

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-01/09-01/11
6 In the case of the Prosecutor versus William Samoei Ruto,
7 Henry Kiprono Kosgey, and Joshua Arap Sang
8 Confirmation of Charges Hearing
9 Thursday, 1 September 2011
10 The hearing starts at 2.30 p.m.
11 (Open session)
12 COURT USHER: All rise. International Criminal Court is now in
13 session.
14 PRESIDING JUDGE TRENDAFILOVA: Good afternoon, everyone. Please
15 be seated.
16 I would like to welcome everyone who is here in the courtroom and
17 also in the public gallery. The Confirmation of Charges Hearing is now
18 in session.
19 Pursuant to a decision that was taken authorising the taking of
20 pictures and videos by those who are interested to be granted this
21 opportunity, I would now invite the Court Officer to usher the
22 photographers for one minute and a half to do their job.
23 Good afternoon. You have one minute and a half.
24 I think your time is over. Have a good day.
25 Now, I would like to ask the Court Officer to please call the

1 case.

2 COURT OFFICER: Good afternoon, Madam President, your Honours.

3 This is the situation in Kenya, in the case of Ruto et al., case number

4 ICC-01/09-01/11. Thank you, Your Honours.

5 PRESIDING JUDGE TRENDAFILOVA: Thank you, Court Officer. On

6 behalf of the Chamber, I welcome the parties and the participants, the

7 legal representatives for victims. At this instance, I would invite the

8 parties, starting with the Office of the Prosecutor, to present

9 themselves. Who is with you here today, Mr. Moreno-Ocampo?

10 MR. MORENO-OCAMPO: Thank you, Madam President. The Office of

11 the Prosecutor is represented by Ms. Cynthia Tai, Ms. Shamiso Mbizvo,

12 Ms. Karen Corrie, Ms. Lara Renton, and Ms. Grace Goh, and the Prosecutor

13 himself, Luis Moreno-Ocampo.

14 PRESIDING JUDGE TRENDAFILOVA: Thank you, Mr. Moreno-Ocampo.

15 Please be seated. Now, I turn to the Defence. As long as in this case

16 there are three suspects and accordingly three Defence teams, the Chamber

17 suggests that the Defence teams present themselves and also make their

18 presentations in the order adopted by the Prosecutor in his case. This

19 of course is without prejudice to the freedom of any of the Defence teams

20 to raise any issue without following this order throughout the hearings

21 these days. So now I give the floor to the Defence team of Mr. Ruto to

22 present yourselves.

23 MR. KILUKUMI: Thank you, Madam President and your Honours. For

24 Mr. Ruto, it is David Hooper, QC, assisted by Caroline Buisman. And my

25 name is Kioko Kilukumi representing Mr. William Ruto.

1 PRESIDING JUDGE TRENDAFILOVA: Thank you. Now it's the turn of
2 the Defence team of Mr. Kosgey.

3 MR. ORARO: For the Defence of Mr. Kosgey, I'm George Oraro. I
4 appear with Julius Kemboy, Allan Kosgey, and Liane Aronchick. Thank you,
5 Madam President.

6 PRESIDING JUDGE TRENDAFILOVA: Thank you, counsel. And finally
7 the Defence of Mr. Sang.

8 MR. KIGEN-KATWA: (Interpretation) My name is Mr. Katwa-Kigen. I
9 appear for Mr. Sang, together with Mr. Joel Bosek, Mr. Philemon Koech,
10 and Logan Hambrick.

11 PRESIDING JUDGE TRENDAFILOVA: Thank you. I would ask the Legal
12 Representative for the 327 victims that have been accorded the status of
13 victims participants to these proceedings to present themselves.

14 MS. CHANA: (Interpretation) Madam President, members of the
15 Chamber, I am Sureta Chana and I represent the victims in this case.

16 PRESIDING JUDGE TRENDAFILOVA: Thank you. And finally we
17 shouldn't forget the office of the Registrar, that is supporting and
18 assisting us in the proceedings. Please, Madam Arbia.

19 MS. ARBIA: Good afternoon, Madam President, your Honours. For
20 the Registry, myself, Silvana Arbia, Registrar, with me Natacha Schauder
21 is associate Legal Officer in the unit for witnesses and victims, and
22 Cyril Laucci, Legal Officer.

23 PRESIDING JUDGE TRENDAFILOVA: Thank you. At this point in time,
24 I would like to present my colleagues, the Judges of
25 Pre-Trial Chamber II. On my right is Judge Hans-Peter Kaul, on my right

1 Judge Cuno Tarfusser.

2 In front of the bench are sitting Mr. Gilbert Bitti, the
3 Senior Legal Advisor for the Pre-Trial Division; the Legal Officers,
4 Mr. Mohamed el Zeidy, Ms. Eleni Chaitidou, the Associate Legal Officer,
5 Mr. Silvestro Stazzone. And in the courtroom are also present the
6 Associate Legal Officers, Simon Grabrovec and Niccolo Pons.

7 Finally I have to present myself. Ekaterina Trendafilova, the
8 Presiding Judge of this Chamber.

9 Now, I would like to turn to the three suspects and first to you,
10 Mr. Ruto, to welcome Mr. Ruto, Mr. Kosgey and Mr. Sang to the hearing
11 today. I hope that your journey was not too tiring and that your
12 accommodation in The Hague is agreeable to you.

13 Mr. Ruto, would you identify yourself to the Chamber by stating
14 your date and place of birth, your nationality, and your current
15 occupation. Of course, starting with your name, full name.

16 MR. RUTO: Thank you, your Honour. My name's
17 William Kipchirchir Samoei Ruto.

18 PRESIDING JUDGE TRENDAFILOVA: Yes.

19 MR. RUTO: Born on the 21st of December, 1966, in
20 Uasin Gishu District, now Uasin Gishu county. I think -- is that all at
21 this point?

22 PRESIDING JUDGE TRENDAFILOVA: Your current occupation, Mr. Ruto.

23 MR. RUTO: At the moment, I'm serving as a Member of Parliament
24 for Eldoret North constituency in Uasin Gishu county.

25 PRESIDING JUDGE TRENDAFILOVA: Thank you, Mr. Ruto. You could be

1 seated.

2 MR. RUTO: Thank you.

3 PRESIDING JUDGE TRENDABILOVA: Mr. Kosgey, the same question
4 addresses you.

5 MR. KOSGEY: Good afternoon, your Honour. I'm
6 Henry Kiprono Kosgey. I was born on 14 July 1947. I'm a Kenyan and
7 currently a Member of Parliament for Tinderet constituency in
8 Nandi county.

9 PRESIDING JUDGE TRENDABILOVA: Thank you very much.

10 Finally, I will address the same request to Mr. Sang. Mr. Sang,
11 I recall that you had an accident back in April. If you are not feeling
12 fine to stand up when you answer your questions you may be seated.

13 MR. SANG: Madam President, I'm okay now. My hand is healed.

14 PRESIDING JUDGE TRENDABILOVA: Yes. Identify yourself now, your
15 name.

16 MR. SANG: Joshua Arap Sang. I come from Saum village,
17 Kajibora (* phon) sub-location, Cherangani Division, Cherangani
18 constituency, Trans-Nzoia county. I was born on 9 September 1975, and I
19 work with Kass FM international as a presenter. I'm head of operations.

20 PRESIDING JUDGE TRENDABILOVA: Thank you, Mr. Sang.

21 Before resorting to our business today, the Chamber shall address
22 the urgent request of the Defence of Mr. Ruto and Mr. Sang for
23 reconsideration of the decision on the schedule for the Confirmation of
24 Charges Hearing filed with the Chamber on the 26th of August, 2011.

25 The Judges of the Chamber read very carefully the submission of

1 the Defence. We studied the request also with concern. Due to the
2 presence of wording and statements such as: The schedule is manifestly
3 unsound; manifestly unsatisfactory; the single judge gives no
4 consideration to nor has any respect for the professional opinions and
5 needs of the Defence and the suspects; the schedule has a difficult
6 effect detrimental on the fairness of the proceedings; and other
7 assertions along the same line.

8 While we share the point made by the Defence in paragraph 13 of
9 the submission that "the cases relating to the Kenya situation are the
10 biggest cases at the ICC with the greatest number of suspects and complex
11 and difficult legal issues," the Chamber cannot agree with the rest of
12 the assertions made and in this regard considers its duty to make the
13 following points:

14 First, there is a necessity to organise a concise and streamlined
15 confirmation hearing given its specific nature, limited scope and
16 purpose.

17 Second, as acknowledged in the Defence's filing, there are two
18 cases arising out of the Kenya situation running simultaneously which
19 requires that the Judges be in a position to diligently, equally
20 diligently, prepare for the next confirmation hearing in case 2.

21 Third, we should also be attentive to the involvement of
22 Judge Tarfusser in the work of Pre-Trial Chamber where there is another
23 confirmation hearing scheduled to start on the 16th of September, 2011,
24 and, therefore, there is a need for the Judge to prepare accordingly, as
25 no one would deny that the decision on the charges against

1 Mr. Mbarushimana is equally vital for him.

2 Fourth, the suspects in our case are at large. There are
3 summonses for them. And, therefore, they are active in their
4 professional and their personal lives. Accordingly, they have legitimate
5 expectations to spend limited amount of time away from their routine,
6 daily life, and commitments, as was also reflected in the latest
7 submission of Mr. Ruto requesting waiver of his right to be present for
8 "portions of the confirmation hearing."

9 Fifth, the sincere confidence, I highlight sincere confidence, of
10 the Judges of this Chamber in the high professionalism of the counsels
11 appearing before the International Criminal Court and the belief that
12 since the beginning of April, till the starting date of this hearing,
13 today, and also bearing in mind the strict disclosure calendar, the
14 Defence has gradually developed its strategy and has prepared for the
15 Confirmation of Charges Hearing. This preparedness will no doubt have a
16 positive impact on their participation in the Confirmation of Charges
17 Hearing.

18 Apart from the above considerations, I would like to call the
19 attention of the parties to paragraph 8 of the decision on the schedule
20 where it was emphasised that "the final schedule for the hearing is
21 subject to change if developments in the proceedings necessitate it."
22 Thus, it was provided in the said decision for the possibility of
23 slightly adjusting the schedule should the circumstances require so.

24 And finally, just in passing to mention that the schedule should
25 not be associated only with the Defence that made the urgent request, but

1 it equally concerns the Defence of Mr. Kosgey, the team of the
2 Prosecution, the Legal Representative for 327 victims participants, and
3 not to forget the Judges of this Chamber who are facing a huge
4 responsibility to conduct this hearing, to evaluate the presentation and
5 performance of all the parties and participants and to finally rule on
6 the subject matter of the case pending before this Chamber.

7 In view of the above considerations, the Chamber, therefore,
8 decides to retain the schedule as decided in the 25th August 2011
9 decision without ruling out, as stated in the decision, the possibility
10 to amend it should it appear to be necessary, in particular, to finish
11 earlier the third session in the schedule and to skip in particular the
12 sessions provided for the second Saturday, the 10th of September.
13 However, in order to achieve this, I kindly invite the parties and
14 participants to be concise and to avoid repetition in their presentations
15 or interventions.

16 The Chamber also recalls that according to the decision on the
17 schedule, in case a party does not fully use the time allotted to it, the
18 Bench will automatically move to the next item on the schedule even if it
19 is scheduled for the following day. Accordingly, we expect the parties
20 to be prepared at any time to make their presentations.

21 Further, I would like to note the decision on victims'
22 participation at the Confirmation of Charges Hearing and in the related
23 proceedings in which victims participants were provided with the
24 following rights to be exercised by their legal representative,
25 Ms. Chana: To attend all public sessions of this hearing; to make brief

1 opening and closing statements; to have access to the public report of
2 the case including public evidence disclosed by the parties; to be
3 notified of all public decisions and filings; and finally, on a
4 case-by-case basis, as Article 68(3) provides, where the personal
5 interests of victims are affected by the issue under consideration and
6 upon request to the Chamber they can be authorised to present their views
7 and concerns.

8 Now we should not forget the Judges of the Chamber to briefly
9 explain, mainly for the public, the nature of the hearing and the role
10 that the Pre-Trial Chamber has to play. As has been highlighted in a
11 number of decisions issued on behalf of the Chamber, the Confirmation of
12 Charges Hearing is not a mini-trial, and in contrast to trial, this
13 Chamber does not have to decide on the person's guilt. Rather, our duty
14 is to act as a filter, distinguishing cases that should go to trial from
15 those that should not, by determining whether there is sufficient
16 evidence to establish substantial grounds to believe that the suspects
17 committed each of the crimes charged as provided for in Article 61(7) of
18 the Rome Statute. Thus, I would like to emphasise that the Chamber does
19 not at all underestimate this hearing, does not undervalue the
20 responsibilities of the Prosecutor and his office and the commitment of
21 the Defence, as well as the Chamber's duties assigned by law. However,
22 the Chamber is firmly committed to act within the legal parameters of its
23 responsibilities and not to take over responsibilities of a Trial Chamber
24 not provided by law to any Pre-Trial Chamber of this institution, the
25 International Criminal Court.

1 The Chamber would also like to remind the parties and
2 participants that they, themselves, have certain obligations pursuant to
3 the statutory documents of the International Criminal Court.

4 In regard to the Prosecutor, the Chamber recalls the solemn
5 undertaking pursuant to Rule 6 of the Rules of Procedure and Evidence.

6 As far as counsels are concerned, the Bench also reminds the
7 Defence and the victims legal representatives of their solemn undertaking
8 pursuant to Article 5 of the Code of Professional Conduct for counsel.

9 To sum up, the Chamber expects the parties and the
10 legal representative for victims to respect the statutory provisions, the
11 rulings of this Chamber, and to conduct themselves in a professional
12 manner. Any deviation from these proceed visions will not be tolerated,
13 and the Bench will not hesitate to implement, in particular, Article 71
14 and Rules 170 and 171 providing for sanctions for misconduct before the
15 Court, as well as chapter 4 of the Code of Professional Conduct for
16 counsel.

17 The Chamber deems it also important to delineate the principle
18 that shall guide this hearing. First, comes the presumption of innocence
19 prescribing that the suspect is presumed innocent until proven guilty
20 before the Court in accordance with the applicable law, Article 66(1) of
21 the Rome Statute.

22 Second, the principle that the burden of proof is on the
23 Prosecutor and consequently that it is his obligation to provide evidence
24 sufficient to prove the charges alleged.

25 Third, the Defence always has the last word.

1 Further, while there may be some closed or private sessions
2 during this hearing, the general rule is that the hearings will be
3 public.

4 Finally, I would request the parties and participants, following
5 the request of our interpreters, not to speak too fast so that we can
6 make it possible for them to do their job.

7 I think I've said everything that I wanted to say as introductory
8 works -- words, and now I shall ask the Court Officer to read the charges
9 as they have been presented by the Prosecutor in the document containing
10 the charges.

11 Please, Court Officer, the floor is over to you.

12 So the Court Officer needs some time to bring it up on the
13 system. Fine. How much time do you need, Court Officer? A couple of
14 minutes. Then we have a short break, remaining here in the courtroom.

15 You're ready to go. Please, Court Officer.

16 COURT OFFICER: Charges. Count 1, Ruto and Kosgey: Murder
17 constituting a crime against humanity, Article 7(1)(a) and
18 Article 25(3)(a) of the Rome Statute, from on about 30 December 2007 to
19 the end of January 2008, William Samoei Ruto and Henry Kiprono Kosgey
20 committed or contributed to the commission of crimes against humanity in
21 the form of murder in locations including, Turbo town, the greater
22 Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi) Kapsabet town
23 and Nandi Hills towns in the Uasin Gishu and Nandi Districts,
24 Republic of Kenya, in violation of Article 7(1)(a) and 25(3)(a) of the
25 Rome Statute.

1 Count 2, Sang: Murder constituting a crime against humanity,
2 Article 7(1)(a) and Article 25(3)(d) of the Rome Statute. From on or
3 about 30 December 2007 to the end of January 2008, Joshua Arap Sang as
4 part of a group of persons, including William Ruto and Henry Kosgey
5 acting with a common purpose committed or contributed to the commission
6 of crimes against humanitarian in the form of murder in locations
7 including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu,
8 Langas, and Yamumbi), Kapsabet town and Nandi Hills down in the
9 Uasin Gishu and Nandi Districts, Republic of Kenya, in violation of
10 Articles 7(1)(a) and Article 25(3)(d) of the Rome Statute.

11 Count 3, Ruto and Kosgey: Deportation or forcible transfer of
12 population constituting a crime against humanity, Article 7(1)(d) and
13 Article 25(3)(a) of the Rome Statute from on or about 30 December 2007 to
14 the end of January 2008, William Samoei Ruto and Henry Kiprono Kosgey as
15 co-perpetrators committed or contributed to the commission of crimes
16 against humanity in the form of deportation or forcible transfer of
17 population in locations including Turbo town, the greater Eldoret area
18 (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi) Kapsabet town and
19 Nandi Hills, towns in the Uasin Gishu and Nandi Districts,
20 Republic of Kenya, in violation of Article 7(1)(d) and 25(3)(a) of the
21 Rome Statute.

22 Count 4, Sang: Deportation or forcible transfer of populations
23 constituting a crime against humanity, Article 7(1)(d) and
24 Article 25(3)(d) of the Rome Statute. From on or about 30 December 2007
25 to the end of January 2008, Joshua Arap Sang as part of a group of

1 persons including William Ruto and Henry Kosgey acting with a common
2 purpose committed or contributed to the commission of crimes against
3 humanity in the form of deportation or forcible transfer of population in
4 locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa
5 Kimumu, Langas, and Yamumbi) Kapsabet town and Nandi Hills town in the
6 Uasin Gishu and Nandi Districts, Republic of Kenya, in violation of
7 Articles 7(1)(d) and 25(3)(d) of the Rome Statute.

8 Count 5, Ruto and Kosgey: Persecution as a crime against
9 humanity, Article 7(1)(h) and 25(3)(a) of the Rome Statute. From
10 30 December 2007 to the end of January 2008, William Samoei Ruto and
11 Henry Kiprono Kosgey as co-perpetrators committed or contributed in the
12 commission of crimes against humanity in the form of persecution when
13 co-perpetrators and/or persons belonging to their group intentionally and
14 in a discriminatory manner targeted civilians based on their political
15 affiliations, committing murder, torture, and deportation or forcible
16 transfer of populations in locations including Turbo town, the greater
17 Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi) Kapsabet town
18 and Nandi Hills towns in the Uasin Gishu and Nandi Districts,
19 Republic of Kenya, in violation of Article 7(1)(h) and 25(3)(a) of the
20 Rome Statute.

21 Count 6, Sang: Persecution as a crime against humanity,
22 Article 7(1)(h) and Article 25(3)(d) of the Rome Statute. From on or
23 about 30 December 2007 to the end of January 2008, Joshua Arap Sang as
24 part of a group of persons including William Ruto and Henry Kosgey acting
25 with a common purpose committed or contributed to the commission of

1 crimes against humanity in the form of persecution when co-perpetrators
2 and/or persons belong to go their group intentionally and in an a
3 discriminatory manner targeted civilians based on their political
4 affiliations committing murder, torture, and deportation or forcible
5 transfer of population in locations including Turbo town, the greater
6 Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi) Kapsabet town
7 and Nandi Hills town, in the Uasin Gishu and Nandi Districts, Republic of
8 Kenya, in violation of Article 7(1)(h) and 25(3)(d) of the Rome Statute.

9 Thank you, your Honours.

10 PRESIDING JUDGE TRENDAFILOVA: Thank you, Court Officer.

11 Before we resort to our schedule, would I like to inform everyone
12 present in the courtroom and in the public gallery that the Chamber was
13 notified of a request by the government of Kenya today at 11.53, so seven
14 minutes before noon, of a request of the government of Kenya so that two
15 representatives, actually, two counsels representing the government of
16 Kenya are present in the courtroom. With all our due respect for the
17 government of Kenya, we took a decision that should have been notified,
18 as I see on the screen, at 14.38 to the government of Kenya rejecting the
19 request, and the reasoning goes to the lack of any submission before the
20 Pre-Trial Chamber raising an issue in the pending proceedings. And this
21 means that the government of Kenya has no procedural standing before this
22 Chamber with regard to the proceedings that are currently running before
23 Pre-Trial Chamber II. That is why this request was rejected.

24 Then we have to proceed with our schedule. I have to keep an eye
25 on -- on the timing. Sometimes it is very much annoying for everyone,

1 including for myself, but this is the job that I was assigned to do, and
2 we have to make a break at 4.00 p.m. for half an hour.

3 Till then, we shall proceed with our schedule, according to which
4 observations should be made by the parties on the issues of jurisdiction,
5 admissibility, as well as the proper conduct of the proceedings prior to
6 this hearing.

7 In reaction to paragraph 11 of the decision on the schedule for
8 the confirmation hearing, the Defence for Mr. Ruto and Mr. Sang and,
9 thereafter, the Defence for Mr. Kosgey lodged on the 30th of August,
10 2011, a written application challenging the jurisdiction of the Court.

11 The Chamber has with due care studied the said submissions, and
12 the Chamber, following its knowledge of these extensive papers submitted
13 by the Chamber, orders the Registrar to transmit the applications
14 received from the Defence teams of the three suspects to submit them to
15 the Prosecutor and to the legal representative of victims in order to
16 allow them to submit written observations to the applications by no later
17 than Friday, 17th of August (* sic), at 1600 hours.

18 As a conclusion, and as far as the Defence case develop their
19 arguments in the written submissions of 30 August 2011, the Bench
20 suggests to the parties and to the legal representative to refrain from
21 delving into the issue of jurisdiction extensively and to address the
22 objections and observations that the Defence teams could have regarding
23 the procedural matters. Thus, we can save some time. We can advance
24 with our schedule, and it could allow the Chamber to amend slightly the
25 schedule for the hearing as requested by the Defence of Mr. Ruto and

1 Mr. Sang.

2 Yes, Mr. Prosecutor.

3 MR. MORENO-OCAMPO: I would suggest that you can clarify, because
4 you mentioned the deadline to submit our written observation is Friday 17
5 of August.

6 PRESIDING JUDGE TRENDAFILOVA: Yes, correctly. Sorry, 17th of
7 September. You're right.

8 MR. MORENO-OCAMPO: 17th of September.

9 PRESIDING JUDGE TRENDAFILOVA: 17th of September. Thank you very
10 much. Are there observations on this issue?

11 Mr. Hooper, as if you're hesitating. Would you like to take the
12 floor?

13 MR. HOOPER: No. My hesitation was whether or not to give way to
14 my friend here who was perhaps quicker to respond than I was.

15 PRESIDING JUDGE TRENDAFILOVA: Mr. Oraro, would you like to take
16 the floor?

17 MR. ORARO: Madam President, he may proceed and then I take the
18 floor.

19 PRESIDING JUDGE TRENDAFILOVA: Fine.

20 MR. HOOPER: Yes. Observations on the issue. I'm sorry, I was a
21 little distracted by -- by something on the transcript.

22 PRESIDING JUDGE TRENDAFILOVA: Sorry, Mr. Hooper. Observation on
23 the proposal that I made on behalf of the Chamber?

24 MR. HOOPER: Yes.

25 PRESIDING JUDGE TRENDAFILOVA: Or you go already into the

1 observations --

2 MR. HOOPER: (* overlapping speakers) no, no. I was organising
3 my mind --

4 PRESIDING JUDGE TRENDAFILOVA: Okay.

5 MR. HOOPER: -- to respond in respect of what your Honour has
6 just proposed. And in doing that, I was attentive to the words that
7 there might be some accommodation to the benefit of the Defence, perhaps,
8 in respect of the schedule, and so I'm just casting my mind forward to
9 the next, say, three days.

10 Tomorrow, essentially, is going to be occupied with an opening or
11 openings, plus the beginning of the Prosecution's presentation of their
12 case --

13 PRESIDING JUDGE TRENDAFILOVA: Correct.

14 MR. HOOPER: -- which runs over into Saturday and is due to
15 conclude by Saturday lunchtime, which at the moment puts me, on behalf of
16 Mr. Ruto, as it were, in pole position in terms of addressing the Court
17 in respect of our observations and concerns on Saturday afternoon.

18 What, in fact, would be helpful to us, I may say, is the certain
19 knowledge that openings will not be reached until tomorrow. That's one
20 thing.

21 And, secondly, and this is not a matter really that I address
22 other than through your Honour to the Prosecutor, and that is whether the
23 time that's been allocated to him to open his case is time that he
24 anticipates he's going to use to the full or largely to the full.

25 We invited them to respond to us, I think, earlier today on that

1 issue, and we got a Delphic response that they didn't know. When I
2 thought on reflection they probably do know if they're going to take much
3 of tomorrow and all of Saturday morning or not. And I say that because
4 for various reasons, and I'll be quite frank, there's still matters of
5 preparation that we want to put in hand, we're working jolly hard, but we
6 still have matters to put in hand, and if we can be, as it were, secure
7 in the knowledge, or I can be, that I won't be addressing the Court on
8 the issues relating to the merits of the confirmation until Saturday
9 morning, say, at the earliest, that would be a great relief to me. And I
10 know, as far as my brother counsel are concerned who will be opening this
11 case on behalf of the various defendants, they, too, would be, I think,
12 reassured and comforted by the fact that they know that their openings
13 aren't going to be due until tomorrow whatever happens this afternoon.

14 Also, if we were to have a shorter day this afternoon, that would
15 not be wasted, certainly not by this side of the bar, nor do I suspect by
16 that side of the bar either. And so I'm being frank and inviting the
17 Chamber to -- to perhaps indicate, if in fact we won't, for a start,
18 reach speeches until tomorrow, in terms of an opening; and, secondly,
19 whether I can get, perhaps with the information that the Prosecutor can
20 give me and give the Court, some assurance that I won't need to address
21 the issues of confirmation until Saturday morning at the earliest.
22 That's still half a day, incidentally, before my allotted time, as
23 your Honour knows.

24 PRESIDING JUDGE TRENDABILOVA: Thank you.

25 MR. HOOPER: In terms of the other matters, the general matters

1 specific to my duties this afternoon, perhaps I can come back to those
2 shortly.

3 PRESIDING JUDGE TRENDABILOVA: Thank you, Mr. Hooper.
4 Mr. Oraro.

5 MR. ORARO: Madam President, all I wanted to request was that
6 since the Prosecutor has been given until 17th to submit their reply to
7 their application, we are requesting that we be given five days to
8 respond to that reply in the event that there are any issues we wish to
9 respond to.

10 PRESIDING JUDGE TRENDABILOVA: First of all, let me answer to the
11 points made by Mr. Hooper.

12 It totally depends on the willingness of the parties to shorten
13 their interventions now, with regard to the issues of jurisdiction,
14 admissibility, and procedural matters. And as I said in the introductory
15 remarks, we can handle today the issues related to opening statements not
16 only by the Prosecutor but also by the Defence teams. So I said that we
17 can always go ahead more expeditiously than as provided in the schedule.
18 So this is point number one.

19 Do I answer by -- by this your question, Mr. Hooper?

20 MR. HOOPER: I understand by that that the less intervention the
21 more sooner we'll get on to opening speeches this afternoon.

22 PRESIDING JUDGE TRENDABILOVA: The less or the shorter
23 interventions. That is -- that is the point that I'm making. Now you
24 have each one hour allotted to -- for observations on the issues of
25 jurisdiction, admissibility, procedural matters.

1 MR. HOOPER: Yes.

2 PRESIDING JUDGE TRENDAFILOVA: And tomorrow there is half an hour
3 for the opening statements.

4 MR. HOOPER: All right. So --

5 PRESIDING JUDGE TRENDAFILOVA: So by this I say that if you're
6 not going to spend the whole one hour dealing with matters that you
7 handled properly in your written submissions, we can go ahead with the
8 opening statements, and this is going to be saving quite a lot of time.
9 So, finally, we can accommodate your request.

10 MR. HOOPER: My request is to put over opening statements to the
11 schedule time tomorrow. In other words, to have that anchored tomorrow
12 that opening statements are made tomorrow. That's my request.

13 PRESIDING JUDGE TRENDAFILOVA: But the opening statements,
14 according to the schedule, are tomorrow.

15 MR. HOOPER: Yes.

16 PRESIDING JUDGE TRENDAFILOVA: So can't we proceed today with
17 them?

18 MR. HOOPER: Well, I'm -- we can, but --

19 PRESIDING JUDGE TRENDAFILOVA: Just think about this, Mr. Hooper.
20 You're not supposed to answer immediately.

21 As to the question raised by Mr. Oraro, in the oral decision
22 assigning the Registrar with the duty to submit the written applications
23 of the three Defence teams regarding challenge to the jurisdiction of the
24 Court, we were following exactly the wording and the spirit of Rule 58,
25 paragraph 2 of the Rules of Procedure and Evidence.

1 Of course, following the Regulations of the Court and following
2 the principle that I have identified as one of the principles guiding
3 these proceedings, you can always make written submissions thereafter
4 bearing in mind the comments made by the Prosecutor and by the
5 legal representative for the victims participants in this case. Although
6 the intention of the Chamber is when we finish with the Confirmation of
7 Charges Hearing to grant the parties and the legal representative a
8 certain period of time, a certain amount of time, when you can make
9 written submissions on any issue that you consider important to be taken
10 into account when we are going to assess the charges, the evidence
11 submitted, and all related issues. So that is why we didn't give you
12 this time following the law, Rule 58, and bearing in mind that we are
13 going to give you around -- I don't want to specify because it's a matter
14 of consultations with my colleagues, two, three weeks that you have the
15 luxury of time to quite quietly and thoughtfully and deeply go into all
16 the issues that you would like to raise before the Chamber.

17 So is it agreeable for all the Defence teams that after the
18 submissions on the 17th of September, as the Prosecutor correctly made
19 his point, that you are granting now two weeks to respond or ten days to
20 respond, or you're going to keep it at the end when you will be granted
21 the two or three weeks of time to deal with any issue that you would like
22 to raise? What is your -- what is your view, Mr. Oraro, or you would
23 like to consult first your colleagues.

24 MR. ORARO: I do think that it's quite acceptable. The time will
25 be sufficient for us to respond.

1 PRESIDING JUDGE TRENDAFILOVA: Of course. Thank you very much.

2 Now we have 40 minutes, and we can go ahead with the observations
3 on jurisdiction, procedural matters, as the Chamber suggests, and as the
4 Chamber brings to the attention of the Defence teams and the Prosecutor,
5 that you do not spend the whole time allotted to the parties.

6 Following our schedule, now the Defence team of Mr. Ruto can
7 make, if the Defence team wishes so, observations on procedural matters.

8 MR. HOOPER: Yes. Can I just draw attention to the Registry to
9 the fact that the screen is stuck, and I'm obviously on my feet and not
10 in a position to rectify that myself, but from time to time even though,
11 of course, everyone here is anglophone, it nevertheless is an aide to
12 have that transcript (* overlapping speakers).

13 PRESIDING JUDGE TRENDAFILOVA: You're right, Mr. Hooper. I shall
14 ask now the Court Officer, although we have agreed that everything will
15 be in perfect order so the proceedings are not disrupted.

16 MR. HOOPER: Yes. Perfect order is not something that's always
17 attainable in this Court, as we know from our experience. There's --
18 there's often technical matters despite the great assistance we get from
19 the IT people here, and I think this is just a glitch that's happened
20 there.

21 I'm going to proceed. I'm not asking for an adjournment in
22 respect to that.

23 PRESIDING JUDGE TRENDAFILOVA: Well, the --

24 MR. HOOPER: (* overlapping speakers)... may have a similar --

25 PRESIDING JUDGE TRENDAFILOVA: -- Court Officer informs us

1 that -- and the Defence team of Mr. Kosgey has the same problem.

2 MR. ORARO: We have the same problem.

3 PRESIDING JUDGE TRENDAFILOVA: So the Court Officer already took
4 care of a technician to come and to handle the problem.

5 MR. HOOPER: There seems to be a general malaise back here
6 (* overlapping speakers).

7 PRESIDING JUDGE TRENDAFILOVA: Yes. So you will proceed now.

8 MR. HOOPER: We can proceed.

9 Can I just say right at the outset that this isn't an opening,
10 though it's the beginning of our sessions. The openings may or may not
11 be tomorrow. We've obviously listened with care to all that your Honours
12 had to say. We are acutely aware that this is not a mini-trial. I hope
13 that the Bench nevertheless recognises the deep frustration that, for
14 example, Mr. Ruto, who I represent feels as he considers he did no wrong
15 and considers he's here solely because of a flawed investigation and the
16 overreliance on a handful of anonymous witnesses. So one can understand
17 if that is his position, and if any of us were put in that position, the
18 deep and -- and heart-felt regret that he must feel and frustration at
19 really not being able to perhaps solve the situation, to address the
20 situation, having to leave it to others, to people like me and having it
21 in my hands.

22 Now, this afternoon there are three issues, in fact, which
23 your Honours invited us to address: The question of jurisdiction, the
24 question of admissibility and also whether there's I suppose what I could
25 call a Rule 122(2) matter, and in respect of all those three, there's

1 essentially just one and that is the issue of course, as your Honours
2 know, of jurisdiction. But I just want to touch on -- on two matters.

3 First of all, in respect of admissibility. Your Honour invited
4 us, if we are minded to, to make submissions, written submission, as we
5 must if we're going to take an admissibility challenge and to have those
6 lodged by Tuesday evening last. We haven't made an admissibility
7 challenge, but we are going to make and have every intention of making an
8 admissibility challenge, and if in time it will be to you as a Bench, but
9 it will not, of course, form any part of the confirmation process. It
10 cannot be joined or considered in respect of that.

11 We have delayed this admissibility challenge, and I'll say it
12 very briefly for the record, because, first of all, the Appeals Chamber
13 here was considering the issue and did so, as you know, on Tuesday
14 afternoon, and we needed to consider and still do need to consider
15 aspects of that judgement and their application. And, secondly, and
16 really, I suppose, as an accessory to that, we will are still awaiting
17 and pursuing further information from the state of Kenya in respect of
18 investigations that are relevant to that application. So that's all I'm
19 going to say about that.

20 Secondly, in respect of --

21 PRESIDING JUDGE TRENDABILOVA: Mr. Hooper. Mr. Hooper, would you
22 excuse me. I would just like to remind you that in the decision of the
23 schedule, we have made a very clear point that if the Defence teams would
24 like to raise the issue of jurisdiction or admissibility before the
25 confirmation hearing to considered throughout the confirmation hearing,

1 it should have been done as was done till the end of the working day, the
2 4.00 p.m. deadline regarding the issue, the challenge to the jurisdiction
3 of the Court. So as of this moment till the end of the confirmation
4 hearing, you're not going to make this written submission. At a later
5 stage, of course, because the law provides you with this right, but I
6 just wanted to make this clarification, because that is what the decision
7 says.

8 MR. HOOPER: And may I say I'm grateful -- grateful for -- for
9 that clarification, and we both understand, as it were, the same -- the
10 same structuring of that. And I'm saying this really to put the Chamber
11 as fully in the picture as I can, and I hope as briefly as I can. So
12 that's -- that's our intention.

13 Secondly, in terms of an issue related to the proper conduct of
14 the proceedings prior to the confirmation hearing, that is a matter
15 spoken of in Rule 122(2), which is another limb of this Chamber's
16 considerations this afternoon, I'm going to just touch again very briefly
17 and I hope encapsulate what our position is in respect of that.

18 What we maintain is that there has been a failure to investigate
19 incriminating and exonerating circumstances equally, a duty that is
20 placed on the Prosecutor very specifically and uniquely by Article 54 of
21 the Statute, and what we maintain here is that there's been a failure, a
22 total failure, to investigate exonerating circumstances. I'm not going
23 to go into detail for reasons I will come to in a moment, but I will just
24 touch upon one example: We have received absolutely no statements of an
25 exculpatory nature as a result of the disclosure obligations placed on

1 the Prosecutor prior to today. That's quite extraordinary, because if
2 the Prosecutor had actively pursued and discharged his obligation to seek
3 out exculpatory material, the duty that's on him, to do so equally, as it
4 were, with his incriminatory investigations, if he had done that, if he
5 had so many as stumbled in the Rift Valley, if he had so much as
6 approached the notables there, the people there, the people in the
7 administration there, the people in the police there, the people in the
8 army there, the district commissioners, people in the Kalenjin community,
9 any of those, is it possible that he would have come away empty-handed as
10 far as exonerating material is concerned?

11 Now, that is, may I say, a very grave concern of Mr. Ruto, and
12 I'm pretty sure the other suspects here this afternoon. And it's a grave
13 flaw, we say, in the presentation of the evidence that's been made to
14 you, the Judges. You've been given a slanted and wrong interpretation of
15 events that we will argue more on the merits later arose really as -- as
16 a spontaneous reaction to a whole combination of matters that came
17 together in those elections of 2007.

18 Now, I say no more about what we consider the merits of what I've
19 just said. We'll touch upon it more when we come to the merits and
20 considering the merits in the course of the confirmation procedure.

21 It seems to me, though, that our option really in terms of
22 seeking relief, and there would be no point raising this unless we were
23 to seek relief, is to ask for a stay of proceedings. As an abuse,
24 essentially, on the part of the Prosecutor's failure to discharge his
25 obligations which have resulted -- potentially result in a complete

1 miscuing of even this process, but in order to do that requires further
2 delay and we don't seek delay. So I'm not asking for that relief.

3 What we would consider is that this is, in fact, a duty to
4 investigate exculpatory material and to disclose it is a continuing
5 obligation on the part of the Prosecutor, and so it continues. It
6 doesn't really fall into the conduct just prior to the confirmation
7 hearing. We're not going to be tied to mentioning this now or not at
8 all. It's a continuing duty and we can pick up on it later.

9 Of course, we note that the Trial Chamber itself, if it's moved
10 by its own consideration of the evidence, for example, or any submissions
11 that may be subsequently made to you in the course of considering the
12 merits is moved to consider that this is or may be the position, then the
13 Court can act *proprio motu*, if it wishes, in terms of staying proceedings
14 at any time if it feels it's necessary to do so to cause, what we would
15 say, the Prosecutor to pick up his obligations and go and discharge them.

16 Now, because I'm not seeking a relief, I mention it only. It
17 will be mentioned more by us in the course of the review of the merits
18 that we come to, we anticipate, Saturday. I say no more about it, and I
19 don't, unless your Honour's got any view, need to trouble you or
20 your Honour's colleagues in respect of it any further other than the
21 planting of the seed of a *proprio motu* stay should your Honours feel that
22 that's a necessary step.

23 So that brings me finally to the issue of jurisdiction, and there
24 has been a challenge to the jurisdiction of this Court on behalf of
25 Mr. Ruto and Mr. Sang, and as we know, Mr. Kosgey as well. Those

1 submissions are contained, for our part, entirely in the written filing
2 which we submitted to the Chamber on Tuesday. I know that your Honour is
3 possibly minded to say, well, if those are your filings, will that be
4 sufficient, and to some extent, to a great extent, I'll be guided by
5 your Honour's view. On the other hand, these are matters of keen
6 interest to people outside this courtroom, not only in the public gallery
7 here, but this is a case that, as your Honours know, is the subject of
8 keen interest not only in Kenya and other parts of Africa but other parts
9 of the world as well. So I'm wondering if in those circumstances, given,
10 albeit relatively limited time between now and 4.00, your Honour would
11 feel it appropriate for me to very briefly step through the submissions
12 that are otherwise contained in our written submissions.

13 PRESIDING JUDGE TRENDAFILOVA: So I'm sorry, Mr. Hooper,
14 actually, you do not accept the proposal of the Chamber in order to move
15 a little bit ahead with our schedule, just to skip the issue of
16 jurisdiction. You would like to make comments.

17 MR. HOOPER: I'm wondering if to some extent some comments are
18 appropriate in terms of those who aren't directly participating in the
19 process. That's -- that's --

20 PRESIDING JUDGE TRENDAFILOVA: You raise the point, and we do
21 agree with your point that these proceedings are extremely important for
22 the whole community in the Republic of Kenya, but still here in the
23 courtroom we, the Chamber, tries to accommodate the expectations of the
24 Defence team of Mr. Ruto and Mr. Sang that, if possible, we do not go
25 ahead with lengthy sessions, and that is why I was expecting that as far

1 as there is a filing which is very extensively exploiting the issue, that
2 you're not going to make this again.

3 In addition, if I would like -- if I could just make the
4 following point with regard to procedural matters: What Rule 122(2) says
5 is to make some objections or observations regarding proceedings, and by
6 this, these are the proceedings, the judicial proceedings, pending before
7 the Chamber. What you have been discussing relates to the investigation,
8 and as the Appeals Chamber of the International Criminal Court in one of
9 its judgements stated, the investigation is not part of the judicial
10 proceedings. So of course you have the right to raise the issues that --
11 that you want to, that are extremely important for the interest of your
12 client and for the interest of just, I highlight, but still, as lawyers,
13 I would like that we adhere to the idea, to the spirit and to the
14 language of Rule 122(2).

15 By this I want to ask you: Do you have objections or
16 observations on the proceedings before Pre-Trial Chamber II up until
17 today?

18 MR. HOOPER: I have no objection to the proceedings, and the
19 matter was raised and commented upon insofar as irregularity in the way
20 in which a case is investigated may in some jurisdictions be viewed as a
21 fair trial problem and therefore can perhaps affect the regularity of
22 proceedings. But if your Honour takes the view that your Honour has in
23 line with the appellate comments in respect of this, then I have no
24 further matters to raise in terms of the proceedings.

25 PRESIDING JUDGE TRENDAFILOVA: Thank you, Mr. Hooper. Thank you.

1 Now, will you proceed, or I shall invite Mr. Kosgey?

2 MR. HOOPER: Your Honour has invited me to consider what
3 your Honour has said. Could your Honour just give me one moment to
4 discuss the matter? Thank you.

5 PRESIDING JUDGE TRENDAFILOVA: Please.

6 (Defence counsel confer)

7 MR. HOOPER: Your Honour, there's one matter that raises concern
8 which, can I think can properly be said to relate to the proper conduct
9 of the proceedings and that is the order of the Single Judge limiting the
10 Defence to calling just two oral witnesses. That affects or relates to
11 the proper conduct of -- of the proceedings, and it's the matter which I
12 raise now.

13 PRESIDING JUDGE TRENDAFILOVA: Thank you, Mr. Hooper. Obviously,
14 the explanations that I gave on behalf of the Bench in the beginning
15 didn't satisfy your concern.

16 Now I pass on to the Defence counsel of Mr. Kosgey. You have the
17 floor, Mr. Oraro.

18 MR. ORARO: Madam President, I have a few comments to make on our
19 jurisdictional challenge and procedural matters. I wish to make very
20 brief observations, taking into account that we have given written
21 submissions. And in making my observations, I will attempt not to repeat
22 anything that we have said in writing.

23 Your Honours on 30 August 2011 the counsel of Mr. Kosgey filed a
24 motion in which it set out complaints of submissions in support of its
25 challenge to the jurisdiction of the Court pursuant to Article 19(2)(a)

1 of the Statute and Rule 58 and 122 of the Rules of Procedure and
2 Evidence. We fully adopt those submissions and we'll now limit our oral
3 submissions to the following very brief observations.

4 It is the position of my client, Mr. Kosgey, and indeed all of
5 us, that the gravity of the events that occurred in the Republic of Kenya
6 between December 2000 and January 2008 cannot be minimised. They're a
7 matter of concern to every Kenyan, including my client, Mr. Kosgey, and
8 it is expected that Kenyan government will play its rightful role and
9 indeed discharge its obligation to ensure that the perpetrators are
10 brought to justice.

11 Having said that, as already stated in the motion filed on
12 30th October 2011, the crux of the present jurisdictional challenge will
13 be to determine whether, grave as they are, these tragic events are
14 matters which fall within the provisions of the Rome Statute. In other
15 words, are these matters that can properly trigger the jurisdiction of
16 this Court, or are they matters which ought to be dealt with in the
17 context of the national jurisdiction?

18 A distinct feature of the jurisdiction created under the Statute
19 is the inherent safeguard which *inter alia* ensure that the Court will
20 only intervene in crimes against humanity while other crimes, however
21 grave, will be dealt with under the national jurisdictions.

22 The import of Articles 15(7), 17, 18, and 19 provide ample
23 evidence of the clear intention of the State Parties during the Rome
24 Conference to give the Court its clearest rationale for entry into what
25 would be a domestic legal matter.

1 It is for this reason that the concept of State or organisational
2 policy developed under the chapter of Article 7(2) seeks to demarcate the
3 outer limit to what the State under the treaty are ready to concede as
4 the delineating outer reaches of the crimes against humanity.
5 Consequently, Madam President, your Honours, I wish to spend a few
6 minutes to address the significance and the context of organisation as
7 provided under the Statute.

8 I begin by posing the question: Is the organisation as conceived
9 in Article 7(2) intended to mean a state-like organisation as found by
10 the minority of this Chamber, or should it be granted the wider
11 interpretation as adopted by the majority to the effect that a
12 distinction should be drawn on whether a group has the capability to
13 perform acts which infringe on basic human value.

14 There can be no dispute that the contextual requirements of
15 crimes against humanity under the Statute were informed by the intentions
16 of the State Parties to effectively confine the use of international laws
17 on crimes of certain forms and constellation of human rights violations.
18 The purpose of this limiting effect is obviously external to human rights
19 law and can be properly understood within the context of sovereign
20 interests on the states. In other words, by conceding to the nature and
21 scope of jurisdiction of international criminal law to be administered
22 through the International Criminal Court, the State Parties considered to
23 the examination of the genuineness of their national criminal proceedings
24 in respect of matters under the jurisdiction of the Court which include
25 presumption against immunities, *ration materiae*, a presumption in favour

1 of universal jurisdiction, and the presumption against the power to grant
2 amnesties. It is, therefore, our humble submission that the contextual
3 requirement of crimes against humanity reflects the wishes of the State
4 Parties that this and other rather heavy restrictions on their
5 sovereignty only apply in particular instances of human rights and not
6 every violation. This is because the significance of the contextual
7 requirement will be of doubtful value if the interpretation of the
8 contextual element is solely anchored on an international human rights
9 law inspired theological interpretation. Our position is fortified by
10 the drafting history of the provisions of Article 7 2) which leave no
11 doubt that the threshold issue in respect of contextual requirement for
12 crimes against humanity was a matter of great concern for the parties to
13 the Treaty as compared to other offences dealt with by the Statute such
14 as genocide and war crimes. No doubt the conduct listed in Article
15 7(1)(a) to (k) of the Statute are based on the infringement of human
16 values, but it is self-evident from the outset that because of the
17 tension between the demands of different states, it was agreed that
18 contextual requirements be formulated thereby giving rise to the criteria
19 of widespread or systematic attack pursuant to a state or organisation
20 policy.

21 A possible explanation, either the intention of the provision was
22 to establish a link between the international law on crimes against
23 humanity and the collective value of international peace and security as
24 is specified in the preamble to the Statute. This has been exhaustively
25 examine by Claus Kress in his article: "On the Outer Limits of Crimes

1 Against Humanity" cited in the motion. For this reason, an argument
2 against liberal interpretation based on infringement of human values not
3 only looks attractive but it accords -- unattractive but accords with the
4 letter and spirit of Article 7(2). The construction of Article 7(2)(a)
5 of the Statute and, in particular, the words in furtherance of a state or
6 organisational policy imply that the policy of organisation should be
7 state-like, particularly when read together with elements of crime at
8 7(3). We state that it is understood that policy to commit such attack
9 requires that the state or the organisation actively promote or encourage
10 such attack against the civilian population, thereby removing the
11 distinction between a state and an organisation as far as policy
12 requirement is concerned.

13 Indeed Article 1 and Article 22(2) stress the need for strict
14 interpretation of the Statute. This is further emphasised under the
15 elements of crimes at Article 7.

16 In the absence of restrictive interpretation, there is a
17 possibility of subjecting many of the organs or organisations which are
18 not state-like to the jurisdiction of ICC exclusively on human rights
19 based *raison d'être*, thereby creating an oddity with the issue of
20 sovereignty and complementarity. Consequently, the definition of what
21 constitutes a state or organisational policy requirements some precision
22 and cannot be predicated on a case-by-case approach in view of the
23 express treated requirement more specifically the *nullum crimen sine lege*
24 provision and the generally accepted principle requiring strict
25 construction of penal statute. Of course where the state is the

1 collective entity behind the widespread or systematic attack against
2 civilian population, there is a reason to doubt that genuine
3 investigation into these crimes will take place within a state. A
4 similar measure of doubt will arise whether non-state organisation behind
5 the attack has established so powerful a presence in a given state that
6 it can prevent the exercise of national jurisdiction in that state,
7 thereby denying the state the right to exercise criminal jurisdiction.

8 It is, therefore, our humble submission that the term
9 "organisation" in Article 7(2) taken in the context of the principle of
10 complementarity which is the cornerstone for establishment of this Court
11 can only have been intended to encompass the scope of such crimes as are
12 of extremely grave threat to basic human values as enshrined in the
13 preamble to the Statute and anticipate situations where there is a reason
14 to doubt that judicial response at national level will not follow.

15 The other case for restrictive interpretation is that the
16 drafters of the Statute intended to conform to customary international
17 law as convincingly argued by Darrell Robinson in his article cited in
18 our motion. He reports that the drafters use the concept of organisation
19 in relation to precedent set in the Tadic case which, although in his
20 orbited observation leaves open the possibility of other organisation.
21 Berasio (* phon) was based on assimilation of organisations with
22 territorial control to states for purposes of policy requirement for
23 crimes against humanity. That view is also supported by the writings of
24 Mr. Bessiouni.

25 This Court has had an opportunity to considered the issue of

1 widespread attack in the case of Prosecutor v. Germain Katanga and
2 Mathieu Ngudjolo and in the case of Jean-Pierre Bemba Gombo. In both
3 decisions, the issue of organisation of policy was considered obiter and
4 in the context of a situation where there was an armed conflict. It is
5 my humble submission that this is the first case in which there is an
6 opportunity to consider what the provision in the Statute in relation to
7 the existence of a state or an organisational policy for the purposes of
8 jurisdiction of this Court is concerned. It is our humble submission
9 that to adopt interpretation predicated on the capacity of organisation
10 to commit human rights violations and to be considered on a case-by-case
11 basis would open the door for all types of groups to meet the
12 jurisdictional requirement of ICC, thereby negating the restrictions
13 intended by introduction of Article 7(2). So that is one aspect of our
14 case.

15 The other aspect we wish you to consider is the issue of
16 ceterminity (* phon). The Statute establishes a series of human rights
17 offences. Those human rights offences are predicated on contextual
18 elements. In interpreting those offences, it is absolutely necessary
19 that not only the States but anybody who comes before this Court is very
20 clear as to how those contextual elements would be considered to make
21 them liable.

22 We appreciate that this Pre-Trial Chamber has already considered
23 this issue at earlier stages. It held in both occasions by majority, but
24 at that stage there was evidence of an organisation and that ICC did,
25 therefore, have jurisdiction over the alleged crimes against humanity.

1 The majority found this as it held that an organisation may be found to
2 exist who had -- a group in question had the capacity to perform acts
3 which infringe on basic human values. The Defence wishes to emphasise
4 that this is the first time that the Pre-Trial Chamber has the
5 opportunity to consider submissions from the Defence on this important
6 jurisdictional point.

7 The earlier decisions of the Pre-Trial Chamber on this issue are
8 necessarily made on the basis *ex parte* applications by the Prosecutor
9 relying upon a limited range of evidence. These applications give the
10 first opportunity for the Pre-Trial Chamber to review the definition of
11 organisation.

12 THE INTERPRETER: Request from the interpretation booth. Could
13 the speaker please be requested to slow down. Thank you.

14 PRESIDING JUDGE TRENDAFILOVA: Just a moment, Counsel Oraro.
15 Would you slow down. And just reminding you we have three minutes before
16 the break.

17 MR. ORARO: Thank you.

18 PRESIDING JUDGE TRENDAFILOVA: And one comment that of course
19 everyone knows material jurisdiction that it is related, the policy
20 element to the material jurisdiction, but you have developed so
21 extensively the issue going to the merits something that we are going to
22 do in the days to come. I couldn't help but make this comment because
23 maybe at the end after all the evidence is presented, at the end of the
24 Confirmation Hearing, maybe in your closing statement you would like to
25 make this thorough analysis.

1 MR. ORARO: Thank you, My Lady, but I was just making them as an
2 introductory requirement to bring to the Chamber the way we are looking
3 at the issue as quite central to the issue before you without the
4 prejudice to our belief that we will be able, from the evidence, to show
5 that our client is absolutely innocent.

6 Now, I will observe what -- what your ladyship has said and
7 proceed to the issue of observations, procedural observations. And in
8 respect of that, all I would wish to say is we share the concern of the
9 Chamber as to the limited nature of what is before the Chamber and note
10 the previous decisions of the Chamber on the purpose of these
11 proceedings. We wish to assure the Chamber that we shall limit ourselves
12 to the purpose of confirmation hearings and robustly analyse the evidence
13 without reducing this to a hearing or a mini-hearing. And with that, I
14 would wish to conclude my remarks.

15 PRESIDING JUDGE TRENDAFILOVA: Thank you, Mr. Oraro. It will be
16 done. Rest assured. This is our duty pursuant to the law.

17 Now we shall have half an hour break, and we shall resume the
18 session at 4.30 sharp.

19 Just to -- to correct not only the month was wrongly addressed,
20 August, September, but the written observations that the Prosecutor and
21 the legal representative for the victims could submit in September, but
22 it turns out that the 17th of September is Saturday. So the proper day
23 should be the 16th, but it doesn't concern the Defence teams. It is an
24 issue that concerns the Prosecutor's Office and Ms. Chana.

25 So now the session is adjourned, and we shall resume it at 4.30.

1 COURT USHER: All rise.

2 Recess taken at 3.58 p.m.

3 On resuming at 4.30 p.m.

4 (Open session)

5 COURT USHER: All rise.

6 PRESIDING JUDGE TRENDAFILOVA: If Counsel Oraro has finished his
7 observations, we can proceed to the Defence team of Mr. Sang.

8 MR. ORARO: My Lady, I still had -- sorry, your Honour
9 Madam President, I still had a few observations to make, but it was still
10 on the issue of jurisdiction if the Chamber has the patience.

11 PRESIDING JUDGE TRENDAFILOVA: (Microphone not activated) ...

12 THE INTERPRETER: Microphone, please, Madam President.

13 PRESIDING JUDGE TRENDAFILOVA: Sorry. I am hoping you're not
14 going, Mr. Oraro, with all our respect for your professionalism, to
15 develop that one of the contextual elements of the crimes against
16 humanity pursuant to Article 7(2)(a).

17 MR. ORARO: Thank you, My Lady. My Lady, all I required to do to
18 finalise my submissions in this respect was to say that the central
19 thrust of the Defence case in relation to the meaning of organisation is
20 the issue of State sovereignty. The Defence is concerned that the test
21 outlined the majority for an organisation is so elastic that it could be
22 used to extend ICC jurisdiction to any situation where mass atrocities
23 have taken place, thereby overriding the intention of the drafters of the
24 ICC Statute who wished to make the ICC a Court of last resort, which is
25 complementary to but does not supplant the prosecutorial role of national

1 jurisdiction.

2 Indeed, the phrase "a state or organisation or policy" was

3 introduced into drafting process for the ICC Statute by a Canadian

4 delegation at the Rome conference. It was an attempt to strike an

5 appropriate balance between crimes against humanity and domestic crimes

6 by preventing the ICC from prosecuting atrocities which were carried out

7 by a groups but which were not truly part of a widespread or systematic

8 attack constituting crimes against humanity. Partly due to the

9 importance placed by His Honour Judge Kaul on the issue of state

10 sovereignty in constructing the term organisation, the Defence submits

11 that the test would be preferred as to its meaning is that outlined in

12 the dissenting judgement, namely that an organisation must partake of

13 characteristics of the state. This test is consistent with both the

14 intentions of the drafters of the Statute. It is supported by esteemed

15 academic commentators such as she Cherif Bassiouni and it ensures that a

16 similar test is applied to those who may be prosecuted for crimes against

17 humanity as well as those who are bound by the provisions of

18 international humanitarian law in a non-international armed conflicts.

19 Perhaps, most importantly, it ensures that the term organisation is a

20 meaningful one; that is, it can be defined by reference to particular

21 qualities which objectively distinguish it from other groups which are

22 not organisations. The Defence recognises that in supporting the

23 dissenting judgement of His Honour Judge Hans-Peter Kaul, it is relying

24 on an approach that the majority has already rejected on two earlier

25 occasions. Nevertheless, the Defence respectfully asks the

1 Pre-Trial Chamber --

2 THE INTERPRETER: Message from the English booth. Could the
3 speaker please be requested to slow down. Thank you.

4 PRESIDING JUDGE TRENDABILOVA: Again from the interpreters, would
5 you slow down, counsel.

6 MR. ORARO: Sorry, Madam President. Nevertheless, the Defence
7 respectfully asks the Pre-Trial Chamber to consider the issue afresh, and
8 in doing so, the Defence places particular emphasis on the following
9 features of this Chamber's earlier majority decision, and those are:
10 One, does the definition of "organisation" effectively remove an
11 important jurisdictional requirement as to the nature of the group in
12 question by simply focusing on its alleged capability? If so, is this a
13 permissible reading of the Statute?

14 Two, to what degree do the academic commentaries support the
15 majority view?

16 Three, do the criteria suggested by the majority enable the Court
17 to objectively distinguish between groups that do constitute
18 organisations falling under Article 7(2)(a) and those which do not? If
19 not, is it a workable and appropriate criteria for this and other cases?

20 Madam President, my comments in respect of that issue rests.
21 Thank you.

22 PRESIDING JUDGE TRENDABILOVA: Thank you. Thank you,
23 Counsel Oraro.

24 Now it's the Defence team of Mr. Sang, the leading counsel,
25 Mr. Kigen-Katwa.

1 MR. KIGEN-KATWA: Thank you, Madam President. Madam President
2 and your Honours, in the first instance, the ruling that was the first
3 item of this Court session being the application to differ the dates --
4 the sittings on Saturday was a filing made by myself, and I wish to
5 apologise if the tone of the application was uncomfortable to the Court.
6 I did not mean an offence to the Court. Thank you.

7 I would like to say a few things on jurisdiction taking into
8 account what Madam President has said, the words being that we should not
9 delve too deeply into the jurisdiction issue.

10 In the first instance, this is the first opportunity we have on
11 our part to raise the issue of jurisdiction. Much of it has been decide
12 earlier on by this Honourable Court. We, on our part, pray very much
13 that the Court reconsiders the perimeters that it has applied in
14 determining that this Court has jurisdiction to investigate the issue and
15 the matters that arose in Kenya in the year 2007/2008. We pray that the
16 reconsideration be informed by the new facts which were not available at
17 that time. The first one was that at that time it was only the
18 Prosecutor who had most of the Court, and for that reason the
19 representations of the Defence were not taken on board, and we pray that
20 with the arrival and the input of the Defence, the Court does find reason
21 to reconsider whether jurisdiction actually obtains.

22 The second reason, Madam President and your Honours, is that in
23 this sitting, the test escalates to the standard of sufficient ground
24 under Article 65 -- 61(5), which different from the standard that was
25 required by -- by -- required of the Prosecutor in the first instance.

1 And lastly, as a third ground upon which we ask this
2 Honourable Court to reconsider, is that unlike when the Prosecutor came,
3 you have now two sets of facts. The first set of facts are the facts
4 that the Prosecutor has presented to you after either conducting
5 investigations and without being offensive in the alternative, purporting
6 to have conducted investigations. That's one set of facts.

7 The second set of facts are the facts that the Defence have
8 presented with acknowledgement of the purpose, the scope, and the limits
9 that go into confirmation proceedings.

10 On those premises, Madam President and your Honours, we pray that
11 you do find reason to reconsider the question of jurisdiction, and
12 without going too deep into the items we have raised in our application,
13 I pray that this Honourable Court does take on board that the intention
14 of the drafters taken again as a background of the investigation of the
15 Prosecutor and the material provided by the Defence is such as to inform
16 the resistible conclusion that in fact there is no jurisdiction for this
17 Court to try the issue of Kenya.

18 The majority decision -- the point of departure between the
19 majority decision and the dissenting judgement, which on our part we
20 agree with, is that the majority decision said that the determinant is
21 whether a group has capability to perform and which acts infringe on
22 basic human rights and that the capability to perform at -- which
23 infringe on basic human rights is the criteria.

24 Madam President and your Honours, we wish to emphasise the fact
25 that the word "group" used by the majority decision is a word which was

1 considered by the drafters of that clause, and there was a conscious and
2 deliberate choice to exclude the word "group." And we submit on our
3 part, therefore, that when the majority -- the majority of the Court used
4 "group" as a test, then it went contrary to the intention of the
5 State Parties and that situation of acting contrary to the intention of
6 the State Parties is not implied. It is explicit. It was something that
7 was consciously considered and a decision was made to disregard it.

8 We pray that if it must be the case that the definition of crimes
9 against humanity must be expand that decision should preferably be made
10 by the State Parties rather than by the choice of the interpretation
11 adopted by the Court.

12 The second argument we wish to make on the issue of jurisdiction,
13 Madam President and your Honours, is that even assuming for argument's
14 sake that we were to accept that the criteria of the majority decision is
15 the one to be applied in respect to Kenya, even with that criteria, Kenya
16 still doesn't qualify for the trial in this Court under Article 7(2)(a).

17 The decision of the majority was that there were five criterias
18 that the majority decision found. The first one is that there has to be
19 command and hierarchy. Madam President and your Honours, we submit the
20 Presiding Judge in a decision scheduling this hearing required of the --
21 of the parties and their counsels not to be too elaborate because the
22 Court has looked at all the material. On that basis, we wish to proceed
23 and articulate the point that having looked at the Prosecution's evidence
24 as presented, it is in fact the situation that in the purported command
25 and hierarchy there are only three people who have been named. The three

1 people are the three suspects and the three alleged commanders. There's
2 nothing beyond those six people. And, Madam President and the Honourable
3 Court, we submit that an assembly of six people, assuming even they
4 actually existed as a group, cannot constitute a command and hierarchy
5 within the intention of Article 7(2)(a).

6 The second criteria that the majority decision applied was that
7 the group or the organisation should have the means to carry out
8 widespread and systematic attack on civilians.

9 Madam President and your Honours, it is in fact the situation
10 that the Prosecutor actually be -- provide what he purports to be the
11 means that the group had to carry out the widespread and systematic
12 attacks, and that is an accumulation of a sum of Kenya shillings,
13 1.2 billion. Madam President and your Honours, the sufficient test that
14 you are -- that you are to apply in deciding whether or not to confirm
15 these charges under Article 61(5) is such as to call to your mind the
16 question as to whether or not it is in fact true that this sum of 1.2
17 billion existed. Madam President and your Honours, this allegation of
18 existence of the sum of 1.2 billion is said by a witness and is not
19 supported by anything whatsoever.

20 We invite the Honourable Court to the fact that if it were true
21 that a sum of 1.2 billion were in existence somewhere in Kenya for
22 purposes of perpetrating violence, that sum of money should have been
23 somewhere, either as a physical sum of money or in a bank account. The
24 Prosecutor is resourced by the State Parties to investigate. Much as it
25 is the case that I intend to come back and state that Kenya in fact is an

1 existing state with structures and institutions, much as that is a point,
2 we wish to submit at this point that if the Prosecutor had investigated,
3 he would either have been able to provide to the Court the existence or
4 the presence of this 1.2 billion. And in the absence of any evidence of
5 its existence, we pray that this Honourable Court does find that in fact
6 there is no evidence of its existence and that second criteria of means
7 has not been satisfied by the Prosecutor. And these charges should not
8 be confirmed assuming the majority of this Court still insists that their
9 criteria must be the one to be applied.

10 The third criteria that this Honourable Court determined was that
11 the group should have control over part of the territory.

12 Madam President and your Honours, we have supplied Exhibit
13 EVD-PT-D09-00001. That exhibit is the election results of the elections
14 conducted in the year 2007 for presidency, civic works, and members of
15 parliament.

16 In respect to the three accused, or starting with my client, the
17 third accused, who comes from a constituency called Cherangani, and, by
18 extension, even that second accused who comes from a constituency called
19 Tinderet, and the first accused who comes from a constituency called
20 Eldoret North. It would be evident that the contestants coming from
21 other political parties other than the ODM that the Prosecutor has used
22 to anchor his case got votes. And so if it were true that there was
23 control over part of the territory as alleged by these three people,
24 these votes could not have been obtained in favour of anybody else. None
25 of the contestants in the three constituencies in respect to the three

1 accused in this case had 100 per cent votes or even 90 per cent. They
2 all fell short, and it is evidence of the fact that they had no control
3 over nor even there the criteria that the Court went into being whether
4 they can actually enforce and sanction disobedience of the intention.
5 The question being: Was it possible for them to punish anybody who
6 disobeys them? We submit that that is -- the fact that everybody got
7 votes as a result of the extent to which he could persuade voters is
8 evidence of the fact that if they had an influence, it is influence
9 obtained by way of persuasion and respect, not by threats and violence.

10 The fourth criteria was that the group should articulate a desire
11 to attack civilians. Madam President, it is alleged that my client
12 Joshua Sang was to serve the purpose of the media to achieve this
13 articulation of the desire to attack a certain set of civilians, and even
14 that set of civilians to be attacked is a (* indiscernible). On the one
15 hand, the Prosecution says it is the PNU members. On the other hand, it
16 says -- or at least before he came for summons, he says it was the
17 Kikuyus and the Kisiis. After the summons had been obtained, he
18 introduced the element of another group called the Kambas. And apart
19 from the fact that they keep shifting who exactly were the target of the
20 attack, Joshua Sang, my client, was a broadcaster, the material he
21 allegedly broadcasted --

22 THE INTERPRETER: Message from the English booth: Could the
23 speaker please slow down. Thank you.

24 MR. KIGEN-KATWA: Sorry.

25 PRESIDING JUDGE TRENDABILOVA: Mr. Katwa, again our interpreters

1 are pleading that everyone speaks slowly.

2 MR. KIGEN-KATWA: I apologise, Madam President.

3 PRESIDING JUDGE TRENDAFILOVA: And in addition, Mr. Katwa --

4 MR. KIGEN-KATWA: Yes (* indiscernible).

5 PRESIDING JUDGE TRENDAFILOVA: I started worrying what actually
6 is going to be the analysis when we go to the merits because you are
7 discussing element by element, the contextual elements of the crimes
8 against humanity. So would you be so kind to a little bit stick to the
9 idea of -- in the schedule that we are discussing jurisdiction, if you
10 want, admissibility and procedural matters. Some objections, something
11 that brought concerns to you that -- that you would like to share with us
12 in the course of all these five months.

13 MR. KIGEN-KATWA: I appreciate, Madam President. I'm duly
14 guided. I will only request that taking into account the fact that none
15 of the legal issues is in a compartment of its own and in view of your
16 directions, I would be very brief in the observations I would wish to
17 make. And I will also be slow, Madam President.

18 The last item -- I was saying that there are no transcripts to
19 show that in fact my client invited anybody to attack other civilians,
20 yet that is something that could be easily obtained and a finger could
21 be placed by the Prosecution on the point -- anything in terms of
22 explicit language or coded language.

23 Lastly on the criteria, Madam President, and I'm being brief, is
24 that the group that is antagonistic has to be part of a larger group or
25 could be part of a larger group with the same intentions in item number 1

1 to 4. The only groups that the Prosecution -- the only groups that the
2 Prosecution have brought out is a political party called the Kalenjin --
3 sorry, political party called ODM and an ethnic group called Kalenjin. I
4 submit that neither of them can be said either to have been created nor
5 to have been initiated for purposes of violence within the criteria set
6 out above.

7 For those reasons, Madam President, we submit that in fact
8 jurisdiction doesn't obtain on that aspect of the test set out by the
9 three -- by the majority Judges.

10 Madam President, the issue of hierarchy, in my view, is an issue
11 which falls very squarely on the issue of jurisdiction. And I only wish
12 to say the Court should kindly notice that the Prosecutor has brought two
13 contradictory fashions of the hierarchy. Through Exhibit
14 EVD-PT-OTP-0399-0142, these are an hierarchy which escalates, and at its
15 apex is Kenya's Prime Minister as its overall commander.

16 The second fashion of the hierarchy is the one presented as EVD--

17 PRESIDING JUDGE TRENDAFILOVA: Mr. Katwa --

18 MR. KIGEN-KATWA: Yes, Madam President.

19 PRESIDING JUDGE TRENDAFILOVA: I really hate to interrupt you,
20 but you're going into the evidence, and this is on our schedule to come
21 tomorrow, and for you the day after tomorrow and the following days in
22 the week. We're not discussing now the merits of the case.

23 MR. KIGEN-KATWA: I wasn't discussing the merits. I was just
24 showing that there was an organisational policy as contemplated by
25 Article 7(2)(a) which is part of what constitutes crimes against

1 humanity --

2 PRESIDING JUDGE TRENDAFILOVA: Yes, I understand. (* overlapping
3 speakers). I understand of course you're referring to the material
4 jurisdiction but still going so deeply and bringing to the -- to the
5 Chamber pieces of evidence makes us think that you are tempted to go into
6 the merits of the case.

7 MR. KIGEN-KATWA: I'm glad if Madam President's concern is the
8 depth to which I'm going. Because then I can't refrain from going
9 (* indiscernible).

10 PRESIDING JUDGE TRENDAFILOVA: Thank you.

11 MR. KIGEN-KATWA: May I only say in this particular issue of
12 hierarchy that there are two contradicting varieties of the hierarchy.

13 Madam President, the majority decision did not address the
14 question of whether under Article 7(2)(a) it is adequate whether time is
15 an issue to be considered in terms of crimes against humanity. However,
16 the dissenting Judge said that it has to have a longer span, a reasonably
17 long span. Madam President --

18 (Trial Chamber confers)

19 PRESIDING JUDGE TRENDAFILOVA: Sorry, Mr. Katwa. You can
20 proceed, but just a comment from the Bench. Could I remind you that the
21 indictment or the charges come from the Prosecutor, not from the Chamber.
22 And in your observations related to jurisdiction, you're all the time
23 analysing the decision of the Chamber. So this is an adversarial trial
24 where you're supposed to challenge the Chamber with regard to some
25 procedural errors, if we -- we made such. But to stick to all the time

1 make comments and analyse the decision of the Chamber, it's ahead. It's
2 to come after the confirmation hearing.

3 MR. KIGEN-KATWA: I wasn't yet on procedural issues, I was still
4 on jurisdiction. And I just wanted to say, even in terms of the span of
5 this violence, it lasted only three days, and we pray that when you
6 retire to consider jurisdiction the fact of the span in the -- in the
7 document containing charges showing a span of attacks between 30 December
8 and 1st January be taken into account, and I hope I'm not going too deep,
9 Madam President, on that issue.

10 Madam President, I wish to say something about procedural
11 issue -- matters that have arisen in these proceedings. The document --
12 the count 1, paragraph 133 of the document containing charges, count
13 number 2, 4, and 6 are the counts that face my client Joshua Sang.

14 In terms of procedural matters, Madam President, it is our desire
15 to participate in this confirmation hearing and to effectually
16 participate as has been observed by yourself in several decisions you've
17 made in the build-up to this confirmation. Madam President, the first
18 thing is that we are unable to completely to understand what the
19 Prosecutor requires of the third suspect. Madam President, it is alleged
20 that the third suspect in count number 3 committed or contributed to
21 commission of crimes against humanitarian. That count is brought under
22 Article 7(1)(a) and Article 23(3)(d). Our concern is really on
23 Article 25(3)(d). Madam President in permitting the Prosecutor to
24 investigate, and I take due notice of the fact that you have pointed out
25 to me I should not keep referring to previous decisions, the charges

1 against the third suspect were to the extent of the provisions of
2 Article 25(3)(a). Article 25(3)(a) does not extend to commission. And,
3 Madam President, we pray for the assistance of this Court for us to know
4 exactly are we coming to answer commission or contribution or both? And
5 whether there has been a new interpretation to the provisions of
6 Article 25(3)(d) to extend to commission over and above contribution as
7 contemplated by Article 25(3)(d), and that's an objection we wish to
8 raise as a procedural issue.

9 Am I still too fast, Madam President?

10 PRESIDING JUDGE TRENDAFILOVA: No.

11 MR. KIGEN-KATWA: Thank you.

12 The second issue, Madam President, is that count number 2, count
13 number -- and count number 4 suffer a defect in the sense that we are --
14 the third accused is charged with committed -- committed or contributed
15 in count number 2, and count number 3 is deportation or forceful
16 transfer.

17 Madam President, we pray that the precision do exist. We are
18 either having to answer for committed and contribution and/or for
19 deportation or forceful transfer but not all because then if it is all,
20 we do not know how to prepare ourself to participate in these
21 confirmation proceedings yet they attack on the rights of my client, the
22 third suspect. So my concern as a second objection is the conjunction
23 used being the word "or," and we are prepared if it is intended that we
24 be charged with the four counts; that is, contribution, commission,
25 contribution, deportation, and transfer we are okay with it but we would

1 like to know exactly what it is that we are being asked to come and
2 encounter.

3 Madam President, the count against the third accused or the last
4 part of it states that the crimes committed by my client were committed
5 in Kapsabet town and Nandi Hills town in the Uasin Gishu district.
6 Madam President, I pray that that be juxtaposed with what the Prosecutor
7 has said at paragraphs 38 and 39. And I'm saying this, Madam President,
8 so that the Court can comprehend my point because the Court does not
9 ordinarily know the geographical perimeters of Kenya. Madam President,
10 there does not exist a place called the Nandi Hills town in
11 Uasin Gishu District. Such a geographical location does indeed exist in
12 Kenya. And we would really like a clarification on that issue in
13 terms -- considering that the Prosecutor at paragraph 38 and 39 gets it
14 right in that he says Kapsabet town and Nandi Hills, and then goes on to
15 say those are in Uasin Gishu District and Nandi District. And,
16 Madam President, we submit that the charge is defective to that extent,
17 and, if anything, it shows that the Prosecutor did not investigate nor
18 did he care about the rights of the suspect.

19 Madam President, the other procedural issue we wish to raise is
20 in determining whether or not to subject the suspect to trial, you have
21 to take into account geographical perimeters. Madam President, the
22 charge against the third suspect, and applies to also the other suspects,
23 is that they are charged with crimes committed, including Turbo town.
24 Madam President, if you look at count 2, the count says that commission
25 of crimes against humanity in the form of murder and location including

1 Turbo town, that item including Turbo town is sustained in all the counts
2 not only against my client but also against all the others. And,
3 Madam President, including Turbo town includes even The Hague itself. It
4 means we have no limit as to the geographical expansion of where it is
5 alleged that we committed the crime, and it is an issue, a procedural
6 issue, Madam President, that we pray that the Chamber takes into account
7 as we've raised the concern.

8 Madam President, lastly, the charge itself is so contradictory.
9 In one paragraph, we have one set of facts; in the next paragraph, we
10 have another set of facts, and we are completely unable to comprehend
11 even on a common sense terms these charges. At paragraph 38, the
12 Prosecutor provides statistics showing that a sum of 230 people died,
13 1.000 people were injured, and 40.000 people were displaced. Immediately
14 in the next paragraph, Madam President, much as he introduces the use of
15 the word "over," it still doesn't cure because now the deaths reduced
16 from 230 to 207 people, the displaced people remain the same, but the
17 murders come to 37.000, the displaced people come to 37.000 from 400.000
18 people. And, Madam President and your Honours, that contradiction is
19 such as to disable us completely from knowing what we are -- exactly what
20 are the perimeters and the scope of what -- and to what extent should we
21 prepare ourselves for these proceedings.

22 Madam President, the last item of contradiction that I wish to
23 highlight from what the Prosecutor as -- the charges as presented by the
24 Prosecutor, is what is contained in paragraph 9 and paragraph 25,
25 Madam President. At paragraph 9, we are told that my client, assuming

1 that Article 25(3)(d), as we understand it, is a question of
2 contribution, then my client supposedly contributed in a certain common
3 plan to evict some people and probably to punish, according to the
4 Prosecutor. At paragraph 9, the Prosecutor says that the political
5 party -- one of the instruments used to plan was incorporated into the
6 year -- the year 2007. Madam President, when he proceeds to
7 paragraph 25, he is ready to say that that political party called ODM was
8 in existence already in the year December 2006, and, Madam President,
9 even on this basic set of facts, we are unable to know what instrument it
10 is alleged, first of all, what group and what common plan we are part of
11 and when it came into existence. And for those reasons, Madam President,
12 in terms of procedural issues, we would really like a certain degree of
13 precision in terms of the charges or in the alternative that the charges
14 be -- that it be deemed that the Prosecutor is unable to make out its
15 case.

16 Madam President, my understand is that you made a finding -- or,
17 rather, made an observation that we cannot raise the default by the
18 Prosecutor to conduct any investigation. It is an issue we feel very
19 strongly about, Madam President. Madam President, it is this
20 Honourable Court that give --

21 PRESIDING JUDGE TRENDAFILOVA: Mr. Katwa, just to make a
22 clarification --

23 MR. KIGEN-KATWA: Yes, Madam President.

24 PRESIDING JUDGE TRENDAFILOVA: -- strictly following Rule 122(3),
25 this is the explanation that I gave you. Otherwise, when you're

1 developing your case, of course you have all the freedom to best serve
2 the interests of your client. But as far as we have strictly to follow
3 the agenda as it is, I was making this comment regarding the
4 investigation, the judgement that the Appeals Chamber regarding
5 proceedings before the Chamber, judicial proceedings. Otherwise, when
6 you start developing the case of your client these days, you're going to
7 make your points freely. No one is going to interrupt you.

8 MR. KIGEN-KATWA: I am grateful, Madam President.
9 Madam President, inasmuch as I appreciate there is a decision emanating
10 from the Appeals Chamber that binds this Court, I will still seek to
11 endeavour to argue that it is possible for the Court to make a finding
12 that the issue of whether or not the Prosecutor actually conducted
13 investigations is an issue, a procedural issue, that you can consider.
14 Madam President, I am coming from the position that it is the Court which
15 authorises him to investigate. He subsequently comes under Article 58 to
16 say: I've investigated and found crimes committed. And subsequent to
17 that, summons are issued.

18 Madam President, if it were to be the case that in fact after you
19 authorised him, he didn't do that and summons have eventually been issued
20 and my client eventually has to stand trial, it is an issue,
21 Madam President, that I submit is a procedural issue that goes into it.

22 Madam President, I appreciate that you have not -- you've
23 indicated that I shouldn't go into evidence. In the course of time,
24 Madam President, we will highlight the fact that under Article 54, the
25 Prosecutor is supposed to investigate both exonerating and exculpatory

1 evidence. As the counsel for the first accused already submitted, it is
2 astounding that --

3 THE INTERPRETER: From the English booth, would the speaker
4 kindly reduce his speed. Thank you.

5 PRESIDING JUDGE TRENDABILOVA: Mr. Katwa, I feel a little bit
6 embarrassed quite often to be reminded that you speak slowly.

7 MR. KIGEN-KATWA: (* overlapping speakers) I'm sorry,
8 Madam President, I'm very grateful --

9 PRESIDING JUDGE TRENDABILOVA: (* overlapping speakers) There is
10 a simultaneous interpretation going on.

11 MR. KIGEN-KATWA: I'm sorry, Madam President. And I'm glad that
12 it is not an objection to what I'm submitting on.

13 Madam President, we will, in due course, highlight the fact that
14 the requirement under Article 54 for investigating both exonerating and
15 exculpatory evidence is an obligation that requires the Prosecutor to
16 take a proactive role, not a reactive role. Madam President, we submit
17 that he failed completely on this. Not only did he fail to be proactive,
18 but in fact even when the first -- the third suspect met him in Nairobi
19 seven days before he announced his name as a suspect, he did not afford
20 himself an opportunity from the third suspect as to what he had to say.

21 Madam President, you've told me I shouldn't go into evidence and
22 we will highlight the exhibit in that regard. Madam President, since it
23 is relevant and since it has been disclosed to us, may I also mention
24 that the first suspect suffers the same prejudice in that he went out of
25 his way to avail himself to the Prosecutor, and the Prosecutor ran away

1 from the opportunity to know the truth. Article 54 asks him to know the
2 truth, not to take one side against the other.

3 For those reasons, Madam President, we pray that you do find
4 reason to doubt that the Prosecutor has done any investigation, that the
5 charges are such as not to enable us to be ready to participate in this
6 confirmation, and that in fact Kenya is not such a country to fall within
7 the jurisdiction of this Honourable Court. The impression created by the
8 Prosecutor is that in Kenya you can't get anything. Madam President, it
9 is not true. Kenya has a police force. It has a functional judiciary.
10 It has intelligence service. It is has a functional media legislation
11 and institutions. The idea that you cannot get any transcripts and,
12 therefore, comes only with witnesses to prosecute my client
13 Madam President, is very far from the truth of the nature, the structure
14 and the institutions that exist in Kenya.

15 For those -- on those grounds, Madam President, I do pray that
16 you do find that my client has been prejudiced and that measures have to
17 be taken to redress this prejudice.

18 Thank you, Madam President.

19 PRESIDING JUDGE TRENDABILOVA: Thank you, Counsel Katwa.

20 Now the floor is over to the Prosecutor. We left the Prosecutor
21 to have the last word in these observations because the very fact that he
22 comes with the case, this implies that according to the Office of the
23 Prosecutor and the Prosecutor himself, the Court has jurisdiction over
24 this case, and second, that the case is admissible. A lot of objections
25 and comments were made on behalf of the Defence, so the floor is over to

1 you, Mr. Prosecutor, or the members of your office, to respond.

2 (Opening Statement by the Prosecution)

3 MR. MORENO-OCAMPO: Thank you, Madam President. We will make a
4 few comments in our opening on the organisational aspect so we will
5 answer on this aspect during the opening, and we will take advantage of
6 your proposal to submit a written brief on 16 of September and we provide
7 our submission there.

8 PRESIDING JUDGE TRENDAFILOVA: Thank you very much. With regard
9 to the procedural issues, you're not taking the floor?

10 MR. MORENO-OCAMPO: I don't think it's necessary to answer now.

11 PRESIDING JUDGE TRENDAFILOVA: Thank you.

12 Now we came to the point when we maybe have to follow paragraph 9
13 of the decision establishing the schedule for the Confirmation of Charges
14 Hearing where it was clearly stated that as far as we finish with items
15 on the agenda for the day, we automatically "move to the next
16 presentation, even if it is schedule for the following day."

17 And on our schedule, we have to start with the opening statement
18 of the Prosecutor to be followed by the opening statement of Ms. Chana,
19 the legal representative for the victims participants, and, thereafter,
20 in the order identified in the beginning: The Defence team of Mr. Ruto,
21 the Defence team of Mr. Kosgey, and the Defence team of Mr. Sang.

22 You would like to make some observations on this proposal? No.
23 So the floor is over to you again, Mr. Ocampo.

24 MR. MORENO-OCAMPO: We would like to show some visual aide. I'm
25 not sure if the Court is prepared. If may take a few seconds, I hope, to

1 be prepared.

2 PRESIDING JUDGE TRENDAFILOVA: Mr. Prosecutor, in the same
3 decision I was referring to, there is a section C, technical issues,
4 where in paragraph 15 it was clarified when the parties would like to use
5 some video material how they're supposed to proceed, so we --

6 MR. MORENO-OCAMPO: We did.

7 PRESIDING JUDGE TRENDAFILOVA: Thank you very much. I see the
8 presence of Mr. Dubuisson, the director of the court services.
9 Mr. Dubuisson, everything is ready for the video material to be
10 displayed?

11 MR. DUBUISSON: (Interpretation) Yes, indeed, Madam President.
12 This is planned for, indeed.

13 PRESIDING JUDGE TRENDAFILOVA: Thank you. Thank you
14 Mr. Dubuisson.

15 COURT OFFICER: Your Honour, if I can just very quickly
16 intervene. I was informed by the technicians that a slight amendment
17 would need to be made to the Prosecution bench in terms of the visual
18 aide that needs to be shown. So if your Honours would be kind enough to
19 give the technicians some minutes to make the ...(* overlapping speakers)

20 PRESIDING JUDGE TRENDAFILOVA: How much time do the technicians
21 need?

22 COURT OFFICER: I believe 10 to 15 minutes would be enough for
23 that.

24 PRESIDING JUDGE TRENDAFILOVA: And they do it more expeditiously?

25 COURT OFFICER: I will notify them, your Honour, of the need for

1 that to happen expeditiously. Thank you.

2 MR. MORENO-OCAMPO: Your Honour, we have proceed without the
3 graph. We show the graph in any case tomorrow in the -- in the case.

4 PRESIDING JUDGE TRENDAFILOVA: Thank you, Mr. Prosecutor. I
5 would very much ask the Court Officer and Mr. Dubuisson so the
6 arrangements are made that we do not lose much of the very valuable time
7 given to the Chamber.

8 MR. MORENO-OCAMPO: Yes, Madam President. We planned tomorrow so
9 there's a little change in the schedule. It's okay. I think the graph
10 that we planned to present would be shown to your Honours and to the
11 suspects tomorrow, so I don't think it would be a big change. So I
12 can -- I can present to Madam President, your Honours, our case, some of
13 our case.

14 Let me start saying that today the Prosecution is representing
15 117 State Parties of the Rome Statute, including the government of Kenya
16 who in their sovereign decision signed the treaty, but in particular
17 there is valid victims of crimes against humanity. And it is in their
18 name that the Prosecution requests that the Pre-Trial Chamber confirm the
19 charges against William Ruto, Henry Kosgey, and Joshua Sang and commit
20 them for trial.

21 The Prosecution submits that the evidence presented establishes
22 substantial grounds to believe that Mr. Ruto, Mr. Kosgey, and Mr. Sang
23 are individually responsible for widespread and systematic, both, and
24 systematic attack against civilians in Kenya Rift Valley province. The
25 crimes charged affected thousands of Kenyan citizens. These massive

1 crimes are, as the Defence say, a Kenyan problem, but they are not just a
2 Kenyan problem. These are some of the most serious crimes of concern to
3 the international community as a whole, and for that reason the
4 International Criminal Court intervene.

5 As the result of the crimes committed by Mr. Ruto and Mr. Kosgey
6 and Mr. Sang, violence was unleashed in Rift Valley. At least 700
7 persons die, and approximately 400.000 persons were displaced between the
8 end of December 2007 and January 2008.

9 The evidence, the Prosecution evidence, shows that the violence
10 in the Rift Valley was the result of the planned crimes. Crimes were not
11 spontaneous. Perpetrators were not opportunistic. They were following
12 the suspects' plans.

13 The evidence will show that the crimes were carefully planned and
14 organised by William Ruto and Henry Kosgey with the goal to gain
15 political power. Mr. Ruto and Mr. Kosgey were leaders of the
16 Orange Movement, later called Orange Democratic Movement, ODM, an
17 opposition political party. Mr. Ruto, Mr. Kosgey supported by Mr. Sang
18 planned to attack people perceived to support the ruling party of
19 national unity, the -- or PNU. The suspect wanted to expel PNU
20 supporters from the Rift Valley to create a uniform ODM voting bloc to
21 create a platform for their political careers.

22 How the crimes were committed? To commit the crimes, they
23 created an organisation that included Joshua Sang, politicians,
24 businessmen, some elders, former army and police officers and had
25 hundreds, at least, of followers. The crimes were planned and prepared

1 well before the elections happened.

2 During 2007, Mr. Ruto, Mr. Kosgey, and Mr. Sang held at least
3 eight meetings specifically dedicated to plan and co-ordinate the
4 attacks. They provided -- they provided weapons, funds, and promised
5 money and land to those who participate in the attacks. They offer money
6 to those who will kill and those who will burn. The question is how
7 could Mr. Ruto and Mr. Kosgey collect such support for their goals? The
8 Prosecution evidence show that Mr. Ruto and Mr. Kosgey took advantage of
9 a distribution of land dispute in the Rift Valley to galvanise support
10 for their plans. During the 1960s and 1970s, Kenya first president
11 granted land in the Rift Valley to his community. Ruto and Kosgey
12 community in the Rift Valley believe that these decisions usurp their
13 ancestral land, and instead of leading their community to a proper
14 solution of the land problem, Mr. Ruto and Mr. Kosgey capitalise on the
15 existing tensions and animosity caused by the redistribution of land and
16 using their usage the election as an excuse to trigger the attacks.

17 Let me summarise the events in accordance with the evidence.

18 Since at least December 2006, William Ruto and Henry Kosgey
19 prepare a criminal plan to gain political power. They decided that if
20 the PNU rigged the elections or even if the ODM lost, there would be war.
21 They planned to -- what the meaning of war? They planned to attack
22 supporters of the PNU and expel them from their homes in Rift Valley.
23 They were aiming to gain power and create a uniform ODM voting bloc in
24 Rift Valley. That was the goal.

25 To achieve this goal, they created and conducted an organisation

1 based on a network of individuals and pre-existing entities in their
2 communities. This organisation, this network, have had five components:
3 political, media, financial, elders, and military.

4 First, there was a political component led by Mr. Ruto and
5 Mr. Kosgey that included other politicians who participated in the
6 preparatory meetings and assisted in the organisation of attacks that
7 were to follow.

8 Second, Ruto and Kosgey relied on the media to disseminate their
9 messages, specifically Joshua Sang played a key role to broadcast their
10 message. The media was used to indoctrinate the network members by
11 broadcasting propaganda against PNU supporters, to broadcast a speech of
12 designated network members who indicated ideas or ways to co-ordinate the
13 attacks.

14 Third, Mr. Ruto and Mr. Kosgey collected financial support
15 from -- from businessmen in order to, A, compensate attendees at
16 preparatory meetings which pertains the evidence how attendees would
17 receive money; second, purchase weapons including guns and gasoline
18 (* indiscernible); third, purchase material to make traditional weapons;
19 four, to provide transport for the attacks.

20 All of these are part of the organisation they conducted and
21 they -- they organised, they created.

22 Four, Mr. Ruto and Mr. Kosgey integrated some tribal elders into
23 their network. This is crucially important. By utilising tribal elders,
24 Mr. Ruto and Mr. Kosgey capitalised on the Kalenjin tradition of
25 demanding strict respect and obedience from their youth. This attitude

1 was critically important to ensure respect for the instructions and even
2 to maintain the confidentiality of the preparation.

3 Finally, the network had a military component integrating former
4 members of the Kenyan military and police that included three commanders
5 or generals. At the top of the organisation was Mr. Ruto. He was the
6 overall head of the military component. Reporting to Mr. Ruto,
7 commanders led a hierarchical organisation whose different jurisdiction
8 in different geographic areas including the north -- the one in the
9 North Rift, and, second, the centre Rift area, including Nandi Hills,
10 that in this area they also reported to Kosgey who was also one of the
11 authorities of the network.

12 The military component advise Ruto on logistical issues, obtain
13 weapons, identify financial resources, and mobilise direct perpetrators.
14 They ensure the implementation of the plan.

15 Below them, there were subordinates playing a variety of roles,
16 identifying PNU supporters homes and business for future attacks. So the
17 targets were identified before the elections, before the attacks.

18 They obtained weapons and these subordinates were clearly
19 important because they were leading the direct perpetrators during the
20 attacks. The direct perpetrators were trained in advance and received
21 weapons, and also they were designated -- there were also some of them
22 designated to lead attacks.

23 In addition to plan, Mr. Ruto and Mr. Kosgey had an important
24 role in the co-ordination and preparation. Mr. Ruto and Mr. Kosgey
25 encourage the attacks, but referring to the targets that PNU supported,

1 using derogative terms, they also elected commander and assigned them a
2 specific geographical areas to control, and they also identify --
3 identified the areas populated by PNU supporters for attack. So they
4 weren't just planning. Their essential contribution, we submit, was much
5 beyond the plan. They were involved in the preparation, including --
6 Mr. Ruto organise the storage and personally distribute weapons,
7 co-ordinate transportation for attacker -- and co-ordination
8 transportation for attacks. Both Mr. Ruto and Mr. Kosgey promised
9 awards, money, or land for the participation in the attacks.
10 Additionally, Mr. Ruto and Mr. Kosgey designated network perpetrators who
11 will call Kass FM to spread the network message. They -- Mr. Ruto and
12 Mr. Kosgey also ensure information on the plan to attack other areas and
13 the progress through Kass FM.

14 On 27 December 2007, Kenyan voters went to the polls to exercise
15 the democratic right and elect a president. On 30 December 2007, the
16 incumbent president and leader of the ruling PNU, Mwai Kibaki, was
17 announced as the winner of the election by a small margin over his
18 opponent from the ODM. The election results announcement triggered
19 Mr. Ruto and Mr. Kosgey's network to act in accordance with the plan.

20 Madam President, your Honours, perpetrators in the network follow
21 the plan and began attacking targeted locations in the Rift Valley
22 immediately after the election result were announced. Violent attacks
23 against persons and property -- and property were carried out in a
24 systematic and uniform fashion in the greater Eldoret area, Turbo town,
25 Kapsabet town and Nandi Hills. The evidence that the Prosecutor will

1 present will show a consistent pattern in the implementation of the
2 attacks. One, perpetrators -- perpetrators gathered at designated
3 meeting points outside the location selected for attack. Second, they
4 were under the supervision of those subordinated especially chosen
5 commanders. Third, they established roadblocks at all major roads around
6 the targeted locations. Four, they proceed to loot and burn down houses
7 and business that had been previously identify as belonging to PNU
8 supporters. As a consequence, they were systematically displacing
9 hundreds of thousands of persons away from their homes. Thousands of PNU
10 supporters fled to nearby police station and churches for refuge.
11 Perpetrators kill or maim people as they attempted to free. In the
12 roadblocks, people from the groups perceived to support PNU were attacked
13 and in many instances killed on the spot.

14 Madam President, your Honours, before I conclude my presentation
15 in this hearing, I'd like to emphasise and highlight that the
16 organisation created and supervised by Mr. Ruto and Mr. Kosgey and
17 supported by Mr. Sang was highly efficient. We will develop this line
18 properly, but it was an organisation who has a clear goal integrated by
19 hundred people. They have clear hierarchies. They have roles, finances,
20 media, politicians, and they have clear co-ordination capacity. They
21 organise roadblocks. They organise transport. They work as an efficient
22 organisation. They were able to co-ordinate at least hundred of
23 perpetrators to ensure transport, logistic and weapons to all of them to
24 co-ordinate roadblocks in the whole area and to identify the houses
25 targeted. It was an efficient organisation used to the crime. And in

1 that way you believe is no problem to prove the element of the crime
2 required by the Rome Statute, but we will elaborate on that in our
3 written submission.

4 The issue is that it is in the outcome that in a little less than
5 a month the organisation created by Mr. Ruto, Mr. Kosgey and Mr. Sang
6 executed at least eight different attacks and achieved its goal. More
7 than 400.000 civilians associated with the PNU were expelled from
8 Rift Valley. In fact, many of them are still displaced, still homeless.
9 This is serious concern for the Prosecutor office. And this is the case
10 of the Prosecutor, the murder, displacement, and persecution of thousands
11 of Kenyan victims.

12 Ms. Cynthia Tai will provide further details of the attacks to
13 conclude the Prosecution opening. Thank you, your Honours.

14 PRESIDING JUDGE TRENDABILOVA: Thank you, Mr. Ocampo. Would you
15 like to take the floor, Ms. Tai?

16 MS. TAI: Thank you.

17 Thank you, Madam President, your Honours. On behalf of the
18 Prosecution, I would like to provide some details on the attacks on the
19 civilians which constitute the crimes against humanity against the three
20 suspects, William Ruto, Henry Kosgey, and Joshua Sang.

21 First, I would like to address the attacks.

22 PRESIDING JUDGE TRENDABILOVA: Ms. Tai, I'm just -- I would like
23 to make just one point. I hope that you're not going to start developing
24 the case as you're expected to do so tomorrow, just to the extent
25 necessary for the purposes of opening statements. That is something that

1 I constantly have been advising the Defence teams, so the equality
2 requires that I address the same concern to you as well.

3 MS. TAI: Understood.

4 Briefly, I would first like to address the attacks.

5 Perpetrators who attended the preparatory meetings and events
6 that were led by William Ruto, Henry Kosgey, and Joshua Sang participated
7 in these attacks in the greater Eldoret area, Turbo town, Kapsabet town,
8 and Nandi Hills. I will not go into the details of those attacks as they
9 will be addressed during the course of the Prosecutor's presentation.
10 However, I would like to highlight some of the significant factors that
11 can be attributed to each of those attacks.

12 Each of them involved local commanders, subordinates, specific
13 tasking of individuals to identify targets, organised transportation,
14 erected roadblocks, and involved the deployment and reinforcement of
15 direct perpetrators.

16 During the course of our presentations, we will describe to the
17 Chamber how most subordinates and perpetrators were transported to and
18 from these areas in groups where they attacked towns or districts. The
19 consistent pattern that we see in the attacks shows that they were
20 centrally planned and organised.

21 From on or about the 30th of December of 2007, network
22 perpetrators committed no fewer than these eight attacks in different
23 locations targeting PNU supporters. These direct perpetrators
24 implemented the network's policy of attacking these supporters to
25 permanently expel them from the Rift Valley. They systematically

1 inflicted fear, killing, looted, burned, or otherwise destroyed their
2 property.

3 The result was devastating. Uasin Gishu and Nandi Districts
4 suffered the largest share of the victims during this period of time. It
5 resulted in approximately 230 deaths, injuries to over 1.000 people in
6 these two districts alone.

7 Again, significantly, these areas bore the same trademark. They
8 used similar means and they used a similar strategy to attack. In these
9 areas of attack, direct perpetrators approached densely populated PNU
10 areas and converged on these locations simultaneously from all
11 directions. Once there, they looted and burned and destroyed businesses,
12 and as a result, hundreds to thousands of PNU supporters fled for
13 shelter. They fled to nearby police stations and churches for refuge.

14 Briefly, Madam President, your Honours, I would like to address
15 the point of individual criminal responsibility.

16 Viewed collectively, the Prosecution's evidence will show that
17 William Ruto, Henry Kosgey, and Joshua Sang are individually responsible
18 for these attacks. Their responsibility is rooted in their common plan,
19 their network, and their policy to expel these PNU supporters.

20 They are responsible by virtue of their participation as indirect
21 co-perpetrators, that being William Ruto and Henry Kosgey. Joshua Sang
22 is liable for the crimes based on his contribution for -- to the crimes
23 committed by the network. William Ruto and Henry Kosgey made essential
24 contributions, and they co-ordinated them to ensure their success. They
25 used their authority as top leaders and as members of parliament to

1 mobilise their supporters, and they provided direct perpetrators with
2 weapons and a range for their logistical success.

3 Within this network, subordinates were assigned particular duties
4 to further their common plan. These subordinates acted as the link
5 between William Ruto and Henry Kosgey and the direct perpetrators, and
6 they acted as conduits to deliver the plans, the funds, the weapons, and
7 transportation for these attacks to occur, but William Ruto and
8 Henry Kosgey alone controlled this network, and they operated as hubs of
9 the organisation. They were the ones that were responsible for gathering
10 supporters and establishing the roles of subordinates in particular
11 areas, and they used these people to ensure participation.

12 Last, William Ruto and Henry Kosgey intended to commit these
13 crimes. They were the leaders of this network and the authors of the
14 common plan. So clearly the Prosecution's evidence will show they had
15 full knowledge that their actions would cause the crimes to occur as they
16 did.

17 Last, Joshua Sang is liable for the crimes charged under a
18 different theory of liability, as you well know. The Prosecution's case
19 is based on his contribution to the network's crimes pursuant to the
20 common plan. As indicated in the document containing the charges, he
21 used his platform, his radio platform, to indoctrinate his listeners, to
22 pressure them, and broadcasted calls of predesigned -- predesignated,
23 excuse me, network members to spread this message.

24 The Prosecution's evidence as to Joshua Sang establishes that his
25 contributions as well were not accidental but instead that he

1 purposefully contributed to Ruto and Kosgey's common plan.

2 Madam President, your Honours, the Prosecution concludes it's
3 opening statement. We thank you for its time and have nothing further at
4 this time.

5 PRESIDING JUDGE TRENDAFILOVA: Thank you, Ms. Tai.

6 Now we have 13 minutes left.

7 Ms. Chana, how do you feel about starting with your opening
8 statement and finalising them after the break?

9 MS. CHANA: I'm ready to start now, Madam President.

10 PRESIDING JUDGE TRENDAFILOVA: Thank you. Thank you. Thank you,
11 madam.

12 (Opening Statement by the Legal Representative of Victims)

13 MS. CHANA: Madam President, members of the Chamber, I am the
14 common representative of 327 victims who have been admitted as
15 participants at this Confirmation of Charges Hearing and the related
16 proceedings. I would like to say something by way of introduction of the
17 people I represent. Given that there are 327 individual people, it is
18 unfortunately not possible in the limited time available to introduce
19 each of them individually, but they are -- but they are, all 327 of them,
20 individual people. People with their own individual lives, families,
21 hopes, and aspirations which all have been turned upside down by the
22 brutal events in the post-election violence of 2007 and 2008.

23 They are all from the Rift Valley province of Kenya. They are
24 mostly members of the Kikuyu tribe, but they also include individuals
25 from the Luhya, Kiambaa, and Kisii communities. They range from the age

1 of 20 to 80. A hundred and forty-six of them are female, and 181 of them
2 are male.

3 Virtually every one of them had their homes or property
4 destroyed, burnt, looted, and destroyed in these events. Virtually every
5 one of them had to flee their homes at the time of the events. Many
6 subsequently returned and have faced the heart-breaking prospect of
7 seeking to rebuild all that was lost. Others have not been able to
8 return to this day, both because their properties have been occupied by
9 others and they have been unable to reclaim them or because of continuing
10 climate of menace makes them afraid to return.

11 Of those who did return after the violence, they found themselves
12 living in the same area as the people who were direct perpetrators of the
13 violence. They live in fear with particular trepidation that they may be
14 recognised as participants in proceedings before the
15 International Criminal Court. They are from -- the community as a whole
16 appears not to see or to understand any distinction between a witness and
17 a victim. This is one of the things which I tried to do when I went on
18 my mission to Kenya, to explain and hopefully the message gets around as
19 to that very important distinction.

20 As I cannot introduce all the victims, I will give a few
21 examples.

22 Picture a man who for the past 20 years has lived in Nandi Hills.
23 In that time he has forged relations with his neighbours, and they have
24 gone together through ups and downs as a community. A farmer by trade,
25 he has brought up and provided for a family of which he was the sole

1 breadwinner. He has striven to ensure that his children have been able
2 to go to school. His life was reversed on 18 January 2008. As the
3 victim himself narrates:

4 "It all started with a cry for help and I attended just to find
5 that, in fact, it was a plan to draw us close. Upon realising this, I
6 took to my heels running for my life, but unfortunately I was unable to
7 outrun the youth coming against me. I was shot down by an arrow to the
8 leg. They caught up with me and stoned me, leaving me for dead."

9 As a result of this attack, this particular victim suffered
10 spinal injuries and was sentenced to spend the remaining days of his life
11 paralysed and at the care of his wife, unable to work, to earn the funds
12 for his own medication, let alone to provide for his wife and children.
13 He has been transformed from a provider for his family to a burden to his
14 family in an a country where social security, invalidity benefits,
15 state-provided health care and compensation for victims of crimes are
16 virtually unknown.

17 Another story relates to a lady who has been completely changed
18 both emotionally and physically by the events, and she has a child's
19 grave which serves as a constant reminder of what happened to her in the
20 2007 and 2008 post-election violence.

21 On 1st January 2008, she told me that she remembers vividly that
22 as the violence grew worse, she and her child sought refuge at the one
23 place that is considered by most people as sacrosanct and consequently
24 most secure: the church. As they -- she sat inside the church with her
25 child, she was amongst about a hundred others, women, children, elderly,

1 disabled. They all sat in that church thinking that they were safe.

2 What happened? They burnt the church. A crowd of riotous youths
3 viciously shouting slogans and brandishing crude weapons surrounded the
4 church. She carries on to describe:

5 "The youths closed the doors and sealed the windows to ensure
6 that no one escapes. They then set the church ablaze and in minutes the
7 whole of the Kiambaa church was on fire."

8 The lady, in a bid to save her child, threw the child out of the
9 window while she burned in the fire. She defied death but sustained
10 burns to 80 per cent of her body, and now she is scarred for life. Her
11 child died despite all her efforts to save him.

12 Other victims lost family members. One victim says:

13 "I lost a son who has just finished his secondly school
14 examinations." A matter of great pride for this -- this particular
15 victim. "I had great hopes and expectations of my son. Since his death
16 during the violence I feel lost."

17 Another victim said:

18 "They chased my son down -- they chased down my son and brutally
19 cut him up. My son used to take care of me, and since his death I have
20 been destitute."

21 Yet another victim records:

22 "Among the victims, young girls are forced into prostitution,
23 sometimes by their parents, as they seek to secure food and money for
24 themselves."

25 Such is the desperation of the people who are now living in the

1 aftermath of this violence.

2 Now, for these victims and others who have not been able to
3 recount, these are not merely tragic events in history or something to
4 read about in the newspapers but real experiences in their own lives.
5 Each victim personally felt the brutality and the heartlessness of the
6 group attacks, the heartbreak of the deprivation of property obtained
7 from years of thankless toil, the indignity of being rendered incapable
8 to fend for one's family, the horror of losing family members and being
9 left alone without support or the terror of fearing for one's life
10 continuously.

11 Beyond the initial impact of the violence, victims then had to
12 endure the consequences of these callous crimes with little or no
13 assistance -- to no assistance from the government. The majority of the
14 displaced victims continue to live in deplorable conditions without
15 adequate shelter, livelihoods, and means of securing food, medical care
16 and education for their families.

17 For the parent within the Kenyan society, nothing is more
18 important than being able to provide for one's family, educate one's
19 children, and leave an inheritance for one's descendants. In most cases,
20 the victims have been deprived of all three of these capabilities. One
21 victim said:

22 "I find it difficult obtaining basic needs such as food and
23 shelter and need a lot of assistance."

24 Another victim said, who was in charge of at least 60 of the
25 IDIs -- IDP:

1 "I have had great trouble dealing with IDPs. Victims are dying
2 almost every day from stress, poverty, inability to access basic health
3 care or sufficient medicines."

4 All this is tied to this situation of powerlessness and poverty.

5 It is particularly enormously difficult for victims of these
6 events to come to terms with what has happened, not merely because the
7 turn of fate was the result of wanton criminality but even more
8 particularly because until now victims perceived no resolve on the part
9 of authorities in Kenya to do anything to pursue the perpetrators. As
10 one victim said:

11 "The government has no interest in protecting little -- the
12 little person. Instead, they use all their might to protect the big
13 people in government."

14 From the perspective of those I represent, victims watched as
15 their land was resettled by the very people that evicted them, as those
16 who carried out these grave criminal acts continued to live normal lives,
17 and as those they perceived to have instigated the violence received
18 offices in the government.

19 One victim said:

20 "After they dispossessed me, those who took away my land
21 continued to keep it. Now I live in constant desperation for basic needs
22 such as food, medical care and paying for my children's education."

23 Another victim said:

24 "We lost our home. We have no place to stay. We live inside
25 makeshift shops."

1 In this respect, it is noted that the Chamber in a decision of
2 30 May 2011 rejected an admissibility challenge by the government of
3 Kenya and said at paragraph 70 of that decision that it considered in the
4 absence of contrary evidence that there remains a situation of inactivity
5 on the part of the Kenyan authorities. The defence appealed against this
6 decision, and the Appeals Chamber has upheld it, which is exactly what
7 the perception of the victims is: There has been inactivity on the part
8 of the government.

9 Indeed, victims of these events who have received no financial
10 support from their government and who have not seen any willingness on
11 the part of their government to devote resources to bring even the lowest
12 level perpetrator to account have had to watch as the government has
13 without difficulty found enough immense resources to devote to seeking to
14 prevent these proceedings from taking place before the
15 International Criminal Court.

16 As a victim appeal to the International Criminal Court --

17 PRESIDING JUDGE TRENDABILOVA: Slow down, Counsel Chana. And let
18 me just ask our interpreters -- how much do you have from your speech?
19 How much time more do you need?

20 MS. CHANA: About another 15 minutes.

21 PRESIDING JUDGE TRENDABILOVA: So shall we make now the break --

22 MS. CHANA: All right.

23 PRESIDING JUDGE TRENDABILOVA: -- and proceed after 6.30 with the
24 third session.

25 MS. CHANA: Thank you.

1 PRESIDING JUDGE TRENDAFILOVA: We will proceed with the third
2 section at 6.30. For the moment, we adjourn the hearing.

3 Recess taken at 6.01 p.m.

4 On resuming at 6.30 p.m.

5 (Open session)

6 COURT USHER: All rise.

7 PRESIDING JUDGE TRENDAFILOVA: Please be seated. We resume our
8 session with the presentation of Counsel Chana. Please, Madam Chana, you
9 have the floor.

10 MS. CHANA: Most obliged, Madam President.

11 I left off before the break to tell you what one victim asked of
12 the International Criminal Court. He asked the Court to direct the
13 government to help the victims as they had lost their homes and had no
14 settlements. They have such hope in this Court, Madam President.

15 Now, this is a matter of particular concern for those I represent
16 for three reasons:

17 Firstly, they obviously have a natural longing to see justice
18 done in relation to what happened to them and to obtain reparation for
19 their losses. The desire for reparation is not merely to address
20 financial losses but also to further the restoration of stolen dignity.
21 They also perceive that without reparations, they will not be able to
22 bring their lives back to where they were before the election violence.
23 The impact of that violence four years ago is continuing to this day.

24 Secondly, as I've already mentioned, they continue to feel
25 vulnerable and threatened now and will continue to do so for the

1 indefinite future if those who were responsible know that it is possible
2 to act within impunity.

3 Thirdly, however and more importantly, their fear that if there
4 is no justice in relation to the events of 2007/2008, similar events will
5 be repeated in the future, for this is not the first time that the
6 Rift Valley has had the experience of ethnic violence around the time of
7 elections. It had happened at the time of the 1992 and 1997 elections
8 and on those previous occasions, the crimes went largely unpunished by
9 the authorities in Kenya. The fact that disturbances during the previous
10 2002 elections had been relatively mild then gave hope of a more table
11 future.

12 In the years prior to the events of 2007/2008, the inhabitants of
13 the region had lived in relative harmony with their neighbours in an area
14 of tribal, cultural and political diversity. Kikuyu, Kisii, Luo,
15 Kalenjin, and Luhya lived side by side sharing common human aspirations
16 as each sought to provide for their families, educate their children and
17 improve their livelihoods. Such common aspirations far outweighed any
18 differences until they were stoked up during the campaigns leading up to
19 the 2007 general elections. Ethnic violence was used by politicians to
20 advance their own political ambitions. The campaigns again saw political
21 parties mobilising around tribal alliances with the ODM bringing together
22 the Ostenstabo (* phon) tribal leaders from the Luo, Kalenjin and large
23 sections of the Luo tribes. A strategy of ODM mobilisers was the
24 demonisation of the tribes and the communities that supported the
25 opposing party, with the intention of polarising communities in a bid to

1 consolidate ethnic support. So the harmony which was had existed was
2 broken. Communities suffered. So this is not only at the individual
3 level, it's at the level of community. Whole communities have broken
4 down.

5 The violence targeted specific communities believed to be
6 supporters of the opposing party, and these included various crimes as
7 charged by the Prosecutor and the most important being the destruction of
8 property. As one of the victims explained, "They forced me out of my
9 home because I was of a certain tribe." The failure to prosecute these
10 crimes in the past has cemented in Kenyan community an atmosphere of
11 impunity that has enabled the cycle to be repeated. I quote from the
12 2008 report of the commission of inquiry into post-election violence, and
13 I do this because this is the perception most of the victims have, so I
14 think it's -- it's an important quote because it really brings together
15 the -- the perception of the victims. Elections-related violence
16 occurred not just in 1992 but also in 1997. In spite of the death and
17 destruction that these methods caused and the reports from the NGOs, such
18 as the Kenyan Human Rights Commission, Human Rights Watch and two
19 government inquiries, the Kikuyu -- the Kiliku Parliamentary Committee
20 and the Akuembe (* phon) Commission, no one was ever punished for this
21 wanton killing and destruction even though the names of the perpetrators
22 to be investigated and those adversely mentioned were contained in the
23 reports of both commissions. The Akuembe report was not made public
24 until 2002, even though it was published in 1999. This led to a culture
25 of impunity whereby those who maimed and killed for political ends were

1 never brought to justice. This changed Kenya's political landscape with
2 regard to elections, a point noted by the Human Rights Watch.

3 Each of these reports implicated politicians as the organisers of
4 the violence and killing for political ends and noted that the warriors
5 and gangs of youths who took action were both paid and pressed into
6 service. Aside from this, youths were sometimes promised land and jobs
7 after evicting upcountry dwellers. However, from the testimony in the
8 Akuembe report, it is not clear if they got either:

9 "A pattern has been established of forming groups and using extra
10 strength violence to obtain political power and of not being punished for
11 it."

12 Should this kind of violence go unpunished yet again, those I
13 represent fear that the culture of impunity will be yet further cemented
14 with the fear that the cycle will continue to be repeated. So deep is
15 the culture of impunity in Kenya that for the majority of victims, there
16 is a sense of complete disbelief at all that it is actually possible to
17 arrest and charge powerful or rich people for crimes. They all expressed
18 it to me. They can't believe it. "Is it really happening?" was a lot of
19 comments.

20 In Kenya there is a perception amongst many that if a rich or
21 powerful person is charged in a criminal court, this signals a loss of
22 political power on the part of the person charged rather than any
23 manifestation of the rule of law.

24 Against this background, the exercise of jurisdiction by this
25 international court is seen by the victims I represent as finally a basis

1 for hoping that some measure of justice for the crimes visited upon them
2 may realistically be achievable. Thus these proceedings directly affect
3 the personal interests of those I represent, both at the very individual
4 level and also at the family community level. It affects the future of
5 their country and their succeeding generations who will live in it. This
6 is a very serious matter.

7 The victims I represent are very mature. They understand that
8 justice being done means a fair trial before an independent and impartial
9 tribunal in accordance with the law. They all knew the concept of a
10 person is innocent until proven guilty. What is important to them,
11 however, now, is that the criminal justice process has now engaged
12 seriously, professionally and rigorously with what has occurred.

13 The provisions in the Statute and Rules of this Court provide for
14 victim participation, and this is a very significant feature that sets
15 this Court apart from ad hoc international criminal courts and, indeed,
16 from criminal courts in many national jurisdictions. There is a movement
17 now for what is called parallel justice even in national jurisdictions.
18 So this is a very important feature. The right to participate is to
19 enable my clients to present their views and concerns.

20 To that end, the victims have already expressed a concern in
21 these proceedings in a filing of 15th August 2011. The concern was
22 expressed in that filing -- was that the destruction and/or burning of
23 property has not clearly been included in the charges supposedly brought
24 by the Prosecutor. It was explained that this was of utmost concern to
25 the victims. In circumstances where virtually the entirety of such a

1 large number of victims in a case have suffered loss as a result of
2 destruction, burning of property, and have specifically indicated to me
3 their intention to seek reparations for such loss and in circumstances
4 where the evidence relied on in support of the charges clearly includes
5 evidence of destruction and of burning of properties.

6 Ms. Tai in her opening remarks also said that there was a lot of
7 destruction and -- of property. So the Prosecution recognises that this
8 is one indicia which could be included in the -- under the umbrella of
9 persecution.

10 Now, it was further explained in a that filing that these
11 concerns are not necessarily confined to the failure clearly to include
12 destruction but extended, for instance, to the fact that the document
13 annex of the Prosecution charges also refer to evidence of infliction of
14 injuries and looting, yet these acts are also not clearly included in the
15 proposed charges. The victims are extremely concerned that their
16 reparations might be compromised if any conviction does not include such
17 conduct. This is a new feature. It is untested, so therefore I lay it
18 before this Honourable Court these concerns.

19 In a decision, Madam President, you found that this request was
20 premature given that the confirmation hearing in this case was at that
21 time not taken place. You went on to conclude that it was without
22 prejudice for the Chamber to consider at the appropriate stage the
23 arguments advanced by the legal representative of victims. It is noted
24 that in the 5th August decision, you set out the procedural rights of the
25 victims participating in these proceedings. Should it therefore prove

1 necessary, appropriate applications will be made for authorisation in
2 accordance with that decision in the appropriate way at the appropriate
3 time. This is one matter that the victims wish me to pursue. I,
4 however, do reassure the Chamber that the interests of those I represent
5 is that the efficient and expeditious conduct of these proceedings not be
6 hindered.

7 Madam President, Honourable Members, unless there is at this
8 stage any specific matters on which the Chamber might require my
9 assistance, I would like to show appreciation for this opportunity to
10 making an opening statement and for your kind attention.

11 Madam President, your Honours, I thank you.

12 PRESIDING JUDGE TRENDAFILOVA: Thank you, Counsel Chana. You
13 have been concise and it took you exactly 30 minutes as provided in the
14 schedule to make your opening statement.

15 I would like now to turn to the Defence teams and to ask them to
16 proceed with the opening statements. We know that with regard to
17 Mr. Ruto, he has expressed his desire pursuant to Article 67(1)(h) to
18 make an unsworn statement in his defence. So, Mr. Ruto, you with your
19 counsels will decide how much time you need in the opening statements to
20 make your points. Of course, the time allotted to your team will remain
21 unchanged. Maybe the Defence could trace the issue that following the
22 timing that the Prosecutor's team took in order to make the opening
23 statement was 40 minutes instead of 30 minutes, but I have to make it
24 clear that if some of the teams, the Prosecutor, the Defence team, or the
25 legal representative for victims does not exhaust all the time allotted

1 to a specific item in our agenda, it will be added to -- to the time for
2 the other items in the agenda and will be used by the party.

3 So without further ado, I give the floor to the Defence team of
4 Mr. Ruto, to be followed by the Defence team and Mr. Kosgey, himself, if
5 he would like to join in the opening statements. And today I was
6 informed that it is the desire of Mr. Sang, himself, together with his
7 counsel, to make opening statements within the time allotted to your
8 team.

9 It is Counsel Musau. Are you going to go ahead?

10 (Opening statement by Ruto Defence)

11 MR. MUSAU: Yes. Thank you, Madam President and your Honours.

12 Your Honour, I will take 20 minutes of the allocated time. My
13 client will take the last ten minutes.

14 Your Honour, on the 27th of December 2007, the Kenyan nation went
15 into a general election. The elections were largely carried out
16 peaceably. On the 30th of December, 2007, the outcome of the
17 presidential elections were announced. On the announcement of those
18 results, fire was all over the Republic of Kenya. Six out of the eight
19 provinces of Kenya, there were spontaneous violence and reactions to the
20 announcement of the presidential results. People died. It's an
21 acknowledged fact. Properties were destroyed. It is an acknowledged
22 fact. Victims went through difficult times. They went through
23 dehumanising conditions during this period, and our sympathies, including
24 that of my client, Mr. Ruto, goes to all these people. Not today, but
25 Mr. Ruto has expressed this before and assisted the victims of this

1 violence.

2 The case before your Honours is centred only in the Rift Valley
3 province, and the question that arises is: What about the other five
4 provinces? Is it Mr. William Ruto who organised this violence? What is
5 critical about the other provinces is the violence occurred
6 spontaneously. It was a concurrent and an instantaneous reaction to the
7 announcement of these results, and it is our case that Prosecution must
8 have done an objective, thorough, and impartial investigations to find
9 out what caused the violence in Kenya and to find out the perpetrators
10 who were behind this violence. They must be brought to book. They must
11 be punished. But the process of identifying the perpetrators of this
12 violence must be done in a professional way. Gathering of gossip,
13 putting together innuendos and rumours is not the way to handle the
14 violence that occurred in the Republic of Kenya. One needs to see
15 professional investigations being carried out.

16 In the course of this confirmation hearing, we will demonstrate
17 before this Chamber that no professional, no impartial, no objective
18 investigations were carried out. If they were indeed carried out, there
19 would be an explanation as to why there was violence in the other
20 provinces.

21 The violence that broke out in Kenya had never been witnessed
22 before. We think the devil must have made a short journey to the
23 republic but not at the invitation of William Ruto.

24 Listening to the opening speech of the Prosecutor, reading
25 through the documents that have been presented before this

1 Pre-Trial Chamber, the William Ruto depicted in those documents and in
2 that speech is dramatically different from the William Ruto seated to my
3 right. The William Ruto seated to my right is a God-fearing man. He is
4 a man who one of his co-values is sanctity of human life. He is a family
5 man. He cannot start contemplating sitting in any meeting to plan
6 killing and forceful transfer of other human beings. He is a man who
7 loves humanity in all its forms. He could hardly contemplate committing
8 a crime against humanity.

9 In the course of this confirmation hearing, we will demonstrate
10 that Mr. William Ruto did not attend any preparatory meeting to plan
11 violence, but Mr. William Ruto did attend many, many meetings from the
12 year 2005 through to 2007. These were legitimate meetings where he was
13 campaigning.

14 The first series of meetings, Madam President and your Honours,
15 were in the year 2005. In the year 2005, your Honours, Kenya was
16 deciding whether or not to have a new constitution, and there was a
17 referendum to be conducted to determine that. Those who were opposed to
18 the proposed constitution had been given the orange as a sign of that
19 particular movement, and that is how Orange Democratic Movement got to be
20 born. In this particular movement, Orange Democratic Movement, there was
21 the Honourable Uhuru Kenyatta who was part of the ODM for the campaign
22 purposes of the constitution. The honourable Uhuru Kenyatta is a
23 recognised leader among the Kikuyu community, the community which
24 principally William Ruto will be sitting to plan on how to attack.
25 Your Honour, we will be demonstrating that that is illogical. That is

1 unreasonable. It is most unlikely that the recognised leader of the
2 Kikuyu community will be sitting with William Ruto and the
3 Orange Democratic Movement to plan on how to kill the Kikuyus.

4 It is important, Madam President and your Honours, to point out
5 that Mr. William Ruto represents Eldoret North constituency. This is a
6 cosmopolitan constituency largely populated by the Kalenjins, but among
7 these Kalenjins there are the Kamba community, there are the Luhya
8 community, there are the Luo community and many others. And since 1997,
9 this constituency has been overwhelmingly electing William Ruto to
10 represent them in parliament. Those who elect him are not just
11 Kalenjins. They are all the inhabitants of Eldoret North constituency.
12 In 1997, that is the first time he was elected for a five-year term. In
13 the year 2002, he was again elected for another five-year term. But more
14 importantly, in the 2002 election, Mr. William Ruto supported the
15 presidential candidacy of the honourable Uhuru Kenyatta a Kikuyu. The
16 point we are making, your Honours, is that Honourable Ruto has no dislike
17 for the Kikuyu community. He has friends in the Kikuyu community whom he
18 has supported politically, financially, and in many other ways.
19 William Ruto has friends throughout the eight provinces of Kenya. He
20 harbours no ill will. He harbours no grudge against the Kikuyu
21 community. Among his workers both in the domestic, in his farm, who
22 include the Kikuyu. And he has no dislike for this particular community.

23 In the year 2007, he was once again elected a Member
24 of Parliament for a five-year term. It is noteworthy he garnered the
25 largest number of any single parliamentary candidate and these results

1 were announced on the 28th of December, 2007. Immediately, the results
2 were announced, the Honourable Ruto left Eldoret North constituency and
3 went to Nairobi, the capital city, where he stayed throughout the month
4 of January 2008.

5 It is our case that it would not have been possible for
6 Honourable Ruto to co-ordinate any attacks when he was actually in
7 Nairobi, and what was it that he was doing in Nairobi? He had been
8 nominated by his political party to join the team known as Kenya National
9 Dialogue and Reconciliation Monitoring Unit which was chaired by Mr. Kofi
10 Annan, former Secretary-General of the United Nations. Mr. Ruto spent
11 one and a half months from the early part of January trying to restore
12 peace in the Republic of Kenya. That is a man who you'd not associate
13 with planning violence. He took time, one and a half months, to bring
14 the country together and to ensure normalcy is restored in the republic.

15 Your Honour, the evidence gathered by the Prosecution is from
16 anonymous witnesses. Apart from these statements from anonymous
17 witnesses, there is no independent evidence which would link the
18 Honourable Ruto with any crime committed between 2007 and 2008 as
19 charged.

20 Honourable Ruto was a member of pentagon, an organ in the
21 Orange Democratic Movement, and he was supporting the presidential
22 candidate for the Orange Democratic Movement, the Honourable
23 Raila Odinga, who doesn't come from his community. He comes from the Luo
24 community. And this is a cosmopolitan man that I would wish your Honours
25 to look at from that perspective. In these meetings in the pentagon, in

1 his meetings campaigning with the Honourable Raila Odinga as a
2 presidential candidate, were extensively covered by both the domestic and
3 the international media, electronic and print. If there were inciting
4 words falling from the mouth of Mr. Ruto, they would independently have
5 been captured by both the international and the local media.

6 When we get down to reviewing the entire evidence, we will be
7 able to demonstrate to this Chamber that that evidence does not exist.
8 We will be demonstrating that the Prosecution has tried to pre-empt this
9 particular aspect by -- by anonymous witnesses suggesting this material
10 cannot be available.

11 Why is it not available? Your Honours, the Rift Valley is part
12 of the Republic of Kenya. That territory was under the firm control of
13 the Republic of Kenya, the government of the Republic of Kenya. There
14 were from the village level a village elder, a locational chief, a
15 divisional officer, a district commissioner, and at the top a provincial
16 commissioner. This territory was not under the command and control of
17 Honourable Ruto.

18 The case presented by the Prosecution, they created an animal
19 they are calling "the network." What was the name of this network? What
20 was the purpose of this network?

21 In the opening speech, it was said that the goal was to gain
22 power. At the end tail of that speech, they said the organisation was
23 efficient and it achieved its goal which was stated as moving people out
24 of the Rift Valley. Which goal is the Prosecution pursuing?

25 By the time Honourable Ruto was returning to Nairobi on the 28th

1 of December, 2007, he had won the only seat he was contesting in the 2007
2 elections. What other power would he be seeking? He had been
3 overwhelmingly elected for the only seat he contested that year.

4 It is, and we will be demonstrating during the confirmation
5 hearing that the Prosecution case lacks logic. It is unreasonable, it is
6 half baked, and instead of professionally investigating their case, they
7 got to chasing the wind and the shadows.

8 William Ruto is absolutely innocent of these grave charges that
9 have been brought against him.

10 We will be urging the Court to look at the Kalenjin community and
11 the way they do things. The culture of the Kalenjin community has
12 grossly been misrepresented through the anonymous witnesses. In the
13 Kalenjin culture, an elderly man belonging to a different generation
14 would not be able to go to a house of a young man belonging to a younger
15 generation.

16 Before Madam President and your Honours are three Kalenjin
17 personalities. Mr. William Ruto happens to be a much younger person than
18 Henry Kosgey. We will demonstrate through evidence, firstly, that the
19 Honourable Henry Kosgey has never been to Mr. Ruto's home, never been.
20 And culturally, unless there are exceptional circumstances, it will be
21 for Honourable Ruto to go to the home of Henry Kosgey if there was need
22 to have a meeting to discuss anything. The Prosecution case is these
23 meetings were happening at the home of William Ruto.

24 During this confirmation hearing, Madam President and
25 your Honours, we will demonstrate that the so-called commanders have

1 never been to the home of Honourable Ruto, and we will be demonstrating
2 that this fiction which has been put together by the Prosecution cannot
3 form a basis to show sufficient evidence for Madam President and your
4 Honours to be satisfied that the substantial grounds to believe test has
5 been met. This case does not meet that test and we will be demonstrating
6 so.

7 The other aspects of the Kalenjin community is initiation, people
8 being initiated from childhood to adulthood, and photographs and many
9 things have been supplied to this Chamber. This has always traditionally
10 been done by the community in the month of December, and it coincided
11 with the election. In the course of this hearing, we will table evidence
12 that traditionally if the Kalenjin people were preparing for any war,
13 they will not circumcise their young men. They will not undergo that
14 ritual for the obvious reason that you would be disabling your youth
15 wing which is supposed to be in the forefront. And all we will be trying
16 to show this Chamber is that the Kalenjin people never prepared for any
17 war, and if they did so, it would not have been possible to have
18 initiates go through this process in the month of December 2007.

19 The calabash, a very important and significant item of the
20 Kalenjin people has been misrepresented here. This will be put in houses
21 so that there will be a passover, so to speak, during the attacks. We
22 will through evidence demonstrate that that is a misrepresentation of the
23 culture of the Kalenjin people.

24 The network that the Prosecutor wants you to believe was in
25 existence, he says in this case they were using pre-existing Kalenjin

1 institutions. We will demonstrate through evidence that Emo foundation
2 was registered long after the general election. We will demonstrate that
3 it is so easy to get financial statements of all these organisation from
4 the banks to demonstrate how much money they had, how it was dispersed
5 during that month. All this evidence you will not see because there was
6 no professional investigations.

7 This is a case largely motivated in terms of choosing who to
8 charge and who not to charge by political considerations. The evidence
9 that has been gathered by the Prosecutor will show very well-drawn
10 hierarchical system. And at the top of that system, you will find the
11 name repeatedly of Raila Odinga. You will repeatedly see that in the
12 enormous statements that he provided finances.

13 To take the most charitable view of it, the Prosecutor did not
14 believe that part of the evidence, because if he did, then the person who
15 would bear the greatest responsibility would be the ultimate person to
16 whom all this was being reported to. If he did not believe that portion,
17 why did he believe the other portion? These are the issues that we'll be
18 raising during this confirmation hearing.

19 Madam President and your Honours, we acknowledge that the process
20 of a confirmation hearing is for a limited purpose and for you to do a
21 filtering so that only cases that are fit to go to trial ultimately go to
22 trial, but in so doing, this filtering mechanism is a judicial mechanism
23 and we fully trust that Madam President and your Honours will apply their
24 own judicial mind in evaluating the evidence presented before you. My
25 client is fully confident that this will not be a conveyer belt to the

1 next stage. Your Honours will clearly look and analyse each and every
2 piece of evidence before you can conclude whether this is a fit case to
3 go to the next stage.

4 Your Honours, I have taken about 20 minutes --

5 PRESIDING JUDGE TRENDAFILOVA: A little bit more.

6 MR. MUSAU: Sorry, your Honour.

7 PRESIDING JUDGE TRENDAFILOVA: Counsel Kilukmi --

8 MR. MUSAU: Yes, Your Honour.

9 PRESIDING JUDGE TRENDAFILOVA: -- in order for your client to
10 have time to make an unsworn statement in the defence, are you going to
11 end soon?

12 MR. MUSAU: Yes, and in fact, I am concluding, Madam President,
13 your Honours, so that I can give my client time.

14 PRESIDING JUDGE TRENDAFILOVA: Thank you, Counsel Kilukmi.

15 MR. MUSAU: Yes, may I thank you. May I thank you,
16 Madam President and you Honours for patiently listening to me.

17 PRESIDING JUDGE TRENDAFILOVA: It is our duty.

18 So, Mr. Ruto, the floor is over to you, please.

19 MR. RUTO: Thank you very much, Madam President, and thank you
20 for accommodating me to make very limited remarks on -- on the issues
21 before this Court.

22 Madam President, I listened very carefully to both the Prosecutor
23 and the advocate for the attorney for the victims, and I want to say that
24 in my constituency where I represent and which has been ably said by my
25 lawyer, there are many communities. Across the country people live in my

1 constituency who have come from almost every part of -- of Kenya, and
2 what happened in 2007 was a blow to many Kenyans but a bigger blow to me.

3 We buried in my constituency many people who had actually voted
4 for me, many people who died in this violence who were my personal
5 supporters.

6 I remember a case in point. A young man, 13 years old, Kevin.
7 Kevin Kimutai (* phon), who was buried in Kisiyebor (* phon) which is
8 just near Turbo, who died from a stray bullet shot by the police. His
9 father, a very great supporter and a person who had voted for me. I
10 remember Daisy, a young girl who lives in Baharini in my constituency.
11 She now lives without another leg. A very promising young girl.

12 I remember in the nearest shopping centre to my house, Jokali
13 (* phon), a deaf and dumb person who was named Bubu because nobody knew
14 his name, who died and we had to bury him as a result of this violence.

15 Many people, many of them people I knew directly, many of them
16 people who were my supporters, many people who had voted for me died in
17 this violence.

18 And here I am in this court to suffer another giobati (* phon)
19 after what I went through. Maybe to bring you closer. Two hundred
20 metres from my house, I mean 200 metres from my house, one house after my
21 home is Paul Kavingi (* phon), a Kikuyu. The next home is, Samlanun
22 (* phon), a Kikuyu. The home to the south of my house is Mr. Matthew
23 Nguani (* phon), a Kisii, and Mr. Mokaia (* phon), another Kisii. These
24 are the people I found when I moved to Sugoi about 12 years ago. They've
25 been my neighbours. We've lived together irrespective of their tribe.

1 These are people we have lived with. These are people who have made
2 statements that have been presented to this Court. They know me. They
3 know what kind of person I am. I have lived with them.

4 I remember and bring to the attention of this Court my own blood
5 sister Theresa married to a Kikuyu. My own blood sister who comes after
6 my brother who follows me. My own sister Tekla (* phon) married to
7 another Kikuyu. These are the people, the Kikuyus, the one I am supposed
8 to have sat down and planned on how they were going to be killed, my own
9 brothers-in-law, according to the script of Mr. Ocampo.

10 Madam President, the William Ruto that is under investigation or
11 was under investigation by Mr. Ocampo must be a very different person
12 from the one that is standing before you in this court.

13 It is alleged that preparatory meetings were carried out in my
14 house in Sugoi. Let me tell you, my house in Sugoi is exactly
15 2 kilometres from the district officer's house and office complete with
16 policemen. The district officer for Turbo division, 2 kilometres from my
17 house, Rebeca Muturi is, herself, a Kikuyu; the officer commanding the
18 police division, the chief police officer, Mr. Karuru (* phon), himself a
19 Kikuyu; the district commissioner for Uasin Gishu District, himself a
20 Kikuyu. How on earth would all these people be in office, responsible
21 for security, running the security agencies of where I live and allow me
22 to hold these meetings on how to plan to kill their people? Surely, how
23 on earth could that have happened?

24 The district criminal investigation officer, the most senior
25 officer in the district, a gentleman called Henry, I don't remember his

1 other name, a Kisii. You want to tell me he was sitting in office, and
2 an opposition member of parliament called William Ruto would gather
3 meetings of thousands of people to plan on how to kill other Kenyans and
4 get away with it? That is that is stretching logic to incredible extent.

5 The Orange Democratic Movement --

6 PRESIDING JUDGE TRENDABILOVA: Mr. Ruto, sorry --

7 MR. RUTO: I will be brief, Madam President. It is alleged that
8 as a member of the Orange Democratic Movement we started to plan from
9 2005/2006. I wanted to tell you, Madam President, that I was with
10 Ruto Kenyatta, who is a Kikuyu; Ungari Uezikesi (* phon);
11 Kalonzo Musyoka, who is the current vice-president of Kenya. We were all
12 in ODM up to and including September 2007, just four months or three
13 months before the election. We were all in the
14 Orange Democratic Movement. And you want to tell me that I would sit
15 with Uhuru Kenyatta and Kalonzo Musyoka in Orange Democratic Movement
16 conspire on how to kill Kikuyus and how to kill Kambas and how to kill
17 Kisiis, together with their own leaders in my house.

18 Lastly, the so-called generals, Mr. Koech, Mr. Cheramboss,
19 Mr. Cheruiyot, have never been to my house. They have never stepped in
20 my house. They do know how my house looks like. They do not know where
21 the door faces in my house, and yet, according to Mr. Ocampo, we -- they
22 were in my house. Apparently I gave them guns, and we had several
23 meetings and all manner of shenanigans that I want to tell you,
24 Madam President. It is -- it's really tragic, because what happened in
25 Kenya in 2007/2008, was wrong, but let me say two wrongs never add up to

1 a right.

2 Thank you very much.

3 PRESIDING JUDGE TRENDABILOVA: Thank you, Mr. Ruto.

4 Now, the Defence team of Mr. Kosgey and Mr. Kosgey, himself,
5 although you didn't ask, Mr. Kosgey, to -- to make an opening statement,
6 but if you wish, you can share the time with your legal -- with your
7 counsel.

8 You have the floor, Mr. Oraro.

9 (Opening statement by Kosgey Defence)

10 MR. ORARO: Thank you, Madam President. Madam President, our
11 Defence will have two aspects: One, the whole of the Prosecution case is
12 based on the existence of a body known as "the network." The allegation
13 is that Mr. Kosgey is a member and one of the prominent members of the
14 network. The evidence disclosed does not show this. Therefore, our
15 first principal issue will be in analysing the evidence to show this
16 Court that the Prosecution has not produced any evidence showing or
17 indicating that Mr. Kosgey was a member of the network, if at all it
18 existed.

19 Two, we will show that there is no sufficient evidence to suggest
20 that Mr. Kosgey was involved in either planning or assistance of what
21 they call network, and all that has been done is the Prosecution has
22 proceeded on a voyage of lumping together Mr. Kosgey and Mr. Ruto and
23 showing that whatever evidence they have adduced in respect of any aspect
24 of their case Mr. Kosgey was involved.

25 I would like to begin by sadly conceding that there is no dispute

1 that there was horrible violence which occurred in Kenya following the
2 announcement of presidential results in the election of 2007. There is a
3 difference of opinion as to whether this violence was occasioned as a
4 result of the palpable outrage in the manner the electoral commission
5 conducted the announcement and compilation of results or if it was
6 organised in respect of the two districts referred to in the Prosecution
7 evidence.

8 What is also acknowledged is that violence was throughout Kenya
9 except in two provinces, and the manner in which it was occasioned in
10 other areas in Kenya was similar.

11 Now, in this case we will be concerned only with the violence in
12 Uasin Gishu and Nandi District, and we will be concerned with whether
13 that evidence was spontaneous or it was organised; and if it was
14 organised, whether it was organised by a network. And most importantly,
15 and that is the only thing which concerns us, is whether Mr. Kosgey was a
16 member of that network which is alleged to have occasioned violence in
17 those two places.

18 Now, it is important to know who Mr. Kosgey is. Mr. Kosgey is 64
19 years old, a very respected member of the Kenyan parliament and of his
20 community. He has been a politician and served as a member of Tinderet
21 constituency from 1979 until the present day. He is a family man and a
22 well-respected Christian in his church.

23 We will be able in the course of our evidence to show that his
24 constituency is in an area where there are large plantations of tea, and
25 the workers -- the people there were not settlers but workers.

1 He was chairman of ODM and did not belong to the apex of ODM,
2 which was the pentagon. In the course of analysis of evidence, we shall
3 be able to show that Mr. Kosgey has always been satisfied to be a
4 constituency representative, and he has at no time endeavoured to be a
5 Kalenjin leader and, therefore, the allegation that he was competing with
6 Mr. Ruto or supporting Mr. Ruto in Kalenjin leadership can only be
7 without any support in evidence.

8 Now, let me come back to the issue of the network which is the
9 basis of the Prosecution case. It is alleged in the disclosed evidence
10 that the network had eight meetings. The meeting where the Prosecution
11 conceived the creation of the network was the meeting of
12 30th December 2006. What is strange is that Mr. Kosgey was not, by the
13 evidence of the Prosecution, at this meeting. This is meeting where it
14 is alleged the hierarchy was conceived, the generals were appointed, and
15 the various parts of the network was constituted. There were thereafter
16 meetings in the follow year, 2007, in September. Strange again, the
17 Prosecution are unable to show that Mr. Kosgey was at these meetings.
18 There was a meeting in November. Mr. Kosgey was not at this meeting.

19 Now, Mr. Kosgey is brought in in alleged meetings in Nandi in
20 December 2007 by one undisclosed, heavily redacted statement of a
21 witness. And the Prosecution goes further to ensure that contrary even
22 to the Statutes they ask for redaction of the dates when Mr. Kosgey is
23 alleged to have attended these meetings. The result is that Mr. Kosgey
24 has been left in a position where he is very heavily prejudiced. He has
25 no means of defending himself because he doesn't even know the dates when

1 he's alleged to have attended these meetings.

2 Again, strange other issue which will be brought out in the
3 course of analysis of the evidence, that the hierarchical structure
4 created for Mr. Kosgey is completely different from the hierarchical
5 structure of the network as presented. It is my humble submission that
6 at the end of the day, we shall be able to show that Mr. Kosgey is an
7 innocent man against whom a prosecution has been conceived without him
8 being given an opportunity to defend himself fully and that on analysis
9 of that evidence there will be no substantial grounds to believe that
10 Mr. Kosgey was either involved in the network or that he was involved in
11 any violence during this period.

12 The other issues we will be able to show you is that in
13 accordance with the Prosecution's own evidence, the nature of the events
14 in Nandi in comparison to what happened in Rift Valley clearly show that
15 if the Prosecution are right on what they allege, then the consequences
16 would have been different.

17 Finally, I would like to humbly submit that in order to create
18 their case, the Prosecution has prejudicially exaggerated the case
19 against Mr. Kosgey by citing large amount of irrelevant evidence which
20 does not implicate Mr. Kosgey. And, in that evidence, they have further
21 aggravated matters by confusing between Henry Kosgey, Sally Kosgei, and
22 Reverend Kosgei, so that at the end of the analysis it will be clear that
23 they're not talking about the same person. It will be our humble
24 submission that the case against Mr. Kosgey is contrived and that even by
25 the Prosecution's own evidence there is no sufficient evidence to

1 establish a substantial case to believe that Mr. Kosgey was in any way
2 involved in any evidence, let alone evidence in Nandi, which he has now
3 been restricted to.

4 That's my humble submission.

5 PRESIDING JUDGE TRENDAFILOVA: Thank you very much indeed,
6 Counsel Oraro. Now you can be seated.

7 Now the Defence team of Mr. Sang, and Mr. Sang, himself.

8 MR. KIGEN-KATWA: Madam President --

9 PRESIDING JUDGE TRENDAFILOVA: If you would like to make an
10 opening statement, just decide with the counsel how much time you will
11 take yourself and leave for your client.

12 MR. KIGEN-KATWA: It is propose that my client will spend ten
13 minutes of the time allocated.

14 PRESIDING JUDGE TRENDAFILOVA: Thank you. The floor is over to
15 you.

16 (Opening statement by Sang Defence)

17 MR. KIGEN-KATWA: I am obliged to you, Madam President and your
18 Honours. Madam President, on our part, we want to, first of all, to
19 knowledge that in fact it is true that there were violence in Kenya in
20 the period 2007 and 2008. We, however, wish to qualify that the
21 atrocities that attended to that violence and anybody who is responsible,
22 any perpetrators should face the justice. We, however, would like that
23 the determination of who is responsible and who are the perpetrators
24 should be founded on sound process, and it will be evidence that in fact
25 the Prosecutor, himself, has not been a player as required of him under

1 Article 54 to seek justice and the truth in the course of this issue.

2 Mr. Sang, whom I represent, as he did when he was introducing
3 himself, is 36 years old. Probably the youngest and probably double --
4 twice younger than the second -- the second defendant.

5 He has relatives who are Kikuyus, some of his relatives are
6 married to Kikuyus. He comes from a constituency and a neighbourhood
7 that is cosmopolitan. He has friends and members in his church
8 congregations who come from Kikuyu, Kamba and Kisii tribes. It is
9 inconceivable that against the background of all those circumstances and
10 ingredients that he could design, plan and plot to attack people who are
11 his relatives, his friends, and, in all senses, people whom he has
12 associated with in the last 36 years.

13 Madam President, we will desire in the course of presenting our
14 case to show that the Prosecutor's case is founded mainly on what is
15 alleged that my client said by way of broadcast. That broadcast material
16 is recorded. Madam President, we will want to maintain the shock that we
17 have as we speak now that after the Prosecutor was given an opportunity
18 to investigate and bring incriminating evidence, the only thing he
19 brought was actually exculpatory material in respect to my client.

20 Madam President and your Honours, I want to repeat and emphasise that,
21 that every single item that the Prosecutor brought is exculpatory of my
22 client. There is nothing incriminating in it. And we were very
23 surprised when the Prosecution were making their opening address, an
24 opportunity we thought would have been used to apologise to our client
25 that he has been subjected to this process when, in fact, the substance

1 of the inquiry into his functioning is such as to suggest that he is in
2 fact innocent in every single detail.

3 Madam President, we will on our part be able to demonstrate that
4 even relying on the Prosecution evidence alone, even without ours which
5 we have supplied, we would still be able to demonstrate that not only is
6 he innocent but the question of sufficiency of ground to confirm --
7 grounds to confirm -- sufficiently of grounds to confirm the charges do
8 not exist.

9 Madam President, we will seek in the source of our presentation
10 to pray that the moment before the Court does confirm the charges, it
11 does apply its mind to the fact that other than the fact that the
12 Prosecutor has come and purported there do exist grounds to suggest that
13 my client and the others are culpable, such grounds should be reasonable,
14 sensible, and logical. Madam President, we will seek to show that, for
15 instance, the allegation by the Prosecution, because they have made two
16 allegations as justifying the reason why there was a common plan. The
17 first reason for the common plan was allegedly to create a Kalenjin
18 voting bloc. The second allegation is that they wanted to punish PNU
19 members if they were to succeed in the -- in the course of the elections.

20 Madam President, you will notice that the violence as held out by
21 the Prosecution was in the period of only 30th December, 31st December
22 and 1st of December (* sic) from the document containing charges. That
23 is the scope of the days of the alleged violence.

24 Madam President, of significance to us at this moment is to point
25 out that each of -- each one of those days was after the people allegedly

1 targeted already cast their votes, and so the logic alleging that it was
2 intended to create a bloc is untenable. It is -- it just doesn't stand
3 logic.

4 Madam President, it is alleged way back in the year 2006 the
5 aggressors, in part, were an outfit called ODM,
6 Orange Democratic Movement, as a political party. In the same period of
7 the year 2006, the target was a party called PNU as a political party.
8 Madam President, we will demonstrate and exhibit documents showing that
9 these two political parties came into existence in the period of
10 September 2007, and so by the year 2006, there did not exist on the
11 ground the outfit that constitutes the aggressor, nor the outfit that
12 constitute the victims of this violence as the Prosecutor has purported.

13 Madam President, without seeming to mention the witnesses, it is
14 a fact also that part of what is alleged by the Prosecution is that it
15 was intended that this violence was intended to create a circumstance
16 that would give power to the first accused and that the third accused was
17 assisting him to achieve that. Madam President, if that power was
18 intended to be as high an office as presidency, it is a fact that the
19 previous constitution of Kenya before August 2010 and the constitution
20 that was enacted in the August 2010 both require a presidential candidate
21 to get at least 25 per cent votes from at least more than half of the
22 provinces in Kenya. Madam President, Kalenjin community alone could not
23 constitute that kind of percentage, and so the allegation that this
24 violence was intended to acquire and confer authority and power on the
25 first accused is untenable even on a matter of logic.

1 Madam President, without being -- without repeating myself, I
2 have already said that the violence was only on three days. We will want
3 to highlight and emphasise on the spontaneity of this violence and the
4 briefness of the period of how this violence was over three days and that
5 it was very specifically spontaneously at the moment of the announcement
6 of the presidential election results.

7 Madam President, we will also pray that it be considered that
8 there is no -- my -- as the counsel for the victims has said, and we wish
9 to thank the counsel for victims for in part supporting our case. She
10 has said on our part that in fact a number of her clients, the victims,
11 have gone back home. Madam President, you will notice that the
12 Prosecutor's case is that the intention was to permanently evict a
13 certain set of people. The victims themselves have confirmed that some
14 of them have gone back, and we wish to pray that the benefit of that
15 detail of the facts should be given to the suspects. But other than
16 that, Madam President, the -- counsel for the victims has also
17 acknowledged that violence was there in the year 1992. She has said
18 there was violence in the year 1997.

19 Madam President, in the year 1992, my client was born in 1975,
20 was 17 years old. There is no conceivable way that he could possibly
21 have been involved in the violence of 1992, nor in the year 1997,
22 assuming at all there was any reason to hold that he was in fact
23 responsible in the year 2007, which we do not agree. In the year 1992,
24 when he was 17 years old, he was in school, and 17 years for that matter.

25 Madam President, at paragraph 50 -- at paragraph -- at

1 paragraph 79 of the document containing charges, the Prosecutor is
2 very -- the Prosecutor has very explicitly said that my client, the third
3 accused, together with the first and the second accused between 31st
4 December and 1st January attacked -- attacked by direct perpetrators
5 people in Langas -- in Langas part of Eldoret town. Madam President, in
6 the same breath the Prosecutor has supplied as exhibits including a
7 commission of inquiry into post-election violence which details the
8 particulars of the violence on the same date that the 1st of December
9 2007 and in the same place, and it states, Madam President, and I'm going
10 to say it verbatim what it says, that in fact the violence was between
11 the Kikuyus and the Luhyas, Madam President. We will pray that the Court
12 takes into account the variance in that detail. That whereas it is
13 alleged that Ruto's instrument -- or rather, the instrument of the three
14 suspects was Kalenjin, the violence in Langas was of different ethnicity.
15 It was Luhyas versus Kikuyus, from the exhibits produced by the
16 Prosecutor. And the logic and even the allegations against my clients
17 and the others is really a figment of imagination or at least it's not
18 rationalised between the violences of 1992, the violence of 1997, the
19 violence in Langas and even the violence that arose in six out of the
20 eight provinces in Kenya.

21 Madam President, we will pray in the course of making our
22 submissions that it be noticed that the witnesses themselves in the first
23 instance contradict each other between the two of them, and, on the other
24 hand, in the course their interviews actually contradicted their own
25 selves to a point where they take away every conceivable credibility

1 about what they say.

2 Madam President, we will pray that the Court does not assume that
3 the witnesses of the Prosecutor are honest. We will pray that their
4 evidence and what they allege be treated with circumspection.

5 Madam President, by extension of the same issue, we will in the
6 course of our submission and our presentation show that in the course of
7 the interview of these witnesses, the Prosecutor did not act in good
8 faith because there are very explicit instances when either the
9 investigators or, generally, the Office of the Prosecutor, put words in
10 the mouths of the witnesses, suggesting either the names of my client or
11 the other clients, and even suggesting dates.

12 Madam President, we will want to highlight that to show that
13 there's a certain question about the credibility of these witnesses.

14 Madam President, my client is said to have been clearly
15 functioning for purposes of assisting a political outfit called ODM. The
16 Prosecutor's produced nothing to show my client's preference for ODM or
17 his membership to ODM. However, on our part, we will show through the
18 exhibits we have already filed that, in fact, my client hosted people in
19 his radio station's programme from all shapes of opinion in terms of
20 tribe, in terms of political party, in terms of religion and that the
21 nature of his dealings at his -- at the radio station was to relate with
22 everybody of every shade and he was not biased in favour of one party or
23 another.

24 Madam President, as I said, we have already produced a document
25 to that effect. We will have witnesses also who will confirm that they

1 were hosted and treated with courtesy that was given and accorded to all
2 people who visited the station for purposes of -- of selling their wears,
3 provided they were legitimate.

4 Madam President, in the course of evidence, we will also
5 demonstrate that Joshua Sang, who allegedly attended meetings at the
6 first accused's home for purposes of planning this violence, had never
7 visited the first accused's home until December 2009. That is the first
8 time he stepped in the homestead of the first accused. And so the plans
9 way back to the year 2006, 2007, are -- did not actually occur.

10 Madam President, we will also demonstrate that the co-attendees,
11 Cheramboss, Koech, and Cheruiyot, the alleged commanders, met for the
12 first time the suspect Macletta (* phon) later in the year 2007 he met --
13 2008 he met Koech, 2010 he met Cheramboss, and has never met Cheruiyot.

14 Madam President, I wish to lastly say that we will also
15 demonstrate that the Prosecutor -- that the -- that the third accused was
16 always available for an interview with the Prosecutor. The Prosecutor
17 avoided inviting him or inviting his comments on the later crimes. Seven
18 days before the Prosecutor went to the media to say that my client is one
19 of the suspects, they had been together, they had taken tea together, and
20 we have supplied material to that effect. And it doesn't make sense why
21 he could not avail himself that opportunity to hear the other side of the
22 story under Article 54, which warrants that he seeks to have the truth
23 and use that truth to assess the veracity of the information he has from
24 the other side.

25 Madam President, we will be contending that the Prosecutor's not

1 acted in good faith. Count in the document containing charges paragraph
2 24, paragraph 25, paragraph 43, 44, 57 to 64, and 126, everywhere he's
3 saying Kalenjin elders, Kalenjin youth, Kalenjin invest -- businessmen,
4 Kalenjin elders, Kalenjin -- Madam President, we will be contending that
5 there's a certain way in which the Prosecutor took offence at a certain
6 outfit constituted in terms of Kalenjin and that his target in these
7 proceedings is not the interest of justice but the styling of this
8 community. And, Madam President, the emphasis I wish to put on that is
9 that in each of those paragraphs he says that the structures that exist
10 in the Kalenjin community were triggered for purposes of violence.
11 Madam President, these Kalenjin community's the only one in Kenya that
12 has all tribe within its confines, and, Madam President, it doesn't --
13 what the Prosecutor is saying is not true and we will adduce evidence to
14 that effect.

15 Madam President, the Prosecution -- the Office of the
16 Prosecutor --

17 PRESIDING JUDGE TRENDABILOVA: Mr. Katwa --

18 MR. KIGEN-KATWA: -- lastly.

19 PRESIDING JUDGE TRENDABILOVA: -- I'm sorry to interrupt you, but
20 you're exhausting the time for your client: Point number one. And point
21 number two: On several occasions, you were referring to your client and
22 to the other two suspects as accused. They are not. In this stage in
23 the proceedings they are suspects.

24 MR. KIGEN-KATWA: I apologise, Madam President.

25 Madam President, I wish to rest my presentation on that, and I

1 kindly request for two minutes for my client. Two minutes -- ten
2 minutes, sorry.

3 PRESIDING JUDGE TRENDAFILOVA: Ten minutes, of course. I would
4 ask the interpreters because actually we have eight minutes. Would you
5 kindly give us the two minutes so that Mr. Sang could talk to us, make
6 his opening statements for ten minutes.

7 THE INTERPRETER: Indeed, your Honour. It goes without saying.

8 PRESIDING JUDGE TRENDAFILOVA: Thank you very much.
9 The floor is over to you, Mr. Sang.

10 MR. SANG: Madam President, your Honours, I stand before this
11 Court today being accused of broadcasting material, directing,
12 coordinating, and allowing people to use the station to attack a section
13 of the Kenyans. I have been a broadcaster for the last 12 years. My
14 first experience in broadcasting did happen in the year 1999 where I
15 started having strong values in the Christianity. I worked in a
16 Christian radio station for six years and later moved to another
17 Christian station for three years before Kass came into being in the year
18 2005. And, as everyone would wish to move on, especially when you get
19 greener pastures, I moved to Kass FM, which broadcast in Kalenjin to ten
20 sub-tribes and that they understand each other, but sometimes would miss
21 in some words.

22 I do my programmes, and I reach all the Kalenjins. In fact,
23 Kass International, being online, I reach all the Kalenjins, even here in
24 the Netherlands. And not only Kalenjin in terms of tribe but people who
25 listen to Kalenjin language.

1 As many have said, Rift Valley where we made our broadcast
2 contains people of all the tribes in Kenya. Myself being 36 years, we
3 have neighbours in which I got them when I was born, both Kisiis, Kambas
4 Kikuyus, Luhyas and the rest, and we have lived with them all that time.
5 I listen -- or, I understand some of the Kikuyu and Kisii language and
6 the Luhya. They do the same. I speak on radio. They listen to me as
7 their son. They understand Kalenjin and they are Kikuyus. They even
8 sometimes contribute in my programme. So if the Prosecution alleges that
9 I used Kass to co-ordinate the attacks because I was speaking to the
10 Kalenjins, what of these Kikuyus, Kisiis, Kambas, Luhyas, and the rest
11 who are getting what I talk? I do not understand what coded language is.
12 I've never used any coded language. And so definitely they understood
13 all I would say on that. So you wonder how would a few people located in
14 two districts, Nandi and Uasin Gishu, who'd only get my messages and
15 implement the same messages while people who listened to me at any time
16 are people who are living wherever they are and they listen to Kalenjin.
17 Rift Valley is the largest province in Kenya. Kalenjin are spread across
18 the whole Rift Valley. So I wonder, the Kalenjins in Tungun (* phon),
19 the Kalenjins in Nakuru, Naivasha, Kericho, Kisii, Kisumu, Nairobi,
20 Ukambani, Mombasa, if I was to say words, if I had to direct them to
21 attack as part of the Prosecution that those who listened to me and acted
22 are from Nandi and Uasin Gishu, what of the other areas? Is there
23 another Arap Sang who was inciting people and directing and coordinating,
24 that all the violence that happened in Kenya was because of me? And if
25 not, then why is it in that a small area?

1 As I said, I'm professional journalist. I've done my diploma and
2 I've just completed my degree in communication and journalist. I know
3 all the ethics of media and furthermore the values of Christianity that
4 is in me. I would never even think in a minute to kill anybody because I
5 respect sanctity of life. Those are my values.

6 I would not at any time join a network or work with people who
7 are anticipating to kill, to maim, to destroy or to move people from any
8 area in this world, because I was not made to be a broadcaster in the
9 Kalenjin. I would like to move to another station, maybe a national
10 station with broadcast in Kiswahili or in English. So would I be a hero
11 in the Kalenjin and end my ambition of being a broadcaster? Definitely,
12 I wouldn't, as young man who would like one day to be one of the greatest
13 broadcasters on earth.

14 I hosted several people in my programmes, both from different
15 tribes and different parties. I gave them an opportunity to argue out
16 their issues in terms of a debate from both parties for the benefit of my
17 listeners. If surely I did that, would I be linked to one party, ODM,
18 while I hosted people from different parties? What was my interest in
19 ODM? I'm a journalist. I do not belong to any party. Most of the
20 witnesses have said things that I wonder sometimes if really the
21 Joshua Arap Sang they are talking about is me if the occasions and events
22 they are saying that I did surely did happen.

23 For instance, this is one who said that I attended funeral,
24 burial of one renowned athlete, Luka Sang on the 14th of January, 2008.
25 For God's sake, I wasn't there. And, again, the burial happened on the

1 10th of January and not 14th of January. So the Sang who attended the
2 funeral on 14 of January is not me. I didn't attend. The same burial
3 which is the original one, which is the real one that happened for
4 Luka Sang was on 10th of January, I didn't attend. And my Defence would
5 be able to give evidence towards that light. So are these witnesses
6 people to be trusted who concorded things against me and my tribesmen?

7 I want again to say one of the witness said about me, talking on
8 air --

9 PRESIDING JUDGE TRENDAFILOVA: Mr. Sang --

10 MR. SANG: I'm ending, please, madam.

11 PRESIDING JUDGE TRENDAFILOVA: I hate to interrupt you. Let us
12 keep our promises. As of -- not tomorrow, tomorrow is the Prosecutor's
13 day, but thereafter you will have all the opportunity to make comments on
14 all pieces of evidence presented by your rival in these proceedings. Let
15 us not abuse the kindness of the interpreters.

16 MR. SANG: I beg for a minute to end this.

17 PRESIDING JUDGE TRENDAFILOVA: Just one minute.

18 MR. SANG: Okay. On the 30th December 2007, immediately after
19 the announcement of the presidential election, the government of Kenya
20 gave a notice banning or suspending all live coverage from 30th December,
21 and me, Arap Sang, being a loyal abiding citizen, I wasn't on air on
22 31st, 1st, 2nd, 3rd, all through, as the days mentioned that I was
23 coordinating and telling people where to attack. I was not on air. The
24 only thing that I did on that time being a human being who felt for the
25 people and the issues that were happening in Kenya, I recorded messages

1 appealing for peace. I looked for people, including Honourable Ruto to
2 record messages appealing for peace because I am a peaceful person.

3 Last, I have never in my lifetime stepped in any court either
4 accused in a civil or criminal case. This is my first one. Thank you.

5 PRESIDING JUDGE TRENDAFILOVA: Thank you. Thank you, Mr. Sang.

6 We have to put an end to today's session. I would like to thank
7 the parties, the Prosecutor and his team, the suspects and their Defence
8 teams, the legal representative for victims. Very much thank you,
9 interpreters, the court reporters, the stenographers, the court officers,
10 my colleagues and our legal officers. So the hearing is adjourned.
11 Tomorrow we start at 9.30 with the presentation of the case of the
12 Prosecutor. Have a nice evening to everyone.

13 COURT USHER: All rise.

14 The hearing ends at 8.04 p.m.

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