

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, 8 September 2011
10 The hearing starts at 2.30 p.m.
11 (Open session)
12 COURT USHER: All rise. The International Criminal Court is now
13 in session.
14 PRESIDING JUDGE TRENDAFILOVA: Good afternoon, everyone. Please
15 be seated.
16 I welcome everyone who is today in the courtroom, the
17 Prosecutor's team; the Defence teams of Mr. Ruto, Mr. Kosgey, and
18 Mr. Sang; Ms. Chana, the Legal Representative for victims; our legal
19 officers. I welcome everyone who is in the public gallery. The
20 confirmation hearing is now in its last session.
21 I would like to ask the Court Officer to call the case, please.
22 COURT OFFICER: Good afternoon, Madam President, your Honours.
23 This is the Situation in the Republic of Kenya, in the case of the
24 Prosecutor versus William Samoei Ruto, Henry Kiprono Kosgey, and
25 Joshua Arap Sang, case number ICC-01/09-01/11. Thank you, your Honours.

1 PRESIDING JUDGE TRENDAFILOVA: Thank you, Court Officer.

2 Today we approach the last part of the schedule for the
3 confirmation hearing, the closing statements of the parties and of the
4 Legal Representative for victims. The time allotted to the parties and
5 to the Legal Representative is specified in the schedule, namely, half an
6 hour for each team.

7 As I have informed you, during our first session, the Judges of
8 the Chamber will grant the parties and the Legal Representative to submit
9 written observations by way of which they can exploit and develop all
10 issues deemed vital for the case pending before this Chamber. Given this
11 fact, the Bench expects the parties and the Legal Representative to
12 respect the time allocated to them without, however, depriving the
13 parties of some additional minutes that they would deem necessary for
14 their closing statements.

15 Lastly, before I give the floor to the Office of the Prosecutor,
16 I would like to remind the parties that they cannot present new evidence
17 in their closing statements or refer to pieces of evidence not presented
18 during the confirmation hearing.

19 Having said this, now I turn to the representatives of the
20 Prosecutor, of his office. Who is going to take the floor for the
21 closing statements.

22 MS. TAI: I will, Madam President.

23 PRESIDING JUDGE TRENDAFILOVA: Yes, and to ask you, Ms. Tai, to
24 tell us the members of your team who are present here today. For the
25 record.

1 MS. TAI: To the left is Meder Begaliev and he will be operating
2 the audio portion. We have four slides to present today. Ms. Corrie,
3 Ms. Renton, and (* inaudible) to represent the Prosecutor.

4 PRESIDING JUDGE TRENDAFILOVA: Thank you very much. You have the
5 floor.

6 MS. TAI: Thank you. Madam President, your honours, I do my best
7 to keep it brief, within the 30 minutes. The Prosecution's presentation
8 in writing has been presented to the interpreters and the translators for
9 their benefit.

10 PRESIDING JUDGE TRENDAFILOVA: Ms. Tai, as I said, this is a
11 request from the Chamber to make your statements within the time
12 allocated to you, but you shouldn't be, neither you or the Defence teams,
13 under some stress that you have to cut when you come to the 30 minutes,
14 but still reasonable additional minutes.

15 MS. TAI: I will do my best.

16 Madam President, your Honours, the question to be answered by the
17 Chamber at this stage is simply: Is the Prosecution's evidence
18 sufficient to commit the suspects' case to trial?

19 During the course of its presentations, the Prosecution has
20 presented its evidence and analysed how it has proven the different
21 elements of the crimes. This evidence in total establishes that
22 William Ruto and Henry Kosgey created a network or organisation, as it
23 were, under Article 7, and that they led a series of planning meetings,
24 meetings with subordinates and perpetrators who then executed the crimes.
25 Third, that Ruto organised and encouraged the violence in the

1 Uasin Gishu and Nandi Districts. Fourth, that Kosgey was significantly
2 involved, especially in respect to the Nandi District. And finally, that
3 Joshua Sang contributed by encouraging and helping to coordinate the
4 crimes through his broadcasts.

5 The question and the answer hinges upon the purpose of this
6 hearing and what type of evidence is contemplated for this stage of the
7 proceedings.

8 As set forth in the Prosecution's brief submitted pursuant --
9 three days before the hearing, pursuant to Rule 121, as well as
10 acknowledged by Madam President on the first day of the hearing, this is
11 not intended to be a mini-trial. Instead, this process is designed to be
12 a filter to distinguish those cases that should go to trial from those
13 that should not.

14 During the course of this hearing, the Prosecution has presented
15 the core of its evidence, and some parts of its incriminatory evidence
16 have not yet been disclosed. The reason is to protect the identity of
17 the witnesses, perceived or otherwise, as well as their families. This
18 information would, of course, be fully disclosed at a later stage.

19 Throughout the course of the hearing, the Defence has attempted
20 to undermine the Prosecution's case by alleging that the evidence should
21 be different, should be more, should require a full airing today at this
22 stage. They argue that anonymous and summary witnesses are somehow
23 unreliable, of little value, and should not be taken into consideration.
24 Their position overlooks the plain and express meaning of the
25 Rome Statute and its Rules, which explicitly permit the use of these

1 materials at the confirmation stage.

2 At this juncture we will not go through our arguments and repeat
3 them here, but instead, we intend to highlight for you an analysis of the
4 evidence offered by the Defence, their documentary evidence as well as
5 the live testimony of their four witnesses.

6 We submit that even if we were to view their documentary
7 evidence, the testimony of these four live witnesses, at their highest in
8 the light most favourable to the Defence, it is not -- it is insufficient
9 to demonstrate that the Prosecution's evidence is not enough. At best,
10 the suspects have established that this case and the issues presented are
11 ready for trial.

12 First, we ask that you take a closer look at the evidence that
13 they presented. We turn first to the evidence submitted by Mr. Ruto, in
14 particular, the written witness statements.

15 These 16 or so statements roughly fall into two categories. We
16 direct your attention to the visual aide before you. This presentation
17 focuses on six particular witnesses, as you see here. In the red box on
18 the left side of the screen identifies Mr. Murei, the witness that you
19 saw testify live before you.

20 COURT OFFICER: Sorry to interrupt you, Madam Prosecutor. Just
21 for reminder purposes, to be able to view this presentation, you have to
22 press the "PC 1" button in front of you. Thank you.

23 MS. TAI: This first category essentially consists of eight
24 handwritten statements. As you can see here on the screen, these
25 statements are all intertwined and tangled, if you wish. Mr. Murei sat

1 before you and told you, "Yes, sure, we sat in a room all together and we
2 gave our statements, but we didn't talk to one another. We didn't share
3 information." We ask you, is this reasonable in light of the fact that
4 each witness, they attested to the veracity of each other's statements?
5 We ask you, is it possible to determine what part of these statements are
6 rooted in their personal knowledge? What part is rooted in hearsay? And
7 which part was created based upon an instruction of another?

8 Second, we turn to typewritten statements or the second group.
9 An analysis of these eight statements identifies numerous paragraphs that
10 are substantially similar. The slide now shown on the screen quotes the
11 exact paragraph at the top, particularly:

12 "I did not see an extensive use of guns or other weapons like
13 grenades and gas cylinders."

14 As indicated in the red column on the left-hand side of this
15 screen, those paragraphs are almost identical in these eight statements.
16 They are moved around, they appear differently, but they are
17 substantially the same. They contain very unnatural formalistic
18 language. Is it reasonable to believe that everyday people that talk
19 about these events would use that language? Is it reasonable to believe
20 that they would all say that exact same thing? We submit no, it's not
21 reasonable.

22 Turning to the second suspect very briefly. Mr. Kosgey similarly
23 presents no evidence, no argument that shows that the Prosecution's
24 evidence is insufficient. The Prosecution addresses the assertion that
25 evidence from Witness 0006 is inconsistent with the rest of the evidence.

1 They assert that its inconsistent because it makes Mr. Kosgey the
2 mastermind.

3 We ask you to take a closer look at this evidence,
4 Madam President, your Honours. Witness 0006, upon closer examination,
5 does not assert that Mr. Kosgey is, in fact, the sole mastermind. He
6 gives evidence that William Ruto was the top leader of the network and
7 that Henry Kosgey was subordinate to William Ruto but deeply and
8 crucially involved in the planning, specifically in the Nandi District.
9 This information is consistent with the remainder of the Prosecution's
10 evidence.

11 Second, Mr. Kosgey's Defence claims that a particular exhibit
12 produced by Witness 0006 identifies Odinga as the top, the top of the
13 network's hierarchy and that this is in contravention with the rest of
14 the Prosecution's evidence. We assert that that is, in fact, untrue and
15 that the Prosecution has no evidence at this time indicating that
16 Raila Odinga was involved in the planning or implementation of the crimes
17 that are the subject of this case. In any event, even looking at this
18 information at the light most favourable to the Defence, does it
19 exonerate Mr. Kosgey? We submit it doesn't.

20 We now direct your attention to the third suspect. That would be
21 Joshua Sang. These documents produced on his behalf, as well as
22 assertions by his counsel, pose similar challenges.

23 As to the witness statements presented by him, these statements
24 also demonstrate the same question on the level of instruction, the same
25 question. They contain very unnatural language and again are

1 substantially similar in parts. One example identified as

2 EVD-PT-D11-00030 at 0090 states:

3 "I have not heard him," meaning Sang, "through the station asking
4 for Kalenjin to kill others/deport others/transfer others/torture and
5 persecute others."

6 Again, are these words that are used in everyday language? Is
7 this how everyday people communicate? We suggest not.

8 In addition, we recall repeated instances by the Defence that
9 Kass FM adhered to the laws and ceased all broadcasting following the
10 30th of December. The Prosecution acknowledges that live broadcasts were
11 indeed supposed to be suspended from the 30th of December until the
12 suspension was lifted in February of 2008. A set of transcripts received
13 of Kass FM broadcasts upon which the Defence has relied upon during this
14 hearing proves that Kass FM did not adhere to this ban and instead made
15 live broadcasts on the 18th of January. This proves that the station did
16 not respect this ban imposed by the government of Kenya, and it
17 corroborates the fact that Kass FM was making live broadcasts during this
18 time.

19 Now we direct your attention to the issue of alibis, many of
20 which were raised during the course of this hearing.

21 All three of the suspects at different times claim that they were
22 elsewhere during the times of these meetings. They were far away, it was
23 geographically impossible for them to appear at the meetings, at the
24 dates, and the times that the Prosecution asserts, but let's look at
25 their argument a little bit more closely.

1 The evidence in this respect is in agreement. Both the
2 Prosecution and the Defence agree, through their documents and videos,
3 that William Ruto and Henry Kosgey both had access to helicopters during
4 this particular time. Henry Kosgey presented helicopter logs in his
5 disclosure, and the Prosecution supplied video and witness testimony that
6 William Ruto had used a helicopter during that period.

7 With access to a helicopter, these alibis are not airtight and
8 they fail. The suspects could actually travel great distances quite
9 quickly.

10 Directing your attention to the visual aide in front of you, it
11 identifies approximate distances by helicopter from Eldoret to other
12 places. It includes many, if not all, of the locations where the
13 suspects say that they were.

14 You can see here that almost everything is within an hour, an
15 hour's ride from Eldoret. It is therefore possible and actually probable
16 that one could move around quite easily attending various meetings in one
17 day.

18 As to Mr. Sang and the evidence that he presents as to the alibi,
19 he asserts that he was not at a 30th December 2006 planning meeting.
20 It's not possible. He was at a tournament. He was elsewhere. But let's
21 look a little bit closer at the evidence supporting that assertion. They
22 are all unauthenticated photographs. They are not dated. We do not know
23 where they came from and when they were produced.

24 We ask: Is this an airtight alibi? And we suggest that it, too,
25 fails. It is not.

1 Lastly before addressing the live witnesses, one final point is
2 that the suspects claim collectively that there's no way that they could
3 have planned the post-election violence. You see, they were calling for
4 peace afterwards in January. In these circumstances, it is completely
5 logical that they would have taken that position and then later planned
6 the violence and later called for peace for several reasons. First, by
7 the time that they called for peace, the violence that they had planned
8 was -- had been achieved. People had been killed, evicted from their
9 homes in the Rift Valley, so why proceed further? They would be content
10 if, in fact, the violence had been completed at that point.

11 Second, the suspects called for peace to conceal their crimes and
12 collect support in other areas in order to appear to be legitimate actors
13 on the national stage, preserving their public view, their public image.
14 Their calls for peace fit with their common plan, because they helped
15 maintain the dominance that they had fought for.

16 Briefly we address the four live witnesses offered by the
17 Defence.

18 The Defence teams collectively chose to assert live witnesses
19 during this hearing. While Mr. Kosgey withdrew his witness after the
20 hearing started, Mr. Ruto and Mr. Sang presented two witnesses each. We
21 have all heard the testimony, and we ask: Are these witnesses neutral?
22 Are they unbiased? Are they uninterested parties?

23 During their examinations, the interests and bias of all of these
24 four witnesses in favour of the suspects became evident, and particularly
25 in the cases of Witness 0001, Samson Cheramboss, and the last witness,

1 Reverend Kosgei, both of which are implicated in the crimes by the
2 Prosecution's evidence. During the course of the examination, their
3 motive to give evidence, precluding or diminishing their own liability,
4 was revealed.

5 A closer look or reflection upon what they said reveals that they
6 were the perfectly placed individuals. They had the right training, the
7 right backgrounds, to make the contributions that the Prosecution
8 asserts. For example, reflecting on the statement of Mr. Cheramboss, he
9 acknowledges that he was the former head of the GSU. He testified that
10 he knew how to train youths, that he knew how to erect roadblocks. He
11 himself told you that he knew how to do these things.

12 Second or moreover, all of the four live witnesses denied
13 basically any and all preparation. Their uncanny ability to remember the
14 events of certain dates several years ago with almost razor-like clarity
15 and the rehearsed nature of some of their answers suggests otherwise.

16 The full picture only started to become clear through the
17 questioning of the Court, the Prosecution, as well as the victims'
18 representative, Ms. Chana. For example, in his direct examination,
19 Reverend Kosgei gave lots of evidence about the Emo Foundation - that was
20 yesterday - as though this was the only branch of Emo. Upon further
21 examination, and only then, did he discuss the other components of Emo,
22 such as the Community Development Society and the Investments, both of
23 which have huge fundraising capabilities and are consistent with the
24 Prosecution's evidence.

25 We submit that this *viva voce* evidence, this live evidence, taken

1 together, of these four individuals do not demonstrate insufficiency on
2 behalf of the Prosecution. Instead, it demonstrates again that there are
3 contested issues of fact that must be resolved. Not today but by an
4 in-depth examination of the evidence that can only be conducted at trial.

5 In sum, the three -- the Defence claims that the evidence as a
6 whole is unreliable, that it is inconsistent, and they point to
7 collateral or secondary or immaterial facts. Looking at the material
8 facts, Madam President, your Honours, the Prosecution's evidence has
9 indeed been consistent.

10 In the Lubanga case at confirmation, the Pre-Trial Chamber
11 disregarded these attacks on alleged inconsistencies of witness
12 statements and witness testimony for this very -- this same reason. They
13 address matters of peripheral nature which did not go to the substance of
14 the statements.

15 In doing so, they have adopted a general principle that evidence
16 should be viewed wholistically or globally, put together an overall
17 picture that establishes the material elements of the case.

18 Last, two additional points before we close.

19 First, we address arguments submitted on why there's no evidence
20 that the suspects were, in fact, an organisation for the purposes of
21 Article 7. We note that we will file in-depth submissions as requested
22 by the Chamber on the 16th of September, but for today, we will identify
23 a few factors for your consideration.

24 The Defence collectively makes much of the fact what is this
25 organisation? It's composed of the same members. We submit that the

1 network organised by these particular suspects gained new members, and as
2 every other organisation does, reacts to changes in circumstance and
3 acquires new resources over time and adapts, but that does not mean that
4 the essential contributions asserted or contributed by these particular
5 suspects is any different. It doesn't diminish their contribution, and
6 it is not an obstacle to the conclusion that this was, in fact, an
7 organisation.

8 Second, we've heard many assertions, it's not an organisation
9 because there's no receipts. They didn't have any public meetings.
10 There's no detailed ledger or log, bookings, identifying their spending,
11 their activities. But does this really matter? The fact that the
12 organisation doesn't have a name, that there is no paper trail, receipts
13 indicating guns purchased, pangas purchased, fuel bought, rough materials
14 bought. Does that affect the value of the evidence? We suggest not,
15 especially in a case where the very purpose of an organisation is to
16 commit illegal acts.

17 Their whole objective is to (* inaudible - interpreter on floor
18 channel).

19 Finally, the Prosecution addresses the Defence -- a variety of
20 attacks on its investigation. We've heard attacks on the wholesale
21 integrity of the investigation, failure to claim potentially exculpatory
22 evidence or claims that the mandate, Prosecution's mandate, was not
23 adhered to.

24 The Prosecution investigated possible exonerating material,
25 including the possibility that the activities of the suspects were the

1 consequence of political interest or other reasons. The Prosecution
2 notes by way of example that the Defence relied on during the course of
3 this hearing a video that the Prosecution gave to the Defence
4 considering -- concerning, excuse me, witnesses who claim that they were
5 bribed, they were just here to frame Mr. Ruto for the violence. This
6 video was disclosed at EVD-PT-OTP-00464. The Prosecution investigated
7 this information as well as other pieces of exonerating evidence,
8 analysed them, and properly provided them to the Defence.

9 Moreover, some of the information contained in one statement or
10 piece of evidence containing incriminatory materials, containing Rule 77
11 materials, containing exonerating evidence, is labelled as such. These
12 are hybrid documents. They're labelled as "incrim" despite the fact that
13 they might include other types of evidence and disclosed. With every
14 disclosure of incriminatory material, amounting to some 440 pieces of
15 evidence, the Prosecution has informed the Defence of this fact and told
16 them that this, in fact, also may contain exonerating information.

17 In conclusion, Madam President and your Honours, on the basis
18 that the Prosecution's -- the evidence that it has submitted, it is
19 sufficient to establish substantial grounds to believe that William Ruto,
20 Henry Kosgey, and Joshua Sang committed the crimes charged. The
21 Prosecution requests that the Chamber confirm those charges and commit
22 this case for trial.

23 Thank you.

24 PRESIDING JUDGE TRENDABILOVA: Thank you, Ms. Tai, for your
25 presentation. It took us just five minutes more than the time allotted,

1 but it is fine. Thank you very much.

2 Now the floor is over to Ms. Chana. By way of the decision on
3 victims' participation, you have been granted the right to make opening
4 and closing statements without seeking the authorisation of the Chamber.
5 So please go ahead with your closing statements.

6 MS. CHANA: Madam President, members of the Chamber, having
7 addressed the Chamber at the commencement of this Confirmation of Charges
8 Hearing, I am grateful for this opportunity to make a further statement
9 at its conclusion.

10 It is my function pursuant to paragraph (3) of Article 68 of the
11 Statute to present the views and concerns of the victims. I do not seek
12 to stray into territory that is the function of the Prosecution or
13 Defence.

14 I am the common Legal Representative of 327 individual people who
15 have been admitted to participate at this stage of the proceedings. I
16 addressed their views and concerns in my opening statement. At this
17 closing stage, it would be appropriate for me to address any further
18 concerns that have arisen in the course of the developments during this
19 hearing. Unfortunately, given the pace of the hearing as well as
20 logistical constraints, it has not been possible for me to communicate
21 with each of the 327 people I represent to obtain their specific
22 comments.

23 However, my field officers in Kenya have managed to contact some
24 victims. They have conveyed to me some of the concerns of the victims
25 that they have met.

1 At this stage I will confine myself to making observations on how
2 certain matters that transpired at this confirmation hearing which affect
3 the concerns that I addressed in my opening statement. This -- these are
4 concerns which were expressed to my field officers in Kenya.

5 In my opening statement, I referred to the culture of impunity
6 that has become well-established in Kenya. I referred to a climate of
7 menace and the victims' fear and trepidation that they may be recognised
8 as participants in proceedings before this court. What I would say is
9 that events during the course of this confirmation hearing show a need
10 for great sensitivity to those concerns. The fear and trepidation and
11 the sense of vulnerability *vis-à-vis* the powerful are very real feelings.

12 I explained the sense of complete disbelief of many victims that
13 it is actually possible to arrest and charge powerful or rich people for
14 crimes. I dealt with their concerns that the government has done little
15 to assist them and how they have continued to devote great resources to
16 prevent these proceedings from taking place. So the victims have
17 expressed a concern about a further development in respect of this issue
18 during the hearing.

19 First, in the judgement given on 30 August 2011, the Appeals
20 Chamber ruled out -- ruled, sorry, on the admissibility challenge brought
21 by the government of Kenya. At paragraph 70 of that judgement, the
22 Appeals Chamber found that the Pre-Trial Chamber's finding that in
23 relation to the three suspects Kenya has not established that it is
24 carrying out an investigation cannot be faulted."

25 The Pre-Trial Chamber considered the annexes submitted by the

1 government, one of which was a letter dated 14 April 2011, signed by the
2 Attorney-General of the Republic of Kenya and addressed to the Kenyan
3 Commissioner of Police, directing the latter to investigate all other
4 persons against whom there may be allegations of participation in the
5 post-election violence, including the six persons who are the subject of
6 proceedings currently before this court. This letter was written two
7 weeks after the government of Kenya lodged its admissibility challenge on
8 30 August 2011.

9 Thus it is clear from this letter that by the time the government
10 of Kenya filed the application asserting that it was investigating the
11 case before the Court, there were in fact no ongoing investigations.

12 Now, notwithstanding these findings, the Pre-Trial Chamber and
13 Appeals Chamber -- I'm sorry.

14 We see that two days after the Appeals Chamber's judgement, on
15 1st September 2011, the government of Kenya filed a request in these
16 proceedings seeking permission to have a representative of the government
17 attending confidential as well as public sessions of the hearing. The
18 request said that it was made, and I quote: "In order to hear the
19 evidence presented and the submissions of the evidence, whether given in
20 public or confidential." And I quote again: "to observe in the
21 courtroom the nature of the evidence presented, including the demeanour
22 of the witnesses called."

23 The government stated that it was making the request because it
24 was currently investigating each of the three suspects in this case.
25 However, the stated justification for the request stands against what was

1 found by the Appeals Chamber just two days previously. What --

2 MR. HOOPER: I'm sorry to interrupt my friend. I'm very sorry to
3 interrupt my friend. I appreciate she has --

4 PRESIDING JUDGE TRENDABILOVA: You have the floor, Mr. Hooper.

5 MR. HOOPER: -- a significant role to play on behalf of the
6 victims. What I'm concerned about is we seem to be talking about an
7 issue here that wasn't in any way the subject of the hearing the or
8 hearings that we've just concluded. And in particular, there's
9 significant factual errors in what is being presented, certainly by my
10 understanding, first of all of the nature of prosecutions in Kenya.
11 There's been over, I understand, 2,500 prosecutions in terms of the case,
12 and in fact, the Attorney-General from the State of Kenya has previously
13 revealed that there was a specific investigation in respect of a specific
14 suspect in this hearing. So I really don't know where we're going
15 because it's not an issue that anyone here has addressed.

16 I think my friend's got to recall she's not prosecutor here.
17 She's representing the interests of victims. But whether that permits a
18 licence to wander at large, as it were, through issues that have not been
19 raised before this Chamber in the course of this process of review for
20 confirmation, I would submit that she must limit herself to issues that
21 were addressed.

22 PRESIDING JUDGE TRENDABILOVA: Mr. Hooper, thank you very much
23 for your comments. I have to acknowledge that Mr. Hooper has to a
24 certain extent some right to make this point given the instructions that
25 I made on behalf of the Chamber that we have to limit ourselves to issues

1 that were discussed during the hearing. Of course, Ms. Chana has to
2 represent the interests of the victims and in particular to express their
3 views and concerns, and it was my understanding and the understanding of
4 our colleagues that she's going along the line that these proceedings
5 shouldn't be terminated given the fact that sometimes there were comments
6 whether spontaneous, whether the contextual elements of the crimes
7 against humanity are present, and so on. But still you have a point,
8 Mr. Hooper, and --

9 MR. HOOPER: Yes, and in terms of expressing the views of
10 victims, there's a line to be drawn between that and, as it were, views
11 expressed retrospective to our hearing that may have been gleaned by
12 field officers or whatever to which we have no resource --

13 PRESIDING JUDGE TRENDABILOVA: No, no. You have a point.

14 So, Ms. Chana, with all the respect for the representation that
15 you have properly to perform, just please be limited to the facts as
16 discussed here during the confirmation hearing and the evidence
17 presented, analysed by the parties.

18 MS. CHANA: Madam President, I'm obliged. I have to say before I
19 continue that I'm here to convey to this Chamber the views and concerns
20 of my victims. Now, while I understand and accept Mr. Hooper's objection
21 that it does not specifically occur within the confirmation of charges
22 hearing, but this is a matter of grave concern to all the victims --
23 well, I cannot say all. The victims that were seen by my field officers,
24 and the perception that it gives that the government is not there to
25 assist them. But I take your point, Madam President. I will move on.

1 PRESIDING JUDGE TRENDAFILOVA: Ms. Chana, that is why I made the
2 point that I agree with Mr. Hooper to a certain extent, but I have to --
3 to remind you that you have the right to present up until the 16th of
4 September your observations on the challenge related to jurisdiction, and
5 I think this is -- this is the right time and the right format by which
6 you're going to address the Chamber, and it will be right to the spot.

7 MS. CHANA: Yes. Thank you, Madam President. Then I will -- I
8 will consult my notes and continue at the next point.

9 I will leave that -- the point of that aside other than to say
10 that the Kenya government did make a request to participate in the
11 proceedings, to be part of the -- to -- as they said, to watch the
12 witnesses and the proceedings before the ICC, including by way of seeking
13 to find ways to access confidential proceedings if possible.

14 PRESIDING JUDGE TRENDAFILOVA: We know this, Ms. Chana, because
15 the Chamber has been dealing with this request, and it was rejected. So
16 let us go ahead with issues of the victims --

17 MS. CHANA: That's right.

18 PRESIDING JUDGE TRENDAFILOVA: -- that you have to present.
19 Anything that is of concern to the 327 victim participants.

20 MS. CHANA: But, Madam President, this is of concern -- this is a
21 concern of the victims which I have presented to you, but I will
22 continue.

23 There have been other developments at the Confirmation of Charges
24 Hearing that would also lead victims to have selective trepidations in
25 light of their experiences of the culture of impunity. The victims have

1 seen the suspects request a delay of this Confirmation of Charges Hearing
2 and then have sought to appeal against the refusal. The victims are very
3 concerned that Mr. Ruto sought to absent himself from parts of this
4 hearing.

5 PRESIDING JUDGE TRENDAFILOVA: But he's present.

6 MS. CHANA: Yes. But nevertheless, the victims felt that this
7 was perceived by them subjectively, although it is acknowledged that
8 after, Madam President, you ruled that he must be present, but for a
9 Kenyan victim, when someone summons them to a court in Kenya, all they
10 know is the victim appears. There are no ifs and buts about it. So
11 these are the concerns of my victims that there appears a cavalier
12 disregard to the authority of the Court. These are their perceptions and
13 this is what I'm bringing to you, Madam President, honourable members of
14 the Court.

15 So I think it is legitimate for them to voice their concerns
16 whatever the outcome of proceedings before the Court may be, but they
17 should be continuously reassured, Madam President, that throughout the
18 course of the proceedings the Court will firmly assert its authority, as
19 it has indeed done, and that the dignity of the proceedings will be
20 maintained and that the Court will ensure that such mechanisms as are
21 available within its procedure for their protection will be available and
22 effective.

23 I mentioned in my opening statement that this was not the first
24 time that there has been violence in Kenya related to elections. The
25 victims I represent in this case feel that it's important that -- that

1 the Judges of this Honourable Chamber understand the context of the
2 post-election violence in Kenya as they make their decision as to whether
3 or not to confirm the charges in question.

4 To one of my clients, the similarities of these separate events
5 have been first-hand experiences. This particular victim expressed
6 concern to my field officers that after he heard that the Defence claim
7 that the violence in the Rift Valley was spontaneous rather than planned.
8 The victim in question was a victim of the 1992 clashes in Burnt Forest.
9 Being of the Kikuyu community, he was deemed to have supported the
10 opposition party which was headed by a Kikuyu at the time and was
11 forcibly evicted by armed Kalenjin youth who were supportive of the then
12 ruling party KANU. He immigrated to Eldoret in 1993 after being
13 displaced from Burnt Forest. He established his home and his farm there
14 until 2007, when he was again displaced in the 2007/2008 post-election
15 violence.

16 MR. HOOPER: Again, I'm sorry to interrupt. We've had no
17 evidence of this during the course of the confirmation and no opportunity
18 to address it, and it's inappropriate to raise it now in this manner.
19 I'm sorry to interrupt my friend. I appreciate she has an important role
20 and function due to representing the concerns of victims who are, of
21 course, the subject of keen concern by this Court --

22 PRESIDING JUDGE TRENDABILOVA: Mr. Hooper --

23 MR. HOOPER: -- but this is surely an inappropriate way of --

24 PRESIDING JUDGE TRENDABILOVA: -- I thank you, but one of the
25 witnesses, especially Mr. Kosgei, the pastor, he was on many occasions

1 referring to the violence in 1992.

2 MR. HOOPER: Yes, he was, and that was an opportunity perhaps to
3 deal with matters. But what's happening here is an in-the-wings account
4 being brought in which hasn't been a subject of disclosure, hasn't been
5 the subject of matters that we could address, and I interrupt now because
6 we don't know, of course, where it's going to go. And so it's really an
7 intervention in order to restrain what we don't know, but could be, of
8 course, highly prejudicial matters that we can't deal with. I don't want
9 to seem as if I'm being obstructive. I'm merely submitting that this is
10 not a reflection of the correct procedure.

11 PRESIDING JUDGE TRENDABILOVA: I appreciate your point. Still,
12 Ms. Chana was referring to part of the witness testimony and we hope that
13 you are still going to adhere to what was discussed, Ms. Chana, during
14 the days of the confirmation hearing. This is the purpose of the closing
15 statements, that you analyse the facts presented and the evidence
16 substantiating these facts.

17 MS. CHANA: Yes, Madam President. My -- my mandate is to present
18 the views of the victim, and this is, I think, what I'm doing.

19 PRESIDING JUDGE TRENDABILOVA: So would you agree that --

20 MS. CHANA: Mr. Hooper is being obstructive --

21 PRESIDING JUDGE TRENDABILOVA: Mr. Hooper, unless there is a
22 compelling reason that you intervene that you leave --

23 MR. HOOPER: Yes, well, I -- merely to clarify --

24 PRESIDING JUDGE TRENDABILOVA: -- Ms. Chana to finalise. She's
25 about to finalise her closing statements.

1 MR. HOOPER: Indeed. But my understanding is -- my interruption
2 was based on -- it may have been a misunderstanding. That this was not a
3 reflection on any witness material that's been made available to us but
4 was anecdotal material relating to what one of the victims has told
5 Ms. Chana to which we've not had access and therefore no ability to
6 respond. But that was --

7 PRESIDING JUDGE TRENDAFILOVA: Mr. Hooper, let us not --

8 MR. HOOPER: -- my basis of my objection.

9 PRESIDING JUDGE TRENDAFILOVA: Let us not discuss further this
10 issue and let us not forget that the Legal Representative for victims is
11 here to speak on behalf of these people whom she's representing, and if
12 people are following all these proceedings going on, who is to speak on
13 their behalf with regard especially to some of the witness testimonies
14 going back to other events of violence in this country? I think that,
15 Ms. Chana, you got my point, and, Mr. Hooper, please.

16 MS. CHANA: Thank you, Madam President.

17 These are communications from the victims on the ground in
18 Nairobi which I am conveying to you, Madam President. It is not the
19 function of the Legal Representative to analyse the facts or to come to
20 any conclusion or suggest any conclusions. I am simply here as
21 Article 68 of the Statute states that I must bring forward. And this
22 particular victim says it is very important that I convey this to the
23 Chamber that there is a pattern to this violence, and he talks about what
24 happened to him both in 2002 and in 2007. He was the victim for both
25 violences, both -- so this is not evidence. This is what the victim is

1 telling me to tell you and that is precisely what I'm doing. And I'd be
2 grateful if I could continue my speech without further interruption.
3 Thank you, Madam President.

4 PRESIDING JUDGE TRENDAFILOVA: Interruption will not be granted.
5 Please proceed.

6 MS. CHANA: Thank you, Madam President.

7 Now, this particular victim emigrated to Eldoret in 1993 and he
8 was displaced from Burnt Forest and he established his home again in
9 2000 -- in -- in the -- I'm trying to find where I was.

10 He states that the violence in 1991/1992, and 2007/2008, and I
11 quote him:

12 "... Was very similar in all essential aspects. Even as early as
13 29 December 2007, I had seen individuals who were displaced from Baharini
14 when armed youth destroyed their homes and forced them to leave their
15 land. They moved to Kapkoros which unfortunately experienced the
16 violence on 30 December 2007.

17 "In 2007, just like in 1992, we were warned to leave the area
18 through leaflets and open threats; we heard in political rallies and
19 meetings that members of the tribe -- tribes of the opposition would be
20 forcibly removed. We were attacked by armed youth in what appeared to be
21 a coordinated onslaught."

22 The victim recalls that prior to the December holidays in 2007,
23 his son had returned home from primary school. He told his father that
24 he had been admonished by his Kalenjin schoolmates that came -- that come
25 the holidays, he and his community would see trouble.

1 He also remembers his older son, who would work together with
2 other children his age to assist in bringing in the harvest from various
3 farms, describe how he had overheard those from the Kalenjin community
4 plot in their language, which he understood having grown up amongst them,
5 to evict their community violently.

6 He is not -- he is but only one of the victims who has spoken of
7 the similarities of the attack in 2002 and 2007. As we know,
8 Madam President, in 1992, there was also 1.500 people killed and 30.000
9 people displaced.

10 Despite various similarities between earlier instances of
11 electoral violence and the 2007/2008 violence, there is a major
12 difference. That is that in relation to the 2007 and 2008 violence, the
13 jurisdiction of the International Criminal Court has been invoked.
14 Victims are naturally hopeful that this will prove to be a crucial
15 difference, that the intervention of the rule of law at the international
16 level will put an end to the culture of impunity and repetitions of the
17 cycle of violence.

18 That is what my victims are concerned about, the repetition of
19 the cycles of violence. That is an extremely important point that the
20 victims make. And one victim has been the victim of two such repetitions
21 of the cycle of violence.

22 So given this history, victims can be expected to be concerned
23 about and to be reassured in relation to these matters that I have
24 raised.

25 Today, indeed, today I have received some troubling news

1 suggesting that attempts may be underway to create a climate of
2 intimidation in Kenya towards those involved in proceedings before this
3 court, especially Kalenjin and Nandi victims and indeed witnesses. I
4 read out this e-mail, well, for the sake of being completely correct,
5 what I received from a field worker in Kenya this morning, and I quote
6 his e-mail because I just got it very -- today, and I didn't have time to
7 incorporate it. It's addressed to me and it states:

8 "I spoke this morning to a gentleman who prefers to have his name
9 and location withheld. He informed me that he -- that he had heard a
10 disturbing commentary on the radio station Kass FM on the morning of
11 Tuesday, 6 September 2011, on the radio show that airs from 7.00 a.m. to
12 9.00 a.m. He informed that Charles Keter, the Member of Parliament for
13 Belgut who was calling in from The Hague, made some very inciteful
14 statements. The gentleman went on to inform me that Mr. Keter was heard
15 to say that," and it is in quotes:

16 "We have come to establish that this," he means the case before
17 the ICC in brackets, "is pure falsehood hatched by PNU supporters and
18 those who call themselves human rights activists."

19 He goes on:

20 "Mr. Keter asserted that he had information regarding the
21 identity of the Prosecution witnesses, remarking, 'We already know who
22 they are.' He specifically referred to knowing the identity of
23 Prosecution Witness number 006 and 0008. Mr. Keter went on to assert
24 further that, 'We are aware of the traitors who are back there at home,'
25 alluding to knowing of other Prosecution witnesses from this Kalenjin

1 community.

2 "He went on to assert that the Kenya Prime Minister was involved
3 in providing accommodation and safe haven to those so-called traitors.
4 Mr. Keter went on to warn that the confirmation of charges would be over
5 by Wednesday or Thursday and that 'these people will face unspecified
6 consequences.'"

7 The e-mail continues:

8 "The remarks of Mr. Keter seem to assert that the Prosecution
9 witnesses were mostly Nandi and that, as such, the Nandi people had
10 betrayed the Kalenjin community. According to Mr. Keter: 'It is not the
11 three people who are being accused but it is the entire Kalenjin
12 community.'

13 "One of the callers into the programme, inflamed by the
14 statements of the Member of Parliament, said, 'It is you Nandi people who
15 are traitors of our community.'"

16 These sentiments -- I continue the e-mail:

17 "These sentiments were supported by another individual who heard
18 the radio show on Tuesday and Wednesday where the sentiments of Mr. Keter
19 were regurgitated. The individual who would also like his identity and
20 location withheld informed that the Nandi people were being painted as
21 traitors of the Kalenjin for allegedly working for the Prosecutor as his
22 witnesses. He stated: 'I have personally -- I have personally heard and
23 received threats because I was opposed to the post-election violence.'

24 "He went on to assert, 'The situation is getting more and more
25 dangerous for the Nandi and human rights workers on the ground due to

1 these statements which have penetrated the mind of the community. I fear
2 it would be" -- sorry, "it could get very ugly for many people soon,
3 especially those who have been dubbed as traitors. I have heard it said,
4 We will give them the treatment deserving of traitors."

5 I say no more other than to read what I have received from my
6 case worker. I think these -- these matters can, of course, be verified.

7 For now, then, I just emphasise that these proceedings before
8 this Court are a source of optimism. This does not mean that it is an
9 easy thing for the victims to involve themselves in these proceedings, as
10 Madam President, honourable members of the Court, you can see. It is an
11 African proverb that says that: "Peace is costly, but it is worth the
12 expense." And it is a European proverb that says: "All that is
13 necessary for the triumph of evil is that good men," and indeed women,
14 "do nothing."

15 So my clients are here to make their contribution to the future
16 of the communities of their countries but they look to the support
17 mechanisms of the court to assist them do so.

18 There is one matter I would mention which is, of course, of great
19 course which I have mentioned before is the failure expressly to include
20 within the charges acts of destruction and/or burning of property, a
21 concern which also applies to acts of physical injury and looting. This
22 concern was raised in a written request on 15th August and it was again
23 raised in my opening statement.

24 Madam President, you, as a Single Judge, issued the decision that
25 it is premature at this stage, but now that the confirmation hearing is

1 drawing to a close, I would respectfully submit that this issue is no
2 longer premature. And I note that paragraph 10 of that decision stated
3 that the decision was without prejudice for the Chamber to consider at
4 the appropriate stage the arguments advanced by the Legal Representative
5 of victims with respect to the possible legal characterisation of acts of
6 destruction and/or burning of property, infliction of injuries and
7 looting.

8 Again, I would respectfully submit that an appropriate stage has
9 now been reached for consideration in this matter. Indeed, I submit that
10 the concerns of the victims in relation to the failure to charge these
11 acts has been bolstered as a result of the Confirmation of Charges
12 Hearing. While the suspects may deny that they have any individual
13 criminal responsibility for what occurred, there does not appear to be
14 any dispute whatsoever that the violence occurred and that this violence
15 included widespread acts of destruction of property, looting and personal
16 injury.

17 On the Prosecution's side, Mr. -- the Prosecutor,
18 Mr. Luis Moreno-Ocampo said, and I quote, "They offer money to those who
19 will kill and those who will burn, and they proceed to loot and burn down
20 houses and businesses that had been previously identified as belonging to
21 PNU supporters."

22 I have the transcript reference number which I will not trouble
23 you with.

24 Ms. Cynthia Tai, on behalf of the Prosecution, also said they
25 systematically inflicted fear, killing, looting, burned or otherwise

1 destroyed their property. She again said that they looted and burned and
2 destroyed businesses.

3 On the Defence side, Mr. Ruto and his counsel both acknowledged
4 that properties were destroyed, and he said it is an acknowledged fact.

5 Counsel for Mr. Sang and Mr. Kosgey also acknowledged such crimes
6 were committed.

7 The Defence witness of Mr. Ruto, Mr. Cheramboss, also
8 acknowledged that properties were destroyed and looted. The victims
9 were -- were very curious about that -- that Mr. Cheramboss in his
10 evidence, and they remarked on this, said that he did not know the
11 conditions of the camp because he had never been to one, but then still
12 appeared to know that the Kenyans were living in the camps, as he said,
13 for their own reasons.

14 This evidence presented at the confirmation hearing, I submit,
15 demonstrates two things. The first is an unequivocal acknowledgement
16 that destruction of property and looting and physical injury occurred,
17 that people were driven from their homes and certain of them have still
18 not returned to this day.

19 The second thing, I submit, is a manifest lack of concern for the
20 plight of those affected or their plight -- or their fate.

21 Mr. Cheramboss said that the victims had not returned for their own
22 reasons. Even if, as he claims, that he has never been to any of the
23 camps, for someone who has held such a high office in the security forces
24 of Kenya for four decades, it is absolutely remarkable that he did not
25 display greater knowledge or curiosity as to why people have not returned

1 home. All the more so given that these facts are matters of public
2 knowledge.

3 Professor Paul Chepkwony also accepted that crimes were committed
4 and also said that the conditions in the camp were deplorable.

5 Madam President, I have lost track of time. How much more time
6 do I have?

7 PRESIDING JUDGE TRENDAFILOVA: How much more do you need,
8 Ms. Chana?

9 MS. CHANA: I just need another five minutes or so.

10 PRESIDING JUDGE TRENDAFILOVA: Please go ahead. You have them.

11 MS. CHANA: Thank you. Then we had the evidence of Bishop Kosgei
12 Kipkemoi who said that the Emo Society is for the welfare of all Kenyans
13 of the Rift Valley, and he said that he could not go to the camps
14 because, as he said, he was in a wheelchair. The victims did not fail to
15 notice that he was able to travel to the United States and to The Hague
16 but not travel a few kilometres within his own home area.

17 These are matters of concern to my victims.

18 The question is, then, what is the appropriate way in which this
19 concern of victims can be ventilated at this stage? Subject to any
20 direction from the Chamber by which, of course, I will be guided, my
21 intention will be to file a further request in relation to this matter
22 after the conclusion of the oral hearing within the same time-limit as
23 the observations on the challenge to jurisdiction. It will be a request
24 for authorisation to make written submissions on the -- on the question.

25 I note that in your 19th August decision, Madam President, you

1 made a finding at paragraph 7 that the Chamber does not have the power
2 either to confirm a charge that is not specified by the Prosecutor or to
3 clarify that the charge included -- includes acts in addition to those
4 specified by the Prosecutor as being included in the charge.

5 However, Madam President, you proceeded at paragraph 8 and 9 to
6 state that Article 61(7)(c)(ii) of the Statute, the Chamber may on the
7 basis of its determination of the evidence at the Confirmation of Charges
8 Hearing adjourn the hearing and request the Prosecutor to amend a charge
9 because the evidence submitted appears to establish a different crime
10 within the jurisdiction of the Court.

11 My submission will be that this provision of Article 61 of the
12 Statute, the word "different" includes the sense of "additional." Thus
13 under this provision, the Chamber can request the Prosecutor to amend the
14 charge to include additional charges or to include additional criminal
15 conduct within an existing charge.

16 My submission will be that this is a compelling case for the
17 Chamber to exercise that power. There is apparently no issue at all that
18 there was widespread destruction and looting of property. Almost all of
19 my 327 victims suffered from it. They will be seeking reparations for
20 these acts, and destruction and looting of property and injury is thus of
21 such central importance to the case that it -- that it is, in my
22 respectful submission, difficult to see any basis upon which it could be
23 justifiably be ignored. Judicial efficiency and the aim of avoiding an
24 undue multiplicity of charges is hardly a justification in circumstances
25 where there is no dispute that such acts occurred.

1 If the Chamber does request the Prosecution to amend the charges
2 in this way and if the Prosecution does so, the other legal issues
3 identified in the victims' 15th August request become moot.

4 However, should it be necessary to do so, I would foreshadow that
5 at the relevant stage I may seek to raise these other issues again. I
6 say so with the utmost of respect, Madam President, bearing in mind that
7 the Single Judge, that's yourself, has ruled on some of those issues in
8 the 19 August decision.

9 Madam President, honourable members of the Chamber, unless I can
10 be of any further assistance to you at this stage, I thank you for your
11 kind attention.

12 PRESIDING JUDGE TRENDAFILOVA: Thank you, Ms. Chana.

13 Before I give the floor for the Defence of Mr. Ruto to start, let
14 me make a comment that I'm making personally, but I do believe that I
15 reflect the conviction of anyone who is following ICC proceedings. The
16 International Criminal Court has been established as a permanent court to
17 deal with atrocities and because of the victims and this is without
18 prejudice, of course, to the International Criminal Court dispensing
19 justice.

20 Thank you, Ms. Chana. Now the floor is over to the Defence team
21 of Mr. Ruto. Or as Judge Tarfusser suggests, do you want that we start
22 at 20 minutes past 4.00 so that we do not interrupt the legal -- the
23 counsel of Mr. Ruto?

24 MR. KILUKUMI: Thank you, Madam President --

25 PRESIDING JUDGE TRENDAFILOVA: You would rather prefer --

1 MR. KILUKUMI: We would prefer it that way.

2 PRESIDING JUDGE TRENDABILOVA: So then, if it is fine with the
3 interpreters --

4 MR. KILUKUMI: (Microphone not activated) ...

5 PRESIDING JUDGE TRENDABILOVA: Yes. We shall resume our session
6 which we adjourn now at 20 minutes past 4.00.

7 COURT USHER: All rise.

8 Recess taken at 3.47 p.m.

9 On resuming at 4.20 p.m.

10 COURT USHER: All rise.

11 PRESIDING JUDGE TRENDABILOVA: Please be seated.

12 So now the floor is over to you, Counsel, representing the
13 interests of Mr. Ruto.

14 MR. KILUKUMI: Thank you, Madam President and your Honours. On
15 behalf of Mr. Ruto; Mr. David Hooper, QC; myself, Kioko Kilukumi,
16 appearing for him for the record.

17 Madam President and your Honours, this is the first case before
18 this court which has been initiated by the Prosecutor. On the 15th of
19 December, 2010, he sought authorisation to start investigations in the
20 Republic of Kenya. It is not a referral either from a Member State or
21 from the Security Council, and the significance of this is the Prosecutor
22 took upon himself to carry out investigations into the situation in
23 Kenya. Upon receiving that authorisation, in a span of nine months the
24 Prosecutor purportedly carried out investigations in the situation in the
25 Republic of Kenya. The result of his investigations were that three

1 people, that is William Ruto, Henry Kosgey, and Mr. Sang, all of them
2 perceived to be either perceived or indeed members of the
3 Orange Democratic Party, were to appear before this Court in what has
4 come to be known as Kenya case 1. In the same investigations he opened
5 another case that has come to be known as Kenya 2, and in that one he
6 charged -- he brought in Uhuru Kenyatta and two others.

7 Whether this symmetry arose out of design or out of product of
8 genuine investigations, the world may never know, but the other curious
9 aspect about this case is that in Kenya 1, we have Mr. William Ruto, who
10 intends to contest for the presidential seat in the 2012 elections. In
11 the Kenya 2, we have Uhuru Kenyatta, who intends to contest for the
12 presidency in 2012. We mention these things, Madam Chair and your
13 Honours, because in the opening statement made by Ms. Cynthia Tai, she
14 indeed referred to the 2012 general elections and said the intention was
15 to create voting blocs.

16 Madam President, that reference to 2012 by the Prosecutor is not
17 supported by any of the witnesses, and the only concern we raise at this
18 stage, Madam President and your Honours, is that this international court
19 will not be a forum to be used to influence democratic and political
20 processes of Member States. We have no doubt, Madam President and your
21 Honours, that you will ably guard against such a possibility that any
22 party to proceedings would use it for collateral purposes. At all times
23 it must be done for the interests of justice so that the victims of
24 crimes can get justice and so that those who are accused before this
25 court can also get justice.

1 Madam President, the jurisprudence of this Court is well settled
2 that at this stage the Prosecutor will present his core evidence. This
3 core evidence is completely lacking in this case. It is, therefore, not
4 open to the Prosecutor to say, "We have other incriminating evidence
5 which we have not tabled as yet." At this particular stage, the real
6 core evidence of the Prosecution is before this court.

7 And what does that evidence show? This evidence shows that the
8 Prosecution relies on four core witnesses. This is Prosecution Witness
9 number 0001, Prosecution Witness number 0004, Prosecution Witness number
10 0006 and number 0008. Their case will fall or stand on those witnesses,
11 whether at this stage or any other stage.

12 And who are these witnesses? Note their identities,
13 Madam President and your Honours, from the transcripts these are
14 self-confessed criminals. In particular, Prosecution Witness number
15 0001, number 0002, number 0006, and number 0008. They have not been
16 punished for the crimes they themselves confess. Instead, they have been
17 rewarded with relocation to countries with a higher income level.

18 It is admitted from our end that in many legal systems of the
19 world, and particularly in organised crimes, insiders, those who
20 perpetrated crimes, could turn out to be crucial witnesses, but the guard
21 that the Court must always have is being an insider to a crime gives you
22 the opportunity to give convincing details and to replace the top level
23 with whoever you want, because you have intimate knowledge of the crime,
24 and you can substitute names and remain convincing.

25 It is for these reasons, Madam President and your Honours, that

1 when you evaluate the evidence of these witnesses, you do approach it
2 with utmost caution, with utmost care and circumspection.

3 What do these witnesses tell you cumulatively, and what is the
4 fundamental features of this case? These witnesses tell you that there
5 were preparatory meetings attended by, amongst others, Mr. William Ruto,
6 Mr. Henry Kosgey, and Mr. Sang. These meetings, the witnesses are clear,
7 Mr. Ruto did not arrive there on a helicopter. Mr. Ruto did not leave
8 that meeting on a helicopter. That is important. But the point is if
9 the Prosecutor had carried out genuine investigations, this would have
10 included taking the helicopter logs to see where exactly was Mr. Ruto,
11 where was Mr. Kosgey on the material dates. He failed to do so. It is
12 the Prosecutor who has a burden of proof. We have no burden at all.

13 Bearing that in mind, Madam President and your Honours, we have
14 placed before you independent evidence not associated at all with Ruto,
15 independent evidence in terms of video records easily obtainable in media
16 houses in the Republic of Kenya. I want to emphasise, Madam President
17 and your Honours, that these are contemporaneous recordings made not for
18 purposes of ICC but made to capture the actual events of those particular
19 days. The statements you have from self-confessed criminals are
20 tailor-made, and they're made purposely for the ICC.

21 Madam President, I will go to demonstrate that all the
22 fundamental features of the Prosecution case have completely been wiped
23 out by independent and real evidence that we have placed before this
24 Court.

25 Regarding the 2nd of November, 2007, when a meeting is alleged to

1 have taken place in Mr. Ruto's home, we have produced a video recording
2 from a media house showing he was attending a meeting at Kapkatet,
3 160 kilometres from his home. If the Prosecutor and his investigators
4 were keen, they would have gotten this information.

5 On the 14th of December, 2007, we have again placed before this
6 Court contemporaneous material, real evidence, to show that Mr. Ruto was
7 at Amagoro, a place that is estimated to be about 160 kilometres from his
8 home.

9 On the 22nd December 2007, we have placed before this Court a
10 video recording obtained from media houses and available to the public
11 showing that Mr. Ruto was at Kisumu attending a political rally which is
12 about 130 kilometres from his own home.

13 Madam President, that is the core of this case. Those are the
14 dates when commanders are supposed to be elected. These are the dates
15 when guns are supposed to be distributed. These are the days when
16 Mr. Ruto is supposed to be saying, "It is now Kikuyus versus the rest of
17 Kenya." The videos we placed before you do not show any of that part.

18 But the other critical nexus between these dates is the supplier
19 of guns. According to the Prosecution's evidence, the supplier of guns
20 was one Honourable Frederick Kapondi. We have placed before this Court
21 evidence to show that he was in prison custody from the 17th of April,
22 2007, to the 14th of December, 2007. That evidence is not challenged at
23 all, and that shows that all the meetings that have been referred to and
24 the presence of Mr. Kapondi put there, we can demonstrate beyond
25 reasonable doubt that he wasn't there, yet, it is so essential that he is

1 the source and supplier of guns to William Ruto for distribution to the
2 network that the Prosecution has created.

3 Madam President, this Court has laid down the purpose of a
4 confirmation hearing, and if you permit me, Madam President, I will just
5 shortly read one paragraph from the case of Prosecutor v. Katanga, a
6 decision rendered on September 30, 2008, at paragraph 63.

7 The Trial Chamber said:

8 "The purpose of the confirmation hearing is to ensure that no
9 case proceeds to trial without sufficient evidence to establish
10 substantial grounds to believe that the person committed the crime or
11 crimes with which he has been charged."

12 And I want to emphasise this particular aspect.

13 "This mechanism is designed to protect the rights of the Defence
14 against wrongful and wholly unfounded charges."

15 Madam President and your Honours, this case is wholly unfounded
16 once you look at the core evidence presented by the Prosecution. And the
17 only option available to this Chamber, with all due respect, we are
18 submitting, is to decline to confirm this case because there is no legal
19 basis, either factual or legal, on which it can be confirmed.

20 The standard of proof was again set out by this Chamber again in
21 the case of Lubanga, and I will just read paragraph 65 where this Court
22 stated:

23 "This standard," that is the standard to be met at this stage,
24 "this standard is met where there is concrete and tangible evidence which
25 demonstrates a clear line of reasoning underpinning its specific

1 allegations."

2 Madam President and your Honours, the words "concrete" and
3 "tangible" have very clear English meanings. What you have before you is
4 flimsy evidence. It is paper-weight evidence. It cannot do anything
5 other than cast suspicion, but this evidence quite clearly cannot
6 convince the Court that there are substantial grounds to believe.

7 Madam President, does the Prosecutor believe in his own case for
8 him to invite you to believe in it? We submit he does not believe in his
9 own witnesses and his own case.

10 The reason for saying this, Madam President and your Honours, is
11 that Witness number 0006, in his own handwriting, draws a chart showing
12 the flow of communication, and on top of that chart -- Madam President,
13 this is EVD-PT-OTP-00399. At the top of the chart he puts four
14 divisional commanders, and the four divisional commanders are General
15 Cheruiyot, Cheramboss, and General Koech, and these two are reporting,
16 according to this witness, to Honourable Kosgey and Honourable Ruto, and
17 those two are ultimately reported to Raila Odinga, according to the
18 testimony, according to the chart that has been placed before the Court.

19 And what does the Prosecutor tell you in her closing speech? She
20 tells you they do not believe Raila Odinga is involved in this. In other
21 words, they do not believe this witness. If the Prosecutor himself does
22 not believe this witness, why should this Chamber have reason to believe
23 anything that has been said by this witness?

24 We invite you, Madam President and your Honours, to hold that
25 where the Prosecutor does not believe in his own witness, it isn't

1 possible for the Court to have substantial grounds to believe, because
2 the Prosecutor himself has already doubted the veracity of the account of
3 this witness.

4 Madam President, we submit that the Prosecutor did not carry out
5 any genuine investigations whatsoever. He landed in the
6 Republic of Kenya, armed himself with the reports from human rights
7 group, Human Rights Watch in particular, armed himself with reports from
8 the Kenya National Commission of Human Rights, armed himself with the
9 report of the Commission into Post-Election Violence, popularly known as
10 the Waki Report, and he found standby witnesses, witnesses, if you read
11 the transcript carefully, every of those witnesses has had previous
12 conduct, has made other statements previously, and indeed they are just
13 doing this as a formality when they're being interviewed by the Office of
14 the Prosecutor. So armed with this, he came to the Court.

15 A critical examination of the statements of the four witnesses we
16 have singled out will demonstrate that the Prosecutor did not do the
17 elementary things that anybody trained in criminal investigation does.
18 And what is that? That is to counter-check the factual accuracy of the
19 statements supplied by a key witness. That serves several purposes.
20 Firstly, you will know that you are not off track because you have
21 established that there is factual basis and accurate factual basis for
22 you to proceed along a certain line.

23 The second purpose it serves to the Prosecutor and investigator
24 is to get any other evidence that would be corroborative and possibly
25 independent of this particular witness.

1 The Prosecutor never done any of those things. And why do I say
2 so, Madam President and your Honours? In all these statements, the names
3 of Cheramboss, a commandant, retired from the General Service Unit;
4 General Koech, retired army commander; General Cheruiyot, were available
5 in Kenya, and it was so easy to get statements from these mentioned
6 people to find out is this account given accurate or otherwise?

7 Madam President, I wish to make a specific reference to
8 Article 54(3)(b) of the Rome Statute, and in that article the Prosecutor
9 is clothed with the power to question persons being investigated.

10 All the people who are mentioned are clearly suspects in those
11 statements, and it was an obligation of the Prosecutor to question any of
12 them to find out whether this -- this story being told is correct or not
13 correct. Had he done so, Madam President, he would have had question
14 marks as to the factual accuracy of the story told to him.

15 You've heard Madam Cynthia Tai from the Office of the Prosecutor
16 saying Cheramboss had the necessary training. Of course he had. Of
17 course the person making this script, creating an artificial
18 organisation, an artificial network, needs people who have that
19 particular training, and that is why the names of these generals appear
20 there. The only thing you can credit the office the public prosecutor is
21 creativity, but investigations never carried out whatsoever.

22 Madam President, if you had genuine investigations, the telephone
23 mobile phones of these three generals or any other person mentioned by
24 the witnesses would have revealed a lot of stuff. Firstly, an analysis
25 of that data, which is routinely done in the Republic of Kenya, could

1 have shown you where Cheramboss was, the actual location because of the
2 GPRS system, where exactly he was, which route he took, how many calls he
3 made, the traffic of calls. People were coordinating, according to the
4 Prosecution theory, attacks. Their mobile phones and analysis would have
5 clearly brought the evidence before this Court.

6 What you have before you, Madam President and your Honours, is
7 not even evidence that in most national jurisdiction anyone can be
8 prosecuted for stealing a bicycle.

9 Mr. William Ruto appears before you, faces very serious crimes,
10 and these serious crimes are crimes against humanity. These are crimes
11 of concern both to the national and to the international community.
12 These are crimes that shock the conscience, and in equal measure, you
13 need to have scientific, impartial, open-minded investigations. When the
14 investigations are so sloppy, it also shocks the suspects, and it could
15 not have been the intention of the Rome Statute that suspects would be
16 shocked by sloppiness of investigations.

17 Madam President, it has been mentioned that the financial wing of
18 this creature created and called network was Emo, and it had raised
19 1.25 billion Kenya shillings. In the exchange rate prevailing at the
20 time in 2007, this translates to 10 million euros, a substantial amount
21 of money by any account.

22 Madam President and your Honours, Mr. Kosgei was here before you,
23 and he told you about the different Emos that exists, and he told you the
24 Prosecutor never bothered to record any statement from them, never
25 bothered to get bank statements from all these different Emos. These

1 bank statements could have shown this Court the movement of monies, from
2 whom and to who, and that could have greatly, greatly enriched the
3 Prosecutor's case if he believed in it, but the Prosecutor did not go for
4 that information, because in so doing he will be demolishing his own
5 theory.

6 Madam President, there has been talk about fuel, houses burned
7 with petrol. No evidence, no forensic evidence, standard things done in
8 every national jurisdiction, not a single evidence that (* indiscernible)
9 charge here was any scientific analysis, forensic analysis, to show what
10 accelerant was used. Trace it back, where was this fuel purchased from?
11 Because from the Prosecutor's case, a lot of petrol certainly was in use.
12 Where was this purchased? From which petrol station? When you talk of
13 the Rift Valley, there are not so many petrol stations that the
14 Prosecutor could not get this information if he was interested in it, and
15 if he had done so, this would have destroyed his case completely.

16 Madam President --

17 PRESIDING JUDGE TRENDAFILOVA: Counsel --

18 MR. KILUKUMI: Yes.

19 PRESIDING JUDGE TRENDAFILOVA: -- just to ask you, how -- how
20 much time do you need? Just because you have two, three minutes left.

21 MR. KILUKUMI: Madam President, would you be kind enough to just
22 give me five more minutes out of the time that I'm ordinarily allocated?

23 PRESIDING JUDGE TRENDAFILOVA: Fine.

24 MR. KILUKUMI: Madam President, in contrast to the Prosecution,
25 we have called two live witnesses. The jurisprudence from this court is

1 that live testimony carries more weight than anonymous witnesses whom you
2 have not seen, whom you do not know how their (* indiscernible) occurred.
3 We have brought live witnesses. And Mrs. Cynthia Tai says they were able
4 to show that these witnesses, their neutrality could be assessed by this
5 Court. That is the value of calling a live witness, that the Court is
6 able to see that witness, he is questioned, the Court is able to assess
7 his demeanour and come to conclusions as to the truthfulness of his
8 account.

9 Madam President and your Honours, the evidence which was led
10 through these two witnesses was not challenged in its fundamental
11 features at all. It was very thorough questioning. "How did you get to
12 be at The Hague?" Obviously one has to be conducted. That was the line
13 of cross-examination, nothing else.

14 We placed before this Court an alleged commander, a general, so
15 that the Prosecutor can show your Ladyship and your Honours what evidence
16 they have against him. We brought the financier according to their
17 theory. Emo patron was here, Mr. Kosgei. You heard him. We gave the
18 Prosecution the opportunity to demonstrate how the various aspects of Emo
19 financed this violence.

20 I'm asking your Ladyship and your Honours to accept the testimony
21 of these witnesses in totality. Indeed, it was not controverted in any
22 way. A Prosecutor who has in his possession incriminating evidence
23 against those two gentlemen, you would have expected them to question
24 those people about that. That did not happen, and that goes to confirm
25 that their testimony is to be believed.

1 Madam President, we have placed before this Court evidence to
2 show that William Ruto called for peace on 1st of January, 2008. And how
3 does the Prosecution turn this round? That it was part of the network.

4 It was part of the plan. Nothing can be further from the truth.

5 On the 1st of January, 2008, it was never in the mind of
6 Mr. William Ruto that there will be an ICC proceedings before this Court,
7 and therefore let us prepare material. This is contemporaneous speech
8 given by Honourable Ruto asking for calm and saying, "This is our
9 country. We -- the democracy we are fighting for, this is not it."

10 I am inviting you, Madam President and your Honours, to consider
11 that speech in its context. He never foresaw that there would be an ICC
12 proceeding and he therefore needs to generate this.

13 Madam President, we are submitting that the network did not exist
14 at all. It was a creation of the Office of the Prosecutor, and he is
15 relying for that network on contrived, on fabricated, and on manufactured
16 evidence.

17 In a Status Conference held on the 18th of April, 2010, he
18 promised every one of us that he will be calling ten live witnesses. He
19 has a choice, of course, to conduct his case in the way he chooses, but
20 having made this promise, he's never come back to this Chamber or
21 disclosed in any way why it became necessary to withheld and to go back
22 on his promise.

23 It is our submission if he had brought these witnesses here, we
24 would not only have shown whether they're neutral or not neutral, we
25 would have shown what motivates them to make the testimony, the type of

1 testimony, they have made to the Prosecution. We have been denied that
2 opportunity.

3 Madam President, we appreciate that the International Criminal
4 Court, and like most other courts, is extremely sensitive to the victims
5 of international crimes, and that is as it should be. But in the process
6 of doing justice for the victims, I implore this Court not to do an
7 injustice to Mr. Ruto, not to turn Mr. Ruto into a victim in the sense
8 but with or without genuine -- genuine investigations we must have a
9 sacrificial lamb. We must have somebody to carry this. Mr. Ruto must
10 atone for the atrocities that occurred in Kenya 2007/2008. That, in our
11 humble submission, would be such a travesty of justice that I am
12 confident that this Court cannot do so. And we are asking that this
13 Court must always insist on the highest possible standards in
14 investigations, and in the absence of that, the Court must routinely
15 refuse to confirm any charges to go for trial.

16 What has been placed before the Court is insufficient to make
17 your Lady -- sorry, to make Madam President and your Honours convinced --
18 sorry, the word isn't "convinced." To make you satisfied that there are
19 substantial grounds to believe that Mr. Ruto had anything to do with the
20 crimes that occurred in Kenya. We have repeatedly acknowledged crimes
21 took place, but where is the nexus between the crimes and Mr. Ruto, and
22 that is where this Court requires tangible and concrete evidence, and it
23 is obviously lacking.

24 In conclusion, Madam President and your Honours, I want, for the
25 record, to state that Mr. Ruto has complied with all the orders that have

1 been issued by this Court to date. The allegation by the counsel for the
2 victims that he sought not to be available in these proceedings is a
3 matter of regret. It is the duty of the counsel for the victims to
4 advise his clients that under the Rome Statute, a suspect has a right to
5 seek permission from this Court not to attend the confirmation at all,
6 and indeed, when the application was made --

7 PRESIDING JUDGE TRENDAFILOVA: I'm sorry, Counsel. The issue has
8 been solved, sorted out. So please do not go back to it.

9 MR. KILUKUMI: Thank you, your Ladyship -- sorry. Thank you,
10 Madam President and your Honours. I will not deal with that.

11 Madam President, in conclusion, we are asking you to find that
12 there were no genuine, independent, and open-minded investigations in
13 Kenya. We can't even start to talk about integrity and honesty. All
14 what my client sees in this is a political scheme to keep him out of the
15 presidential elections in 2012. That's how he sees this whole case.

16 Thank you very much, Madam President and your Honours, for
17 listening to me.

18 PRESIDING JUDGE TRENDAFILOVA: Thank you, Counsel.

19 Now, who is going to speak on behalf of the Defence team of
20 Mr. Kosgey? As far as I recall --

21 MR. ORARO: Madam President.

22 PRESIDING JUDGE TRENDAFILOVA: -- Counsel Oraro pleaded --

23 MR. ORARO: I am going to request --

24 PRESIDING JUDGE TRENDAFILOVA: -- for Mr. Ryder.

25 MR. ORARO: -- that you permit Mr. Ryder to --

1 PRESIDING JUDGE TRENDAFILOVA: Yes.

2 MR. ORARO: -- talk on our behalf.

3 PRESIDING JUDGE TRENDAFILOVA: Yes, this is possible. We have
4 already granted to Counsel Ryder this right, pursuant to Rule 22(1),
5 Regulation 68 and the Appeals Judgement number 134 from 21st of February,
6 2007. You have the floor.

7 MR. ORARO: Thank you, Madam President.

8 PRESIDING JUDGE TRENDAFILOVA: Counsel Ryder, you have
9 30 minutes.

10 MR. RYDER: Thank you, Madam President.

11 Madam President, your Honours, thank you very much for allowing
12 me the opportunity to make closing submissions on behalf of Mr. Kosgey.
13 Mr. Oraro, in his address to you, introduced the members of Mr. Kosgey's
14 team, and unless you wish me to do so, I don't intend to introduce
15 everyone again.

16 We did provide a note to the interpreters because of the -- today
17 and yesterday, because of the changes that have been made in the place of
18 the hearing, I may have some modifications of that note, and I will go
19 slow in order to make sure that the interpreters are not in any
20 difficulty, I hope, over any changes that we've had to make to respond to
21 the submissions that have been made before you today.

22 PRESIDING JUDGE TRENDAFILOVA: I'm sorry, I didn't understand
23 you. Did you provide your speech in writing to the interpreters?

24 MR. RYDER: Yes.

25 PRESIDING JUDGE TRENDAFILOVA: Thank you.

1 MR. RYDER: I was simply saying that there may be some small
2 changes.

3 PRESIDING JUDGE TRENDAFILOVA: This is not going to be a problem
4 to the interpreters. They are extremely experienced. Please go ahead.

5 MR. RYDER: We know that we'll have an opportunity to make
6 further submissions in writing so I intend to cover just a few key areas
7 and respond to the points made by the Prosecution in their closing
8 submissions to you.

9 Dealing firstly with Mr. Kosgey's principal points, you will
10 recall, Madam President and your Honours, Mr. Oraro's submissions that
11 the case against Mr. Kosgey hinges on the evidence of one witness
12 described in these proceedings as Witness 0006. And it is that point to
13 some degree that the Prosecution sought to address in their closing
14 remarks today. You will recall that Mr. Oraro made the following points
15 clear: First, of the eight meetings that are supposed to be at the heart
16 of the Prosecution case, they allege that Mr. Kosgey attended only three,
17 and those three meetings are described only by Witness 0006.

18 Second, Mr. Kosgey's alleged position in the network is also
19 described only by Witness 0006.

20 And third, the part that Mr. Kosgey played -- is alleged to have
21 played in the network as an alleged co-perpetrator is again described
22 only by Witness 0006.

23 Mr. Oraro explained precisely why the evidence of that witness
24 could only be accorded a low probative value, and in brief summary, I
25 don't intend to repeat his submissions, he made the following points:

1 One, Witness 0006 comes before you as an anonymous witness. The
2 caution with which this Chamber will approach the evidence of a single
3 anonymous witness on the key issues was made clear in the case of
4 Abu Garda, Pre-Trial Chamber I's decision of 8th of February, 2010.

5 Two, all the information by which to assess the weight of
6 Witness 0006's evidence has been stripped away and not been disclosed.
7 We say this is important because there are a number of reasons why
8 Witness 0006 may have made false allegations against Mr. Kosgey --
9 forgive me. Let me just say that again. Because there are any number of
10 reasons why Witness 0006 has make false allegations against Mr. Kosgey.

11 In a case like this, the prospect that Witness 0006 may have some
12 ulterior motive for making allegations against Mr. Kosgey is real, not
13 fanciful, but because of the lack of disclosure by the Prosecution, that
14 question cannot be examined by the Defence or by this Chamber. As
15 Mr. Oraro pointed out, it means that the witness's evidence must be given
16 significantly lower weight.

17 Perhaps most importantly, crucial aspects of Witness 0006's
18 allegations have been withheld. Madam President, you will recall in
19 particular the dates of the meetings that were supposed to be the key
20 evidence of Mr. Kosgey's role have not been disclosed. Again, this
21 reduces significantly the weight you can attach to that evidence.

22 And four, for reasons set out in detail by Mr. Oraro, the
23 evidence of Witness 0006 is inconsistent with other Prosecution evidence.
24 I will not repeat all of Mr. Oraro's submissions on those
25 inconsistencies, but on the organisation -- sorry, on the structure of

1 the organisation, on the nature of fundraising, on when the so-called
2 network started, on who was involved, and on a variety of other details,
3 Witness 0006 is, at best, significantly out of sync with other parts of
4 the Prosecution case.

5 Madam President, your Honours, we acknowledge that simply because
6 criminal charges are based almost entirely on one witness does not
7 automatically mean that those charges cannot proceed. However, it does
8 mean that the Court approaches such allegations with real caution, and in
9 this case, we do not only have just one significant witness in relation
10 to Mr. Kosgey, but as I've already said, this witness is anonymous. We
11 accept there may be valid reasons for keeping the identity of a witness
12 anonymous at this stage, but the mere fact that the Prosecution chooses
13 to rely on an anonymous witness does not of itself mean that that
14 witness's evidence must be rejected, but there are inevitably real risks
15 of injustice to the Defence in such circumstances. This has been
16 explicitly acknowledged in other cases, and we would rely particularly in
17 the Abu Garda case at paragraph 52 of its decision where Pre-Trial
18 Chamber I concluded anonymous witnesses will be given a lower probative
19 value and will be evaluated on a case-by-case basis according to whether
20 the information contained therein is corroborated or supported by other
21 evidence tendered into the case file.

22 The problem in relation to Mr. Kosgey's case does not end there.
23 It is not simply that the witness is anonymous but the critical
24 information regarding the dates of the meetings has not been disclosed.

25 If the Prosecution allege Mr. Kosgey was at those meetings, he

1 would know the dates, so why would the dates need to be withheld from
2 him? On the face of it, that nondisclosure appears to serve no purpose
3 other than to deprive Mr. Kosgey of the ability properly to address that
4 evidence, and the Prosecution in their submissions before you today have
5 simply not answered that point.

6 For such evidence to get past the confirmation stage, the Chamber
7 must either be able to make at least, at least, a minimal assessment of
8 that witness's account or be able to identify significant other
9 supporting evidence, and as Mr. Oraro demonstrated in his address to you,
10 neither is possible in this case in relation to Mr. Kosgey. Witness 0006
11 cannot be assessed in even the most basic way, and the very limited
12 evidence the Prosecution has made available to try to support
13 Witness 0006 does not, in fact, support him. It has little, if any,
14 probative value.

15 In their closing submissions today, the Prosecution sought to
16 answer at least in part Mr. Oraro's submissions which I have summarised
17 before you. The Prosecution made a number of points in their closing
18 submissions, and I will try and deal with all of them shortly and
19 briefly.

20 Before I do so, we want to point out that one of the points that
21 was made in closing by the Prosecution today was that Mr. Kosgey
22 presented no evidence and no argument that the Prosecution case is
23 insufficient. As Mr. Oraro explained we called no live evidence
24 precisely because we did not believe it necessary to do so. We have in
25 keeping, we hope, with the guidance of Bemba, analysed the Prosecution

1 evidence itself.

2 The Prosecution also suggested that we presented no argument to
3 say the evidence was insufficient. We say Mr. Oraro addressed you in
4 some detail, analysing with care the Prosecution evidence. We submit he
5 made precisely that argument, and we stand by it today.

6 I will deal, I hope, with three points that were made by the
7 Prosecution in their closing submissions before you today.

8 The first appeared to be an assertion that the assessment of
9 Witness 0006 is a matter for trial. We submit if that is what is being
10 suggested, it misunderstands the role of this Chamber and this hearing.

11 On behalf of Mr. Kosgey, we are not asking you to compare
12 Witness 0006's account against that of Defence witnesses and determine
13 which you should prefer. It is not a trial issue in that sense. We are
14 asking you simply to look at the Prosecution's own case and assess how
15 much weight you can give this evidence in support of their case. We are
16 merely asking you to determine whether Witness 0006's evidence reaches
17 the sufficient standard to pass confirmation.

18 There are, we submit, on any view serious shortcomings in the way
19 Witness 0006's evidence has been presented. So in that context, the
20 critical question is whether this Chamber has substantial grounds to
21 believe the evidence of Witness 0006. And that assessment, we suggest,
22 is not purely for trial. In fact, it is precisely the function of this
23 Chamber and this hearing.

24 In the case of Bemba, this Pre-Trial Chamber set out, we say with
25 respect, helpfully and comprehensively, the function of the confirmation

1 hearing, the role of this Chamber, and how evidence should be categorised
2 and assessed at this stage, and so we rely on that judgement in saying
3 that the assessment we are asking you to undertake is inherent in the
4 role the Pre-Trial Chamber plays.

5 We note also that in the case of Abu Garda, Pre-Trial Chamber I
6 refused leave to the Prosecution to appeal the decision not to confirm
7 charges, and at paragraph 8 of that decision of 23rd April 2010,
8 Pre-Trial Chamber I concluded:

9 "The free assessment of the evidence presented by a party is
10 pursuant to the Statute a core component of the judicial activity both at
11 the pre-trial stage of the case and at trial."

12 Madam President, your Honours, I know you are very familiar with
13 these principles, but we are emphasising them to indicate that what we
14 are seeking for you to do is precisely in keeping with the role that this
15 Pre-Trial Chamber fulfils.

16 Of course this is not a mini-trial, and we hope that our
17 presentation and analysis put before you by Mr. Oraro demonstrated that
18 we fully understand that. But the whole purpose of the confirmation
19 hearing is for the Prosecution to allow their evidence to be subjected to
20 scrutiny and to enable this Chamber to determine what weight can be given
21 to it.

22 We say in passing that some of the terminology used by the
23 Prosecution in addressing you today did not seem consistent with the role
24 of this hearing. We heard expressions like: "Does this evidence
25 exonerate the suspect?" "Is this evidence watertight?" On one view, we

1 respectfully submit, those kind of expressions do not sound consistent
2 with the fundamental principle that the burden of proof at this hearing
3 lies on the Prosecution.

4 In any event, Madam President, our points over Witness 0006 go
5 beyond his credibility alone, and for reasons I've touched upon and
6 Mr. Oraro outlined, in key areas Witness 0006 is inconsistent both with
7 the other Prosecution witnesses and with important aspects of the
8 Prosecution case as outlined in the document containing the charges.

9 If the Prosecution are seeking to assert to you that the
10 assessment of Witness 0006 is purely a trial issue, then we say that
11 simply doesn't answer the problem they have at this stage with
12 Witness 0006's evidence.

13 The second point that the Prosecution sought to make to you
14 today, as we understand it, was to deal with the inconsistencies of
15 Witness 0006's evidence as submitted to you by Mr. Oraro.

16 The Prosecution asked you to consider some areas of
17 inconsistency, two in particular, that Mr. Oraro had pointed out, and
18 they attempted to say that Witness 0006 was not inconsistent with other
19 aspects of the Prosecution case.

20 As we understand it, the first was that Witness 0006 used the
21 term "mastermind" in reference to Mr. Kosgey, and their assertion as we
22 read it is that they are claiming -- sorry, they are not claiming that he
23 was the sole mastermind.

24 With the greatest of respect, we submit that is not an answer to
25 the point. Whether it is mastermind that Witness 0006 used, sole

1 mastermind, or otherwise, the Prosecution cannot escape the fact that the
2 role Witness 0006 ascribed to Mr. Kosgey is inconsistent with that of
3 other of their witnesses.

4 As Mr. Oraro pointed out, the other witnesses around whom the
5 Prosecution have built their case do not even mention Mr. Kosgey. It is
6 a material inconsistency and one which is a flaw in the Prosecution case.

7 The second inconsistency raised by the Prosecution before you was
8 Witness 0006's mention of Mr. Raila Odinga. As we understand it, the
9 Prosecution have now conceded that they have no evidence that
10 Mr. Raila Odinga was involved.

11 Our point is a simple one. Witness 0006 reports that on the
12 basis of what he was told in a meeting, Raila Odinga was at the head of
13 the alleged network. In this regard, Witness 0006's evidence is clearly
14 inconsistent with the other witnesses. No one else claims to have been
15 told that. No one else claims that was the case. And the Prosecution do
16 not suggest it now.

17 As Mr. Oraro made clear, we on behalf of Mr. Kosgey are not for a
18 moment suggesting there is evidence against Mr. Raila Odinga. We are
19 simply pointing out that this claim is indicative of Witness 0006's
20 evidence. He is not, we submit, a reliable witness, but not least
21 because he is not even consistent with the Prosecution case on key issues
22 of this kind.

23 Those inconsistencies which I have outlined to you relate to the
24 framework of the alleged network and the role of Mr. Kosgey and others.
25 We do not accept the Prosecution's characterisation of these points and

1 these inconsistencies as peripheral. We submit respectfully that is not
2 a realistic submission. The Prosecution need to grapple with those
3 inconsistencies and we say respectfully that they simply have not.

4 Third, the evidence -- the Prosecution referred to the evidence
5 in relation to non-ICC witness summaries, and the only other material
6 which the Prosecutor referred to in closing was the evidence of the --
7 from these non-ICC witness summaries.

8 We do not accept that Mr. Oraro asking you to approach such
9 summaries with caution is contrary to the Statute. If that was the
10 submission this morning, we do not agree with it. Mr. Oraro addressed
11 you on those submissions, and we submit that in Abu Garda, Pre-Trial
12 Chamber I made it very clear how little weight can be attached to such
13 summaries, but it is even more important to note that even the two
14 non-ICC summaries in relation to Mr. Kosgey that the Prosecution have
15 mentioned even support Witness 0006 in relation to the meetings alleged
16 to involve Mr. Kosgey or on any of the details of Witness 0006's
17 evidence. In truth, those summaries amount to no more than vague
18 allegations which the witnesses may or may not simply have heard from
19 others. In fact, unlike some of the other non-ICC witness summaries that
20 the Prosecution have disclosed in this case, the two summaries they
21 mention in relation to Mr. Kosgey do not even indicate whether the
22 persons in question have first-hand knowledge of what they are
23 describing. Some of the non-ICC witness summaries make that indication.
24 Those two don't. So even taking it at its highest, we respectfully
25 submit that this category of evidence does not provide any real support

1 for Witness 0006.

2 Madam President, your Honours, I would just like to address you
3 now shortly on what we respectfully submit are some of the implications
4 of confirming this case in relation to Mr. Kosgey.

5 We say when the Prosecution presents very limited evidence to
6 support their allegations against a suspect and seeks confirmation on
7 that basis, it has implications for the functioning of this court and
8 this Chamber. It impacts on the standard that is necessary to pass
9 through the filter that the Pre-Trial Chamber is here to provide.

10 Madam President, your Honours, as we know you are well aware, in
11 the case of Abu Garda the Prosecution sought confirmation of the charges
12 based on evidence about meetings from an anonymous witness and witness
13 summaries. The Pre-Trial Chamber did not confirm those charges because
14 that evidence, either taken alone or cumulatively, could not provide
15 substantial grounds to believe the charges. In that case, the
16 Prosecution, if they wanted to proceed, would have needed to have
17 disclosed more, to have produced some additional evidence, and to try
18 again, but on what they produced, confirmation could not occur.

19 Of course, Abu Garda is a different case, and each case and each
20 suspect must be considered separately, but we submit that Abu Garda does
21 provide helpful guidance to all parties. It indicates the basic standard
22 of evidence that is needed to pass the confirmation stage. It also
23 illustrates what sort of evidence does not satisfy this stage. Partially
24 disclosed, unsupported anonymous statements centred around one witness
25 may not be enough.

1 In the cases of Bemba and Lubanga, the Pre-Trial Chambers made it
2 clear that the evidence at confirmation meets the right standard was a
3 critical function of the court. It fundamentally protects the interests
4 of suspects. But we say it goes further. It goes further than simply
5 protecting the interests of suspects, important though that is.

6 Maintaining the correct standard of evidence at confirmation
7 benefits all parties. It gives guidance to the Prosecution as to what
8 the Pre-Trial Chamber requires and what this Chamber expects to see at
9 this hearing. If that standard is lowered in the way that was sought in
10 Abu Garda and in the way the Prosecution are seeking to do in
11 Mr. Kosgey's case, there are implications. The important Chamber of the
12 Pre-Trial Chamber -- forgive me. The important function of the Pre-Trial
13 Chamber as a filter is undermined, and it benefits no party, nor does it
14 benefit the interests of justice for cases based on slim, untested,
15 anonymous and partial evidence to continue to the next stage.

16 For reasons that Mr. Oraro submitted, the evidence you have been
17 provided with against Mr. Kosgey is seriously deficient. The Prosecution
18 response to Mr. Oraro's address has not answered that central criticism.
19 The Prosecution has simply not provided this Chamber with sufficient
20 evidence to confirm the charges against Mr. Kosgey. We say this is
21 because such evidence does not exist. That is why that kind of evidence
22 is not before you now.

23 As Mr. Oraro emphasised, Mr. Kosgey is confident he can answer
24 any allegation made against him. If the Prosecution had such evidence --
25 had put such evidence before you, he would have dealt with it, but they

1 have not. Other than the highly unsatisfactory evidence of Witness 0006
2 which we have addressed, there is really nothing.

3 We say that in relation to Mr. Kosgey, on any reasonable view,
4 the evidence does not satisfy the standard of substantial grounds to
5 believe the charges, and for that reason, we respectfully submit that the
6 charges against Mr. Kosgey cannot properly be confirmed.

7 Thank you, Madam President. Thank you, your Honours.

8 PRESIDING JUDGE TRENDAFILOVA: I thank you very much, Mr. Ryder.
9 You have been very strict about the timing, and you kept your promise.
10 I'm saying this (Microphone not activated) ... because this Chamber is
11 going to have another meeting that has to start at 6.30, and the
12 Court Officer kindly asked us to finish half an hour early in order to
13 organise this courtroom for the next meeting, not because the Chamber
14 doesn't want to listen a little bit more to the presentations of the
15 counsels, but just because we have to be strict with regard to our other
16 responsibilities. Now -- thank you.

17 Now the floor is over to the other counsel. Will it be you -- to
18 the counsel of Mr. Sang. Again with the same -- with the same request,
19 that you make your closing statements to the points reflecting on the
20 evidence presented and the case of the Prosecutor. Thank you,
21 Counsel Katwa. You may start.

22 MR. KIGEN-KATWA: Thank you, Madam President and your Honours.
23 Madam President and your Honours, I will commence my submissions by in
24 the first instance responding to the contentions made by the Office of
25 the Prosecutor, and a significant contention made by the Prosecutor in

1 respect to the third suspect was the allegation that, in fact, he defied
2 government order banning live broadcast in the period from 31st December
3 2007 for approximately a period of a month.

4 Your Honour and Madam President, it is our contention that the
5 Prosecutor managed to provide to provide to this Honourable Court a
6 transcript for the period from 18th January 2008 to December 2010. There
7 is no explanation given as to why they could not produce the transcript
8 for the period of the 30th December 2007 to the 3rd December -- to the
9 3rd January 2008 as they allege is what contains the co-ordination of the
10 violence by my client.

11 Madam President and your Honours, we also contend that the
12 contention made by the Prosecution that the peace message made by my
13 client was part of a plan to conceal the intention to perpetrate violence
14 is completely untenable and untrue. This argument is made by the Office
15 of the Prosecution on their feet in these closing submissions. They are
16 not contained in any statements of the witnesses. Madam President, as it
17 is the case, we will not have an opportunity if it were to go to trial to
18 cross-examine the maker of such a statement from the Office of the
19 Prosecutor, and to the extent to which in an allegation is not supported
20 by any of the witness statements, Madam President, we pray that it be
21 disregarded.

22 Madam President, we have contended that those peace messages were
23 recorded -- were prerecorded and were played from 1st of January, 2008.
24 And the reason why it was prerecorded and played is because there was a
25 ban to live coverage.

1 Madam President, that contention on our part has not been
2 contested. The fact of it having been made on 1st of January is not
3 contested.

4 We would also wish to say a few things about the allegations made
5 by the victims' counsel. The allegations made by the victims' counsel in
6 the first instance is not admitted by my client and in any event referred
7 to the events of 6th of September, a date that this Court can confirm my
8 client was not at Kass FM. But assuming even for argument's sake that
9 the victims' counsel was right, it proves exactly the case we've always
10 wanted to make in this court.

11 The first one, Madam President and your Honours, is that my
12 client, Joshua Sang, is not Kass FM, and to have brought him here as if
13 he is the person and the entity referred to as Kass FM has been
14 demonstrated by the counsel for the victims as being untenable.

15 The second thing, Madam President, is that as we intend to
16 contend in a few minutes, the Prosecution did not do any investigation,
17 and the victims' counsel has demonstrated how they would probably have
18 done a better work. Madam President, the counsel for the victims was
19 able to make reference to, for instance, an e-mail. Madam President,
20 compare that situation with the fact that my client has not been
21 associated in any way with any violence with a transcript or any other
22 document including any e-mail from the web or any entries in the web site
23 of Kass FM or any short messages or any telephone transcripts or
24 broadcast transcripts.

25 Lastly, emanating from the counsel for the victims and, for

1 argument's sake, limited to the purpose of demonstrating the
2 ridiculousness of these charges is the fact that the victim quoted is
3 clearly a person who is aggrieved by some events and has been able to
4 demonstrate his or her concerns within two days of the occurrence of that
5 event.

6 The Prosecutor -- the Prosecutor's Office has attempted to
7 present to you a case that commenced in December 2006 culminating in the
8 end of the month of January 2008, and there is no one who raised an alarm
9 for all that period. Madam President, we submit if there had been any
10 plan and if my client had been responsible for any inflammation, that
11 fact of that inflammation would have been known the same way that the
12 victims have demonstrated. Such information would come out within two
13 days. And we wish to highlight the fact that the effect of what the
14 victims said is to suggest that it is possible for people other than
15 members of the Kalenjin community to hear what is being said or, in the
16 alternative, that members of the said Kalenjin community can between
17 themselves raise an alarm if there is an inflammation.

18 In substance of our arguments, my client is charged under
19 Article 25(3)(d) which requires that he answer an allegation of
20 contributing to a crime.

21 THE INTERPRETER: The interpreter should like to draw attention
22 to the speed of the speaker. Would he please be asked to slow down.
23 Thank you.

24 PRESIDING JUDGE TRENDABILOVA: Counsel, have you provided some of
25 your comments to the interpreters? I didn't ask you.

1 MR. KIGEN-KATWA: No. Madam President. And I'm not referring to
2 any -- I'm just referring to a summary of my notes.

3 PRESIDING JUDGE TRENDAFILOVA: Would you be so kind as to slow
4 down.

5 MR. KIGEN-KATWA: I will, Madam President, and I apologise.

6 The allegation of contribution, the Office of the Prosecutor was
7 completely unable to provide sufficient evidence to show that my client
8 made any contribution to any plan or design to perpetrate violence, if
9 there was any plan of such a nature.

10 Secondly, the Office of the Prosecutor was completely unable to
11 show any nexus between my client and any common plan, if there did exist
12 any common plan.

13 And lastly, my client was not shown to have contributed
14 intentionally to any criminal scheme.

15 On the issue of the criminal scheme, Madam President and your
16 Honours, the Prosecutor has given two potential outfits that may have
17 been aggressors. The first one is in the form of a political party
18 called ODM. The second one was an outfit that is constituted of a tribe
19 called Kalenjin. Madam President and your Honours, we submit that
20 neither ODM has been demonstrated to have been constituted for purposes
21 of a criminal objective, nor is it being said that the Kalenjin community
22 came into existence for purposes of a criminal objective and any nexus
23 shown between my client and of any such criminal intentions.

24 Madam President, we have already highlighted the fact that no
25 investigations were done in this case. We acknowledge on our part that

1 in the case of the Prosecutor versus Abu Garda, the Court held that lack
2 of investigation is not in itself a reason to refuse confirmation.
3 However, the Court went on to qualify what the criteria would be, and I'm
4 referring to the decision of Pre-Trial Chamber I made on 8th of February,
5 2010, a Chamber in which Honourable Judge Tarfusser was present, where
6 the Court stated the mere lack of investigation will cause the Chamber to
7 decline to confirm the charges on the basis of an alleged investigative
8 failure on the part of Prosecution. Rather, this objective may have an
9 impact on the Chamber's assessment of -- rather, this objection, that is
10 the objection as to whether or not investigation was done. Rather, this
11 objection may have an impact on the Chamber's assessment of whether the
12 Prosecutor's evidence as a whole has made substantial ground to be -- to
13 believe threshold.

14 Your Honours, we submit that Article 54, under which the
15 Prosecutor is supposed to investigate equally both exonerating and
16 incriminating evidence, requires four aspects to be covered by the Office
17 of the Prosecutor. First one is that he should investigate facts. We
18 emphasise on the investigation on facts. The second one is that they
19 should investigate the evidence that they have. The third one is that
20 they should investigate the circumstances relating to both the facts and
21 the evidence they hold. And lastly, that they should attend to every
22 aspect that goes into an assessment of whether a crime has been committed
23 or not and therefore whether or not to bring somebody to this court.

24 We submit, your Honours, that in terms of assessment, it was
25 absolutely necessary that our client -- that my client should have been

1 given an opportunity to respond to the allegations made against him by
2 the four witnesses whom we have already highlighted as having made
3 reference to him, and that is Witness number 0001, Witness number 0002,
4 Witness number 0006, and Witness number 0008.

5 The Office of the Prosecutor in the entirety of their submissions
6 in the course of this confirmation hearing have not made any attempt to
7 explain why they found it unnecessary to make an inquiry from my client
8 as to the circumstances of these allegations brought before this Court.

9 Number two, in terms of assessment, they did not investigate
10 issues that had been raised about the likelihood that the witnesses had
11 been induced to fabricate and seek to have my client brought before the
12 court even if as a collateral to the other suspects.

13 Madam President, we submit that if the Prosecutor had taken the
14 interest to investigate, there are some very obvious issues that they
15 would have realised. The first one would be that they would have
16 realised that their witnesses were lying on very commonplace issues
17 including dates for nominations that were conducted in Kenya, the
18 nomination for parliamentary officers, which is a very significant date
19 they have referred to in their statements.

20 Number two is they would have realised that there was a ban on
21 live coverage and produced evidence that notwithstanding that live
22 coverage, my client proceeded to make broadcasts, to coordinate violence.

23 Number three, they would have realised the fact that the banks
24 they have referred to as being where the money was placed following an
25 act on the part of my client as alleged to coordinate the fundraisings

1 does not exist, the bank being one alleged Emo bank. And,
2 Madam President, very significantly, one of the witnesses, particularly
3 Witness number 0008, said that (* indiscernible) were in existence and,
4 in fact, were reported in the newspapers. And we pray that you put
5 significant weight to the fact that such corroborative evidence outside
6 the testimony, the naked testimony of these witnesses was not availed to
7 this Honourable Court.

8 Madam President, it is our submission that in default of that
9 provision of Article 54, the Prosecutor in the first instance failed to
10 inquire and reconcile his own evidence and realised that it was not
11 tenable. Number two, he failed to investigate and afford the suspect, my
12 client, an opportunity to demonstrate that he was innocent, and, in fact,
13 when my client offered himself to provide evidence in the encounter which
14 we have provided, being Exhibit EVD-PT-D11-00006, being an interview he
15 had with the Chief Prosecutor, the Prosecutor practically ran away,
16 because the situation was inconsistent with the intention of having to
17 present my client, unfortunately, before the court.

18 For purposes of the point of investigation, Madam President and
19 your Honours, I wish to make reference additionally to the same Abu Garda
20 decision which I've just referred to at paragraph 41, where the Court
21 stated that:

22 "The Chamber will assess the evidence presented by parties for
23 the purposes of confirmation hearing as a whole in order to determine
24 whether the Prosecution has brought sufficient evidence to establish
25 substantial ground to believe that crimes charged were committed and

1 whether the Prosecution has brought sufficient evidence to -- to
2 establish substantial grounds to believe that Abu Garda committed the
3 crimes with which he is charged."

4 Madam President, at paragraph 43, the same Court stated that
5 evidence that is inconsistent, that is ambiguous, that is contradictory,
6 is such as to deny the Prosecution the request for the confirmation of
7 the charges as is requested here.

8 Madam President, when we were going through the evidence, we
9 showed all those items, inconsistency, ambiguity, and contradiction.
10 Madam President, we acknowledge that the decision in Abu Garda does not
11 bind you, but we pray that you do find that, in fact, the persuasive
12 content of that decision is such as to speak directly to this case and
13 especially in respect of my client.

14 Madam President, moving on to the issue of the meetings, which
15 was an issue which was substantially dealt with in the same case of
16 Abu Garda, I wish to make reference to paragraph 173 in that case where
17 the Pre-Trial Chamber I stated that:

18 "The Chamber is therefore of the view that evidence presented by
19 the Prosecution in respect to Abu Garda's participation in the first
20 meeting is weak and unreliable due to the many inconsistencies exposed
21 above."

22 Madam President, we submit that we demonstrated as many
23 weaknesses in the meetings where my client is alleged to have broadcasted
24 and in which my client is alleged to have attended, and also
25 unreliability in few of the contradictions between the witnesses, and

1 even the attendees who in actual fact were not present.

2 The same point is reiterated at paragraph 177 in the same
3 Abu Garda case, where the Court stated that:

4 "The Chamber notes that such information contained in a summary
5 of the interview transcripts of witnesses whose identities are known to
6 the Defence is not corroborated or supported by any other evidence."

7 At paragraph 179, Madam President and your Honours, the Court
8 stated that:

9 "Evidence tendered by the Prosecution in support of its
10 allegation is so scant and unreliable that the Chamber is unable to be
11 satisfied that there are substantial grounds to believe that Abu Garda
12 participated in any meeting in which a common plan to attack MTS was
13 agreed upon."

14 Madam President, we submit that in similar fashion as happened in
15 the case of Abu Garda, we have demonstrated that in fact the material
16 supplied alleging my client participated in the nine preparatory meetings
17 is so scant and unreliable and that it is irresistible to refuse to
18 confirm the charges as asked by the Prosecution.

19 The other issue I wish to highlight is the issue of the
20 witnesses.

21 Madam President, the Office of the Prosecutor in their closing
22 submissions desired to emphasise on the confidentiality and the security
23 of the witnesses, and we have no problem with that. We agree that there
24 could be good cause for that. We, however, submit that our rights should
25 not be prejudiced by that, and that the previous decision in respect to

1 the circumstances of these witnesses should be equally visited in this
2 case on the Prosecution's case.

3 Madam President, all the witnesses are anonymous. All the four
4 witnesses the Prosecution has sought to rely on in making their case,
5 that is Witness number 0001, Witness number 0002, Witness number 0006 and
6 Witness number 0008, who seemed to constitute the entirety of the
7 Prosecutor's case against my client.

8 The first one is that they are anonymous. The second thing under
9 which they labour is that they are all self-confessed criminals. Number
10 three is that they have nothing outside their word to support their word.
11 There is nothing to corroborate what they say, including the ones who say
12 the allegations are reported in the newspaper. That material is not
13 provided.

14 Number four is that they contradict each other.

15 And lastly, Madam President, we pray that the Court does not wish
16 away the size of Rift Valley in Kenya vis-à-vis a meager number of nine
17 anonymous witnesses to demonstrate crimes of the gravity that is in this
18 case.

19 We agree with counsel for the second suspect that even one
20 witness is adequate. However, we submit that these four witnesses in
21 this case who are self-confessed criminals, who contradict each other,
22 are such as to make it completely impossible for their word to have any
23 weight. And in support of our argument in respect to witnesses,
24 Madam President, we will make reference to the decisions made in the same
25 case of Abu Garda at paragraph 173, where the Court stated that:

1 "The Chamber notes that all the statements relied on by the
2 Prosecutor -- Prosecution, apart from Witness number 442, were given by
3 witnesses whose identity is unknown to the Defence and have been
4 presented in form of summaries or of interviews, transcripts. As stated
5 in previous section in this decision, both of these aspects lower the
6 probative value of the statements at issue. Accordingly, the Court
7 concludes that the evidence presented by the Prosecution does not provide
8 substantial ground to believe that Abu Garda participated in the first
9 meeting."

10 THE INTERPRETER: Message from the interpreters: Could the
11 speaker speak more slowly.

12 MR. KIGEN-KATWA: (* Microphone not activated) ... to the extent
13 of holding --

14 PRESIDING JUDGE TRENDAFILOVA: Would you slow down, Mr. Katwa,
15 and do you have much to add to what you've said till now?

16 MR. KIGEN-KATWA: If you give me ten minutes, I'll finish. And
17 I'll make sure I'm not fast (* inaudible).

18 PRESIDING JUDGE TRENDAFILOVA: The Court has to make some oral
19 decisions and to make some announcements. That's why you have just five
20 minutes.

21 MR. KIGEN-KATWA: I'll try --

22 PRESIDING KIGEN-KATWA: And do not so extensively read to us
23 paragraphs of jurisprudence that is known to us.

24 MR. KIGEN-KATWA: I'm obliged, Madam President.

25 PRESIDING JUDGE TRENDAFILOVA: In addition, you know that you're

1 going to be granted the opportunity to develop your points in written
2 observations.

3 MR. KIGEN-KATWA: I'm obliged.

4 In addition to the said paragraph 173 and in view of the
5 directions of the Chamber, I will only wish to say the same point that I
6 have mentioned is also highlighted in paragraph 177.

7 We rely on the same decision in respect to common plan as is
8 stated in paragraph 230 of the same decision.

9 Madam President, in conclusion, I -- on behalf of my client, I
10 would like to recall the Court's mind to the decision made on 31st March
11 2010 being the decision to authorise the Prosecutor to investigate this
12 case and particularly the concern of this Chamber in terms of the
13 circumstances and the context of a Prosecutor requesting on his own
14 motion to investigate. In that situation, the Court stated that at the
15 out -- at the outset the Chamber wishes to highlight that it is well
16 aware that this article was one of the most delicate provisions of the
17 Statutes, and that the concern of some of the State Parties is that the
18 Prosecutor could very possibly politicise this process, and that the
19 concern that concerns us was that the Prosecutor's request to investigate
20 on his own motion be managed by the Court.

21 Madam President, we pray that you do find that the concern of
22 most State Parties, who include Kenya, has come to pass in this case in
23 that the Prosecutor has, in fact, endeavoured to politicise the process
24 of this court.

25 Madam President, it is the Office of the Prosecutor themselves

1 that said that they have chosen to believe Witness number 0006
2 selectively in respect to two things. The first one is that he was not
3 at the top of the hierarchy of the command, and number two, that he was
4 not the financier.

5 Madam President, looking at the whole lot of the witness
6 statements and the disclosures done by the Prosecution, apart from the
7 three suspects that are in court today, the only other person who is
8 mentioned is the same person that the Prosecution say they have found
9 reason not to disbelieve, that is, the Prime Minister. Madam President,
10 the only person that the Prosecutor has had occasions to meet in Kenya is
11 that same -- the same Prime Minister, Raila Odinga.

12 Madam President, we submit that there has not been equality of
13 terms even in terms of investigating the suspects, because some other
14 suspects were afforded an opportunity to clear their name. Others were
15 denied an opportunity to clear their name.

16 Madam President, we pray that this Court do find that there is
17 reason to find that the Prosecutor has not done any investigation and
18 that on the evidence of what we have supplied, it is untrue that any
19 crime was organised and that my client was not part of any scheme to
20 perpetrate any violence as alleged by the Prosecutor (* indiscernible).

21 On those grounds, Madam President, we pray that you decline to
22 confirm these charges.

23 PRESIDING JUDGE TRENDABILOVA: Thank you, Counsel Katwa, very
24 much, indeed, for your comments.

25 Of course, if I can just respond to you. The Chamber doesn't

1 have the power to direct the Prosecutor's investigation. We have only to
2 assess the quality of evidence.

3 But now let us proceed with what the Chamber could like to say at
4 the end of the last session the confirmation hearing. We are going to
5 touch upon some issues.

6 First, as previously announced by the Chamber, the parties and
7 the Legal Representative, Ms. Chana, will be given the opportunity to
8 submit to the Chamber, if they wish so, written observations. This
9 shouldn't be considered an obligation.

10 In this regard, I must emphasise that in their written
11 observations, the parties and the Legal Representative are expected to
12 address only issues, first, relevant to the case and discussed during the
13 confirmation hearing. No new issues could be raised by way of the said
14 written submissions. If regardless of this guidance such issues will be
15 contemplated, they will not be taken into consideration by the Chamber in
16 its final decision on the charges.

17 With respect to the challenge of the jurisdiction of the Court,
18 the Chamber has granted the Prosecutor and the Legal Representative of
19 victims to submit their observations should they wish to do so by the
20 16th of September, 2011. As to the Defence, the Chamber decided that
21 during the first session of the hearing, if they wish to submit
22 observations on the observations submitted by the Prosecutor and by the
23 Legal Representative for victims, this shall be included in their overall
24 final written submissions. Accordingly, the Chamber decided to grant
25 three weeks to the Prosecutor and to the Legal Representative of victims

1 starting as of tomorrow, the 9th of September, 2011, to submit the
2 written observations to the Bench if they wish to submit such
3 observations, meaning that the final date for these submissions will be
4 Friday, the 30th of September, 2011.

5 For the Defence, which has always the last word, the three weeks
6 will start running as of Monday, 3rd of October, 2011, and will end up on
7 Monday, 24th of October, 2011.

8 Second, the Chamber has also discussed the page limit which
9 according to the Regulations of the Court, in particular
10 Regulation 37(1), Regulation 36(3) regarding the format of such
11 submissions, shall not exceed 20 pages. However, the Chamber has decided
12 to extend the page limit to 50 pages for the Prosecutor, 30 pages for the
13 Legal Representative, and 50 pages to each Defence team.

14 Finally, I would like to remind the suspects, Mr. Ruto,
15 Mr. Kosgey, and Mr. Sang, to fully comply with the conditions imposed on
16 them in the summonses to appear, in particular not to approach or
17 intimidate any witness, any victim, or to undertake any activities that
18 are likely to trigger or exacerbate tension or violence in Kenya.

19 Defence teams, and here we mean the counsels, are also reminded
20 to adhere to the Code of Professional Conduct for Counsel, and in
21 particular, to respect the confidentiality of information as enshrined in
22 Article 8 of the Code of Professional Conduct.

23 With this, the Chamber concludes the sessions of the confirmation
24 hearing in the case of the Prosecutor versus William Samoei Ruto,
25 Henry Kiprono Kosgey, and Joshua Arap Sang.

1 COURT USHER: All rise.
2 The hearing ends at 6.01 p.m.
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