then he went on to say:

18 "There are clear lines of responsibility in government, and that
19 is clear from the governing laws of Kenya."

20 And he continued in paragraph 18 to say:

21 "Members of NSAC are not subordinate to Muthaura. Any idea that
22 Muthaura can give orders over the heads of government ministers is
23 absolutely wrong."

24 Your Honours, we have a whole lot more evidence on this
25 particular issue, and we refer you to Cyrus Gituai, EVD-PT-D12-0090 to

1 0210 at 0213, paragraph 14. We refer you to Cyrus Gituai. We --
2 perhaps, your Honours, I can withdraw that one, because I do not have the
3 EVD number, and I would substitute it with General Jeremiah Kianga,
4 EVD-PT-D12-0036 (* sic), 0291 at 0293 at paragraph 11; and also the
5 statement of Francis Kimemia, who is currently the permanent secretary
6 for provincial administration and internal security. At least he would
7 know how the police would function.

8 So the evidence regarding the authority -- your Honours, I would
9 just go back to Cyrus Gituai. I have been provided with the EVD so
10 kindly by my colleagues. It is EVD-PT-D12-0063.

11 Does Ambassador Muthaura have any power or authority over the
12 police or any security chief, for that matter, because the whole reason
13 why we're here is one supposed order that Ambassador Muthaura is alleged
14 to have been given, one order, and we put the question to honourable John
15 Michuki, former minister for provincial administration, and this is what
16 he has to say, that:

17 "The commissioner of police is appointed by the president and
18 reports to the minister of state for provincial administration and
19 internal security. During my time as minister of state for provincial
20 administration and internal security, the Kenya police was within my
21 authority. After I left this position, it fell within the authority of
22 the minister who succeeded me, namely Honourable George Saitoti. The
23 commissioner of police is in charge of the operational issues of the
24 police pursuant to the Police Act."

25 At the same page, he states:

1 "As evidence in the blue book, the commissioner of police does
2 not report to the head of public service or the chairman of NSAC. The
3 commissioner of police during 2007 and 2008 pre- and post-election period
4 was General Hussein Ali. At no time did General Ali report to Muthaura.
5 One of the major duties of Muthaura is to coordinate government business,
6 and all ministries and government departments should brief him as
7 necessary. It does not create any superior/subordinate relationship."

8 Francis Kimemia, the current permanent secretary ministry of
9 provincial administration and internal security states in
10 EVD-PT-D12-0038, 0301 at 0302, paragraph 5, and he said:

11 "The ministry of state for provincial administration and internal
12 security comprises the following main institution. Provincial
13 administration, Kenya police, the administration police, the government
14 printer, and other institutions like campaign against drug abuse. The
15 ministry provides the policy and strategic direction to these
16 institutions. The commissioner of police is in charge of the operational
17 issues of the police. The police did not report to Ambassador Muthaura."

18 That's what he said.

19 Your Honours, the evidence, it's quite overwhelming as to what is
20 the authority of Ambassador Muthaura. It is very clear from the excerpts
21 of the statements I have read out that he had -- he does not have or did
22 not have the authority that was attributed to him, but Cyrus Gituai, a
23 former permanent secretary of -- of the ministry of state for provincial
24 administration and internal security also added his voice to this, and he
25 said at EVD-PT-D12-0063 to 0001 at 0005, paragraph 18, that

1 Ambassador Muthaura is not in charge of Kenya police. The police does
2 not report to Ambassador Muthaura. He further state that NSAC does not
3 give directions on operational issues. The head of each agency is
4 responsible for the specific operations of his own institution or
5 department. The police commissioner is responsible for the operations of
6 the police, the Chief of Staff is responsible for the military
7 operations, and the director general is responsible for intelligence
8 operations. It's quite clear. But let's hear what those heads of
9 institutions have to say about authority of ambassador over them, since
10 the Prosecution's case is that Ambassador Muthaura is head of security.
11 His authority as chairman of NSAC and head of public service give -- puts
12 him in a superior relationship with General Ali. That is the case. The
13 witnesses do not seem to agree with that.

14 Major-General Michael Gichangi, who is the current director
15 general of NSIS states at EVD-PT-D12-0053 at 0401 -- 0401, excuse me, at
16 0405 to 0406, paragraphs 16 and 17, and he said:

17 "The Defence team has made reference to claims made that
18 Ambassador Muthaura as chair is in charge of national security and the
19 police. I state that Ambassador Muthaura as NSAC chairman does not have
20 executive powers as the committee is advisory and -- and therefore this
21 cannot make him in charge of national security of Kenya nor the Kenyan
22 police. The police operates under the Police Act which designates
23 clearly the persons in charge of the police and its command structure."

24 We have asked the question to the attorney general, but I think,
25 your Honours, it has become unduly cumulative because the evidence on

1 this simply staggering.

2 I will now turn to Ambassador Muthaura's *de facto* authority over
3 the police.

4 You have heard what the president said, that Ambassador Muthaura
5 does not possess the kind of authority that is attributed to him. I
6 don't think that it can be any clearer now. So for that reason, I would
7 move straight away and deal with the issue of Ambassador Muthaura and the
8 Mungiki. Is he a member of the Mungiki as alleged by Witness 0012? My
9 learned colleague Karim Khan has dealt with it already, but perhaps I
10 should just read out this excerpt from the statement of Phares Rutere,
11 who is Secretary-General of the Njuri Ncheke, and he states:

12 "I am absolutely sure that there is no link of any nature
13 between Mungiki and Njuri Ncheke. It is, in fact, very insulting to the
14 traditions of the Meru people to suggest that there is any link or
15 similarity between the council and that (* indiscernible)."

16 The issue of the link between Ambassador Muthaura and this
17 person, a Defence witness, D12-PP-0047. This person has clearly stated
18 he is no Mungiki. He rubbished the suggestion that he has ever had any
19 contact with Ambassador Muthaura, but this is the person who is being
20 suggested to be the link between Ambassador Muthaura and the Mungiki. He
21 is the link man or the network, the network person, and we refer your
22 Honours to EVD-PT-D12-00228.

23 And since the Prosecution has relied so heavily on the director
24 general of NSIS, we have interviewed him, and he has stated quite --
25 quite categorically that Ambassador Muthaura has no link with the

1 Mungiki. I believe my learned friend Karim had dealt with that, so I
2 would not read out the full excerpts of what the witness said.

3 The next thing I would want to deal with is whether
4 Ambassador Muthaura intended, intended, that these crimes be committed.
5 This is important because in order to determine what he intended to do,
6 we have to at least examine his actions, what he's done during this
7 relevant period. Before that, though, we would argue that there was no
8 common plan. The so-called meetings that the Prosecution allege never
9 occurred. There were, of course, meetings which occurred in Nairobi
10 during the time of the PEV as confirmed by the director general NSIS.
11 Ambassador Muthaura never participated in any meeting to plan attacks
12 against anybody.

13 We would show that the following actions taken by
14 Ambassador Muthaura, in fact, undercut the Prosecution assertion that
15 this person intended to commit crimes and planned -- and procured people
16 to commit those crimes. And we go back to NSAC. I have earlier referred
17 to the 3rd January 2008 NSAC meeting, but there are more.

18 On the 3rd -- excuse me. On the 3rd of January, besides issuing
19 recommendations asking for the police and the commandant of
20 administration police to mobilise more security personnel and move them
21 to -- move them from peaceful areas in order to beef up security in other
22 areas, on that same day they recommended some form of mediation, that
23 police (* indiscernible) should be talked to to try to calm their people
24 down. Such a person certainly does not intend harm for anybody.

25 On the same day, 3rd January, he helped write the speech that the

1 president made to the nation. We have a number of witnesses who
2 testified to that. There is Dr. Alfred Mutua. You can find his
3 statement in EVD-PT-D12-00 -- 12-00044. We have Hyslop Ipu. There are
4 other witnesses.

5 So this further states that Ambassador Muthaura in the statement,
6 for instance, of Dr. Alfred Mutua, he claims to have been with
7 Ambassador Muthaura almost throughout the period, so Ambassador Muthaura
8 could not have been anywhere else, and this account is also corroborated
9 by the statement of Isaiya Kabira, the head of the presidential press
10 service in Nairobi, and his evidence is contained in EVD-PT -- excuse
11 me -- D12-00234, 005 at paragraph -- at para 17 and 18 in which he
12 confirms the presence of ambassador at State House throughout that day
13 from the afternoon.

14 We also refer to presidential press statement that was issued for
15 that day, EVD-PT-012-00236. The controller of State House, Hyslop Ipu,
16 his statement is EVD-PT-D12-0012 (*sic), 00194.

17 Your Honours, on 25th January, NSAC also recommended that members
18 of the Kikuyu community should be encouraged to exercise restraint
19 against retaliation. PNU MPs should also avoid antagonising them with
20 their constituents, thus derailing the peace initiative, and that is
21 EVD-PT-D12-0021 (* sic) at 0149. And on that same day, they recommended
22 to the minister of state for provincial administration and internal
23 security that there were tensions in building up in Nakuru, rather, the
24 brief did, and said that the actions that NSAC has cause to be taken.
25 The deployment of 210 officers and dispatch of 25 Land Rovers to the

1 provincial commission. That's all they could do. They don't control
2 forces.

3 On 27th January 2008 they recommended again proactive measures be
4 employed to stop Kikuyu revenge, and then the police commissioner
5 informed members that security operation to forestall further skirmishes
6 has already started that day, on 27th January, 2008, but this day,
7 Nakuru, there was violence in Nakuru. There was violence in Naivasha.
8 So NSAC at least within their limited powers have acted, including
9 Ambassador Muthaura. And we refer to EVD-PT-D12-0022 (* sic) at 0157 to
10 0159.

11 We also offer into evidence the minutes of 21 January 2008,
12 EVD-PT-D12-00019 at 0135, and the minutes reflect the recommendation by
13 NSAC to the Attorney General and commissioner of police to ensure
14 immediate arrest of executors and inciters of post-election violence.
15 This is what they recommended. It would be quite astonishing that
16 Ambassador Muthaura would turn around and do something else.

17 The minutes of the 27 January are contained in
18 EVD-PT-D12-000222 (* sic), at 0159. The minutes reflect that after
19 deliberations and in order to address the post-election violence in
20 Nakuru and environs, NSAC members recommended the following: that the
21 police commissioner should immediately launch a robust offensive against
22 the managers and executors of post-election violence as earlier
23 recommended by NSAC members, to destroy their organisational structure.
24 Similar action should be directed to attackers and their leaders.
25 Members felt that the number of people arrested is not commensurate with

1 the crimes committed and asked the commissioner of police to intensify
2 action to net those involved."

3 And minutes of 14 January 2007, EVD-PT-D12-0016 at 0109. They
4 recommended the establishment of a judicial commission of inquiry to be
5 constituted to inquire into the matter and advise the government on
6 course of action to take to forestall similar occurrence. The Attorney
7 General was requested to facilitate formation of the commission. And
8 typically on 14 January, that same day, Ambassador Muthaura sent a letter
9 to the Attorney General informing him of the decision and asked him to
10 kindly take action along the recommendations of NSAC. The letter has
11 been provided. It's contained in EVD-PT-D12-0015.

12 Your Honours, these are just a sample of actions which show that
13 Ambassador Muthaura worked tirelessly to prevent violence. If you look
14 at the minutes, you would see they even sat on Sundays. They even sat on
15 December 31st. Many people would take off those days. Not for them.
16 His was to try to find a solution to prevent violence. To therefore
17 suggest that he intended to commit the very crimes that he worked so
18 arduously to prevent from occurring is just inexplicable. How can one
19 explain that on the one hand he planned the crimes and on the other he's
20 trying to prevent them from happening and on the other he sent or he
21 helped in making decisions leading to deployment of forces to at least
22 protect people. It simply does not make sense.

23 Ambassador Muthaura should be congratulated. He should be
24 congratulated.

25 And we interviewed a colleague of his, and this is what he has to

1 say, Bitange Ndemo former permanent secretary ministry of information,
2 and it's contained in EVD -- current, current ministry -- current
3 permanent secretary, ministry of information. And his statement is
4 contained in EVD-PT-D12-00092 at 0016, at paras 35 and 36, and this is
5 what he says:

6 "I like many Kenyans and civil servants were shocked at the
7 allegations of crimes and association with Mungikis leveled by the ICC
8 Prosecutor against the ambassador. I make this statement for a number of
9 reasons: First, apart from his character and integrity which I have
10 spoken to extensively, ambassador as chair of NSAC has been in the
11 fighting line against criminal activities and criminal organisations
12 which threaten the stability of the state."

13 So it is preposterous to say that he would associate with the
14 Mungikis. This is an unacceptable proposition by the ICC Prosecutor.
15 Similarly:

16 "I make this statement based on my observations of the
17 ambassador's attitude in the times we interacted at NSAC during the time
18 of the election crisis. He was concerned with the security situation to
19 the extent that he invited all stakeholders to help in finding a solution
20 to the crisis. He always listened to all views and ensured
21 recommendations by relevant -- to relevant institutions or relevant
22 implementing authorities," I beg your pardon, "were forwarded from NSAC.
23 As I said, the ambassador, if he was a criminal, would not have
24 spearheaded efforts to take steps to ban such text messages; to call for
25 perpetrators to be brought to justice, and most importantly his role in

1 the development of legislation and media strategy to regulate the media.

2 How can you associate such a man with criminality?"

3 Thank you.

4 PRESIDING JUDGE TRENDAFILOVA: Mr. Faal, is this the end of your
5 presentation?

6 MR. FAAL: Yes.

7 PRESIDING JUDGE TRENDAFILOVA: Perfectly within the timing.

8 MR. FAAL: Thank you.

9 PRESIDING JUDGE TRENDAFILOVA: Because otherwise I wouldn't like
10 very much to remind you very much about the timing. So we shall proceed
11 with the break. On behalf of the Chamber there is a proposal whether the
12 parties would agree that the break is limited to one hour so that we
13 commence -- what about the Prosecutor's Office, because the Defence are
14 nodding in agreement. So is it a silent consent --

15 MS. ADEBOYEJO: We have no problem with it, Madam President and
16 your Honours.

17 PRESIDING JUDGE TRENDAFILOVA: Thank you very much. So we shall
18 proceed at 2.00 sharp.

19 MR. OGETTO: Your Honour. I'm sorry, your Honour.

20 PRESIDING JUDGE TRENDAFILOVA: Yes.

21 MR. OGETTO: I think probably there is a small misunderstanding.

22 I do not think that this is the end of the submissions by the --

23 PRESIDING JUDGE TRENDAFILOVA: No, no. It's just for the moment
24 before the break. Thereafter it's your policy --

25 MR. OGETTO: (* Overlapping speakers)

1 PRESIDING JUDGE TRENDABILOVA: It's your strategy, of course.

2 MR. OGETTO: (* Overlapping speakers)

3 PRESIDING JUDGE TRENDABILOVA: The Chamber is not interfering
4 into your decisions how to best serve the interests of your client. So
5 let me ask the interpreters. Are they fine with a one-hour break?

6 THE INTERPRETER: Well, Madam President, the interpreters would
7 have needed an hour and a half to be able to catch their breath for the
8 break.

9 PRESIDING JUDGE TRENDABILOVA: Thank you for your response.

10 THE INTERPRETER: Madam President --

11 PRESIDING JUDGE TRENDABILOVA: (Microphone not activated) ... we
12 will finish at 3.00. Are you nodding in agreement, because I do not hear
13 anything.

14 THE INTERPRETER: Hello? Can you hear me, Madam President?

15 PRESIDING JUDGE TRENDABILOVA: (Microphone not activated)...
16 fine. So we suspend the hearing and we shall meet at 2.00. Have a nice
17 lunch.

18 COURT USHER: All rise.

19 Recess taken at 1.00 p.m.

20 On resuming at 2.00 p.m.

21 (Open session)

22 COURT USHER: All rise.

23 PRESIDING JUDGE TRENDABILOVA: Please be seated. We resume our
24 last session for today, and the Defence team of Mr. Muthaura has one hour
25 left. So the floor is over to you.

1 Just to ask, is there someone new at this late --

2 MS. ADEBOYEJO: None from the Office of the Prosecutor.

3 PRESIDING JUDGE TRENDAFILOVA: You do not have.

4 In the Defence, there is no one new. So please, the floor to
5 over to you.

6 MR. OGETTO: Good afternoon, your Honours. I am basically going
7 to focus on the alleged crimes in Nakuru and Naivasha, but before I do
8 that, your Honours, allow me to make just one observation in relation to
9 a critical witness that the Prosecution uses to attempt to show that my
10 client was involved in the commission of crimes in Nakuru and Naivasha,
11 and that is Witness number 0010, EVD-PT-OTP-00674.

12 Your Honours, a lot has been said about Prosecution witnesses and
13 some of the bizarre allegations that they make, but I want to point out
14 one aspect of this particular witness that is specifically interesting,
15 and your Honours will recall that this is the witness who talks about an
16 alleged meeting in State House, bringing together about 100 Mungiki, and
17 he says quite interestingly that this happened either mid-January or end
18 of January. Interesting, because if this witness was really involved in
19 the events in Naivasha as he says, it defeats logic to understand why he
20 cannot recall when the events in Naivasha happened and why he would now
21 say that this meeting took place either in mid-January or end of January.
22 But that is not the end of it.

23 This witness, your Honours, says that when they went to State
24 House that Saturday morning, this Mungiki, holding a rally in State
25 House, basically, in the gardens of State House, never mind that State

1 House is occupied by not only the president but many other people,
2 including employees from different ethnic communities all over Kenya, and
3 this witness wants this Court to believe that they can hold what he calls
4 a private meeting in State House. Then he says that they were served
5 with drinks, including alcoholic drinks. And this is at page 0552.

6 And, your Honours, if you pause for a moment, serving alcoholic
7 drinks to Mungiki in State House, the residence of a president, and these
8 are Mungiki who are supposed to be on their way to fight. They're going
9 to fight, and you're giving them beer, you're giving them alcohol, it
10 defeats logic. It shows how incredulous, how incredible the Prosecution
11 witnesses are. It shows the hopelessness of the Prosecution case. And,
12 your Honours, these details are extremely important, because they're
13 extremely telling, telling of the nature of the case that the Prosecution
14 has brought before your Honours.

15 Having said that, your Honours, it is important to note that the
16 Prosecution case in relation to Nakuru and Naivasha is contradictory.
17 The Prosecution alleges that my client was part of a plan to commit
18 crimes in these two places, that these crimes were meticulously planned,
19 and that the police stepped in to help by letting Mungiki attack ODM
20 supporters.

21 Now, your Honours, the Prosecution's own testimony from witnesses
22 that he has interviewed contradicts this theory, and, your Honours, I
23 wish to refer to Prosecution witness 0011, EVD-PT-OTP-00309, at page
24 1315, lines 403, 408.

25 As a preliminary point, Witness 0011 is one of the key witnesses

1 for the Prosecutor. The Prosecutor's recorded lengthy statements from
2 this particular witness, and this is what the witness says at page 1315,
3 and I quote: For Nakuru, there was confrontation, and "some Mungiki
4 people felt in their own initiative they'll have to defend themselves and
5 their community. This is because some part of Nakuru had confrontation
6 with a Kalenjin."

7 A statement from a Mungiki who is supposed to have been in the
8 know of what happened during the post-election violence, a statement that
9 the Prosecution has interviewed at length, saying that the violence in
10 Nakuru was not planned. It was Mungiki in Nakuru who took it upon
11 themselves to defend themselves.

12 Nevertheless, that is not the end of the story. The Prosecution
13 has disclosed the CIPEV report, what is known ordinarily known as the
14 Waki report, and that is EVD-PT-OTP-00228.

15 Now, what is important about that report, your Honours, is that
16 in the report, the Prosecution discloses a tally of the deaths in Nakuru,
17 and the tally indicates the cause of death, how many people were killed
18 in Nakuru during the post-election violence. And, your Honours, this
19 report and this tally is extremely important in understanding the
20 dynamics behind the violence and the killings in Naivasha, which dynamics
21 contradict the Prosecution theory. And, your Honours, the tally is to be
22 found at EVD-PT-OTP-00228, at pages 0681 to 0690.

23 You will notice, your Honours, that the analysis of the totals on
24 the cause of death was presented to the Waki Commission in the form of a
25 graph, which again has been disclosed by the OTP as EVD-PT-OTP-00004,

1 page 0699.

2 Now, the information to be found on this graph indicate that the
3 deaths occurred throughout the month of January and that there were some
4 deaths reported in February. Now, the figures on this graph are very
5 interesting, and again they contradict the Prosecution theory in this
6 case. That graph identifies the number of deaths by their ethnicity, and
7 if you look at the number of Kikuyu on that graph, it is indicated as 93.
8 So those are the Kikuyus who die in the post-election violence in Nakuru
9 during the month of January and February. Luo, 31; Kalenjin, 27; Luhya,
10 21; Kisii, 12; Teso, 1; Kamba, 2, then there is a figure unknown, 26.
11 The total comes to 213. And so quite clearly, the Kikuyu are the
12 majority of the victims.

13 The graph also indicates the cause of death, and again the
14 results are interesting. Seven Kikuyus shot by the police, nine
15 Kalenjins shot by the police, and three Luos shot by the police. And one
16 may ask the question: How do we know it is the police who shot these
17 individuals? Your Honours, again on the basis of the Prosecution
18 disclosures, the Prosecution's own evidence, it is concluded that these
19 people were shot by the police. And again I wish to refer to the CIPEV
20 report, EVD-PT-OTP-00004, at page 0720, where the commission concluded as
21 follows, and I quote:

22 "The commission has received no evidence to suggest that where
23 gunshots -- gunshots were recorded as the cause of death or injury it was
24 from a source other than the police. This calls into question the
25 contention that the post-election violence was a citizen-to-citizen

1 violence, and it validates the view that the police action accounted for
2 a good part of the post-election violence."

3 So again, a Prosecution disclosure clearly concluding that these
4 deaths that have been catalogued in this graph were caused by the police,
5 again contradicting the Prosecution theory that the police took no
6 action. They stood by and watched as ODM supporters were killed.

7 Now, your Honours, from this document, which has been disclosed
8 by the Prosecution, which is part of the evidence in this case, it is
9 quite clear that there can be no logical argument that there was this
10 grand planning of the violence in Nakuru targeting exclusively ODM
11 supporters. Otherwise, why would we have the Kikuyu as the majority of
12 those killed in that violence? Why would we have seven Kikuyus shot by
13 the police if indeed the police were supportive of the Mungiki and, by
14 extension, the Kikuyus? It doesn't make sense. It cannot be logically
15 argued that the police took no action. The figures are here. They speak
16 for themselves. These are figures that have been disclosed by the
17 Prosecution.

18 What these figures also show, your Honours, is that there were no
19 guns available to Mungiki. We've heard stories, we've had narratives
20 from witnesses of the Prosecution about importation of guns, thousands of
21 guns, from Somalia, I think Ethiopia, distribution of weapons, guns to
22 Mungiki for the purpose of attacks in Naivasha and Nakuru. So the
23 question that this Chamber may wish to ask itself: Where are these guns
24 gone? Where were they used? Waki concludes that the people shot in
25 Nakuru were shot by the police. Where were these other guns used? And

1 again this is the evidence that the Prosecution wants to use against my
2 client, that he was part of a scheme to distribute weapons. He was part
3 of a scheme to distribute military uniforms. So what happened when he
4 distributed them? Nobody, no Prosecution witness, has come up to say
5 that the people who were involved in the attacks in Nakuru or Naivasha
6 wore military uniform or police uniform, for that matter. So what was
7 the purpose of this distribution of uniforms, of guns?

8 So, your Honours, quite clearly that allegation is hollow. It is
9 a fabrication. It is a lie.

10 And the reason why we're in this problem, your Honours, is
11 because this case has not been properly investigated. Prosecution have
12 simply assembled a gang of thugs, selfish individuals out to make money,
13 individuals in search of a good life. These are the individuals, these
14 are the people the Prosecution has assembled and brought before this
15 Court in the name of witnesses, and these are the people that the
16 Prosecution wants your Honours to rely on in confirming these charges.
17 It will be unfair. It will be a travesty of justice to rely on such
18 witnesses.

19 You will notice, your Honours, that the Prosecution did not
20 interview any of the thousands of victims in Nakuru. The people know
21 what happened on the ground. Instead, he interviews people who were not
22 even in Nakuru to tell tales, to fabricate evidence, to convey fiction.
23 Prosecution did not bother to interview members of the Nakuru security
24 machinery. At least we have no evidence on the record, even if it was
25 redacted (* indiscernible), but this must be coming from somebody within

1 the security machinery. We have no such evidence, your Honours.
2 Provincial administration, the people who were on the ground, the people
3 who worked tirelessly to restore law and order have not been interviewed.
4 Members of the clergy in Nakuru have not been interviewed. Ordinary
5 civilians, men and women of honour, have not been interviewed.

6 And so what does the Prosecutor bring before your Honours?
7 Again, discredited individuals, selfish individuals out to tarnish the
8 good name of my client, the good name of Uhuru Kenyatta, and the good
9 name of Commissioner General Ali.

10 We urge your Honours to reject this case, to dismiss it, because
11 to allow this process to move forward to confirmation would, in my very
12 humble submission, be a grave miscarriage of justice.

13 We have interviewed Defence witnesses who have, in a very
14 credible and very objective fashion, explained to us what actually
15 happened in Nakuru. Defence Witness number 0038, Wilson Wanyanga, who
16 was the district commissioner in Nakuru at the time, has given the
17 Defence a statement in which he explains -- and that witness, your
18 Honours, is EVD-PT-D12-00052, and the relevant portions will be at page
19 395, 396. And as I said, this was the district commissioner in Nakuru, a
20 man who was in the district security committee, a man who knew what was
21 happening on the ground, a man who tried all his best, together with the
22 entire security machinery, to restore law and order. And he explains
23 what happens. He says the trigger for the violence in Nakuru was the
24 attack on the Kikuyus in an estate known as Githima on the 24th of
25 January, 2008. This is what triggered the violence in Nakuru. It is not

1 any plan by my client, Ambassador Muthaura. It is not any meeting in a
2 members club in Nairobi that caused this violence. The DC is clear about
3 it. The DC knew and knows up to now that my client was not involved in
4 the violence in Nakuru.

5 We've spoken, your Honours, to -- spoken to and recorded a
6 statement from a Catholic Father, Defence Witness 0029, EVD-PT-D12-00047.
7 Again, this particular witness was on the ground, was involved in as far
8 as helping the IDPs was concerned, and he's able to explain that this
9 violence was not planned, and suddenly not planned in Nairobi by my
10 client.

11 Defence Witness 0009, EVD-PT-D12-00064, at pages 0011, 0012, a
12 victim of the violence in Nakuru explaining what happened and giving the
13 genesis of the violence in Nakuru again as nothing to do with any
14 planning by my client.

15 Defence Witness 33 -- 0023. Defence Witness 0023, your Honours,
16 is Mutahi Edward Karega. Mr. Karega was the permanent secretary in the
17 ministry of education at the time of the post-election violence,
18 currently the permanent secretary in the ministry of local government in
19 Kenya. This witness was in Nakuru on the 25th of January, 2007, and he
20 says that he encountered a large group in the morning of the 25th of
21 January in the outskirts of the town, a very large group of people, men,
22 women, young men, young women, children, in their thousands marching
23 towards the town. The reason? They were angry. They were annoyed
24 because their kinsmen had been continuously, continually attacked in
25 other parts of Rift Valley, North Rift in particular, annoyed that the

1 violence had now been brought into Naivasha and Githima had been banned
2 on the 24th. And so they were annoyed, and they are marching in their
3 thousands into Naivasha.

4 And Karega Mutahi says -- into Nakuru. Sorry. Into Nakuru.
5 Karega Mutahi says he was were very scared. A member of government,
6 senior member of government, very scared that these thousands of people,
7 a mammoth number of people marching into town. Got very scared, and he
8 called Ambassador Muthaura and told him the situation is terrible in
9 Nakuru. Ambassador told him action will be taken and that the military
10 was on their way to Nakuru.

11 The witness says that later that day on his way to Nairobi, in
12 Naivasha he saw the military land and he concluded that
13 Ambassador Muthaura must have acted to save the situation in Nakuru.

14 And so Karega Mutahi is convinced that as a result of the call
15 that he made to Ambassador Muthaura and as a result of the prompt action
16 that Ambassador Muthaura may have taken in consultation with other organs
17 of government, the military was promptly taken to Nakuru.

18 Now, that cannot be a man who is planning violence. That cannot
19 be a man who is plotting the killing of innocent civilians.

20 In relation to Naivasha, your Honours, the story is the same:
21 Prosecution relying on discredited witnesses, Prosecution relying on
22 fabricated testimony. And, your Honours, again there is no evidence.
23 There is no credible evidence at all that my client sat somewhere in
24 Nairobi together with Uhuru Kenyatta and others to plan the violence in
25 Naivasha or any other part of the country.

1 And let me go back to -- to this Witness 0004, who really is the
2 core Prosecution witness as far as this plan is concerned. And I know my
3 colleague Karim Khan and Essa Faal have said a lot about this witness,
4 and for good reason, but allow me, your Honour, to -- to also say
5 something about this witness.

6 This is the only witness who talks about a meeting at the Nairobi
7 Club. Initially, of course, as you've heard, he said it was the Nairobi
8 Safari Club. Never mind that these two distinct places.
9 Nairobi Safari Club in the middle of town, a five-star hotel. Nairobi
10 Club on a hill about 3, 4 kilometres away from Nairobi Safari Club, and
11 yet he makes a mistake about the two places, and he changes his mind
12 later on when the Prosecution interviews him and he says, "Oh. I now
13 think it was Nairobi Club." Forget about that. More importantly, your
14 Honours, is the fact that this is the only witness who talks about this
15 grand plan hatched or adopted at the Nairobi club.

16 We are told that Mungiki is a very well-structured organisation,
17 well-structured in formation flows, and so you expect that the other
18 Mungiki should be able to know about this important meeting. They don't
19 seem to know anything about this meeting, because they don't talk about
20 it. They talk about other meetings, and yet this is the most critical
21 meeting, where my client gives instructions to General Ali so that the
22 Mungiki are left free to attack civilians. An important meeting, and no
23 other Mungiki witness seems to know anything about this Nairobi club
24 meeting. Not Witness 0012, not 0011, nobody else.

25 And you will notice this is a common feature of these

1 testimonies, these fabricated testimonies that are being presented before
2 your Honours that each Mungiki witness, each of these witnesses talk
3 about their own events, and their colleagues don't seem to know about
4 these events.

5 The witness talks about the feasting that they are treated to in
6 State House, alcohol. Hundred Mungiki holding a meeting there. Nobody
7 else seems to know about this meeting. It's only Witness 0010.

8 Another one talks about a meeting in stadiums, football stadiums
9 where people are registered to go and fight in public, and no other
10 Mungiki seems to know about this, and yet this is happening in the open,
11 supposedly.

12 So there is something wrong about this case, and we know what it
13 is. It is because these are fabrications. It is because these are lies.
14 It is a disgrace to international criminal justice that this kind of
15 testimony can be brought before an international criminal tribunal, a
16 distinguished international criminal tribunal like this.

17 Your Honours are being told that the police took no action in
18 Naivasha. Forget for a moment that the DCC itself actually talks about
19 9.000 IDPs secured at a police station. Nobody attacks them, and they
20 are there for a considerable period of time. Some witnesses say two
21 weeks, others three weeks. They're there. And there are other camps
22 that are set up within Naivasha and secured by the police. And my
23 learned friend Ocampo, Luis Moreno-Ocampo, has the guts to come before
24 your Honours to tell you, without blinking, that the police did not take
25 any action in Naivasha despite all this evidence, some of it coming from

1 him from, his own witnesses, from his own reports, Waki reports.

2 Your Honours, it is not true that the police stood by in Naivasha
3 and did nothing as civilians were attacked. We will be calling the
4 Naivasha district commissioner. He will be testifying in public, and he
5 will tell your Honours -- he will explain to your Honours the measures
6 that the security machinery in Naivasha took to ensure that law and order
7 was maintained.

8 The other interesting aspect, your Honours, and this is what
9 comes out of the Prosecution evidence, and we are going to elaborate on
10 this in our written submissions, is that within the Naivasha security
11 apparatus, there was no senior Kikuyu. If we start with the OCPD,
12 Officer Commanding Police Station, it was a Luhya, and the Luhyas at that
13 time were associated with the ODM. His deputy was a Luhya. The DCIO,
14 District Criminal Investigations Officer, a Kalenjin. The district
15 commissioner himself a Kamba, not PNU. The prisons man, Luo.

16 And so the top cream in the security machinery in Naivasha was
17 non-Kikuyu. Are these the people who were giving orders to let Mungiki
18 massacre their own kinsmen? It doesn't make sense. It's illogical.

19 Your Honours, this case should not go to trial. I have had the
20 opportunity, indeed the privilege to be Ambassador Muthaura's lawyer
21 since he was named, and in the course of gathering evidence for his
22 Defence, I have spoken to many Kenyans, and I know Kenyans because I'm
23 Kenyan. I've spoken to many, many of them. I have recorded statements
24 from many of them. And, your Honours, speaking from the bar, if you can
25 allow me for a moment -- I'm advised, your Honours that, probably my time

1 should be up. So, your Honours --

2 PRESIDING JUDGE TRENDAFILOVA: You have 14, 15 minutes, not more.

3 MR. OGETTO: So, your Honours, this case is not a case that is
4 fit to go to trial. Your Honours, I know you know the law. I have no
5 doubt in my mind, that is why you are Judges, but allow me to refer to
6 the decision in Bemba on the threshold for confirmation.

7 In Bemba, the confirmation decision of 15th of June, 2009, at
8 paragraph 30, the Chamber reiterated that in order for a case to be
9 confirmed, it must be one that fits any of the following objectives,
10 solid, it must be solid, material, well-built, real rather than
11 imaginary. The Chamber further clarified that the Prosecutor must
12 present tangible proof demonstrating, and this is important, your
13 Honours, demonstrating a clear line of reasoning. That is the threshold.

14 The threshold is not as the Prosecutor would like us to believe,
15 that you dump anything before your Honours, and we go and sort out the
16 mess in trial. He must present a clear case, a solid case. His
17 reasoning must be clear. And, your Honours, if you pause for a moment to
18 ask yourselves whether before you there is a case that is solid, before
19 you there is a case that has a clear line of reasoning, there will be
20 none.

21 Thank you.

22 PRESIDING JUDGE TRENDAFILOVA: Thank you, Mr. Ogetto.

23 Mr. Khan, is there someone else from your team who would like to
24 speak?

25 MR. KHAN: Madam President, your Honours, you'll be glad to know

1 there's nothing else to say in this part of the -- bear with me one
2 moment, your Honour.

3 PRESIDING JUDGE TRENDAFILOVA: Yes.

4 (Defence counsel confer)

5 MR. KHAN: Madam President --

6 (Defence counsel confer)

7 MR. KHAN: Madam President, with your indulgence in the time that
8 remains, the ten minutes or so, Mr. Faal will have the final submissions
9 on behalf of the Defence of Ambassador Muthaura.

10 PRESIDING JUDGE TRENDAFILOVA: Yes, of course. It's your time.

11 MR. KHAN: I'm grateful. I'm grateful.

12 PRESIDING JUDGE TRENDAFILOVA: Yes, Mr. Faal, you have the floor.

13 MR. FAAL: Madam President, your Honours, perhaps I should go
14 back a little to Nakuru before I end up at Naivasha. I am cognisant of
15 the fact that we have about ten minutes at the most. I probably would
16 not exhaust most of the time.

17 The charges we face, at least that Ambassador Muthaura and the
18 other suspects face, is that Ambassador Muthaura created a free zone in
19 which the Mungiki were allowed to go and commit mayhem and that the
20 police would stand by and watch.

21 Another important element of this case is that the attacks were
22 meant to be retaliatory and that they had been planned.

23 As my learned friend explained, in Nakuru, at least if you are
24 retaliating for an attack, you make the initiative. You take the step.
25 That did not happen in Nakuru. The evidence, as cited by my friend, my

1 learned friend, is that in Nakuru, the Kikuyus were attacked, and that is
2 why the highest number of dead per ethnicity is Kikuyus. So they are the
3 victims there, not the aggressors as the Prosecution's theory would
4 led -- lead you to believe. They are the victims in Nakuru. How did it
5 happen? Githima estate was attacked, houses burnt. We have provided the
6 evidence of Samuel -- excuse me, your Honour. Let me just get the -- my
7 learned friend will soon provide me with the EVD numbers. And the
8 witness explained how the attacks in Nakuru started. But Nakuru, too,
9 has to be understood within a particular context.

10 From 1992, Kikuyus were being attacked in Rift Valley after that
11 elections. In 1997, they were attacked again and displaced. In 2002, it
12 wasn't so bad. And then come 2007, lots of Kikuyus were attacked as
13 evidenced by what is happening in the other case.

14 Obviously, therefore, in Nakuru at the time, there were about
15 20.000 IDPs, 20.000, fuelled, angered by detention, angered by what had
16 happened to their brethren and sistren in the North Rift. They had to do
17 something, especially when there were lots of rumours flying around that
18 the Kalenjin warriors are coming around. That is what happened in
19 Nakuru. Do they have to just sit by and let themselves be slaughtered
20 again?

21 On the 24th, Githima estate was attacked, people killed, houses
22 burnt.

23 The witness D12-00009's, that's EVD-PT-D12-00064, testified about
24 how his 13 houses were burnt in Githima. Would he sit by and see
25 everything go again? He was displaced during that attack. He was

1 displaced from -- I can't remember the village off-the-cuff, but he was
2 displaced with his family. He came to Nakuru, thinking it would be a
3 safe haven. Nakuru was attacked again by Kalenjin warriors. That's why
4 if you look at death by cause of death, it's more about arrows, bows and
5 arrows. So Nakuru has to be understood in that context. The people had
6 to defend themselves, and this witness explains that.

7 There is this theory that Mungikis were imported into Nakuru.
8 Far from the truth. The evidence of the priest that we interviewed
9 clearly indicate that, in fact, they were (* indiscernible) Nakuru was
10 already a Mungiki stronghold anyway. Why plan in Nairobi to bring
11 Mungiki to Nakuru when you already have them there in abundance? These
12 people were local people who deemed it necessary to defend themselves.

13 If that were not the case, then more of them would not have died.
14 More Kikuyus died than Luos. More Kikuyus died than Kalenjins. It is
15 because they were first attacked and taken by surprise.

16 During my earlier presentation, I dealt with the issue of the
17 so-called arms that had been sent to Nakuru. The Defence witnesses
18 debunk that. I mean, the government of Kenya is not like -- it's not a
19 failed state. There are processes and procedures. You cannot get the AP
20 to issue guns and uniforms to you without at least any documentation, but
21 what is interesting about the statement of this witness is that the
22 person in charge of issuing guns and uniforms is not Kikuyu. You -- I
23 don't have the leaders off the -- off-the-cuff at the moment, but we
24 would deal with this in greater detail in our final submission. Since --

25 MS. ADEBOYEJO: Madam President, I'm sorry to interrupt my

1 learned friend, and I do this with the utmost respect. I wanted to find
2 out if my learned friend could provide the EVD number. He was going to,
3 I think.

4 PRESIDING JUDGE TRENDAFILOVA: That's what Mr. Faal was
5 promising, to provide not only the Prosecutor but the Chamber as well
6 with EVD number. Do you have it, Mr. Faal?

7 MR. FAAL: Yes, I do. I do. I did not mean to blind-side you.
8 The EVD number is D12-290 -- excuse me. Let me just clarify this.

9 (Defence counsel confer)

10 MR. FAAL: EVD-PT-D12-2900047 (* sic).

11 (Defence counsel confer)

12 MR. FAAL: All right. That is the evidence of the priest I was
13 referring to.

14 Whilst I have two, three minutes, if you don't mind, your Honour,
15 I could talk a little bit about Naivasha. Just to refer your Honours to
16 the evidence of Prosecution Witness 0002. The evidence she gives clearly
17 explains the efforts that the police have taken in order to deal with the
18 crisis in Naivasha. That evidence does not support the theory that the
19 police were asked to step back, and one important thing about her
20 testimony is the visit of the minister for internal security in Naivasha
21 during the time of the crisis. And the people protested, according to
22 the witness, that they don't want the presence of the DC and the DCIO,
23 because they were ODM supporters preventing them, not making it easy for
24 them to achieve their objectives. And this is important, because it just
25 goes to show that the police were doing what they were supposed to do.

1 They were simply overwhelmed, as it is recognised by Waki and by many
2 reports that talk about Naivasha.

3 Thank you.

4 PRESIDING JUDGE TRENDAFILOVA: Thank you Mr. Faal.

5 Now we came to the end of the last session for today. I would
6 like on behalf of my colleagues to thank very much the Defence team of
7 Mr. Muthaura for -- and we would like to say that we appreciate really
8 very much that you avoid any inappropriate presentation regarding
9 confidential information, anonymous witnesses. That was a concern to us
10 regarding our responsibility concerning the protection of individuals on
11 account of the activities of the court.

12 I would like to thank you very much the Office of the Prosecutor
13 for respecting their colleagues on the opposite side and not intervening
14 while they were presenting their case.

15 I would like to thank the other two Defence teams.

16 Of course, my thankfulness, as always, goes to the interpreters,
17 to the stenographers, to the court officers, to the security officers and
18 those who are in the public gallery.

19 On Monday we proceed with the witnesses of Mr. Muthaura. Until
20 then, I wish you a pleasant weekend. See you at 2.30 in the same
21 courtroom, p.m., on Monday.

22 The hearing is adjourned.

23 COURT USHER: All rise.

24 The hearing ends at 3.00 p.m.

25