

1 International Criminal Court
2 Trial Chamber V(a) - Courtroom 1
3 Situation: Republic of Kenya
4 In the case of The Prosecutor v. William Samoei Ruto
5 and Joshua Arap Sang - ICC-01/09-01/11
6 Presiding Judge Chile Eboe-Osuji, Judge Olga Herrera-Carbuccia
7 and Judge Robert Fremr
8 Status Conference
9 Friday, 15 January 2016
10 (The status conference starts in open session at 9.33 a.m.)
11 THE COURT USHER: All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
15 Court officer, please put the case on the record.
16 THE COURT OFFICER: Good morning. Yes, Mr President.
17 Situation in the Republic of Kenya, in the case of The Prosecutor versus William Samoei
18 Ruto and Joshua Arap Sang, case reference ICC-01/09-01/11.
19 And for the record, we are in open session.
20 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
21 Appearances, do they change?
22 MR STEYNBERG: Good morning, your Honours. Yes, one change to the Prosecution
23 this morning; Ms Alice Zago replaces Mr Lucio Garcia this morning.
24 MR KIGEN-KATWA: Good morning, your Honours. Mr Sang's team remains the
25 same.

1 MR KHAN: Good morning, your Honours. Mr Ruto's team is as it was yesterday.

2 MR NDERITU: Good morning, Mr President, your Honours. We are still the same as
3 yesterday. Thank you.

4 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.

5 Then we will take the submissions or the observations, views, concerns of the Victims'
6 counsel, Mr Nderitu.

7 And we will for now, as indicated yesterday, Mr Nderitu you have one-and-a-half hours
8 to make your submission, that will take us to 11, and then we will stop it there with you.

9 And the OTP would start at 11.30, for one-and-a-half hours, and stop at 1.

10 When we come back at 2, we will use the rest of the day to take submissions of the
11 Defence counsel finally.

12 And we're hoping that we should be able to take your submissions up to 5 if you can
13 manage to split it to that time, but if not we can also do one-and-a-half hours per counsel,
14 but we're hoping that you don't need the one-and-a-half hours because if you took the
15 one-and-a-half hours it means we will have to sit until 5.30. We're hoping you can spare
16 us that. So think about it. But we reserve the time just in case. We reserve the time just
17 in case, but we're hoping that we don't go until 5.30.

18 We will commence, but before we do, Mr Kigen-Katwa, Mr Khan, are you now in a
19 position to react to the request of the Prosecutor yesterday?

20 MR KHAN: Mr President, I'm grateful. I informed my learned friend, lead counsel for
21 the Prosecution, that we will be in a position to respond after -- before he starts --

22 PRESIDING JUDGE EBOE-OSUJI: All right.

23 MR KHAN: -- his submissions. Thank you.

24 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, the same for you?

25 MR KIGEN-KATWA: Yes. Yes, your Honours.

1 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. Thank you.

2 Now, Mr Nderitu, your turn.

3 MR NDERITU: Thank you, Mr President, your Honours.

4 My understanding, Mr President, your Honours, is that I would be somewhat limited to
5 views, concerns, observations. And I just wanted to get a clarification that there is no
6 limit whatsoever with regard to the law as opposed to with regard to the facts.

7 PRESIDING JUDGE EBOE-OSUJI: No, just -- you have your time slot, one-and-a-half
8 hours. Address any issue you wish.

9 MR NDERITU: I thank you.

10 Mr President, your Honours, let me start by trying to make more understandable the
11 concept of judgment and acquittal or conviction at the end of the Defence case, as opposed
12 to the concept of no case to answer, because I am alive, Mr President, and your Honours,
13 that, one, we're in open session and, two, there is a keen Kenyan public that is listening in
14 to these proceedings.

15 Now, over the course of the last two days, I submit that there has been a
16 misunderstanding of the whole concept of the no case to answer submissions and the
17 standard of proof that would be required at this stage.

18 Now, the concept that most people are aware of is the one that relates to judgment or
19 acquittal or conviction at the ultimate end of the Defence case and, therefore, it is very,
20 very easy for a layperson to understand that within the context of proof beyond a
21 reasonable doubt, rather than the standard of proof that I will be making greater reference
22 to in the course of these submissions.

23 Mr President, your Honours, the standard that is required at the stage of no case to
24 answer is, of course, whether there is sufficient Prosecution evidence on which, if
25 accepted, a reasonable Trial Chamber could convict the accused. And --

1 PRESIDING JUDGE EBOE-OSUJI: Is it that -- of course one can leave it at that. Is that
2 the complete statement of it, could convict or could properly convict? And if that is the
3 case, what do we mean by could properly convict or, in the more abbreviated form, could
4 convict if could convict incorporates or is understood to mean could properly convict?
5 What does -- what is properly doing in there?

6 MR NDERITU: Thank you, Mr President, your Honours.

7 I talked about could convict rather than could properly convict because there is the
8 assumption that we're talking about a reasonable Trial Chamber, and therefore a
9 reasonable Trial Chamber will only properly convict and will not convict when it -- it
10 should not.

11 But having said that, the -- this phrase whether there is sufficient Prosecution evidence on
12 which, if accepted, a reasonable Trial Chamber could, and I may just add properly convict
13 the accused, to my mind means the following:

14 That, one, the Prosecution evidence would be taken or would be assumed to be true,
15 would be assumed to be worthy of credence, irrespective of whether ultimately -- for
16 example, if the case were to go to the Defence phase, irrespective of whether there would
17 be issues then that would be seen regarding to reliability, regarding credibility, regarding
18 weight and so on.

19 So at this stage what is required is no more than just looking at does the -- does evidence
20 upon which a reasonable Trial Chamber could convict exist.

21 It is a question of existence rather than one of strength, if I may. I don't know if I have
22 made myself clear.

23 PRESIDING JUDGE EBOE-OSUJI: As far as it goes, the question arises of course in
24 the -- the Prosecutor did take this up and answered it in his own way, but do you accept
25 the proposition that it may now be part of the law of no case to answer to the extent that it

1 applies in some places that -- it means that you may not take out the plums and leave the
2 duff behind? You're familiar with that expression?

3 MR NDERITU: Yes, I am, Mr President.

4 PRESIDING JUDGE EBOE-OSUJI: And what is it telling us?

5 MR NDERITU: Yes, that expression tells us that the evidence should be taken in its
6 totality. But taking the evidence in its totality means looking at a certain -- at a number
7 of things. And one --

8 PRESIDING JUDGE EBOE-OSUJI: Is it taking the evidence in its -- in its totality, or is it
9 taking the case for the Prosecution as presented up to that point in its totality -- or, rather,
10 the evidence on record in its totality?

11 MR NDERITU: I beg your pardon, it is taking the evidence that has been given in -- into
12 court, that has been rendered into consideration and accepted by the court as evidence up
13 to that stage so that this technically should be to the exclusion of Defence evidence that
14 could come later.

15 PRESIDING JUDGE EBOE-OSUJI: I'm not quite sure that the Prosecutor's proposition
16 goes that far that there will be a total exclusion. I mean, of course he will be speaking to
17 it in case -- to clarify it that there is a total exclusion of whole evidence presented by the
18 Defence. I may have misunderstood, but I may have been under the impression that he
19 is saying that there are some evidence that should not be taken into account, but there
20 may be others whose authenticity and veracity is not reasonably open to question if they
21 were introduced by the Defence. That may be something that maybe taken into account
22 as part of the evidence on record that may be taken in its totality.

23 MR NDERITU: I think, Mr President, you have correctly captured what I understood the
24 Prosecution to be saying. And perhaps I was not clear enough.

25 I am not saying that there should be total exclusion of Defence evidence, but what I am

1 saying is that the evidence that may be brought in by the Defence, in the ordinary sense
2 that would be through cross-examination, would have to take a back seat unless it is of
3 such a nature that it would render the Prosecution evidence itself unworthy of any belief.
4 I think that's a way I would want to capture it. And I hope that we're on all fours now.

5 PRESIDING JUDGE EBOE-OSUJI: Do you also accept their proposition, I believe
6 Mr Kigen-Katwa did deal with that when he opened his submissions with the matrix of
7 kinds of evidence coming from the Defence that may be taken into account. Do you
8 accept the proposition that when a witness for the Prosecution is on the stand and the
9 Defence puts certain evidence to that witness, depending on the answer the witness gives,
10 the evidence of the Defence may then be taken into account; for instance, if the witness
11 uses that opportunity to correct himself or herself and say yes, now that I remember -- I'm
12 now -- my memory is more refreshed, this evidence, defence, you've presented now
13 refreshes my memory, so I correct myself in terms of what I said earlier. Or -- that's one
14 instance.

15 Another example would be where the witness says yes, I have seen this evidence before
16 and, yes, it is true, the evidence is correct in terms of what happened at the material time.
17 Would those two instances qualify as the kinds of evidence from the Defence that may be
18 taken into account?

19 MR NDERITU: Thank you, Mr President, your Honours.

20 I would say yes and no. And I will want to explain why I say yes and no.

21 In the first place, there would be -- in relation to any witness there would be evidence that
22 can be taken to be what I would call evidence that does not go to the periphery of the
23 issue in dispute. That is evidence that directly touches on the elements of the crime that
24 has been charged, for example.

25 PRESIDING JUDGE EBOE-OSUJI: Let's assume that that is the kind of evidence that the

1 Defence had introduced and fall within the realms of the two instances I elaborated. Is
2 that not periphery evidence but central evidence?

3 MR NDERITU: Yes. If the evidence is evidence that attaches on the criminality, it does
4 not necessarily follow that whatever evidence that is introduced by the Defence at this
5 stage would necessarily then mean that the Prosecution has not approved its case.

6 And the reason is this: That the legal position is that where there are two inferences that
7 could be drawn in connection with a certain issue, one favouring the Prosecution, the
8 other one favouring the Defence, then, in keeping with the phrase taking the Prosecution's
9 case at its highest, then there would be the Prosecution's evidence that would be preferred
10 in contradistinction to the Defence evidence.

11 And the only exception to that rule, Mr President and your Honours, is if the evidence
12 produced by the Defence is such that it would render the Prosecution's case -- or, the
13 Prosecution's evidence so hopeless as not to be salvaged, or to use the words that were
14 used in decision number 5, evidence that would be substantially insufficient. I think
15 those were the words that were used.

16 So unless it is substantially insufficient, if there are two competing inferences that can be
17 drawn, then the Prosecution's inference at this stage would be the one to be preferred.

18 PRESIDING JUDGE EBOE-OSUJI: Taking the case at its highest, the phrase plums and
19 duff, substantially insufficient, those are all expressions we've used either in the
20 submissions or in the course of the discussion now, taking the case at its highest, vis-à-vis
21 the dictate about not taking out the plums and leaving the duff behind, is it the view, as I
22 seem to have understood the run of the submissions for the Defence, that taking the case
23 at its highest would mean that after you have done that subtraction that is necessary, by
24 the plums and duff principle, some people say it is not a principle, nevertheless that is an
25 expression, that after you've applied the plums and duff concept to the case that exists

1 and decided some things are duff, then what is left is what we have in the meaning of
2 taking the case for the Prosecution at its highest, meaning after you've removed things
3 that are -- that necessarily resolve from, you know, weeding out what shouldn't be taken
4 into account because they really cannot amount to proof? Did you understand my
5 question?

6 MR NDERITU: I did not quite, I'm afraid.

7 PRESIDING JUDGE EBOE-OSUJI: I'm saying would taking the case of the Prosecution
8 at its highest mean taking the case, the entire case as presented, notwithstanding that
9 some of it may really be duff?

10 MR NDERITU: Yes, I understand the question now. But --

11 PRESIDING JUDGE EBOE-OSUJI: Or are you saying we should also take -- include the
12 duff in the whole body and take it at its highest so that the duff also helps to raise the
13 quantum of the evidence?

14 MR NDERITU: Interesting.

15 But this would be my take on it, Mr President, that taking the Prosecution's case at its
16 highest means, first of all, taking the Prosecution's evidence and keeping it there and
17 saying what does it say.

18 And when I talk about the Prosecution's evidence here, I'm talking about the Prosecution's
19 evidence as distinguished from evidence elicited by the Defence during cross-examination,
20 so that we are saying that this is what the Prosecution is urging the Court, then we get on
21 the other end what the Defence would be providing, as it were, to punch holes into the
22 Prosecution's case. And then the determination would be ultimately are there
23 to -- equally plausible the situations.

24 If the answer is yes, then take the Prosecution's case and get on with it. If the situation is,
25 out of the evidence given by the Prosecution, and by that I mean during evidence in-chief

1 and re-direct, if you screen it against the evidence that is given in cross-examination, does
2 the totality of the evidence nullify the Prosecution's position on it? If it does, then it
3 means that the Prosecution's case -- or, the Prosecution's evidence is substantially
4 insufficient.

5 That's the way I put it. Thank you.

6 PRESIDING JUDGE EBOE-OSUJI: All right. Thank you very much.

7 MR NDERITU: With your leave, I proceed.

8 So, Mr President, your Honours, we are saying that the threshold that is required at this
9 stage is a rather low one for the Prosecution to attain. And I'm saying this guardedly
10 because there was suggestion yesterday that the onus of proof, with regard to the
11 proceedings before us today, with regard to the status conference and the contents of it, is
12 on the Prosecution.

13 And my position on that is that it cannot be and it is not, that --

14 PRESIDING JUDGE EBOE-OSUJI: What's your authority for that?

15 MR NDERITU: The very basic --

16 PRESIDING JUDGE EBOE-OSUJI: I guess the question is is it about the case that the
17 onus of proof in a criminal case, for purposes of establishing the case for the Prosecution
18 ever shifts from the Prosecution to the Defence, except for instance in certain exceptions
19 where you have this certain affirmative defences being pleaded affirmatively?

20 MR NDERITU: Like alibi?

21 PRESIDING JUDGE EBOE-OSUJI: Yes. Are we saying that the function of adjudication
22 of no case to answer motions necessarily relieves the Prosecution of the onus of proof
23 even for that -- for the purposes of that exercise? If you have that we would need the
24 authority. It would help us immensely.

25 MR NDERITU: Thank you, Mr President, your Honours. I do not claim to have an

1 authority at the moment, but I think I will take up the challenge and I will come up with
2 something hopefully.

3 But the argument that would support what I am saying is this: That, first of all, it's a
4 basic legal principle that he who asserts must prove.

5 PRESIDING JUDGE EBOE-OSUJI: But the reason I ask that question, the reason I said to
6 you finding the authority would help immensely is, if you remember, you were here
7 when we opened the proceedings and I referred to the case from the High Court of
8 Australia, *May v O'Sullivan*, the citation for those who care, I didn't give it at the time,
9 would be (1955) 92 CLR 654. I believe CLR means Commonwealth Law Report. And in
10 there we have this observation, quote, from the court, quote:

11 "When, at the close of the case for the prosecution, a submission is made that there is 'no
12 case to answer', the question to be decided is not whether on the evidence as it stands the
13 defendant ought to be convicted, but whether on the evidence as it stands he could
14 lawfully be convicted. This is really a question of law. Unless there is some special
15 statutory provision on the subject, a ruling that there is a 'case to answer' has no effect
16 whatever on the onus of proof, which rests on the prosecution from the beginning to end."
17 I'll stop there. Is that -- although one would say that the quote does not directly,
18 specifically address the question of whether the process of no case to answer
19 determination in itself means that the onus of proof remains on the Prosecution, it doesn't
20 directly say that, but when we have in there a statement to the effect that "Unless there is
21 some special statutory provision on the subject, a ruling that there is a 'case to answer' has
22 no effect whatever on the onus of proof, which rests on the prosecution from beginning to
23 end," when we say from the beginning to the end, within that span, don't we have the
24 stage of no case to answer motion?

25 MR NDERITU: Yes, thank you, Mr President, your Honours. My answer to that is that,

1 first of all, it cannot be disputed that the burden of proof of the facts constituting a crime
2 rests always on the Prosecution.

3 But having said that, it is important to recognize the fact that the submissions of no case to
4 answer are not about proof of facts.

5 As a matter of fact, we depart on the basic premise that the Prosecution evidence will be
6 assumed rather than determined to be true.

7 PRESIDING JUDGE EBOE-OSUJI: You meant to say that the process is not about proof
8 of facts, but that -- did I hear you correctly?

9 MR NDERITU: Yes, that the -- it is not about proof of facts. Of course there is the usual
10 exception that where the evidence that is elicited by the Defence is so overwhelmingly
11 inconsistent with the Prosecution evidence, then that, in a sense, appears as if it is tending
12 towards proving or disproving, but primarily the exercise is about taking a basic
13 assumption that the evidence that is given by the Prosecution is true.

14 PRESIDING JUDGE EBOE-OSUJI: The reason I asked you "Did I hear you
15 correctly?" -- or, did you mean to say that it is not about proof of facts, or that it is about
16 proof of facts but the standards are different? And if the latter is the case, doesn't it fall
17 within the general realm that the onus of proof, at that lower standard, remains that of the
18 Prosecutor - remains that of the Prosecutor - within the realms of the principle that the
19 Prosecutor bears the onus of proof from beginning to the end when the "end" could
20 actually be the stage of the no case to answer if the case is so weak as to result in that kind
21 of judgment. Wouldn't that still remain an onus of proof upon the Prosecutor?

22 MR NDERITU: Just one minute, Mr President.

23 Yes. Mr President, your Honours, as I said, we will take up the challenge to submit
24 relevant authorities on this point.

25 But for the time being, the argument that we bring is that the proceedings before

1 your Honours are not about proving facts. The proceedings before your Honours, and
2 by "the proceedings before your Honours," I mean strictly the no-case-to-answer motion
3 and the responses are a matter of law, just to determine whether, on a prima facie basis,
4 there is sufficient evidence upon which the defendants could be asked to call evidence.
5 And what I'm saying is that the determination is really not about going into the facts and
6 weighing Prosecution facts, vis-à-vis Defence facts, except in that limited circumstance
7 where the evidence given by the Prosecution may be so inconsistent with evidence that is
8 produced by the Defence as to lead to a conclusion that no reasonable Tribunal or Court
9 or Chamber could reach a decision that the Defence should be -- that the defendants
10 should be asked to defend themselves.

11 PRESIDING JUDGE EBOE-OSUJI: Mr Nderitu, you may continue with your submission
12 in other areas. Perhaps it may be that the difficulty is the -- again, we can all discuss this
13 at a more convenient time -- that when those who can reasonably -- who originally
14 conceive of the idea of no case to answer and principle of it, when they did, that was done
15 in the context of jury trials in which you have the Judges and you have the Jurors, and it is
16 said that Judges are Judges on questions of law and the Jury determines questions of fact,
17 and that now resulted in this talk about the matter in terms of questions of law and
18 questions of facts. So if it is a question of law, then it is appropriate for the Judges to
19 enter into that decision-making, but then they cannot determine that question of law
20 without some factual premises for that kind of judgment making.

21 But you may continue so that you only have until 11 to finish your submission, and I'm
22 sure there are other things you want to submit about.

23 MR NDERITU: Yes. Thank you, Mr President, your Honours. Just so that I wind up
24 on that, I would say the matters relating to facts that are of concern to the Court at this
25 stage and any proof of them would be on a very preliminary basis and, therefore, it would

1 not be really -- there would not be matters that are being finally determined except, as I
2 said, in those exceptional cases where the Prosecution evidence would be so substantially
3 insufficient.

4 But it is, of course, our position that the -- neither in the written submissions nor in the
5 oral arguments have the Defence made out a case that the Prosecution case is so
6 substantially insufficient as to allow that -- the invocation of that exception.

7 And as we produce some case law on that, there is a very interesting decision from
8 Kuala Lumpur that looked at this, and it went into *May v O'Sullivan* and so on, and it is
9 *Arulpragasam Sandaraju v Public Prosecutor*. We will be putting that together with the
10 rest of the case law. And it deals also, quite substantially, with the question of their
11 standard of proof.

12 Now, Mr President, your Honours, I was, over the last two days, also left a bit confused as
13 to the purpose of rendering the decision number 5 on the conduct of trial proceedings.
14 My understanding -- because this seems to have been shaken by the submissions that
15 were made by the Defence teams. My understanding was that the decision on the
16 conduct of trial proceedings was to guide the principle and the procedure that would
17 be -- that would govern the written submissions and the oral arguments that we now
18 make.

19 And it was very clear to me that at June 2014 when that decision was made, the question
20 of the standard of proof that was required became a non-issue when it was said that the
21 standard is to establish whether there is sufficient evidence upon which a reasonable
22 Chamber could convict.

23 But in the course of the last two days, we have gone to the level of proof beyond
24 reasonable doubt, which I did not understand was really what the decision had talked
25 about. Of course it is noteworthy that there was no challenge to the decision that was

1 made and, therefore, my understanding is that that is the decision that would be guiding
2 the standard.

3 Now -- and in passing, perhaps I could mention, Mr President, your Honours, with regard
4 to the Sang Defence there was, in fact, a different standard that was adopted in the -- in
5 the written submissions vis-à-vis what was being urged by the Court here because in the
6 written submissions I did understand the --

7 PRESIDING JUDGE EBOE-OSUJI: What was being urged by the Court or what was
8 being urged on the Court?

9 MR NDERITU: I beg your pardon?

10 PRESIDING JUDGE EBOE-OSUJI: You said there was a difference between what the
11 Sang Defence argued in writing, and then you went to say vis-à-vis what was being urged
12 by the Court here. I meant, do you mean -- I was asking you did you mean to say by the
13 Court or being urged upon the Court?

14 MR NDERITU: (Microphone not activated) I beg your pardon. What I'm saying is
15 that in connection with the oral arguments made by the Sang Defence this week, there
16 was an attempt to be consistent with decision number 5. But what the Sang Defence had
17 put in, in their submissions, was an argument regarding proof beyond reasonable doubt.
18 But the point I make is that it is the prima facie standard that should be -- should be
19 adopted.

20 Now, Mr President, your Honours, in sum, what we are saying is that this, therefore, is an
21 exercise regarding quantity rather than quality with the usual caveat for the exceptional
22 circumstances, if they do exist.

23 Now, let me turn on to the issue regarding an argument that was made by the Ruto
24 Defence on untested evidence.

25 And Mr President, your Honours, it is my submission that, in fact, the evidence that was

1 said to be untested evidence was evidence in relation to which the Ruto Defence did not
2 take the opportunity, which was available, for them to test the evidence. And of course
3 that raises a totally different dimension to the question whether such evidence can be said
4 to be untested evidence. This is in connection with certain witnesses who were the
5 subject of Rule 68.

6 We are saying that it is not so much -- what makes evidence tested or untested is not so
7 much the actual cross-examination or production of evidence to rebut, but the availability
8 of the opportunity, a reasonable opportunity so that even with a witness who comes in to
9 court to testify, if counsel says in cross-examination that they have no questions for the
10 witness, that does not mean that the evidence of that witness was untested. It only
11 means that counsel did not take advantage of it.

12 I think I need say no more regarding that.

13 PRESIDING JUDGE EBOE-OSUJI: Mr Nderitu, that proposition, the implications of it
14 would be that whenever a witness is called into court, the lawyer has to ask the witness
15 every question, even those that had not arisen directly in the process of the witness's
16 examination-in-chief, is that what you're saying, in order to be sure that they have covered
17 all the bases? Is that your proposition?

18 MR NDERITU: Mr President, your Honours, ordinarily a lawyer will only ask of a
19 witness questions that have -- issues that -- questions about issues that have arisen during
20 examination-in-chief, ordinarily. But with leave, when the opportunity to examine a
21 witness does arise, questions can be asked that sometimes even go beyond the -- what
22 may have been put on the record by the Prosecution.

23 PRESIDING JUDGE EBOE-OSUJI: You're very experienced, counsel, and you're telling
24 the Court -- I'm not saying anything one way or the other, but I want you to help us so we
25 understand from your experience that it is no longer correct strategy for counsel in a case

1 to listen carefully to what the witness is saying to see whether that witness has really
2 touched upon critical matters in the case and then make a determination as to whether or
3 not to examine that witness at all or to conduct only limited examination of that witness
4 on cross-examination. You're saying that that strategy no longer works or should no
5 longer be part of advocacy?

6 MR NDERITU: By no means, Mr President. That, in fact, is the correct strategy to take.
7 But what I'm saying is that if --

8 PRESIDING JUDGE EBOE-OSUJI: Can we have it both ways, then, if that is the correct
9 strategy and yet the witness is there and you say, well, you have an opportunity, you
10 must now ask all the questions?

11 MR NDERITU: I think we need to make a distinction between what counsel may take as
12 strategy, and for that there are more ways than one of killing a cat. One may decide to
13 say nothing; and B, perfectly in order in relation to ensuring the least damage is done to
14 their client's case. One may choose to ask questions and, again, they may be perfectly in
15 order with regard to the case that they have to meet. But either way, what we are saying
16 is if the opportunity is given and not taken advantage of, then one cannot later come and
17 say that I did not test this evidence because the question then would be who stopped you
18 from testing the evidence?

19 But with regard to strategy, it all depends on what one feels is best for them. Sometimes
20 the less said, the better. But other times it may be -- it may be strategic to seek to totally
21 demolish the evidence of a witness by taking the opportunity to ask questions of them.
22 Just one minute, Mr President.

23 PRESIDING JUDGE EBOE-OSUJI: Are you going to limit your submissions and
24 questions on matters of legal principles, or would you be speaking to some of the
25 factual -- I mean to facts and circumstances as touched upon by the evidence and other

1 considerations in the case?

2 MR NDERITU: Mr President, your Honours, my intention, given the amount of time
3 that I was given, would be just to touch on the legal issues mainly; although, there would
4 be an issue or two that I would want to mention with regard to the relevance or
5 irrelevance of a network, the question of legal recharacterization of facts and also the
6 question of political context and duty of care.

7 I think those are the only ones that I have flagged as being absolutely important. I'm
8 thinking that given the amount of evidence that has gone in, both in the course of the
9 written submissions and also in the book of extracts and so on, that it might not be
10 necessary to -- and I wouldn't do justice within the short time anyway.

11 PRESIDING JUDGE EBOE-OSUJI: And then remember we had invited counsel who
12 made submissions to -- if they choose to also file their outlines of their oral arguments.

13 MR NDERITU: Yes.

14 PRESIDING JUDGE EBOE-OSUJI: So that also --

15 MR NDERITU: And we will be doing that.

16 PRESIDING JUDGE EBOE-OSUJI: -- that also avails you as well --

17 MR NDERITU: Thank you.

18 PRESIDING JUDGE EBOE-OSUJI: -- if you want to do that.

19 Do you think you can take the matter of the political context and the duty of care?

20 MR NDERITU: Yes. Thank you, Mr President, your Honours.

21 Yes. The question of political context, I think, has been brought out quite well by the
22 Waki Report, which was admitted on to the record by this Chamber.

23 And without going page by page on the report, Mr President and your Honours, there
24 was sufficient evidence that came out from the report regarding a criminal action that
25 took more or less the same pattern in the year 1992 and again in the year 1997. And by

1 "pattern," we are talking about, for example, questions of who were seen to be the
2 aggressors, who were seen to be the victims of the violent attacks, what was the mode of
3 the violence in terms of the form that it took. And over here we're talking about burning
4 of properties, we're talking about killings, we're talking about massive displacements, and
5 we're talking about looting of property, the means that were used, and we're talking
6 largely about the use of machetes, known as "pangas" in Kenya mainly. Of course, there
7 has been a question with regard to whether guns were used in 2007 or not. And there
8 was a report that gave out statistics regarding the demographics. And from that report,
9 although the report was used by the Ruto Defence for the purpose of showing that people
10 from other ethnic groups than those that were perceived to be -- than Kikuyus and those
11 who were perceived to be sympathetic to the PNU were equally victims. And that is
12 true, of course, that the violence did not just involve the Kikuyu.

13 But the question here is whether there was use of guns. And I think that report does also
14 show that guns were responsible -- gunshot wounds were responsible for the deaths of
15 quite a number of people.

16 But before I go further on to the political context and duty of care, let me just make a quick
17 comment in passing, and that relates to the non-PNU and non-Kikuyus that -- of whom
18 there is evidence of deaths. And the numbers were given by Mr Karim Khan, my learned
19 friend.

20 And let me say this, that there were different loci in quo. There were different places
21 where criminality was said to have occurred, where people were killed in large numbers,
22 where people were displaced in large numbers.

23 A lot of the people, as will be seen from the report, a lot of the people who came from, for
24 example, the Luo community, were not people that were killed within the context of the
25 document containing charges in this case but, rather, within the context of the Kenya case

1 2. And therefore, it would not be appropriate to make a comparison and say that if you
2 look at the numbers of people from this particular community, vis-à-vis this other
3 particular community or this party vis-à-vis the other party that, in fact, there were so
4 many ODM adherents that were killed without looking at the specific place where those
5 killings took place.

6 And I think that's a fundamental point that I am making in order to dispel that argument
7 that the PNU supporters, or perceived PNU supporters, and people from ethnic
8 communities that were seen to be sympathetic to the PNU did not suffer in the manner
9 that the Prosecution case has tried to show.

10 Now, when we talk about the political context -- and I will want to make a reference here
11 to Ms Buisman's suggestion about Donald Trump. Of course the United States of
12 America has a totally different political context from the one that we have in Kenya today
13 or that we had in Kenya in the year 2007.

14 There had been -- in the United States there had been, of course, history, but not in the
15 very recent past of mass attacks against certain races or people from certain races as
16 opposed to Kenya.

17 And it would not be proper to compare the two in the same/same way that perhaps even
18 Kenya itself might not be compared to Burundi, for example, at this point in time, or to
19 Rwanda in the wake of the genocide in 1994.

20 The political context is very, very important when, as was admitted by the Sang Defence,
21 the politics of Kenya in 2007 and I'm afraid even now, to a large extent, does follow fairly
22 tribal lines so that there is a duty to take absolute care when one makes whatever
23 statements that may be understood by people from different communities in a manner
24 that may be taken to be inciting.

25 There is an old US case, I think it is Schenck v US. And in Schenck v US, this was a case

1 about, if I recall, somebody who shouted "fire" in a theatre when there was no fire. And
2 that led to the injuries -- to the injury of many people.

3 And within that context, although whatever was said was not even criminal, it was said
4 that this could not be speech that can be protected because there was what was -- what
5 was called "clear and present danger"; that in a situation where there is a clear and present
6 danger, having regard to the place, to the time, to the circumstances of whatever has been
7 said, then the level or the standard of duty of care is certainly -- would be different.

8 The political context, again, comes to answer questions, for example, about the Mungiki.

9 In 2007, the term "Mungiki" had morphed from just meaning criminal gangs that were
10 responsible for terrorising the civilians, but to what was perceived to be the ethnicity of
11 those gangs.

12 MR KHAN: Your Honour, could we ask for references please.

13 PRESIDING JUDGE EBOE-OSUJI: I was going to come to that.

14 Mr Nderitu, remember at this stage we're not receiving new evidence. We have to speak
15 on the basis of the evidence on record, including the Waki Report, which was
16 adopt -- which was accepted by the Chamber for background purposes. So if you have
17 reference for that particular assertion it will be helpful to give it.

18 MR NDERITU: Yes, thank you, Mr President, your Honours. With regard to the --

19 PRESIDING JUDGE EBOE-OSUJI: And I, of course, understand the difficulty someone
20 in your position would be in, speaking from a position of familiarity with circumstances
21 to that. You cannot give evidence in the case.

22 MR NDERITU: That's much appreciated.

23 With regard to the reference to the Waki Report, we will be supplying this to the Court in
24 the course of the day today.

25 With regard to the question of the Mungiki, that I think I would -- I would leave at that,

1 but I would want to just make a quick comment with regard to the question of weeds.

2 And I think I can fairly state without --

3 PRESIDING JUDGE EBOE-OSUJI: You have to realize the importance of that

4 Mungiki -- is a very serious matter now, what you've said, and we need to be extremely
5 careful about that.

6 We saw evidence yesterday of a video played by the Defence where apparently Mr Ruto
7 was brandishing a hammer to say the hammer was to crush the Mungiki. In that -- with
8 that kind of evidence on record, we have to be very careful that when we say that
9 Mungiki had morphed from a reference to a certain criminal gang to something bigger, to
10 possibly signify a reference to an ethnic group at large, if that was where you were headed.
11 So we need to be extremely careful with that sort of submission.

12 MR NDERITU: That's appreciated, Mr President, your Honours. And in keeping with
13 respecting the fair trial rights of the accused persons --

14 PRESIDING JUDGE EBOE-OSUJI: Let me correct myself; the evidence did not show
15 brandishing a hammer, but a symbol of it, not an actual hammer, I'm sorry, the video
16 yesterday.

17 MR NDERITU: Yes, thank you, Mr President, your Honours. And I was saying that in
18 keeping with the recognition of the fair trial rights of the accused persons, I would want to
19 withdraw from the record the reference to, or the suggestion about the Mungiki, in view
20 of the fact that I am short of the evidence right now.

21 But --

22 PRESIDING JUDGE EBOE-OSUJI: You need not withdraw reference to Mungiki at large,
23 what was troubling was the suggestion that in 2007, by 2007 there had been a morphing of
24 the -- the understanding of Mungiki. So if that is the concern. If there is discussion
25 about Mungiki, it, in the ordinary acceptance of that term, as referring to a criminal gang

1 in the classic sense, there's no need to withdraw that, you can make submissions you need
2 to make on that itself. Is the -- the extension -- the extended meaning you're arguing that
3 we were to be sure, it is that that you're saying you're withdrawing, is that it, the extended
4 meaning part?

5 MR NDERITU: Yes. The extended meaning, which -- well, I had reasons that would
6 have justified its obstruction, but I think I would be guided by the Chamber to withdraw
7 that.

8 But let me say that on the evidence itself there was ample evidence that was referred to
9 yesterday with regard to the idea that the Kikuyu had taken Kalenjin land, for example.
10 And it is my submission that that is -- and also not just the Kikuyu having taken Kalenjin
11 land, but other issues relating to social inequalities and, if you may, historical injustices.
12 And it is within that context that the whole idea of 41 to 1, which featured also in the
13 proceedings, came about, that there were 41 tribes against one tribe, and the one tribe was
14 the Kikuyu tribe, and the 41 were all the others combined.

15 And my submission, Mr President, your Honours, is that the concept of tribalism would
16 have to be understood within that political context that when there was reference about
17 tribalism that the face, if you may, of tribalism was then being seen in the context of the
18 Kikuyu person. I don't know if I'm making myself clear.

19 MR KHAN: Your Honour, can I urge once again that my learned friend be very wary
20 about descending into giving evidence from the bar table. That would be an abuse of the
21 privilege that has been extended to the common Legal Representative of the Victims and
22 invidious to the fair trial rights that we're here to protect.

23 MR NDERITU: Mr President, your Honours, if I may just proceed. And I have taken
24 note of what Mr Karim Khan says.

25 PRESIDING JUDGE EBOE-OSUJI: Proceed then.

1 MR NDERITU: I think Mr Khan misunderstands me.

2 And it's not my intention to abuse the privilege that is given to me to address the

3 Chamber at this critical juncture, but the point that I just wish to make is this: That you

4 cannot talk about tribalism in an abstract.

5 What I'm saying is that when you talk about tribalism and when you say that tribe A has

6 taken tribe B's land, then that word "tribalism", which is itself a derivative of the word

7 "tribe" will be understood to mean something in relation to the tribe rather than in relation

8 to any individuals. That's really the point that I'm making.

9 And that's not a point that I need to make on -- by providing evidence as such. But --

10 PRESIDING JUDGE EBOE-OSUJI: We will review the record and see what the witnesses

11 say and whether the testimony is to the effect that the Kikuyus in power were practising

12 ethnic discrimination in favour of Kikuyus, hence other Kikuyus were identified with that

13 problem in general.

14 We will see what the evidence says in that regard, especially as -- in regard to -- in relation

15 to whether or not Mr Ruto and Mr Sang had been inciting Kalenjins against the Kikuyus.

16 But you may proceed on your submission about the duty of care. Yesterday you heard

17 the discussion engaged with counsel on -- the Defence counsel on both sides, or for the

18 both parts, to not quite know if I understood Mr Khan's take on it to be -- to have gone as

19 far as to say, well, is it once you can proclaim a society as sophisticated, the idea of or the

20 suggestion that politics may have run along ethnic lines becomes something that's too

21 simplistic and inappropriate to make. I'm not sure whether he went that far.

22 But, of course, I want to understand your submission and whether or not you agree with

23 the idea, keeping in mind of course that the crime of genocide is an international crime, so

24 too apartheid. The crime of apartheid is a crime against humanity now part of

25 international criminal law, or practiced by highly-sophisticated societies, whether that

1 now results in -- well, if a society is highly sophisticated, we cannot talk about tribalism as
2 appropriate in the politics of the place. What's your take on that?

3 MR NDERITU: Mr President, your Honours, I'm trying to digest the different angles of
4 that question. And I would kindly just ask if you could compress it for me because I see
5 it's a question that can bring very many sides to it and I'm not sure what you were looking
6 at when asking it?

7 PRESIDING JUDGE EBOE-OSUJI: It is a simple proposition whether you agree -- a
8 simple question whether you agree with the -- with any suggestion that may end up
9 saying that it is inappropriate to discuss, to inquire whether politics run along ethnic lines,
10 the politics of Kenya as of 2007, and also that violence was a part of the politics up until
11 that time, given the events of 1992, 1997 and then 2007. That's all.

12 MR NDERITU: Thank you, Mr President, your Honours. It is not inappropriate to talk
13 about such issues. In fact, it behoves a maturing democracy to talk about such issues
14 openly. But of course one must bear in mind that even as the issues are discussed, they
15 are discussed in a manner that does not polarize, but rather in a manner that unifies the
16 people as a nation. That's really the only distinction. But it is certainly appropriate that
17 such issues are discussed and discussed honestly and openly.

18 PRESIDING JUDGE EBOE-OSUJI: That's not really the run of the question, although I
19 may have phrased it that way, but it is about this: Whether, in light of those features of
20 the politics of a place, if those are identifiable features, that they may well result in
21 violence that runs along ethnic lines in the wake of a contested election.

22 MR NDERITU: Yes. I think let me -- let me say this, that making reference to tribalism
23 as a concept by itself one does no wrong.
24 But the political context becomes relevant in this sense, that -- and also of course the
25 question of the duty of care when one is making reference to tribalism.

1 Where people are sensitive about such issues and where history has taught that when
2 issues -- that such issues are raised without regard to the consequences that may then
3 result, and then serious negative consequences then result, then of course that then
4 justifies a question -- the question as to exactly what has spurred the negative, the serious
5 negative consequences.

6 And if one is talking about tribalism and saying that, by way of example that
7 President Kibaki had appointed only people from his ethnic group, or from ethnic groups
8 that were seen to be close ethnologically to his own, that is different.

9 If the attack is on a person that has the instrumentalities of power, as opposed to an attack
10 on civilians on account only of the fact that they may belong to the same ethnicity as those
11 who might be seen to be perpetuating tribalism and -- just by way of illustration, and
12 Nairobi, which is not one of the -- one of the places that was of concern in this case, but in
13 Nairobi people were killed.

14 Luos were killed because they were perceived to be ODM followers. Kikuyus were
15 killed because they were perceived to be PNU followers and by extension to be affiliated,
16 never mind how, to a regime that was seen to be tribal.

17 So what we're saying is that the level -- the standard of duty of care necessarily gets
18 higher and higher the more sensitive a society is to such issues.

19 And 1992, 1997, the entire period from the referendum, in November 2005, right up to the
20 elections -- and there has been evidence of people, for example, leaving the Rift Valley
21 ahead of the elections. That by itself just kept on raising the tribal -- the political tensions,
22 as a result of which eventually there were violent attacks. And those are violent attacks
23 that I'm saying that could very well have been --

24 PRESIDING JUDGE EBOE-OSUJI: Ethnic in orientation?

25 MR NDERITU: Well, they were ethnic and political in orientation, but they may very

1 well have been avoided, depending on how the -- the whole -- or, all the issues that were
2 being brought to the table had been addressed.

3 PRESIDING JUDGE EBOE-OSUJI: The -- I think the Waki Commission does make that
4 point together with -- citing also the previous reports. I believe the Akiwumi Report and
5 the Kiliku Reports as well to that effect.

6 All right. Okay, you have six more minutes.

7 MR NDERITU: Thank you, Mr President, your Honours.

8 Perhaps with the time that is there, perhaps just to get back to the whole question about
9 weeds.

10 And there was in evidence, I would say, quite liberal referral to the question of weeds to
11 the question of mushrooms and so on.

12 Now, the Rift Valley, and I hope I won't be accused of presenting evidence, but the
13 Rift Valley is the bread basket of Kenya. And --

14 MR KIGEN-KATWA: Mr President, I would object. That is adducing evidence.

15 PRESIDING JUDGE EBOE-OSUJI: All right.

16 MR KIGEN-KATWA: My understanding of the scope of what Mr Nderitu has to do,
17 after you allowed him the liberty to address anything he wishes, is that he's limited to
18 what he wrote and what has been exchanged in Court, but not introduce testimony on
19 account of his knowledge of Kenya or the privilege he's been given as a representative of
20 the Victims.

21 MR NDERITU: Thank you very much.

22 PRESIDING JUDGE EBOE-OSUJI: Mr Nderitu, okay, you have four minutes.

23 MR NDERITU: Four minutes. Yes.

24 PRESIDING JUDGE EBOE-OSUJI: So why don't you choose your most important point
25 remaining and make that.

1 MR NDERITU: Yes, I think that's really the only other point. My main issues have
2 been on the question of the standard of proof, and -- but I will just address very, very
3 briefly the question.

4 And I think that based on the evidence that has been produced before this Court,
5 particularly with -- from the CIPEV report and also from Witness 464, it really cannot be
6 again said that the Rift Valley is the bread basket of Kenya. I think that is really an issue
7 that I would be inviting the honourable Judges that you take judicial notice of, based on
8 the Waki Report particularly, that the main fight --

9 PRESIDING JUDGE EBOE-OSUJI: I'm not sure we can take judicial notice of that, but
10 you can make your point quickly.

11 MR NDERITU: Yes. The point that I want to make with regard to weeds and
12 mushrooms, and so on, is that weeds and mushrooms are -- and more so in -- when we
13 talk about weeds, there are something that is familiar to any person who lives in an
14 agrarian society, and so when there is reference to weeds and -- it is something that would
15 resonate in the mind of anyone. If you say pluck out the weeds, that becomes a fairly
16 easy thing to understand. When -- you know, what happens to the weeds, the weeds
17 stop the rest of the plants that we need from growing. So what do you do to them, you
18 burn them. The evidence is there about that.

19 And when used figuratively then that becomes a very, very easy concept that can be
20 understood by people to whom it is addressed.

21 PRESIDING JUDGE EBOE-OSUJI: I'm not sure that the concern is -- the interpretation
22 itself, as much as it is whether it was said. I don't think you need to say the Rift Valley is
23 the bread basket of Kenya for anyone to understand that. Whenever you are, even
24 people who don't farm, if you have a small lawn, you want a certain grass to grow there,
25 you don't want weeds to be there. So the question is whether Mr Ruto or Mr Sang would

1 have referred to Kikuyus in the Rift Valley as weeds.

2 MR NDERITU: Thank you, Mr President, your Honours.

3 Yes, that is the question. And the answer to that is that the evidence -- as I said, I don't
4 want to go into the evidence given the time that I have, but the evidence itself will bear
5 witness to those references and to -- on the question of who made the reference and to
6 whom the reference was made.

7 I think I just need to end now then by saying that with regard the -- just one minute,
8 Mr President.

9 MR KIGEN-KATWA: May I have your permission, Mr President, to make this
10 observation that it is --

11 PRESIDING JUDGE EBOE-OSUJI: Can you -- can you not make that observation when it
12 is your turn to speak. Let's have Mr Nderitu finish.

13 MR KIGEN-KATWA: It is on what he is saying, Mr President. If he can restrain
14 himself to weeds, if he really must go on with that subject, he is the one who has
15 introduced the issue of the mushrooms. That issue of mushroom has not been part of
16 our --

17 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, you could very well have made
18 that point when it is your turn to speak next.

19 MR KIGEN-KATWA: I'm obliged, Mr President.
20 Mr Nderitu.

21 MR NDERITU: Yes, I thank you, Mr President. I notice the time is up, but the only
22 thing that I want to say as a parting shot is that the question of the existence of a network,
23 or the network, whether understood as the network, which means a well-structured
24 organisation that was used as the means of perpetrating criminality, or used as a network
25 in the looser sense of people not having very, very firm connections to each other but

1 having a common objective, is not necessary with regard to the crimes that are before this
2 Court.

3 That is all I need to say. And I thank you for your patience.

4 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.

5 We will take our break now and we will come back in 30 minutes.

6 (Recess taken at 11.02 a.m.)

7 (Upon resuming in open session at 11.33 a.m.)

8 THE COURT USHER: All rise.

9 Please be seated.

10 THE COURT OFFICER: Mr President, we are in open session.

11 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.

12 I see Mr Steynberg is on his feet, and that should be the case. And, of course, Mr Nderitu,
13 you've finished your submission. I realize, of course, that given the time you had to
14 speak, the questions asked of you may have seemed a little disproportionate
15 compared -- relative to the time you had on your feet, but that is the nature of the exercise.
16 We're here to take submissions and ask questions, so the questions you were asked
17 followed from the propositions you made so that it was clear in the mind as we think of
18 them.

19 As we had said to the other lawyers, as to you as well, you may file your notes of
20 submissions so that you'll be sure that everything you had in mind to say we would
21 have -- we will see that in writing, in addition to the one you've already filed.

22 Mr Steynberg, please.

23 MR STEYNBERG: Thank you, your Honours. Before I begin, just two points. Firstly,
24 on the issue of the notes to be handed in, I note my learned friend before, Mr Sang, said he
25 would be handing up some documents. I don't know whether he has or not, but we've

1 not been copied, if that is the case, so we're unable to respond to anything which might be
2 contained in that.

3 Secondly, before I begin, my learned friend, Mr Khan, undertook to give an answer to the
4 Chamber's question before I commence, so I hand over the floor.

5 MR KIGEN-KATWA: Mr President, may I apologise that I haven't handed in my
6 schedule of submissions. I should be able to do that within the end of the day. I wasn't
7 aware that I needed to have handed it in to assist my colleague for the Prosecution. If I
8 had been aware, I would definitely had put it in. I have them. I was just polishing
9 them. I apologise for that.

10 In answer to the question as to whether or not Mr Sang proposes to call witnesses, I have
11 consulted him, and his instructions are that he would rather await the ruling, subsequent
12 to which he will decide which form of Defence he's to adduce. He, however, wishes to
13 emphasize that he has made his application and his submissions in utmost good faith, and
14 it was not meant in any way to be a fishing expedition. He honestly believes that the
15 Prosecution has not made out a case that he needs to answer.

16 Thank you very much, your Honours.

17 MR KHAN: I'm grateful, your Honours. We broadly take the same position. In fact, it
18 was -- I find it a rather incredibly difficult question to answer, because I didn't want the
19 Bench at all -- and I know the Bench was not inclined to do this, there's no indication the
20 Bench would do this, but to draw somehow an adverse inference if we were not willing to
21 give such -- make such an election, that we're standing on our submissions, as it were.
22 Your Honour has said that the surest proof, perhaps, in some cases that the Defence
23 would not be engaged in a fishing expedition would be making such an election. And in
24 our respectful submission, because I've never come across this in my own limited
25 experience -- and I've spoken to others in other jurisdictions that we're not familiar with it,

1 nor from the practise of the ICTY for 20 years -- in my respectful submission, there is
2 perhaps an understandable reason why the question often is not put. And it could be a
3 distraction to the main issue, which is the strength of the Prosecution evidence. Of
4 course, conduct of counsel can't be used to bolster a submission on evidential evaluation
5 on the record.

6 So I know, again, there's no indication the Bench was going to draw an adverse inference
7 or take anything in that -- on that line of matters. Put it simply, we don't know what's in
8 your Honours' mind, and that's why I think at this stage it's best not to make such an
9 election that we're not going to call witnesses.

10 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, I don't think we needed submissions. As I
11 said, it was an inquiry, and it was clear that it was not a requirement. Mr Kigen-Katwa
12 had simply answered it. If that's your position, you can adopt it.

13 MR KHAN: Well, I'll adopt in that case.

14 PRESIDING JUDGE EBOE-OSUJI: We shouldn't get into whether or not the basis for it if
15 that's implied argument. One of them in -- you probably are aware of a case called
16 Alexander v Rayson, R-A-Y-S-O-N. It is the equivalent in the civil realm that continues
17 to apply in some jurisdictions. But let's not belabour the point.

18 MR KHAN: I'm grateful.

19 PRESIDING JUDGE EBOE-OSUJI: Yes.

20 MR KHAN: Your Honour, in that case I will with great gratitude adopt the position of
21 my learned friend, Mr Katwa-Kigen. Thank you so much.

22 PRESIDING JUDGE EBOE-OSUJI: Thank you.

23 MR STEYNBERG: Thank you, your Honours. I note that we are now 10 minutes into
24 my time. I'll try my best to finish nevertheless within the allotted session.

25 Your Honours, before I respond to some of the specific criticisms levelled by my learned

1 friend at the Prosecution's case, I'm unfortunately compelled again to return briefly to the
2 issue of the correct standard to be applied by the Chamber.

3 If I may preface this by referring to counsel for Mr Ruto's praise for the Chamber
4 yesterday for its prescience back in 2014 in issuing its decision permitting this no case to
5 answer motion to be brought.

6 I observe in passing that, in fact, the decision was made earlier than that on the 9th of
7 August 2013.

8 But the importance of the 2014 decision is in fact in the standard, the clear and
9 unambiguous standard that the Chamber told all of the parties it would apply in judging
10 any future no case to answer motion.

11 I note, as did my learned friend, that the Defence did not seek to appeal that decision. I
12 note that there was no request made to reconsider in good time, but, rather, the Defence
13 now exhort the Chamber to apply a different standard both explicitly in their written
14 submissions and perhaps more subtly by putting what I would -- might term a spin on the
15 test which the Chamber has set down here at the eleventh hour, in fact, not at the eleventh
16 hour, after the clock has already struck midnight, as it were, because the Chamber is now
17 seized with this question.

18 And the important fact is that all of the parties since at least 2014 have conducted their
19 cases, presented their evidence, have made strategic decisions based on that standard.

20 And, in fact, for the Chamber -- for the Defence to request the Chamber to vary that
21 standard at this late stage would, in my respectful submission, almost guarantee that any
22 successful decision in their favour by this Chamber would be at least susceptible for
23 overturning on appeal, because the goalposts have changed as it were.

24 Secondly, as to the onus of proof, my learned friend states at page 123, lines 12 to 14 of
25 yesterday's realtime transcript --

1 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, you know this, and I don't know
2 whether I believe I've had occasion to say what I'm going to say to you now to I believe
3 counsel, one of the Defence counsel, the Chamber is quite alive to the fact that the system
4 of adjudication has hierarchies and that parties are entitled to appeal or will seek leave to
5 appeal, and then a decision is made, and depending on what decision is made, appeal will
6 happen.

7 So it doesn't help us to remind the Chamber of that, because that's not something we find
8 impressive at all in argument from counsel. Thank you.

9 MR STEYNBERG: Thank you, your Honours. Lest I have been misunderstood, this
10 was not some sort of threat of a sword of Damocles hanging over the head of the
11 Chamber.

12 PRESIDING JUDGE EBOE-OSUJI: We've all practised law, Mr Steynberg.

13 MR STEYNBERG: What I'm simply trying to put, to convey in perhaps more dramatic
14 terms than was necessary is that what my learned friends are inviting you to do would
15 result in substantial unfairness to the parties, particularly to the Prosecution.
16 Turning to the issue then of the onus, my learned friend said yesterday that, quote, "The
17 Prosecution have the burden of proof, and they have to persuade you, the Chamber, that a
18 reasonable Trial Chamber in -- based on the evidence that they've led could convict."
19 Your Honours, again, close, but not quite correct. Yes, the Prosecution bears the ultimate
20 burden of proof at the end of the case. We need to establish the guilt of the accused
21 beyond a reasonable doubt. Yes, as the Chamber has pointed out, that ultimate burden
22 of establishing guilt does not shift backwards and forwards during the course of the case,
23 with the exception of specific legislative requirements, which aren't applicable here.
24 That is not to say that the Defence do not have a burden of persuasion where they seek the
25 Chamber to rule on certain issues in their favour. And in fact, I note that, Mr President,

1 you said as much in your separate concurring decision at paragraph 93, this is the
2 separate concurring decision to decision number 5 that we've referred to, and I quote, "At
3 the earliest stage of motions of no case to answer or judgment of acquittal, it is not unfair
4 to require the Defence to overcome the legal hurdle of persuasion on their own motion
5 that the accused must be acquitted immediately upon the close of the case for the
6 Prosecution."

7 And on the case, the Australian case which your Honour referred to, I didn't write down
8 the name for some reason, but your Honour knows what I'm referring to, as I read this
9 extract, and unfortunately in the limited time I've not had time to go and pull the case and
10 read it in total, but from what your Honour has quoted, what the Court seems to be
11 saying, and I'll read the relevant provisions, "Unless there is some special statutory
12 provision on the subject, a ruling that there is a case to answer has no effect whatever on
13 the onus of proof which rests on the Prosecution from the beginning to the end."

14 The Chamber is not saying as I understand it -- is not discussing as I understand it the
15 onus or the "burden" is perhaps a better word and the incidence of the burden in a no case
16 to answer inquiry. What it is saying is that should the no case to answer inquiry be
17 rejected and the matter proceed to the Defence case, the finding that there is a case to
18 answer doesn't then shift the burden on to the Defence. The Prosecution will still need to
19 establish at the end of the case the guilt of the accused beyond a reasonable doubt.

20 PRESIDING JUDGE EBOE-OSUJI: That is the discussion that Mr Nderitu and I had.

21 And the reference you're talking about you said you didn't have was the case of May and
22 O'Sullivan that I also quoted to Mr Nderitu, of course. And the question, my question to
23 Mr Nderitu was in relation to the assertion about burden of proof, not only that, but also
24 is that it's not about fact, it's about law.

25 And the authority we have in mind now, you and I, May and O'Sullivan, it says the

1 Prosecution retains the burden until the end, quote, "Unless there is some special statutory
2 provision on the subject, a ruling that there is a case to answer has no effect whatever on
3 the onus of proof which rests on the Prosecution from beginning to end."

4 The question is when is this beginning and when is this end, if we have the proposition
5 that the burden of proof rests with the Prosecution from beginning to the end, what end
6 are we talking about could the end comprise, the stage of no case to answer? Could it
7 come within that spectrum of beginning to the end, within the proposition? And,
8 particularly noting that the objective of the no case submission, there have been instances
9 where they have not succeeded, and there have been instances where they have succeeded,
10 in those instances where a no case to answer succeeds, do we not say that that marks the
11 end of the case?

12 So I'm not sure it's a very straightforward matter as to say that the onus on the case shifts.
13 And you can see how dangerous it is for appeal purposes to boldly say that the onus of
14 proof has shifted to the Defence. Here we mentioned, you mentioned appeals, we can
15 keep that in mind as well.

16 And again we return to what has the discussion we had, Mr Nderitu and I, had about
17 facts or law, you know. Is it a matter that the onus of proof has shifted to the Defence
18 because we're in a no case to answer stage, or is it that the onus has not shifted, it remains
19 on the Prosecution, but it is of a lower standard, and that is where we need to concentrate?

20 MR STEYNBERG: With respect, your Honours, I would say neither. And I think what
21 is important is we need to draw a clear distinction between the onus of proof of guilt and
22 a burden of persuasion which may lie on an asserting party where there is a dispute of
23 fact or a dispute of law.

24 And my learned friend referred to the well-known adage "He who asserts must prove."
25 Let me make this clear, the onus of proof never shifts to the Defence. The onus of proof

1 of guilt or innocence never shifts to the Defence. It's not that when the Prosecution
2 reaches a certain stage all of a sudden the accused must now put up a case to prove his
3 innocence.

4 PRESIDING JUDGE EBOE-OSUJI: Exactly. So that maxim you started, "He who asserts
5 must prove," doesn't of course go as far as if an accused person in a criminal case asserts
6 his innocence, he must prove it.

7 MR STEYNBERG: I distinguish the ultimate issue of guilt from those interlocutory and
8 intermediate decisions that a Chamber may be called upon to make.

9 Drawing the analogy perhaps with the Rule 68 request, okay, it was the Prosecution there
10 who was the -- who is the applicant, but we sought -- we bore the onus of persuading the
11 Chamber that the various fundamental underlying factors had been met before the
12 evidence could be admitted.

13 The Defence might bring a similar application in their case, in which case they would bear
14 the onus. It's not the case that because the Prosecution bears the onus of guilt that they
15 bear the onus of establishing or negating in that case every intermediate fact or legal
16 point which arises.

17 If I may go back to the issue of the fact that, yes, if the no case to answer motion succeeds,
18 the case will end. But that is not the same thing as saying that at that stage that is not
19 because the Prosecution has failed in its burden to prove the guilt of the accused. We
20 have not even got to that stage yet.

21 It would be because the Prosecution has not even put up a case which calls for a response
22 from the Defence.

23 PRESIDING JUDGE EBOE-OSUJI: Isn't there an onus of proof there, that it would be
24 because the Prosecution has not met the onus of proof that there is a prima facie case?

25 MR STEYNBERG: With respect, your Honour, the onus of proof only falls -- or the proof

1 of the guilt or innocence of the accused only falls to be determined at the end of the case.
2 It only falls to be determined at the end of the case.
3 The normal procedure would be at the end of the Prosecution case, I would sit down, my
4 learned friend would sit up and call his -- stand up and call his first witness. It is an
5 exception to the accepted procedure of the case as set out in the Rome Statute and Rules
6 that this Chamber has permitted the Defence to bring this motion.
7 But it is for the Defence to persuade the Chamber that in fact the motion is well-founded.
8 And in doing so it is the Defence -- the Defence must persuade the Chamber that there is
9 no evidence upon which a reasonable court may convict. If it does do so, then the
10 Chamber is not even called upon to rule on the question of guilt or innocence. It doesn't
11 arise.
12 If the Chamber refuses, then the case will continue; and at the end of the case, if a case is
13 led for the Defence, then we will debate the full ramifications of the evidence, weight
14 thereof, and whether or not the Prosecution has established guilt.
15 But I'm mindful of the time, and there are other matters I would like to address, so if I
16 may leave it there, I think I've made the point as well as I can.
17 As predicted, your Honours, the Defence have devoted the vast majority of their
18 arguments to analysis of the alleged deficiencies or the strength, credibility, or reliability
19 of Prosecution evidence and Prosecution witnesses.
20 However, in doing so, we submit that they have often relied on a particular interpretation
21 of the evidence that best suits their arguments, focused on individual aspects of the
22 evidence without considering the body of the evidence as a whole, and relied on Defence
23 assertions in certain circumstances that are yet to be substantiated by evidence or other
24 evidence which has not yet been properly authenticated or tested.
25 Your Honours noted that in the videos played by my learned friend for Mr Ruto, there

1 were -- there was one -- in fact, there were two MFIs in that compilation, which should not
2 be take into account at this stage, we submit.

3 But even assuming, your Honours, that the Defence have succeeded in persuading the
4 Chamber that there are contradictions or improbabilities or inaccuracies in the evidence of
5 certain witnesses, it does not follow that the whole of the witness's evidence must be
6 rejected as incapable of belief. Even if the Chamber is persuaded that the witness lied in
7 a certain respect, it does not follow that the entire evidence of that witness is incapable of
8 belief.

9 The law reports in the libraries around the world are replete with cases where Chambers
10 have found witnesses to have lied on a particular point, and yet accepted their evidence
11 on other points.

12 The Prosecution submits that the time to do a proper analysis and to parse out the
13 evidence in the light of the entire record is not at the no-case-to-answer stage but at the
14 end of the case unless the Chamber is persuaded upon a prima facie reading of that
15 witness's evidence that he's simply or she is simply incapable of belief on any reasonable
16 standards.

17 I turn now to address a few of the specific arguments. Firstly, my friend for Mr Ruto
18 addressed the evidence on the organised nature of the attacks or lack of evidence, as he
19 said, on the organised nature of the attacks. I can only deal with a couple of points that
20 he has raised in the limited time.

21 But firstly, as, in fact, my learned friend for the victims has pointed out, Mr Khan's
22 reliance on the CIPEV report, his good faith submissions on the CIPEV report, that to
23 establish that the PEV was spontaneous and not organised ignores, I'm afraid, the ultimate
24 conclusions of that report.

25 He points out the fact that, yes, there was evidence in other areas and asks the Court to

1 conclude that because there was evidence not only in the Rift Valley, therefore, the
2 evidence in the Rift Valley was -- could not have been organised. It was another example
3 of spontaneous violence.

4 I refer, your Honours, to pages -- in fact, it's in my book of evidence, page 524 and
5 onwards, 523 and 524. And perhaps I should just read this out. These are the
6 conclusions -- and in fairness to the Defence, I'll start at paragraph 2 where CIPEV finds:
7 "Initially, the violence witnessed was spontaneous and was in part a reaction to the
8 perceived rigging of the elections."

9 So far it seems to support their theory.

10 "In areas like the Rift Valley and the Coast, it targeted members of the Kikuyu and Kisii
11 communities perceived to be associated with the PNU party and with President Kibaki
12 who were seen as the beneficiaries of the 'rigged' election."

13 And the rest of that paragraph is not directly relevant.

14 From paragraph 3: "Subsequently the pattern of violence showed planning and
15 organisation by politicians, businessmen and others who enlisted criminal gangs to
16 execute the violence. That was particularly the case in the Rift Valley and Nairobi."

17 And at the end of that paragraph there's a reference to "organised Kalenjin youth
18 particularly in the North Rift attacked and drove out Kikuyus living there."

19 At paragraph 4, the Commission points to several pointers to that organisation, including
20 several of the points we've made in our arguments. "In instances, warnings were issued
21 to the victims before the attacks; the violence involved large numbers of attackers, often
22 mobilised from areas outside the location of the violence; petrol and weapons were used
23 in various places to carry out the attacks and destruction, which required arrangements as
24 regards acquisition, concealment and transport."

25 And finally, "Sometimes the attacks specifically targeted only members of given ethnic

1 groups to the exclusion of others."

2 Also importantly the fifth paragraph, "Some responsibility for the violence must also be
3 laid at the feet of the country's politicians who precipitated the violence by among other
4 actions and omissions:

5 (i) Conducting the election campaign in a strident and confrontational manner, thereby
6 creating an atmosphere of tension;

7 (ii) For party political ends, casting the majimbo debate in ethnically divisive terms; and

8 (iii) Failing to create confidence among voters around the electoral processes and
9 institutions."

10 Now, these are put up to rebut my learned friend's arguments. We're relying on our
11 evidence that we have led, but certainly your Honours will recognize some of these
12 themes as themes which were identified by the Prosecution, by myself, during the course
13 of my address on Tuesday.

14 The second point I would like to just clarify is the alleged absence of proof that the
15 previous cycles of violence in 1992, 1997, et cetera, were also organised. Firstly, we're not
16 required to prove this. Our case is to prove that the 2008 violence was organised. So
17 absence of proof does not mean that it was or was not --

18 PRESIDING JUDGE EBOE-OSUJI: You don't need to address that part.

19 MR STEYNBERG: Thank you, your Honours. But perhaps I could just place on record
20 that, in any event, there is a lot of evidence on record that the previous cycles of violence
21 were organised. And I refer to Mr Maupeu's report. It's in the book of evidence at our
22 page 585 as well as references in the CIPEV report. It's not in our book of evidence, but
23 the reference is KEN-OTP-00010364 at page 0412. And this is part of the report that was
24 admitted.

25 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, now that you're on the subject of

1 organised attack, the word "organised," there were some discussions had with the Defence
2 side on the interpretation of Article 7(2)(a), that notion that -- the widespread definition of
3 attack against a civilian population. And the argument of the Defence is that there must
4 be an organisation behind an attack before it can qualify as a crime against humanity.

5 And the question is -- my question would be, of course, mindful of the primary perceptive
6 standard for interpretation. Purpose, context, a treaty and all that must be taken into
7 account. The question is do you accept the thesis that we cannot have the idea of a crime
8 against humanity in this Court if there is no proof of an organisation behind it?

9 MR STEYNBERG: Your Honours, it was a conscious choice of the drafters of the Statute
10 to include that requirement, which was hitherto, not necessarily generally recognized as a
11 requirement for a crime against humanity. But we are bound obviously by the terms of
12 the Statute. And the task of this Court is obviously to interpret it and to apply it to the
13 evidence before it.

14 My submission is that, yes, there has to be some form of organisation. And your
15 Honours, I can refer your Court, the Chamber --

16 PRESIDING JUDGE EBOE-OSUJI: Does "organisation" mean an aggregate entity
17 arranged as such, or can "organisation" mean the idea that something is organised?

18 MR STEYNBERG: Your Honours, I would say that the latter may suffice.

19 In the present case, there is a danger of conflating the organisation, which is being pled for
20 the purpose of establishing a 25(3)(a) or 25(3)(d) common purpose. So there must be an
21 organised group which has certain characters which are defined by Pre-Trial Chamber
22 and by Article 25.

23 This is not, in my respectful submission, necessarily the same as the organisation which
24 needs to be established in order to satisfy the contextual elements under Article 7(2).

25 And I think it might be useful to refer to the submissions of the amicus curiae before the

1 Appeals Chamber in the Côte d'Ivoire case. And the source is Professors Robinson,
2 deGuzman, Jalloh and Cryer, where they usefully summarise, in my respectful
3 submission, the position with relation to what needs to be proved.
4 And the purpose of the policy element, they submit, is best stated or well stated by the
5 Supreme Court of Peru in the Fujimori case, and I quote "The political factor [policy
6 element] requires only that the causal acts of individuals acting on their
7 own" -- sorry -- "the casual acts of individuals acting on their own, in isolation, and with
8 no one coordinating them, be excluded... Such common crimes, even when committed on
9 a widespread scale, do not constitute crimes against humanity, unless they are at least
10 connected in one way or another to a particular state or organisational authority: They
11 must be at least tolerated by the latter."
12 That's not relevant to our current inquiry.
13 The next paragraph, I continue: "This modest purpose is reinforced by three features of
14 the policy element that have been consistently emphasised in the jurisprudence. First, it
15 is not a bureaucratic concept: A policy need not be formalized, need not be stated
16 expressly, and need not be defined precisely."
17 And I made submissions on this in the opening statement of this case.
18 "Second, the policy element merely requires a sufficient link to a state or organisation. A
19 policy need not be adopted at the highest levels of a state or organisation, but it does
20 require that the crimes are not simply the product of a few isolated members acting on
21 their own."
22 And "Third, a policy may be inferred from the manner in which the acts occur. These
23 three features are consistent with the purpose of the policy element, which is to exclude
24 the 'ordinary,' crimes of individuals on their own initiative without direction or
25 encouragement. Thus, it can be satisfied by showing the improbability that the acts

1 occurred randomly."

2 And the reference to this is ICC-02/11-01/11-534, and it's on appeal 5.

3 PRESIDING JUDGE EBOE-OSUJI: Elimination of the random nature of the attack.

4 Now, but also other things you've read in the course of your last observations seem to be

5 talking about we still need to see an organisation. And the question is this -- and I asked

6 this question to all the counsel for the Defence: You have an event, let's say, in two

7 situation countries. In one instance, let's assume that 20,000 people were unfortunately

8 killed, the same number in two places. But in one instance, you can see someone or an

9 organisation as such who coordinated it.

10 In the second instance, what you might have -- what might have occurred, for example,

11 would be on the first day an event for whatever reason, it could be a situation where there

12 is underlying ethnic hatred and so on and so forth, and maybe any prominent member of

13 one ethnic group was attacked. We saw that in World War I. That's how it all started.

14 And members of the other ethnic group descended upon the ethnic group, the persons of

15 the ethnic group said to be the assailants, from where the assailants came.

16 That sort of violence continues for days or weeks, nobody coordinating it, but just that we

17 know we don't like the people of the other, you know, ethnic group.

18 Early in the morning folks gather and start again the attack. It continues for days or

19 weeks. No one really organising it, just that there is this common understanding that we

20 don't like them and they have been doing all these awful things to us over the years.

21 Now here is our chance to get rid of them. At the end of the day, you have, as I said,

22 20,000 people dead in that situation country, no one identified as -- no organisation

23 identified, but then in the other place, the same number of people, but there is somebody,

24 an organisation behind it.

25 And you say that -- is your submission that in the second scenario it will not be an

1 international crime called crimes against humanity just because we don't see an
2 organisation --

3 MR STEYNBERG: Yes.

4 PRESIDING JUDGE EBOE-OSUJI: -- whereas the other one would be an international
5 crime because there is an organisation?

6 MR STEYNBERG: Your Honours, I think we should be careful not to conflate the issues
7 of organisation and gravity. There is also a gravity requirement in crimes against
8 humanity as well. There must be repeated commission of Article 7(1) offences, which are
9 very serious offences.

10 PRESIDING JUDGE EBOE-OSUJI: That's why I chose the number 20,000.

11 MR STEYNBERG: Yes.

12 Your Honours, it's an interesting debate but it's, with respect, not a question I need to
13 answer.

14 PRESIDING JUDGE EBOE-OSUJI: You can leave it at that.

15 MR STEYNBERG: I would -- yes, I would be worried about being accused of *riding
16 roughshod over the language of the Rome Statute, which I don't propose to do, but what I
17 do submit is that the minimum that we -- or, what we do have to require is no more than a
18 degree of organisation which excludes random acts of violence, no more than that.
19 Whether less than that might suffice, I'll leave it to minds wiser than mine.

20 PRESIDING JUDGE EBOE-OSUJI: Even Mr Khan when he submitted said, well yes, you
21 may have a language, but ultimately there is a matter of interpretation. So I think you
22 even made that concession.

23 But we don't need to belabour you with that.

24 Before you go, there is a question not about the legal matter of organisation or nature or
25 not, but on the factual constructs of this case. Pledaded around the existence of a network,

1 can you help me understand the criteria that, according to the evidence, guided the theory
2 of the case for the Prosecution that our job is to accept, which identifies persons as
3 members of the network, what criteria would you have used to do that?

4 But the reason is that in your brief there is -- there are instances where you identify some
5 persons as members of the network, where others not as such, and others associated with
6 a network and all this. On what basis do we ascertain who is or who is not a member of
7 the network?

8 As well, on the second part of that question while I'm on it, similarly in relation to events,
9 in relation to events, what are the criteria that guide the ascription of certain events as
10 events of the network and others not?

11 I give you one example in relation to the latter events now. When we -- there is that
12 meeting, I believe, on the -- alleged to have occurred on 31 December, at Bronjo Shopping
13 Centre, and there was a meeting before, the day before on the 30th, alleged to have
14 occurred on the 30th, and the story goes, and I will not refer to the witness who said it,
15 that at Bronjo on the 30th not everyone was present and then -- but somebody gave an
16 order to coerce the attendance of other persons, so that on the 31st some persons were
17 coerced to attend at the shopping -- meeting at the shopping centre.

18 But we're not sure, first of all, whether the event itself is a network event? We're also not
19 sure whether the person who ordered the coerced attendance of persons is a member of
20 the network.

21 MR STEYNBERG: Thank you, your Honours. As to the members of the network, and
22 perhaps I should just go back to a submission I just made in relation to the nature of the
23 organisation, and that applies not only to the organisation for the purposes of the
24 contextual elements, but also for the purposes of Article 25(3)(a).

25 There are various requirements for the organisation, but it is not required to be a formal

1 organised or a formal organisation with a list of members, appointments, officers, ranks,
2 or anything like that.

3 In organised crime terms, this sort of group may be referred to as an association in fact
4 group. That's a common term used in American *RICO prosecutions.

5 The essence of that group is it is defined by their factual association.

6 PRESIDING JUDGE EBOE-OSUJI: De facto association.

7 MR STEYNBERG: Indeed, your Honours.

8 So for proof of the criteria of ascribing some other label of a member of the network, firstly
9 I should say that this is not entitled to be exhaustive. We do not claim that we've
10 identified or labelled or named every single person that was involved in this network.

11 PRESIDING JUDGE EBOE-OSUJI: But it must be some -- that accepted, of course, that
12 you may not have exhaustive criteria, but what are the ones that are there that you are
13 using?

14 MR STEYNBERG: Your Honours, the most important criteria would be the factual
15 association between the persons. So attendance of members at meetings, at important
16 meetings, the behaviour of members in communicating with other -- associating with
17 other known network members, or other alleged network members, the actions of the
18 persons in carrying out orders or instructions or furthering the what we say is the aim of
19 the common-purpose group. All of those issues need to be examined to determine
20 whether or not this person can safely be said to have associated himself with the goals and
21 objectives of this group and have, in essence, joined in the common plan.

22 PRESIDING JUDGE EBOE-OSUJI: You do remember the complaint of Mr Khan, I
23 believe, that you were engaged in the circulatory or in a circular argument being, well,
24 somebody is found to have done a certain thing, therefore that must be a member of the
25 network. Is that something you care to address?

1 MR STEYNBERG: With respect, your Honours, there's no circulatory there. If the facts
2 establish to the requisite degree of certainty that the person in question has associated
3 himself and is carrying out the business of the organisation, then the Chamber is entitled
4 to infer that person was de facto a member of this organisation. So it's -- the facts prove
5 the membership, not vice versa.

6 PRESIDING JUDGE EBOE-OSUJI: And events?

7 MR STEYNBERG: Events, your Honours, again, well, there has to be some sort of link to
8 the network in order to ascribe responsibility or to ascribe this event or the actions that
9 that event -- to the network.

10 So for instance, in the case of the meeting under the tree, I won't refer to the area, I think it
11 was done in private session, your Honours know what I'm referring to, we have two
12 persons of the three persons who addressed that meeting who are alleged to be members
13 of the network.

14 And contrary to what my learned friends said, they were indeed alleged to be members of
15 the network. And I can give the Court the reference.

16 The Defence relies on what was entitled -- what was intended to be illustrative chart,
17 which I used in my opening address, which he now seems to think defines the network.
18 But in fact, the network is defined in the charging document, the UDCC. And I refer to
19 paragraphs 20, 21 and 25 of the Updated DCC wherein we allege the network to be
20 comprised of, inter alia, the following, and the names Kibor Jackson Kibor, Farouk Kibet,
21 Fred Kapondi, Isaac Maiyo, Christopher Kisorio, Solomon Tilawen or Tirop, and Sammy
22 Ruto and Lucas Sang are alleged to be members of this network. So this is not a new
23 invention.

24 But in any event, the -- sorry, I'll come back to your point your Honours, but while I'm on
25 this point, the Chamber has already ruled that the Prosecution is not necessarily bound by

1 the evidence which it led at confirmation. If the evidence disclosed that through their
2 actions and their associations other persons might be concluded to also be part of their
3 network, the Chamber is not estopped from reaching that conclusion at this stage just
4 because they weren't specifically named, we say, in the charging document.

5 PRESIDING JUDGE EBOE-OSUJI: Would that be a matter of fact now or a matter of
6 evidence?

7 MR STEYNBERG: Your Honours, we say it's a matter of evidence establishing the
8 network. And actions of the network is not an essential matter of fact that we need it to
9 be pled, otherwise the Chamber would not have allowed us to plead the network in terms
10 such as including 'inter alia', or not including 'but not limited to'.

11 The Chamber was very careful to restrict the Prosecution in certain respects from what it
12 considered to be loose pleading. And I'm sure that if that were and if the Chamber
13 consider that to be an essential element of the offence, the Chamber would not have
14 allowed the UDCC to have been framed in those terms.

15 Now I'm afraid that I have gone on so long I've forgotten the question I was supposed to
16 address.

17 PRESIDING JUDGE EBOE-OSUJI: Yes. The question -- you were addressing the matter
18 of what makes an event a network event and you said --

19 MR STEYNBERG: Yes.

20 PRESIDING JUDGE EBOE-OSUJI: -- that the event has to have some link with the
21 network.

22 MR STEYNBERG: Yes.

23 PRESIDING JUDGE EBOE-OSUJI: And my question -- with the identified members of
24 the network I presume you meant to say.

25 MR STEYNBERG: Yes.

1 PRESIDING JUDGE EBOE-OSUJI: And the question then becomes how much of a link
2 would the event have with identified members of the network to become a network
3 event --

4 MR STEYNBERG: Well --

5 PRESIDING JUDGE EBOE-OSUJI: -- and at what level?

6 MR STEYNBERG: Your Honours, my submission is that that's purely a question of
7 evidence. The Chamber must accept that the -- on the facts in question it may be inferred
8 or may be concluded that it was in fact a network-related event.

9 And perhaps it's a useful illustration to turn to the meeting under the tree. And in fact, I
10 can refer to this in public session. This is the evidence of Witness 658 and this was
11 mainly done in public.

12 And my learned friend spent some time on criticising the conclusions which the
13 Prosecution sought the Chamber to draw from this meeting. I've already dealt with the
14 fact that Sammy Ruto and Lucas Sang were in fact alleged to be members of the network.
15 And we have to look at the evidence in total, not to focus on the individual aspects. My
16 learned friend refocused on the evidence of what Mr Sammy Ruto said. He focused on
17 the evidence of what Mr Lucas Sang said, but left out an important part about the
18 gentleman from Marakwet whose name the witness did not know what he said. So we
19 need to take this altogether.

20 First we have Sammy Ruto saying, just talking about the election results and saying,

21 "Okay, these Kikuyu are not good. It seems they are going to rig the elections and we
22 have to be ready for anything to make sure we demand our right."

23 That he says, "No evidence of any crime."

24 He then says we need to -- "He was saying that we hear information from our leader." At
25 line 15, "We are waiting information from our leader."

1 He's asked who was he referring to.

2 "The only leader was -- in Nairobi was Mheshimiwa Ruto."

3 Now, there follows some questioning about what the person actually said, what was said

4 by Sammy Ruto, and what was the witness's conclusion, and it was established that the

5 speaker, Mr Sammy Ruto, did not mention the accused, Mr Ruto. But he did mention the

6 leader in Nairobi, and it was the witness's conclusion that this was a reference to Mr Ruto.

7 But he didn't -- he didn't withdraw that submission. It was his impression that this was a

8 reference to Mr Ruto and not an unreasonable conclusion, we say, because Mr Ruto was,

9 in fact, the premier Kalenjin candidate who was in Nairobi at that time, it's a fact, it's not

10 disputed, and was observing and waiting for the outcome of the elections. So even

11 though Mr Raila Odinga was the leader of the ODM party, we say it's clear that Mr Ruto

12 was the person who the Kalenjin in the Rift Valley looked to for direction, not Mr Odinga.

13 But then we go on to the speech by the Marakwet in the presence of the other two, and

14 that then places a different -- casts a different light on what was said earlier by Mr Ruto,

15 Mr Sammy Ruto. And he says at page 324 of my book of extracts from line 9, "He was

16 angry that Kikuyu were already rig the elections and we have to be prepared. So he was,

17 like, showing the identification of houses around there belonged to Kikuyus."

18 And then on the next page from line 5 "He was saying that he's -- because we have already

19 known that the election is going to be rigged, we have to be -- these people should go out

20 from our side also."

21 He's asked who these people he was referring to and his answer is at 9 the "Kikuyu."

22 He goes on further at line 14 "To be driven from the Rift Valley or the area of Eldoret to

23 the area, their ancestral land in Kenya." Again, his interpretation as a person present.

24 But what he did say was they need to go out from our side, the Kikuyu.

25 And then we have Mr Sang again at page 327, line 23 "I think he was also supporting the

1 youths, that these people, Kikuyus, have rigged the elections." And he, again, is saying
2 that we need to wait for our leader.

3 So the connections we have here are the identities of the two network members and also
4 the connection with -- that they're waiting for the orders of Mr Ruto.

5 Now, the question which the Court needs to ask itself at this stage is whether a reasonable
6 court could accept this evidence at the end of the case and in connection with all of the
7 other evidence taken at its highest could convict.

8 But it is not necessary to establish that this individual piece of evidence, of course, is
9 proven. It's certainly not proven beyond reasonable doubt at this juncture.

10 So I hope by giving you that example I've answered the Chamber's question. It is a
11 combination of the identities of the persons involved, the actions of the persons involved,
12 and particularly any link that might be established to the accused, in this case Mr Ruto,
13 that led the Prosecution to the conclusion that these were network events.

14 If I may move on, your Honours. Briefly on Mr Ruto's position and authority in the
15 Kalenjin community. Now, the Defence made much of the issue of Mr Ruto's position as
16 king or leader, Kirgit in the Kalenjin community. The Prosecution submits that the exact
17 title is not the important issue. What is important is the effect and the authority that this
18 position conveyed on him.

19 The Prosecution has already given ample evidence on record that demonstrates that the
20 crowning of Mr Ruto as king of the Kalenjin or spokesperson of the Kalenjin or Kirgit in
21 fact had the effect that his words had carried great weight in the community. Some
22 witnesses said that anyone who went against his opinion would be considered a traitor.

23 Mr Ruto was clearly not just an ordinary back-bencher MP, as the Defence would have
24 you believe at that time. He held a position far more significant than that in Kalenjin
25 society. He was the leading -- he was the one chosen by the Kalenjin people to represent

1 them, basically, in this election. He was the only Kalenjin member of the Pentagon.
2 And in a sense, the hopes and aspirations of the Kalenjin people rested on his shoulders.
3 Now, this does not to say that everything -- this does not mean that everything and every
4 order and every instruction that Mr Ruto uttered would automatically be obeyed by the
5 entire Kalenjin people. But, in fact, this is nothing more than a strawman argument
6 because the Prosecution does not seek to nor is it required to prove that. The
7 automatic -- almost automatic compliance requirement referred to by my learned friend is,
8 in fact, a requirement set up by the Pre-Trial Chamber for liability under Article 25(3)(a)
9 for indirect co-perpetration.
10 But it doesn't require that the witness or the accused have authority over an entire country
11 or an entire community. All that it requires is that he has authority over the network and
12 the perpetrators of the crimes.
13 And at least we've had -- well, I digress just to point out, if I may for a moment, that even
14 though many Kalenjin may have voted in the end for the PNU and some even stood as
15 members, candidates for the PNU, we've seen the evidence of at least four witnesses who
16 suffered the consequence of having gone against Mr Ruto's wishes and supported the
17 opposition party who were dragged before Kalenjin elders or Nandi tribunal as one
18 witness called it and forced to apologise and pay penance and fines for the crime of being
19 a traitor, basically, to the Kalenjin community.
20 But all the Prosecution needs to show in order to satisfy this requirement, your Honours,
21 is that the perpetrators of the crime acted in almost automatic compliance with the wishes
22 of the network and in ultimately the accused. And we submit that we've shown
23 adequate, if not ample evidence showing that orders and the wishes of Mr Ruto and the
24 wishes of the network were transferred to Kalenjin elders and other senior network
25 members who, in turn, instructed youth leaders. I refer to the example of Christopher

1 Kisorio, an elder instructing Solomon Tirop, youth leader in the Turbo area, to commit
2 crimes which were in fact then and there committed. And there's the example of the
3 attack on a certain person's house. If the Court will bear with me.
4 I refer your Honours to my book of extracts at pages 236 to 237. It's relating to day two
5 at the compound which we've referred to where a certain house of a certain wealthy
6 Kikuyu is, in fact, targeted and attacked as a result of this sort of order. And there are
7 other examples too.

8 But let me move on from that. I think that is --

9 PRESIDING JUDGE EBOE-OSUJI: But the Defence argue, Mr Khan in particular,
10 remember, said that there were persons whom the witnesses accepted as being close to
11 Mr Ruto, other politicians who were endorsed by him who still lost the election in that
12 region. And also there is evidence on record from a Prosecution witness to the effect that
13 Mr Ruto had opposed, amongst the Kalenjins, the endorsement of Mr Odinga, but they
14 told him no, this is who we are going with, you better join us.

15 MR STEYNBERG: Your Honours, I return to my previous submission that it is not the
16 Prosecution's case and it does not need to be the Prosecution's case that Mr Ruto held
17 sway over every decision of every member of the Kalenjin, particularly when it came to an
18 issue like casting votes.

19 I'm reluctant to get into the issue of the support for Mr Odinga not because my
20 recollection of what is on record and what is otherwise in my knowledge, I'm not sure I
21 can distinguish it, but certainly I think it's on record that Mr Ruto himself was vying for
22 the position of leader of the ODM. When it came to -- I'm not sure if it was after that fell
23 away that the issue of who the leader should be came up, and I prefer not to address that
24 when I'm unsure of my facts, but it is unnecessary and it is not destructive of the
25 Prosecution's assertion that Mr Ruto held authority over his network to demonstrate that

1 certain candidates who may have endorsed, may not have succeeded. And as context to
2 this, I can refer you also to Mr Maupeu's evidence. And I'm paraphrasing here because I
3 haven't read it recently or I haven't read it all recently, but from recollection, his evidence
4 was that he spoke about the ethnic politicizing or the ethnic divisions in Kenyan politics,
5 particularly -- as existing particularly at the presidential level; whereas, at the local level
6 and to an extent at, well, less than presidential level, the persons, the voters were
7 sometimes more pragmatic and would vote for persons who they believed in their area
8 would be most beneficial for them.

9 So it may be that a distinction may be drawn between voting in or out a particular
10 candidate that was endorsed by Mr Ruto where the electorate believed that electing their
11 own preferred candidate would be more beneficial to them.

12 PRESIDING JUDGE EBOE-OSUJI: Are we in the madoadoa territory now?

13 MR STEYNBERG: Yes, your Honours. Well, I mean, there was obviously a campaign
14 to ensure that the ODM won at all levels. It was not successful at all levels, but it was
15 successful at some levels, we know that.

16 But really now we are getting into the realm of speculation and, in my respectful
17 submission, speculation on an issue which is not necessary for the Prosecution to prove.
18 I note that time is fleeting.

19 If I can then move on briefly to issues of credibility that were raised, certain issues of
20 credibility raised by my learned friend. And a substantial portion of the submissions
21 were aimed at this; in particular, your Honours, the submission that the Chamber should
22 find that all of the Rule 68 witnesses are incapable of belief in general due to the fact that
23 they have been recanted, they have recanted, their evidence is untested or -- allegedly or
24 the fact that in other cases, in other tribunals, evidence of a prior recorded testimony has
25 been rejected unless corroborated.

1 A few points to consider in this regard, your Honours. Firstly, it's worth remembering
2 why the previous recorded testimony of these witnesses was submitted and ultimately
3 admitted by the Chamber. It was not because the Prosecution didn't feel like calling the
4 witnesses. It was because the Chamber found a clear pattern of interference with these
5 witnesses, which led to their recanting en masse. And this prevented the Prosecution
6 from leading their evidence in the sort of detail that we would have obviously have
7 preferred. We would have much rather the witness in court giving his testimony
8 voluntarily and being tested and being able to rely on the complete product, as it were.
9 But if Rule 68(2)(d) is to have any utility, if it is to serve the stated purpose of deterring
10 improper interference with witnesses, there must at least be a possibility that a reasonable
11 Chamber may rely on that evidence at the end of the case; if not, why do we bother?
12 By urging you, your Honours, to conclude at this juncture that the Chamber could never
13 convict on this evidence, the Defence is in effect asking the Chamber not only to ignore the
14 clear purpose of Rule 68, but also to make a final assessment of the weight to be attached
15 to the evidence at this no case to answer stage.

16 PRESIDING JUDGE EBOE-OSUJI: Do you have difficulty with that argument? I'm not
17 saying you do, it's just a question. Do you have a problem with that argument, because I
18 believe one of the clauses of Rule 68 appears to suggest that the facts that the out-of-court
19 testimony deals with acts and conducts of the accused, this may be a reason not to accept
20 it. Is that what it says? Can you remind me?

21 MR STEYNBERG: Your Honours, from memory, maybe a reason not to admit it, not not
22 to accept it.

23 PRESIDING JUDGE EBOE-OSUJI: A reason not to admit it, indeed, indeed, I think you
24 corrected me. But the question then becomes does that cause a problem to your
25 proposition?

1 MR STEYNBERG: Your Honours, no, I don't believe it does. The fact that it goes to the
2 facts and circumstances of the case is also a factor that the Court may and probably will
3 take into account in its ultimate assessment.

4 PRESIDING JUDGE EBOE-OSUJI: And the reason I ask you that question is if it is what
5 Rule 68 says, that clause, if you can find it, does that suggest that, yes, you can admit Rule
6 68 material for other reasons beyond conviction of an accused person in a case?

7 MR STEYNBERG: If I may first find the reference, and then I'll try to answer the
8 question, your Honours.

9 PRESIDING JUDGE EBOE-OSUJI: I asked you that because you said: What's the point
10 of admitting if you can use it to convict? And I'm saying that indicated there may be
11 other reasons why 68 was drafted, to allow admission of that sort of material without
12 going to conviction.

13 MR STEYNBERG: Well, firstly, if I can just refer you to the relevant paragraph, it's
14 68(2)(d)(iv). "The fact that the prior recorded testimony goes to proof of acts and conduct
15 of an accused may be a factor against its introduction or part of it."
16 Your Honours, when I say "What is it for," it must carry some weight, otherwise there
17 would be no point of admitting it. It was admitted for proof of its contents.

18 PRESIDING JUDGE EBOE-OSUJI: Carry some weight towards what, conviction of an
19 accused?

20 MR STEYNBERG: Yes, your Honours. Certainly to be weighed in the totality of the
21 evidence. But to say at this stage that we should simply cut it out at the no case to
22 answer stage because it is Rule 68 evidence would, in my respectful submission, not be the
23 appropriate way to proceed.

24 I can also just point out one other rule which I think is implicated, and this is in
25 connection with the submission that the evidence must be corroborated, the Rule 68

1 evidence must be corroborated and findings in other tribunals to that effect. And I refer
2 your Honours to Rule 63(4), which states, "Without prejudice to Article 66" -- which is of
3 course the presumption of innocence -- "a Chamber shall not impose a legal requirement
4 that corroboration is required in order to prove any crime within the jurisdiction of the
5 Court."

6 So corroboration obviously serves a useful purpose in assessing the weight and credibility
7 of evidence, but it is not a necessary legal requirement, the absence of which should lead
8 the Chamber to conclude that evidence of that nature may not -- what is the test? -- is
9 incapable of belief on any reasonable grounds.

10 If I can move on then from that point, a few miscellaneous criticisms. I'm afraid I'm not
11 going to have time to address more than a few.

12 PRESIDING JUDGE EBOE-OSUJI: Did you -- I know Ms Buisman referred us to
13 authorities where she said that the ad hoc tribunals had never relied on uncorroborated
14 hearsay and as well as recanted testimony to convict anyone.

15 Do you have any authority that shows the opposite or addresses the opposite, specifically
16 whether uncorroborated hearsay has been relied upon to convict anyone in international
17 criminal law?

18 MR STEYNBERG: Your Honour --

19 PRESIDING JUDGE EBOE-OSUJI: And a second one, whether recanted, uncorroborated
20 recanted testimony had been used to convict?

21 MR STEYNBERG: If your Honours will bear with me a moment, I just want to check
22 something.

23 (Counsel confers)

24 MR STEYNBERG: Your Honours, it seems that at the ad hoc tribunals, recanted
25 statements have not to date been used to convict. I do note that in the Limaj case, the

1 Appeals Chamber did, in rejecting the Prosecution's appeal, did state that the reason for
2 its rejection wasn't simply the fact that it was a recanted statement, there were other
3 factors that were taken into account. So it's not merely the fact that it is a recanted
4 statement that led to its rejection, but, your Honours, again, each case depends on an
5 assessment of the evidence in that case; the fact that it's not been admitted before.
6 Certainly I don't believe that any of those cases had seen the nature of and scale of
7 interference of the number of witnesses we have in this case. And it may well be that in
8 assessing the credibility of the witnesses' statements, the Chamber might have cause at the
9 end of the case, the Chamber might have cause to reflect upon why the persons who went
10 through so much trouble and expense and risk of prosecution to bribe the witnesses to
11 recant felt it necessary to do so, and that might have something to do, in fact, with the
12 weight of the evidence implicating the accused in this case. And I say that --

13 PRESIDING JUDGE EBOE-OSUJI: You know the next question coming up, don't you?

14 MR STEYNBERG: Well, may I, before you ask the question, I must make it clear, I don't
15 rely on that as substantial proof of guilt of the accused. What I do rely on that is the fact
16 that it may be of relevance in assessing the credibility of the evidence of those witnesses
17 and in particular their prior statements vis-à-vis their recantations.

18 PRESIDING JUDGE EBOE-OSUJI: Do we need to worry about the causal link between
19 the accused and the interference?

20 MR STEYNBERG: Your Honours --

21 PRESIDING JUDGE EBOE-OSUJI: Proof of the causal link?

22 MR STEYNBERG: Your Honours, clearly if -- well, if the Prosecution were able to prove
23 beyond a reasonable doubt, I thought it was able to prove beyond a reasonable doubt that
24 the accused was in fact the person responsible, then the Prosecution might adopt a
25 different attitude towards the consciousness of guilt argument.

1 But in this case what we do know is that the witnesses purported to be acting on behalf of
2 the accused, and the Chamber accepted that they were acting in the interests of the
3 accused. So certainly somebody felt that it was in the interests of the accused that these
4 witnesses shouldn't come and testify.

5 The question which the Chamber might ask is: If these witnesses were in fact such
6 mitigated liars, and if the evidence was incapable of belief on any standard, why go
7 through all that trouble?

8 But, again, I'm getting ahead of myself because we're not required to make that argument
9 at this stage.

10 I see there is a question.

11 PRESIDING JUDGE EBOE-OSUJI: Judge Fremr has a question for you.

12 JUDGE FREMR: I'm sorry, Mr Steynberg, but I would rather, instead of listening to
13 miscellaneous, listen to your response to one of my general, general question. And I'm
14 sorry, if you allow, I would like to return back, even if you are almost at the end of your
15 oral submission, at the very beginning of that, and you made a statement which really
16 attracted my attention when you said that the Chamber should focus on assessment of
17 quantity of evidence rather than on assessment of its quality.

18 And in my view it's interesting because, in effect, in my view it characterised in a nutshell
19 the issue before us. And in this connection I would like to put you in fact three questions
20 at one time. The first one: Do you think that such an assessment focused on quantity of
21 evidence would meet requirement of Article 64(2) that Chamber should ensure the trial is
22 fair and expeditious?

23 The second would be: To me, evidence is generally mean that should prove some
24 allegation, and do you think that it's even possible to call or to work with this term
25 without looking at the quality on the strength of evidence?

1 And the third one: You are advocating to postpone the assessment of quality of evidence
2 at the end of the case, which means in our practise here after the Defence case. Do you
3 think that such assessment of quality of evidence presented so far by the Prosecution
4 would be more positive as now or at least would remain the same?

5 MR STEYNBERG: Thank you, your Honour. On the first point, it is not unfair, in my
6 respectful submission, to put the accused on their defence where the Prosecution's case
7 meets the standard that the Chamber has annunciated, has put forward, and that is the
8 standard of the Prosecution's case taken at its highest requires an answer.

9 It is not the procedure in these courts as I understand it that we should assess the guilt or
10 innocence of the accused separately at the halfway stage and at the end of the case. I
11 understand the function of this inquiry to be a filtering mechanism to filter out cases that
12 could not on any reasonable standard result in a conviction regardless of what follows.

13 It is, of course, true that the Prosecutor, the Prosecution cannot rely on an accused to
14 convict him or herself. But it does often happen that during the case of the -- during the
15 Defence case, evidence is elicited either in the Defence case or in any rebuttal case that
16 may be permitted which does establish or bolster evidence on certain points which might
17 have been weak or lacking at the end of the Prosecution case, even where that evidence
18 was not so weak or lacking to fall short of the no case to answer standard.

19 So my submission, your Honours, is that I'm taking what I believe to be your Honours'
20 standard on its face. And as far as expeditiousness is concerned, we spent four days now
21 in this hearing. This is not meant as a criticism, but I observe that in the final
22 submissions in the previous three cases, the final submissions at the end of the case we've
23 not spent more than two days in final arguments. So we've spent between us maybe 500
24 pages of written submissions, four days in argument. My understanding and my
25 conception of the no case to answer motion is it is a limited -- it is intended to be a limited

1 and simple inquiry as it were to filter out those cases which are so obviously hopeless that
2 there is no point in going forward.

3 We risk, with respect, getting into, by delving into such detail, getting into what becomes
4 very close to a final assessment and a final argument, a debate on the guilt or innocence of
5 the accused.

6 PRESIDING JUDGE EBOE-OSUJI: But this is a very serious criminal case, a very serious
7 offence, and the Defence counsel in it are taking it very seriously, and that's why they
8 deserve and should deserve that level of attention to the detail. I'm not sure that we can
9 say because in another Chamber they have done it a certain way, therefore, that sets the
10 gold standard. Here we want to look at this thing very carefully and that's why we have
11 given all the parties enough time to get to address us substantively on the evidence.

12 Yes, I just thought I -- he didn't mean it as a criticism, I didn't take it as such, but it needed
13 to be clarified on the record.

14 Now, but the thing though with Judge Fremr's question is that it was focused on the
15 commencement of your submission that it is quantity that matters and not quality that
16 matters.

17 MR STEYNBERG: Yes.

18 PRESIDING JUDGE EBOE-OSUJI: So keep that in mind.

19 MR STEYNBERG: Maybe I can further elucidate that. What I intended to --

20 PRESIDING JUDGE EBOE-OSUJI: I say that because I'm not sure that we said any such
21 thing in our -- okay.

22 MR STEYNBERG: That is my attempt at encapsulating what your Honours have said,
23 and that is that it is the Prosecution's case taken at its highest, which will be judged, and
24 that questions of weight, credibility and reliability will not be entered into unless the
25 evidence in question is incapable of belief on any reasonable standard.

1 So I say that if it's the Prosecution case taken at its highest, then you look at the
2 Prosecution case without entering into those debates about credibility, et cetera, except
3 where it reaches that threshold. So there was always that caveat. And I believe, I still
4 believe and I submit that that is -- encapsulates the test of the Chamber and indeed the
5 other ad hoc tribunals have laid down.
6 I hope I've answered your question, Judge Fremr.
7 Right. I'm really running out of time now. So one or two other important issues, if I
8 may.
9 Right. The succession of videos played by my learned friend as proof that Mr Ruto is a
10 reasonable man, a man of peace, a man of unity. The first observation is obviously that if
11 one person -- if a person is seen to call for peace on one occasion does not exclude the fact
12 that he might call for the opposite on another occasion.
13 The second is that the accused is after all a politician, and it is, I say, I submit, reasonable
14 to suppose that his speeches would be tailored to his audience.
15 It would be extremely foolish of a person in the accused's position to openly call for
16 violence during events which are being publicly broadcast and broadcast to the whole of
17 Kenya.
18 But in this respect, I note, your Honours, that in all but one of the clips played, the
19 accused was speaking either in Swahili or in English, which tells us a little bit about the
20 audience at which those comments were directed.
21 And -- well, I asked my learned friend, Mr Nderitu, to have a look because I don't
22 recognize Swahili, but he confirmed that that was the case.
23 Of course, two of them were MFI'd and should be left out of the reckoning in any event.
24 But even -- even taken on its face, this claim or call to end tribalism, the Court should be
25 very hesitant to draw conclusions on that out of context and without a proper

1 understanding, we submit, of the context in which they were said. And my learned
2 friend, Mr Nderitu, referred to this 42 against 1 campaign. And he was cut short by
3 counsel who didn't want him to give evidence.

4 But, in fact, there is evidence on record, and I can refer to the evidence of P-658, at
5 transcript 171, line -- page 73, where he says he saw banners at Kapsabet rally stating 41
6 against 1.

7 P-464 speaks about -- at T-88, page 52, during the campaign "There was ... a certain degree
8 of anti-Kikuyu populism, and which was embodied in this slogan: 41 against 1."
9 Meaning "... 41 communities against 1 community."

10 "This ... anti-Kikuyu populism ... capitalised on the feelings of frustration of certain
11 communities," including or "specifically Kalenjins."

12 P-487 at transcript 53, page 105, on the slogan 41 against 1. The "... ODM supporters"
13 were "putting 41 community against one community."

14 There are 42 communities in Kikuyu. They were against the Kikuyu community.

15 So this call to end tribalism, we submit, is nothing more than a call for the various
16 communities to rally together against the ruling Kikuyu, as they were at that time, to evict
17 them from office.

18 So there is not too much that can be read into that, firstly. And secondly, it does not
19 disprove the fact that Mr Ruto may have committed the offences that we allege he has.

20 Very briefly on the so-called alibis that my learned friends have put forward that on this
21 meeting he was in Western Province, on that meeting he was in Nairobi. It seems that
22 Mr Ruto spent very little time in the Rift Valley.

23 But the fact is that, to give a few examples, some of the areas where the accused was
24 alleged to be on the relevant times and periods are in fact not that far away.

25 If I can refer to my notes. From what we are able to see, Kipchoge Stadium is

1 approximately 100 kilometres from Kakamega, one and a half hours drive. And this is
2 just from looking on Google Maps. And anyone can do this.

3 Sugoi is --

4 MR KHAN: Your Honour, can I object. We asked the Prosecution at least four times
5 during the trial for maps and they declined our request for maps. And now we're
6 getting evidence once again from the bar table. Desperate measures in desperate times.

7 MR STEYNBERG: Your Honours, I can't count the number of occasions when my
8 learned friends pulled up maps from the so-called Google corporation.

9 But I don't have to rely on that. There is evidence from Mr Lars Bromley as to travel
10 times between Nairobi and various other places.

11 We have evidence on record that Mr Ruto was -- want to travel backwards and forwards
12 by helicopter.

13 And even from the evidence presented that -- relied on by the Defence, we see Mr Ruto
14 covering a lot of ground.

15 So the point is that the fact that he may have been at one place at one time does not
16 necessarily exclude the fact that he might have been at another place. But even if it is
17 excluded, all that it establishes is that the date in question is incorrect. But it is not a
18 critical date.

19 If the witness --

20 PRESIDING JUDGE EBOE-OSUJI: Time.

21 MR STEYNBERG: Time, yes. Well, let me just finish that point.

22 PRESIDING JUDGE EBOE-OSUJI: Finish your point.

23 MR STEYNBERG: Even if the witness were mistaken about the date, it does not
24 necessarily mean that the entire evidence must be rejected as false beyond a
25 reasonable -- or, as false -- as incapable of belief on any reasonable standard.

1 Your Honours, I will have to end there unfortunately. Thank you for your attention.

2 PRESIDING JUDGE EBOE-OSUJI: Thank you very much, Mr Steynberg.

3 We will take our luncheon break now and we reconvene at 2 o'clock.

4 THE COURT USHER: All rise.

5 (Recess taken at 1.02 p.m.)

6 (Upon resuming in open session at 2.04 p.m.)

7 THE COURT USHER: All rise.

8 Please be seated.

9 THE COURT OFFICER: Mr President, we are in open session.

10 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.

11 MR STEYNBERG: I beg your pardon, your Honours, if I may just have one minute of my
12 learned friends' time?

13 Your Honours asked before some references before the break to cases in which
14 uncorroborated hearsay may have been relied upon. I didn't answer that question. In
15 the limited time, if I can just point out two or three references which might be of
16 assistance to the Chamber.

17 The first is the Appeals Chamber decision in the Charles Ghankay Taylor case, in the
18 SCSL of 26 September 2013, where at paragraph 91 the Chamber states: "Given the
19 safeguards provided by the statute and the rules of the Special Court as interpreted in the
20 jurisdiction of the Court, there is no prohibition against the use of uncorroborated hearsay
21 evidence, even if such hearsay evidence is the basis of the conviction provided that the
22 Trial Chamber has subjected the hearsay evidence to a fair and proper assessment of its
23 reliability," which of course we say should be done at the end of the case.

24 They rely in part, your Honours, on the case of Al Khawaja and Tahery v United
25 Kingdom. It is a judgment of the European Court of Human Rights. It is a lengthy

1 judgment, which I won't attempt to paraphrase, but basically the finding was that a
2 conviction based on uncorroborated hearsay evidence, even if it formed the foundation of
3 the conviction was not in conflict with the accused's rights under the convention.

4 And finally, just a useful summary of the jurisprudence of the ad hoc tribunals, I refer
5 really more for the summary than for the conclusions, but it is an article written by
6 Yvonne McDermott in the Leiden Journal of International Law, 2013, November 2013,
7 entitled "The Admissibility and Weight of Written Witness Testimony in International
8 Criminal Law, a Socio-Legal Analysis," which might be of assistance to the Chamber in
9 locating other sources of interest.

10 PRESIDING JUDGE EBOE-OSUJI: Of course, that is not authority, but that's certainly
11 not authority of international criminal law. But if that reference, the academic article can
12 point to some authority, we will look at that.

13 MR STEYNBERG: That is, of course, the purpose. It does refer to various decisions
14 which might be of interest to this Chamber. Thank you.

15 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.

16 Mr Kigen-Katwa, Mr Khan, who -- now you will tell me you will not be needing
17 one-and-a-half hours first. Good. I see Mr Khan is shaking his head on your behalf.

18 MR KIGEN-KATWA: Your Honour, I do not need one-and-a-half hours. As you can
19 appreciate, I actually don't have anything to say.

20 PRESIDING JUDGE EBOE-OSUJI: That's good news.

21 Mr Khan.

22 MR KHAN: Your Honours, I'm grateful. I will be a little bit longer, but not by much
23 really.

24 PRESIDING JUDGE EBOE-OSUJI: Longer than what, than Mr Kigen-Katwa has just
25 been?

1 MR KHAN: Yes, indeed, indeed.

2 Your Honour, the Prosecution haven't addressed, in our respectful submissions, the

3 glaring deficiencies that are obvious on any fair appraisal of the facts.

4 In relation to network members Sammy Ruto and Lucas Sang, the point I was

5 endeavouring to make yesterday was simply this, no evidence of attending -- of those two

6 men attending any meetings that the Prosecution allege were network meetings and no

7 evidence led by the Prosecution, and they had a chance to deal with this specifically

8 today, no evidence that they attended any rallies that are subject to the charges.

9 Three new network members: John Tanui, Chamalan, Isaac Maiyo, deceased. Brand-new

10 ones, not alleged pre-trial, not alleged in a pre-trial brief, alleged in their response.

11 Symptomatic of a disintegrating case, we say.

12 In relation to 658, my learned friend referred again to the evidence of 658. And he's the

13 gentleman that the court record shows met the Prosecution in underpants and without

14 shoes, leaving aside the facts that he accepted he lied about attending Mr Ruto's house

15 and drew a plan when he stated he never had been to the building. But leaving that

16 aside, the Prosecution today refer to the banners at the rally 42 against 1. Your Honours

17 had the opportunity, and it is Ruto Exhibit 86, of seeing that video, and it was subject to

18 the questions. No banner at that rally, no banner at that rally was seen. And the witness

19 was taken through it, 41 against 1. And that was an OTP exhibit. That was an OTP

20 exhibit -- sorry, our exhibit, an OTP video. I'm grateful. Sourced from the OTP. No

21 reference to support the proposition canvassed today.

22 This idea that Mr Ruto helicoptered here and helicoptered there.

23 Well firstly, the burden is on the Prosecution. Secondly, the absence of independent

24 media evidence to support the Prosecution case is revealing.

25 But just in relation to Witness 604. Witness 604 stated that the whole day or two hours, 3

1 till 5, were spent at a particular location at the alleged planning meeting. And annex G,
2 page 33, we produced a Daily Nation newspaper report which was quite clear that
3 Mr Ruto and the Pentagon members spent, quote, "The entire day in meetings at Pentagon
4 house."

5 Well even with the space shuttle, you can't manage to get from Pentagon house, in
6 Lavington, and attend a meeting between 3 and 5 that's alleged by the Prosecution and be
7 back.

8 There's a clear gaping hole in the Prosecution's case.

9 Your Honour, apart from that, we say the very pertinent questions, if we can say so, of the
10 learned judge, Judge Fremr, were put to the Prosecution and not answered, we say - not
11 answered we say - and it's revealing.

12 Rules of Procedure, it is often said, and it is tried, as it is commonly known, are
13 handmaidens of justice, not the mistress.

14 Stepping aside from the very interesting legal rules that we've had the privilege of
15 discussing in the course of these two years since the trial started, and the very fascinating
16 points that arise, this process, this building that we are in is meant to administer justice.
17 And this juncture of proceedings, really there's one question facing your Honours: Is it
18 pointless - is it pointless - given what you've seen, the scrutiny with which it's been tested,
19 to go to a Defence case, or do your Honours have the right and, indeed maybe the
20 responsibility, but certainly the right, to look at the evidence and say that no reasonable
21 Trial Chamber could convict.

22 We ask that you apply your own standard, the standard of the Yugoslav tribunal to the
23 Prosecution's test. No wonder they're running away from a critical analysis. No
24 wonder they're saying quantum not quality because there's no quality. And for that
25 reason your Honours, we do ask you to dismiss this case.

1 I'm so grateful for the opportunity that the Bench has provided the Defence in this
2 important stage of proceedings to address it fully on the matters that are of concern and
3 interest to us. Thank you so much.

4 PRESIDING JUDGE EBOE-OSUJI: Thank you.

5 (Trial Chamber confers)

6 PRESIDING JUDGE EBOE-OSUJI: I thank you very much.

7 The exercise was what we wanted to see happen, and that is to give the parties full
8 opportunity to address us and we all look at the evidential matter together and discuss
9 them. And the exercise has done what we hoped it would do, and we thank you all for
10 your submissions.

11 The proceedings are adjourned.

12 THE COURT USHER: All rise.

13 (The status conference ends in open session at 2.14 p.m.)

14 CORRECTIONS REPORT

15 The Trial Chamber V(a) has brought the following corrections into the transcript:

16 *Page 44 lines 15-16

17 "...accused of writing rough shot over the language..." is replaced by "...accused of
18 riding roughshod over the language..."

19 *Page 46 line 4

20 " American recco prosecutions" is replaced by " American RICO prosecutions"