

1 International Criminal Court
2 Pre-Trial Chamber II - Courtroom I
3 Presiding Judge Ekaterina Trendafilova, Judge Hans-Peter Kaul and
4 Judge Cuno Tarfusser
5 Situation in the Republic of Kenya - ICC-01/09-01/11
6 In the case of the Prosecutor versus William Samoei Ruto,
7 Henry Kiprono Kosgey, and Joshua Arap Sang
8 Confirmation of Charges Hearing
9 Tuesday, 6 September 2011
10 The hearing starts at 2.31 p.m.
11 (Open session)
12 COURT USHER: All rise. International Criminal Court is now in
13 session.
14 PRESIDING JUDGE TRENDAFILOVA: Please be seated.
15 Good afternoon to everyone who is in the courtroom today. We
16 welcome the teams from both parties, the Prosecutor's team, the Defence
17 teams of the three suspects, Ms. Chana, and we welcome also the public,
18 those who are in the public gallery.
19 Now, as we have agreed yesterday before suspending the hearing,
20 the Defence team of Mr. Sang will proceed with its presentation.
21 Now, Mr. Katwa -- I'm sorry.
22 Court Officer, please call the case. I always forget about this.
23 COURT OFFICER: Good afternoon, Madam President, your Honours.
24 This is the Situation in the Republic of Kenya, in the case of the
25 Prosecutor versus William Samoei Ruto, Henry Kiprono Kosgey, and

1 Joshua Arap Sang, case number ICC-01/09-01/11. Thank you, your Honours.

2 PRESIDING JUDGE TRENDAFILOVA: Thank you, Court Officer. Just
3 before Mr. Katwa takes the floor, are there some new members of the
4 teams, new faces? No. Then, Mr. Katwa, it's your time now.

5 MR. KIGEN-KATWA: Thank you, Madam President and your Honours.
6 Madam President and your Honours, at the close of the last sitting, I was
7 making reference to the alleged meeting of 14th of December, 2007, and
8 there's one last detail I wish to make reference to before I depart
9 from -- before I depart from the events of the meeting of 14th December
10 2007.

11 Your Honours, it is alleged that on the meeting of 14th December
12 2007, apart from supply of guns and gas cylinders, there was also supply
13 of grenades. Madam President, Witness number 0008 had said that the
14 grenades were obtained, stocked, and supplied by one of either the
15 co-perpetrators or a perpetrator, one Mr. Cheramboss.

16 Madam President, in respect to the issue of grenades, I wish to
17 mention two things. The first one is that that witness was present in
18 court and no question was put to him by the Prosecutor on the allegation
19 that he actually stocked and supplied grenades for use of -- for use in
20 the violence.

21 The second thing that the Witness number 0008 said in respect of
22 the grenades is that he said grenades were recovered from the home of the
23 said witness Mr. Cheramboss, and that issue of the recovery of the
24 grenades was reported in all leading print media in Kenya
25 Madam President, the Prosecution have not supplied any of that material,

1 inclusive of the newspaper the Witness number 0008 said exists to confirm
2 that grenades were recovered from the home of Cheramboss.

3 Lastly, Madam President, on that issue of the grenades is that
4 the Prosecutor's case does not allege anybody died of the use of
5 grenades, and, Madam President and your Honours, we submit that the issue
6 of existence and supply of grenades was to sensationalise this case by
7 the eighth witness in pursuance of the course of lying to the
8 Prosecution.

9 The next meeting I wish to refer to, Madam President, is a
10 meeting alleged to have been attended by Mr. Sang on 14th of January,
11 2008. This meeting, it is alleged, was an event where Mr. Sang attended
12 and was the master of ceremony for the purposes of burial of one
13 Mr. Lucas Sang, an athlete, an international athlete. Madam President,
14 we have supplied three items to show that, in fact, Luka Sang was buried
15 on 10th of January, 2008.

16 The first item we've produced is the statement by the third
17 suspect, and that is OTP-EVD-D11-00048. The second material we've
18 supplied in support of the contention that in fact in that statement by
19 the third suspect he has explained that he did not attend the funeral and
20 that Luka Sang, being a person of international standing, was buried on
21 10th of January, 2008, to the best of his knowledge, and the
22 circumstances and the event of his burial was covered by the media in
23 Kenya. So the fact of when he was buried cannot be in dispute.

24 The second statement we have supplied, your Honours, is a
25 statement sworn -- an affidavit, and we relay that it is an affidavit as

1 opposed to a statement, sworn by one Daniel Komen, who is an athlete.
2 That affidavit swears that he attended the funeral of his friend Luka
3 Sang and that funeral was on 10th of January, 2008; and secondly, that
4 Joshua Sang is known to him, and he was not in attendance either by way
5 of being one of the people who were attending as bereaved or as a master
6 of ceremony as alleged by the eighth witness.

7 The other item of evidence we have supplied is the programme --
8 the burial programme that was used in the course of the burial of the
9 said Luka Sang, and that programme is exhibited by ourselves as
10 EVD-PT-D11-00047.

11 Lastly, we have supplied a statement from the employer of Luka
12 Sang, the managing director, one Mr. Julius Lamaon -- the employer of
13 Joshua Sang. I'm sorry, I said Luka Sang. Joshua Sang. Mr. Julius
14 Lamaon and it is exhibited in his statement. He confirms that
15 Joshua Sang was at work the whole day of 14th January 2008 and -- in
16 Nairobi and could not therefore be said to have been in Eldoret, a
17 distance of over 300 kilometres, to attend the funeral of Luka Sang.

18 Your Honours, the statement of the said Mr. Julius Lamaon is
19 EVD-PT-D11-00036. Madam President and your Honours, we pray that the
20 Court does share the consternation that we have as to the possibility of
21 having someone buried on 10th of January and having him buried again on
22 14th of January as the Prosecution would want this Court to believe.

23 Madam President and your Honours, we would like to move on to the
24 next meeting alleged to have been the event when guns were distributed.
25 On my part and on behalf of the third accused -- the third suspect, I

1 should acknowledge and highlight the fact that the third suspect is not
2 mentioned as having attended this meeting, but it is one of the meetings
3 that he is alleged to have announced and broadcasted, and this meeting
4 was allegedly held on 22nd of December, 2007.

5 This meeting, Madam President, is the product of the mind of the
6 same eighth accused, Witness -- Witness number 0004 --

7 PRESIDING JUDGE TRENDAFILOVA: Witness, you mean -- Witness you
8 mean, Mr. Katwa.

9 MR. KIGEN-KATWA: Madam President, I'm sorry, I apologise. It is
10 Witness number 0004, actually, not number 0008. And Witness number 0004
11 in part says that the attendants constituted of a sum of people amounting
12 to 30.000 people, and in that meeting, guns were distributed and that
13 people were placed to proceed with the -- with the intended plan to
14 commit crimes. The statement of that witness is contained in Exhibit
15 number EVD-PT-OTP-00239, paragraph 42.

16 This meeting, it is alleged, was held at the home of the first
17 suspect. Madam President, we would like to play a video to show the
18 whereabouts of the alleged host who distributed guns and at whose home
19 the third accused is alleged -- the third suspect is alleged to have
20 announced. The video is EVD-PT-D09-00054. There is no confidentiality
21 on that video.

22 COURT OFFICER: Your Honours, I would like to remind parties that
23 to be able to view this video, you have to press on the "PC 1" button
24 right in front of you. Thank you.

25 (Video-clip played)

1 MR. KIGEN-KATWA: Your Honours, we would like to make three
2 explanations about the three videos that we have exhibited in the course
3 of these proceedings. The first one is that they had audio, and for some
4 technical reason in the process of formatting them for purposes of the
5 proceedings the audio seems to have missed out.

6 The second one, your Honours, is that these videos were sourced
7 from various media houses, and if the Prosecution were interested in
8 acquiring them, these are items that were easily available.

9 And lastly, your Honours, it must have appeared apparent that the
10 crowds are in a jovial and celebratory mood. Your Honours, these are
11 campaign events for purposes of civic, parliamentary and presidential
12 elections which culminated in the elections held in 2007, following which
13 is the subject of these proceedings, the violence that followed.

14 The last meeting I wish to make reference to is the meeting which
15 was extensively referred to by counsel for the second suspect, and one
16 item I wish to mention about it is that it is alleged that one Frederick
17 Kapondi is in that meeting of 13th of December, 2007. Madam President,
18 as we looked, we saw yesterday it is in fact the case that Kapondi was
19 still in the cells as at the 13th and could not have been in attendance
20 at that meeting.

21 In the result, your Honours, there are three meetings where it is
22 alleged that guns were distributed; the meeting of 2nd of November, 2007,
23 the meeting of 14th December 2007, and the meeting of 22nd December 2007.
24 Your Honours, we pray that the material we have supplied do persuade you
25 that in fact these meetings were never held, that the supplier of the

1 guns, one Mr. Frederick Kapondi, was not available to supply the guns,
2 and the subject of the meetings and the subject of the guns is an entire
3 fiction in itself fabricated by the Prosecution witnesses.

4 Your Honours, I would like to proceed and mention that this --
5 the meeting I just referred to a while ago, the meeting of 2nd of
6 November, 2007, was allegedly held at the home of the first suspect
7 according to Witness number 0008. However, Witness number 0001 says the
8 meeting of 2nd of November, 2007, was held at Sirikwa Hotel in Eldoret,
9 not the home of the first suspect. And, Madam President, we pray to get
10 benefit of the doubt that arises from that contradiction.

11 Madam President, it is also alleged by Witness number 0001 that a
12 meeting was held for purposes of raising funds at Sirikwa Hotel on 2nd of
13 September, 2007. My client's contribution is in announcing and
14 publicising the event of that fundraising for purposes of funding the
15 violence. That allegation is in the statement of the Prosecution
16 witnesses, EVD-PT-OTP-547 to 707, and also EVD-PT-285.

17 Madam President, we have supplied material from the proprietors
18 of the said hotel and for avoidance of doubt, as we have explained in
19 those statements, Sirikwa Hotel is internationally assessed as being a
20 three-star hotel.

21 In the statement supplied, it is confirmed by Witness number
22 EVD-PT-D11-00022, who is the manager; EVD-PT-D11-00029, and
23 EVD-PT-D11-00037 that in fact they have never hosted any event convened
24 by either Emo Foundation or Emo Society or Kass FM as alleged by the
25 witnesses, and that the event alleged to have occurred for purposes of

1 raising funds was neither held at that place nor were the attendees
2 visitors of the said institution in that period. And that is the only
3 fundraising event that is alleged to have been contributed to by my
4 client.

5 Madam President, in terms of this meeting of 2nd of September,
6 2008 -- 2007, as alleged by Witness number 0001, Witness number --
7 Witness number 0008, Witness number 0001 says the same meeting was
8 actually held on 2nd of November, 2007, and that witness contradicts the
9 allegation of -- the Prosecution's own witnesses contradict each other in
10 that regard.

11 I would like to move on to the allegation against my client that
12 he communicated using coded language. The allegation that he used coded
13 language is made by three Prosecution witnesses. The first Prosecution
14 witness who makes that allegation is Witness number 0001. The second one
15 is Witness number 0002 at EVD-PT-D11-00764. The third witness who says
16 that coded language was used is Witness number 0008, and it is contained
17 in EVD-PT-D11-00380.

18 Other than alleging that a coded language was used, neither the
19 Prosecution as an office nor the witnesses procured exactly what the
20 coded language was. There is no formulation of that alleged coded
21 language.

22 Secondly, there is no formulation of the solution to that coded
23 language if there was a code which was to be used by a select set of
24 people for purposes of communicating.

25 Your Honours, it is also not stated what was the form of the

1 recruitment and the membership of the alleged participants or membership
2 of the said coded communication network. It is not explained how the
3 secret of the code was maintained to avoid leakage to third parties, and
4 for purposes of secrecy, we wish to highlight two issues.

5 The first one is that looking at the whole of the Prosecution's
6 case, the impression created is that it was Kalenjins who were members of
7 this coded language. Kalenjins total up to over 4.9 million people in
8 Kenya, and that is reflected in the Prosecution's own exhibit -- sorry,
9 our Exhibit EVD-PT-D09-0009 at page 34. And, Madam President, we submit
10 that the possibility of having a coded communication in the hands of a
11 sum of 4.9 million people is inconceivable, most especially when it is
12 taken into account that some of those people would not necessarily agree
13 with the intentions of that network that is communicating coded. And
14 secondly, that there are intermarriages, the effect of which is that in
15 every likelihood, some of the victims would be people who were not
16 necessarily the members of the Kalenjin community.

17 Madam President, we already highlighted on the fact that whereas
18 it is true that in the document containing charges it is alleged that my
19 client broadcasted the start and coordinated the attack at Langas, the
20 actual fact on the ground was that the fight between -- the fight at
21 Langas is reported by the Prosecutor himself in his own exhibits to have
22 been a fight between members of the Kikuyu tribe and the Luhya tribe, and
23 Kalenjins played no role in that fight or at least are not reported to
24 have played any role. And therefore, the alleged coded language used to
25 cause the violence in that point is not tenable.

1 Your Honours, we also wish to repeat the fact that other than the
2 three witnesses, Witness number 0001, 0002 and 0008, there is no
3 transcript showing communication or broadcast by the third suspect
4 communicating in any coded language.

5 Your Honours, we submit that within the terms of the law, you do
6 find that in fact there is lack of specificity in the detail of the
7 alleged coded language, and more importantly that you do find that within
8 reason, it is not possible to uphold the allegation that there was any
9 communication by way of coded language.

10 Madam President, that would mark the end of my highlights of the
11 meetings alleged to have been held following the contribution and the
12 assistance of my client, the third suspect.

13 Your Honours, I would like to say something about the witnesses,
14 especially Witness number 0008, who is the star witness of the
15 Prosecution.

16 Madam President, out of the about 4.000 pages of the Prosecutor's
17 statements and interviews, Witness number 0008 made -- constituted about
18 3.000 pages. There are only nine witnesses supporting the allegations
19 brought before you by the Prosecutor. Out of the nine witnesses, one of
20 them is the first suspect, who visited the offices of the Prosecutor in
21 November the year 2010 and invited the Prosecutor to tell him what it is
22 that the Prosecutor has against him, and from the transcript that has
23 been availed to this Honourable Court, it will be noticed that the
24 Prosecutor preferred not to ask him any question, especially anything
25 relating to this case.

1 The second witness is one person whose name -- who declared that
2 he doesn't want his name redacted, Mr. McFadyen, who was one of the
3 commissioners in the Commission of Inquiry into Post-Election Violence
4 and which report has been availed to this Honourable Court.

5 The other witness, your Honours, that we -- for all purposes,
6 cannot be of any relevance to this case is Witness number 0002, who says
7 he was on transit from Kenya -- sorry, Witness number 0007, who said he
8 was on transit from Kenya to South Sudan, and he took photographs on his
9 way, and very significantly says, as far as he was concerned, the
10 violence was spontaneous and supplied to the Prosecutor some photographs
11 of what he saw.

12 Out of the nine witnesses, therefore, there remain only six.
13 Madam President, all the submissions and everything that the Prosecution
14 has said rests on the evidence of only Witness number 0002, number 0006,
15 and number 0008.

16 Madam President, Witness number 0008 himself acknowledges that he
17 is a criminal, but as I get the quote, which I'll read shortly, in which
18 he acknowledges that "I am a thief," and those are -- I'm using his own
19 words that, "I'm a thief. I looted in the year 1992, 1997, and I am
20 still present, and that I am a drunkard." I will read that shortly, but
21 in the meantime, this is what that witness says:

22 "Interview.

23 "I told you that I participated in the violence, I participated
24 in 1992, but what happened in 1992, 1997, I was grown up like this.
25 Those days I used to take alcohol. Those days I used to take cigarettes

1 because of the peer group that I was," and then there's something
2 unintelligible. "So I participated also in looting. They had the
3 looting now in 1997. In 1992, I looted people's property. I looted in
4 1997 people's property until I was caught up in a crossfire. I was
5 caught up, yes, and then these people, the people we were fighting by
6 then were Kikuyus, I was -- I was caught here."

7 Your Honours, I highlight that paragraph for purposes of inviting
8 you to consider that this is a self-confessed criminal in respect for the
9 period since 1992 and goes on with this -- with this career as a
10 criminal. He has chosen path as a criminal. And I say this because he
11 says even in the year 2007, he was in the middle of the fights and the
12 violence.

13 PRESIDING JUDGE TRENDABILOVA: I'm sorry, Mr. Katwa. The floor
14 is to Ms. Tai.

15 MS. TAI: My apologies. I don't mean to interrupt Mr. Katwa,
16 however, I am concerned about the disclosure of particular information
17 that would lead to the identity of particular people. In our
18 presentations, we have taken great care to be careful with that type of
19 information. For that reason, we would propose that that either be
20 eliminated or presented in a private session.

21 PRESIDING JUDGE TRENDABILOVA: Your care, Ms. Tai, is to be
22 appreciated --

23 MS. TAI: Thank you.

24 PRESIDING JUDGE TRENDABILOVA: -- because the responsibility of
25 the Office of the Prosecutor, equally the responsibility of the Chamber,

1 to protect people who might be facing some risk. So, Mr. Katwa, if you
2 would like to further on proceed with the analysis of the witness,
3 Witness number 0008, his personality, habits and so on, maybe then we can
4 switch into a closed session. What is your view on this?

5 MR. KIGEN-KATWA: Madam President, it did not occur to me --
6 provided I did not disclose ever his identity if I knew or his
7 handwriting if it was available, I thought it is available for me to
8 highlight what he says.

9 PRESIDING JUDGE TRENDAFILOVA: Mr. Katwa, you can disclose the
10 identity of a person not only by the name or the handwriting. So some
11 peculiar information that could be linked to a particular person could
12 also reveal the identity and pose some risks, and we would not like to
13 have risks regarding this witness.

14 MR. KIGEN-KATWA: In that case, Madam President, I would leave
15 the issue of that detail of analysis. I will only summarise what he said
16 so that I don't have to go into private session.

17 PRESIDING JUDGE TRENDAFILOVA: Thank you, we appreciate.

18 MR. KIGEN-KATWA: I'm most obliged, Madam President and your
19 Honours. The next characteristic of all of these -- especially the three
20 witness who have supplied most of the material to the Prosecution and on
21 whom the Prosecution is relying is the fact, as the Court would notice,
22 that they are present everywhere. Madam President will notice that when
23 the Prosecutor was presenting -- when the Office of the Prosecution were
24 presenting their case, they assured that, on a straight line, the
25 distance between the furthest northern point of the violence and the

1 southern-most point is a total of 62 kilometres. That is accepting the
2 fact that there are other points of the straight line. And,
3 Madam President, these three witnesses are present in each and every one
4 of these meetings, and we find that incredible, and we pray that the
5 Court takes that with a pinch of salt.

6 Madam President, the witnesses -- thirdly, the witnesses
7 contradict each other. We will make a substantive filing of the various
8 contradictions they have said but I will highlight only three. The first
9 one is that Witness number 0001 and Witness number 0008 contradict each
10 other on the one and only fundraising event held at Sirikwa -- allegedly
11 held at Sirikwa Hotel. The first witness says that the event was held at
12 Sirikwa Hotel on 2nd of November, 2007. The eighth witness says the same
13 event was held on 2nd September 2007.

14 Madam President, we pray that they should not be given the
15 benefit of doubt as to any error, because these are people who are very
16 detailed in their statements and should be treated to have a very
17 accurate memory.

18 Madam President, the same two witnesses contradict each other on
19 another very important meeting. This is the meeting at which guns are
20 allegedly distributed on 2nd of November, 2007. Witness number 0008 says
21 that the meeting at which the guns were distributed was 2nd of November,
22 2007. Witness number 0001 says that same event with the same attendees
23 was on 2nd of November, 2007.

24 The second contradiction is a contradiction that was
25 highlighted --

1 (Defence counsel confer)

2 MR. KIGEN-KATWA: The second contradiction is an issue that was
3 highlighted by the counsel for the second suspect. This is the question
4 of the hierarchy of the organisation that perpetrated violence, but do I
5 not wish to repeat what he said. I just want to add two details.

6 The first detail, Madam President and your Honours, is that the
7 Prosecution produced in this court a graph of the order of the people who
8 constitute the membership and the network. In that new graph,
9 Madam President, my client, Joshua Sang, is at the third level.
10 Madam President and your Honours, we pray that the Court -- and I do not
11 intend to exhibit, but I would invite the Court to look at these two
12 graphs because they were already exhibited to the Court by the counsel
13 for the second suspect. And that is EVD-PT-OTP-00399, produced by
14 Witness number 0006, at which the hierarchy is -- at the top of the
15 hierarchy is one Honourable Raila, followed by Kosgey and Ruto in equal
16 measure, followed by three commanders, Cheruiyot, Cheramboss and Koech,
17 followed by divisional commanders.

18 Witness number 0008 in EVD-PT-OTP-00286 has produced the top of
19 the command as being the first suspect, Ruto, followed by commanders,
20 followed by administrative coordinators, followed by local coordinators.

21 Madam President, we pray that that be compared with what the
22 Prosecution produced. It will be noticed that Witness number 0008 and
23 0006 have produced the first three lines of command, and my client is not
24 there. None of the witnesses has placed my client in any of the first
25 three levels, but the Prosecution, because they can't rest unless they

1 have my client, have promoted my client to the third level of this
2 command structure in the diagram they produced in court, and on my part,
3 I wish to emphasis that that diagram is the product of the Prosecution
4 because there is no witness who said that my client was there.

5 Madam President, we also wish to express our perplexion at the
6 way the Prosecution asked us to go into camera just to show a graph which
7 is typed and which had no risk of disclosure, and, Madam President and
8 your Honours, we quite completely cannot comprehend the reason why we
9 needed to go into camera when none of the items in it was sourced either
10 from any witness nor were they likely to prejudice anybody.

11 The third contradiction that we wish to highlight is that the
12 graphs showed different identities for the different levels of command.
13 The first level -- the third level of command in the two graphs, the
14 Witness number 0006 calls that level of command divisional commanders.
15 The Witness number 0008 refers it to administrative -- administrative
16 coordinators. And we submit that if this was an organisation with
17 state-like structure and nature, even the names of the identities -- or,
18 rather, the names of the players in the organisation would be similar.
19 As a result of the fact that the sixth, and the seventh -- the sixth and
20 the eighth witness did not coordinate what they were saying, they have in
21 the result introduced their own identities for the third level of command
22 and we pray that the benefit of the doubt arising from that inconsistency
23 be given to us.

24 The other contradiction is in the manner with which this
25 organisation was administering discipline among its members or, rather,

1 administering commitment of membership. It is alleged by Witness number
2 0002 at EVD-PT- -- sorry, EVD-PT-OTP-00546 at page 19, that on 15th of
3 April, 2007, an oath was administered. The same alleged event of
4 administering oath is alleged by Witness number 0008, but in this case it
5 is allegedly held on 14th of December, 2007, not 15th of April, as was
6 said by the first witness. And this is alleged to have been done at
7 Sugoi. Witness number 0008, the reference of that witness is
8 EVD-PT-OTP-00551 at page 23.

9 The third oathing was allegedly held at the home of one
10 Mr. Mberia on a date that is redacted. And this is alleged by Witness
11 number 0006.

12 Madam President and your Honours, all the three witnesses,
13 Witness number 0002 on the oath of 15th of April, 2007, at Molo, Witness
14 number 0002; on 14th December 2007, in Sugoi, Witness number 0008; and
15 Witness number 0006 at Mberia's home, indicate different forms of oaths.
16 Witness number 0006 says the oath at Mberia's home was administered by
17 holding up each other's hands, just by holding hands and lifting them,
18 and that, according to him, the Kalenjin circumcision ritual in itself is
19 an act of taking an oath.

20 Witness number 0002 says the way an oath is taken and was taken
21 on 15th of April, 2007, is by taking the blood of a dog. Witness number
22 0008 says that the oath that was taken in Sugoi on 14th of December,
23 2007, is by using blood, but he doesn't say what kind of blood it is.

24 We submit that if there was any form of precision in terms of
25 whether or not there was discipline and there was a formal way of

1 recruiting, even the event of recruitment by way of an oath could have
2 been uniform and consistent, and that contradiction, your Honours, we
3 pray should be exercised in our favour, the benefit of that doubt.

4 The fifth issue that I wish to highlight a contradiction on is on
5 the question of the policy of this organisation. Witness number 0006
6 says that in a meeting in Kisumu, the first suspect, William Ruto, and
7 the second suspect, Henry Kosgey, said -- told the warriors that they
8 should proceed with the violence and should have no fear, and the reason
9 is because they were going to ascend into government and would give
10 impunity -- immunity, sorry, that they would be immunised from any
11 consequences.

12 Witness number 0008 on his part says -- at EVD-PT-OTP-00551 at
13 829 states that Ruto told them at his home that the signal that they
14 should start fighting would be upon the swearing of the president of
15 Kenya, Kibaki, Mwai Kibaki.

16 Your Honours, the policy in this scenario would be such as to beg
17 the questions whether or not, first of all, the organisers were expecting
18 to succeed in the elections that were forthcoming. Considering what is
19 alleged about Ruto saying the swearing in of Kibaki would be the signal
20 to start the war, it begs the question what would become of it if the
21 party they were contesting in ODM were to succeed. What would become of
22 what the Prosecution alleges to have been the organisation that had been
23 put in place since the year 2006 and over which a sum of 1.25 billion
24 shillings had been raised for purposes of violent. And lastly is the
25 question as what was the expectation of this organisation by way of

1 policy in -- in terms of the elections that were forthcoming.

2 The last contradiction by way of sampling that I wish to
3 highlight is what is said by Witness number 0006. Witness number 0006 at
4 EVD-PT-OTP-00487 at 301, paragraph 891 to 901, said that there did exist
5 something called a Emo Foundation and that Emo accommodated all Kalenjins
6 despite of party affiliation, regardless of their party affiliation.

7 Within the same interview he proceeds at paragraph 1031 -- 1013
8 to 1039 to say Emo Foundation's objectives were to ensure that all
9 Kalenjins were in a political party called ODM, and that those who
10 supported Kibaki and Musoka couldn't join Emo.

11 Madam President, we -- and your Honours, we pray that the fact
12 that the inability even by these witnesses to say one thing consistently
13 is clear indication of the fact that they're not saying the truth and
14 that this whole story is a fabrication. In regard to that same Witness
15 number 0006, he alleges that Emo Foundation owns a bank called Emo bank.
16 And in his own words, that Emo bank is the tallest building in central
17 business district in Nairobi. The date of the interviews is redacted.
18 However, this interview must have taken place between the year 2007 and
19 the year 2010. There are not many buildings that are very tall in
20 Nairobi, and surely if the Prosecutor were interested, and the office of
21 the chief Prosecutor has made several visits to Kenya, it would not be
22 very difficult to locate the existence, if at all, of the said bank.

23 On our part, Madam President, we hold out the position that in
24 fact no such bank exists, and a witness will come and testify on whether
25 any bank of such a nature exists with a resource base of a sum of over

1 1.2 billion.

2 Madam President, it will be noticed that the Prosecution in
3 presenting this case in the first instance acknowledges that they do not
4 believe their witnesses but still have the cheek to come and ask your
5 Honours to believe the witnesses they do not believe in themselves. And
6 I have particularly in mind Witness number 0006, whose testimony has been
7 extensively referred to in this court, including the fact of the planning
8 of the violence and the meetings held. The same witness is the one who
9 produced Exhibit number EVD-PT-OTP-00399 in which the hierarchy of the
10 command structure rests in the hands of the Prime Minister of Kenya. He
11 secondly says that's funds that were used to fund this violence were from
12 the Prime Minister.

13 The Prosecution in their presentation to this Court said that the
14 head of the command structure in this -- in this -- in this violence that
15 was perpetrated by the three suspects and others, the head of it was one
16 William Ruto, the first suspect. Secondly, they say that all the funds
17 came from William Ruto, the first suspect, and Henry Kosgey, the second
18 suspect.

19 Madam President, it immediately is clear that that Witness number
20 0006 has been treated with suspicion by the Prosecutor, and his evidence
21 has been excluded to the extent not convenient to the Prosecution. And
22 we submit that the Prosecution themselves have suggested to you what kind
23 of a mindset should obtain in determining whether or not to confirm these
24 charges being the posture that, in fact, the witnesses that they have
25 sought to have to rely on are not believable.

1 Madam President, we also wish to submit that the Prosecution have
2 continuously adjusted their case right from the date the summons were
3 issued. It will be recalled that when the summons were issued, the
4 allegation against the three suspects was that from the radius of
5 25 kilometres from the home of the first suspect, they exterminated and
6 killed every Kikuyu, Kamba and Kisii. That allegation has been dropped
7 in the document containing charges as presented to this Court.

8 The second alteration that the Prosecutor has done is that all
9 the witnesses say that the post -- that the election violence was a
10 result of an attempt to obtain power in Rift Valley in terms of election
11 process, and that would be for purposes of the year 2007.

12 When we made the remarks in the opening address that in fact they
13 have placed all the violence after the elections and therefore there was
14 no logical purpose in what the Prosecutor was saying, the Prosecution
15 have -- and the Office of the Prosecutor, we are saying, has changed the
16 argument to say that the violence was for purposes of the elections
17 expected to be in the year 2012.

18 We wish to make an emphasis on this, that none of the witnesses
19 have said that, and it is coming for the first time from the mouths of
20 the Office of the Prosecutor, and it is an adjustment that was done on
21 the floor between the period we appeared before you on 1st of September
22 and when they were given audience.

23 The third alteration that they have adopted in the course of
24 these proceedings, your Honours, is that in their document containing
25 charges, they say the violence was perpetrated between the period of the

1 end of December 2007 and the end of January 2008. We highlighted to the
2 Court that organisational policy would be such as to necessitate that the
3 violence takes longer than the three years that they have captured in
4 their document containing charges. Three days.

5 Owing to that observation we made, the Office of the Prosecutor
6 now has said that the organisational policy for -- was formulated so as
7 to ensure that the violence would be perpetrated in the shortest time
8 possible. Your Honours, we wish to observe that first of all, that is
9 inconsistent with their own document containing charges; and secondly, is
10 not something that is derived from the witness statements. It is
11 entirely from the Office of the Prosecutor. And in that regard,
12 Madam President and your Honours, we submit that the Office of the
13 Prosecutor should be treated with circumspection in view of the fact that
14 they keep adjusting their case.

15 It is alleged for purposes of this case that the intention of the
16 three perpetrators was to make sure that Rift Valley is exclusively a
17 Kalenjin area, explicitly and impliedly. And probably I need to explain
18 that. In terms of the perpetrators, there's a mixture of whether it is a
19 question of wanting Kalenjins exclusively in Rift Valley or it is ODM,
20 and we pray that that ambiguity be given to our benefit.

21 Your Honours, we wish to submit that the Prosecution themselves
22 have produced a map showing that there are areas predominantly occupied
23 by people of a political party called PNU which they say it the target of
24 the aggressors in this case, the three suspects. The witness who
25 testified before this Court confirmed that in fact those areas have

1 already generated Members of Parliament from those political parties.

2 Your Honours, we submit that if it were true as the Prosecution
3 was trying to persuade you to be true, it would be the case that if the
4 intention was to acquire power, then the areas that were likely to vote
5 Members of Parliament through a political party called the PNU and did
6 actually do that would be the prime candidates for the attack, as opposed
7 to the small areas where the concentration of Kikuyus and PNU -- Kikuyus
8 or otherwise the PNU members are. And for that argument, Madam President
9 and your Honours, we make reference to document EVD-PT-OTP-00275 produced
10 by the Office of the Prosecution and highlighting the concentration of
11 persons other than Kalenjins and, in the alternative, persons other than
12 ODM members. And we submit that those would be the prime candidates for
13 such an attack if there was any plan at all.

14 We -- we also wish to submit, as I have already mentioned, that
15 the names and the identity of the aggressors is unclear, because on the
16 one hand they -- the Office of the Prosecution say the aggressors were a
17 political party called ODM. They very readily also use the aggressors as
18 being the Kalenjin community and they have highlighted identities of the
19 elders, the identities of youths whom they say are the warriors,
20 businessmen, athletes, and every other outfit that exists in the Kalenjin
21 community and says the roles of elders, the structures of Kalenjins were
22 used to perpetrate this violence.

23 Your Honours, we pray that in terms of the law requiring
24 specificity in the document containing charges, it should have been made
25 clear whether the people under trial are people subscribing to the

1 political party called ODM or it is the Kalenjin community considering
2 their culture, their structures and their roles -- and the roles of the
3 various people in it, and we submit on that account that this -- these
4 charges should not be confirmed for lack of specificity.

5 On those premises, your Honours, we pray that you do find that
6 there's reason to refuse to confirm the charges in this case.

7 At this point, your Honours, I pray to be given permission to
8 allow my colleague from my team to make submissions on the item of hate
9 speech and the reliability of the witnesses intended to be relied on by
10 the Prosecution.

11 PRESIDING JUDGE TRENDABILOVA: So your participation in the
12 presentation is over for the moment.

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

14 PRESIDING JUDGE TRENDABILOVA: So --

15 MR. KIGEN-KATWA: Yes, my --

16 PRESIDING JUDGE TRENDABILOVA: -- let us --

17 MR. KIGEN-KATWA: My colleague --

18 PRESIDING JUDGE TRENDABILOVA: -- proceed with the other member
19 of the team.

20 MR. KIGEN-KATWA: Most obliged.

21 MS. HAMBRICK: Good afternoon, Madam President, your Honours.

22 I'm here to make two key assertions which individually and collectively
23 illustrate the lack of persuasiveness in the case brought by the
24 Prosecution to implicate Mr. Sang in the post-election violence.

25 Number one, the Prosecution case on its own merits is weak and

1 does not meet the sufficient grounds threshold. My colleagues have given
2 numerous examples of how Prosecution witness accounts contradict each
3 other and fall apart when compared to Defence evidence.

4 Secondly, the Prosecution, realising the inherent weaknesses in
5 its case, deliberately did not investigate or disclose exculpatory
6 evidence per their obligation under Article 54.

7 The Prosecution has previously acknowledged that it has no reason
8 to disbelieve its witnesses. The Lubanga Defence team recently reminded
9 us that the Prosecution once argued in response to an abuse of process
10 application that he had not investigated the accounts put forth by his
11 witnesses because he considered --

12 PRESIDING JUDGE TRENDAFILOVA: Ms. -- I'm sorry I forgot your
13 name.

14 MS. HAMBRICK: Ms. Hambrick.

15 PRESIDING JUDGE TRENDAFILOVA: (* Microphone not activated).

16 THE INTERPRETER: Madam President, you can't be heard.

17 PRESIDING JUDGE TRENDAFILOVA: (* Microphone not activated) ...
18 they are excellent and most professional, but still there are some
19 limits. Please slow down.

20 MS. HAMBRICK: Sure. The Prosecutor had argued that he
21 considered there was no reason to call into question the testimony of his
22 witnesses. You can find this in the Lubanga Defence team's closing
23 arguments in the transcript of the 26th of August, 2008. Sorry, that's
24 the response to the abuse of process application.

25 As a corollary, it seems that the Prosecutor believes he has no

1 reason to investigate credibility issues with respect to his witnesses.
2 It seems the Prosecutor has not learned his lessons from Lubanga. Far
3 from it. The Prosecutor has a statutory obligation to investigate
4 exculpatory evidence in equal part with incriminating evidence. This
5 necessarily includes questioning the credibility, reliability, and motive
6 of its own witnesses. In this case, as we will demonstrate in due
7 course, the Prosecution has consistently failed in this regard.

8 Before I move on to any specifics, I will briefly outline a few
9 points of jurisprudence from other confirmation decisions. I note first
10 Abu Garda, the confirmation of charges decision from the 8th of February,
11 2010. Therein, the charges were not confirmed against Abu Garda, because
12 the Chamber found inconsistencies between Prosecution accounts of Abu
13 Garda's presence at various alleged meetings (see paragraph 173).

14 Furthermore, the Pre-Trial Chamber was of the view that:
15 "... inconsistent, ambiguous, or contradictory evidence may
16 result in the Chamber reaching a decision not to confirm the charges ...
17 evidence of such a nature is not sufficient to establish substantial
18 grounds to believe that the suspect committed the crimes with which he is
19 charged," and that is at paragraph 43.

20 Furthermore, in the Katanga and Ngudjolo confirmation of charges
21 decision from the 30th of September, 2008, at paragraph 116, it says:

22 "... the Chamber retains discretion in evaluating any
23 inconsistencies and in considering whether the evidence, assessed as a
24 whole, is reliable and credible. Similarly, the Chamber retains the
25 discretion to accept or reject any of the 'fundamental features' of the

1 evidence."

2 I note that this is in contrast to the types of arguments that
3 the Prosecution has made recently in attempting to narrow the scope of
4 what the Defence is able to challenge during the Confirmation of Charges
5 Hearing. We therefore ask the Chamber to reject the fundamental features
6 of the evidence of Witness 0002, Witness 0006, and Witness 0008
7 pertaining to allegations of meetings and of broadcasts and find that
8 there are no sufficient grounds to believe that the alleged meetings or
9 broadcasts ever took place.

10 If, your Honours, you reject these fundamental features, the
11 entire Prosecution case should fail. This is on the basis that the
12 existence of the alleged network and its alleged criminal purpose are
13 predicated on these alleged meetings. In essence, we submit that
14 Joshua Sang cannot be held criminally liable in regard to the
15 post-election violence in Kenya.

16 You may ask, then, given the dearth of credible evidence that has
17 been presented by the Prosecution, why does this case exist? Simply put,
18 it is because of this failure to investigate. In our submission, there
19 has been, at best, a dereliction of duty on the part of the Prosecution
20 with respect to the case against Mr. Ruto, Mr. Kosgey, and Mr. Sang.

21 As my colleagues have previously argued, the Prosecution did not
22 do even a cursory search of public records. Kenya is a functional state.
23 Transcripts of broadcasts, newspaper articles, media clips are all
24 available to the Prosecution had it been interested in knowing what
25 really happened. I will not go back over the examples already presented

1 by my colleagues, but there are other glaring examples to which I need to
2 draw your attention. I will start with Witness 0008.

3 In his statement contained in at EVD-PT-OTP-00551 at pages 0832
4 to 33, therein he stated that on the 6th of December, 2007, there was an
5 ODM rally in Kipkarren where Mr. Ruto addressed the crowd and told the
6 youths to prepare to barricade roads, to destroy property, to kill the
7 Kikuyus. Witness 0008 then told the Prosecution that at this rally,
8 Citizen TV was present. He further told the Prosecution that they could
9 check the archives of "The Standard" and the "Nation" newspapers in order
10 to substantiate his account.

11 The Prosecution has not disclosed to us any clip from Citizen TV
12 or from any contemporaneous newspaper. Perhaps there was a shortage of
13 time on the part of the Prosecution. Maybe there was a shortage of
14 resources. We submit the Prosecution just wasn't interested. Maybe it's
15 because they learned that --

16 THE INTERPRETER: Message from the English booth:
17 Madam President, the interpreters in the English booth do not have in
18 their possession -- in the French booth, I beg your pardon, do not have
19 in their possession the text that is being read.

20 MS. HAMBRICK: -- which should, in theory, corroborate their
21 witnesses' accounts. They find that the public records, in fact,
22 discredit their witnesses.

23 Let's look at Witness 0001. In his statement at OTP-00159 at
24 1221, and 00160 at 1259 to 1260, therein Witness 0001 alleges that at a
25 rally in Kapsabet, one councillor Ishmael Choge was speaking and received

1 a phone call during his address from Ruto who told Choge that they should
2 set fire. Witness 0001 gave to the Prosecution DVDs of the recordings of
3 this rally. Witness 0001, together with the Prosecution, watched these
4 DVDs recordings. Neither the witness nor the Prosecutor could find the
5 part in the rally where Ishmael Choge received a phone call from
6 Honourable Ruto.

7 Your Honours may be interested to note that despite the
8 Prosecution's clear obligation to disclose these videos, the Prosecution
9 did not. We had to ask for the videos before the Prosecution made them
10 available to us. We submit that they withheld this information because
11 the Prosecution knew that Witness 0001's account would not otherwise
12 withstand scrutiny. The videos I have referred to are at OTP-00305 and
13 00130.

14 We submit that the Prosecution's case is built around statements
15 obtained from career witnesses, i.e., which is who have spoken to every
16 commission, every court investigating post-election violence in Kenya.
17 The Prosecution has failed to independently investigate the post-election
18 violence, instead relying primarily on the work of these organisations.

19 The Prosecution has relied extensively on documentation from
20 Human Rights Watch, from the Kenyan National Commission for Human Rights,
21 and from the Commission of Inquiry into post-election violence, or the
22 Waki commission. These reports all have a common thread. The Court
23 should be wary of relying on this evidence. Indeed, there is a tainted
24 link between the witnesses relied on in these reports and the witnesses
25 the Prosecution now asks you to rely on.

1 In the Status Conference held here on the 18th of April, 2011,
2 the Prosecution indicated that they wanted to call ten live witnesses.
3 Your Honours, we have seen none. It is clear to us why the Prosecution
4 has not called live witnesses.

5 We suggest that the Prosecution evidence is, in fact, contrived
6 and manufactured and could not have withstood the rigours of
7 cross-examination. Instead, Mr. Sang has been brought here as a victim
8 of a scheme designed to implicate Mr. Ruto and, by extension, members of
9 his alleged Kalenjin network.

10 At this juncture, I would like to watch a video-clip from a
11 Kenyan news station. This is OTP-00464. In this clip, you will see two
12 witnesses who provided testimony for the CIPEV commission and for the
13 Kenyan National Commission on Human Rights. Two witnesses who were
14 recruited to testify for the ICC Prosecution and who have since recanted
15 their statements.

16 PRESIDING JUDGE TRENDAFILOVA: Just while the Court Officer is
17 helping us with the video, I would like to make the point to Ms. Hambrick
18 that we have agreed before the commencement of the presentation of the
19 parties in case you have already a paper, you're going to give it the
20 previous day to the interpreters.

21 MS. HAMBRICK: I did, your Honours, yesterday.

22 PRESIDING JUDGE TRENDAFILOVA: But today you didn't give it,
23 Ms. Hambrick, and you shouldn't at least make it almost impossible for
24 them to do their job. So you should speak slowly.

25 MS. HAMBRICK: Your Honour, thank you.

1 PRESIDING JUDGE TRENDAFILOVA: I'm sorry, Judge Kaul would like
2 to make a point as well.

3 JUDGE KAUL: Yes. Ms. Hambrick, I see here on the -- on the
4 screen a sentence in which -- in which you basically say -- I cannot see
5 it anymore here, otherwise I would quote it, said the Prosecutor has
6 constructed a scheme to implicate, to implicate Mr. Ruto and others. I
7 find this language inappropriate. The Office of the Prosecutor is an
8 organ of this court. The language which you are use is close to, well, a
9 misconduct or an abuse of prosecutorial powers. I cannot recall that any
10 member of this Court, of this Chamber, or any member of the team of the
11 Office of the Prosecutor has used similar negative and, if not,
12 aggressive language with regard to the adversarial party. So I would be
13 pleased if you could remain within the realm of language which is
14 commonly and usually and traditionally accepted at -- at this court and
15 which is in conformity with the standards that participants in this --
16 with the standards of mutual respect that participants in these
17 proceedings should demonstrate.

18 I hope that I have made my feelings very clear, and I will be
19 listening with great attention to the continuation of your pleadings.
20 Thank you very much.

21 MS. HAMBRICK: Thank you, your Honour, and I'm sorry if I've
22 caused any undue -- if I've made any undue remarks. I do want to clarify
23 that I have said the Prosecution evidence is contrived, not necessarily
24 that the Prosecution themselves are responsible for it.

25 PRESIDING JUDGE TRENDAFILOVA: Thank you, Ms. Hambrick. Let us

1 proceed with the video if the Court Officer is ready. Is there sound to
2 the video?

3 MS. HAMBRICK: There should be, your Honour.

4 (Video-clip played)

5 "Yesterday, they sent affidavits to the media claiming they were
6 bribed to give false evidence on post-election violence. Today, two men
7 who claim to have been witnesses protected by the Kenyan National
8 Commission on Human Rights came forward to back Ruto's recent
9 accusations. The man repeated claims that Commissioner Hassan, Omar
10 Hassan, promised them a windfall to implicate Ruto in the violence in the
11 Rift Valley. The two gave journalists a tour of their residences, one on
12 Lenana road and the other at Chaka place, where they claim they have been
13 living at the commission's expense with a monthly stipend of 60.000
14 shillings. They allege this was meant to induce them to malign Ruto.

15 "I do not agree with Commissioner Hassan, because he wanted us to
16 change our statement, and in that statement every witness must mention
17 the name of Honourable William Ruto.

18 "Sources say Wakesa had previously approached the media, claiming
19 his life was in danger after International Criminal Court investigators
20 rejected him as a witness. The two claim that they were promised that if
21 they successfully implicated Ruto, they would get a payment of 1.5
22 million shillings.

23 "As the two made the fresh allegations, the Eldoret North MP was
24 at the CID headquarters to lodge a formal complaint against the Kenyan
25 National Commission on Human Rights over the allegations that they

1 coached witnesses.

2 "The commission was completely unable to answer to the questions
3 I had asked them, which to me clearly indicates that the commission has
4 something to hide. And it is really unfortunate that a commission that
5 is supposed to look after the human rights of every Kenyan has chosen to
6 be the body that is going to subvert the course of justice.

7 "All this come as the high court set the date to hear Ruto's case
8 seeking to have his name removed from the KNCHR report on post-election
9 violence. Three Judges will hear the case on the 22nd and the 23rd of
10 February next year."

11 MS. HAMBRICK: Thank you. Madam President, at this point I would
12 like to request going into private session for about ten minutes.

13 PRESIDING JUDGE TRENDAFILOVA: But now we have just four minutes
14 left. Maybe after the break we shall give you again this opportunity.

15 MS. HAMBRICK: Thank you.

16 PRESIDING JUDGE TRENDAFILOVA: Ms. Hambrick, I have received a
17 message that, actually, yesterday evening you gave your speaking notes to
18 the interpreters, these that you're using today.

19 MS. HAMBRICK: Yes, ma'am.

20 PRESIDING JUDGE TRENDAFILOVA: But anyway, even so, I withdraw my
21 kind of reprimand, but, please, still, you have to speak slowly.

22 MS. HAMBRICK: Speak slowly. Yes, your Honour.

23 PRESIDING JUDGE TRENDAFILOVA: So we adjourn --

24 MS. HAMBRICK: Could I also just request -- I realise this may be
25 toward the end of our three hours, but we would like that we take between

1 15 and 20 minutes of the time allocated to our witnesses so that we can
2 finish our submissions.

3 PRESIDING JUDGE TRENDAFILOVA: We are not going to object to
4 this.

5 MS. HAMBRICK: Thank you.

6 PRESIDING JUDGE TRENDAFILOVA: The parties should be given all
7 opportunities to best present their cases.

8 MS. HAMBRICK: Thank you.

9 PRESIDING JUDGE TRENDAFILOVA: So the hearing is adjourned for
10 half an hour.

11 COURT USHER: All rise.

12 Recess taken at 3.56 p.m.

13 On resuming at 4.29 p.m.

14 (Open session)

15 COURT USHER: All rise.

16 PRESIDING JUDGE TRENDAFILOVA: Please be seated.

17 We resume our session with Ms. Logan having 10 to 15 minutes.

18 MS. HAMBRICK: I would say 15 to 20.

19 PRESIDING JUDGE TRENDAFILOVA: Okay. 15 to 20, it's your time.
20 The floor is over to you.

21 MS. HAMBRICK: Before we begin, I just want to ensure that we're
22 in private session.

23 PRESIDING JUDGE TRENDAFILOVA: Court Officer, would you arrange
24 this.

25 (Private session at 4.30 p.m.)

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6 (Open session at 5.02 p.m.)

7 MS. HAMBRICK: You will hear in this clip a portion of an

8 interview of members of the Kenyan media, including my client Joshua Sang

9 in his capacity as a broadcast journalist, interviewing the ICC

10 Prosecutor Moreno-Ocampo in early December 2010, less than two weeks

11 before my client was summoned to appear before this Chamber.

12 (Audiotape played)

13 "... Do the job. They are those in charge to protect, but it's a

14 unit of the court.

15 "(* Indiscernible) and what people want is they would like to see

16 justice, because as some of the witnesses who have come out, they come

17 from those areas, from that community, and they have said, like one

18 William Rono who was the ringleader. He claimed and he said that he's

19 the one who organised the others to come and witness because they were

20 called to do so. So by saying that, people now are believing that.

21 Whatever case you will have, it will be false witness, and that will not

22 go well.

23 "No. Now, this -- this case will be handled by the ICC. The

24 other cases is basically what Kenyans should decide. But on the first

25 point, I will not debate, but I was making clear the point the person who

1 were talking in the media that they receive bribes are no more witnesses.
2 So they have no -- they are no more witnesses, so no evidence is based on
3 them.

4 "And people have to understand that the (* indiscernible)
5 evidence will be presented before the Judges. And you can see the Judges
6 at the ICC were tough. In my first case against Thomas Lubanga, they
7 stayed the proceedings twice. It was the first case of the ICC and twice
8 they -- so the Judges will be with no mercy to the Prosecutor. No mercy,
9 merciless. So the people have to trust. Okay, I will present my case
10 and the Judges will decide and they have no interest to be biased. On
11 the contrary.

12 "Judges and also myself, we are building this International
13 Criminal Court so we cannot base on wrong evidence, so that's why for
14 that we are very careful how to present the evidence. People can talk
15 and we will not debate with them because we will debate in court, but the
16 people from all the regions have to trust, okay, this will be debated
17 properly in court and so they have to wait for debate there. I believe,
18 yes, it's important for Kenya to define who are responsible of the crimes
19 committed and that's the way nothing of the past prevent the past. That
20 is, I think, the Kenyan decision, not just my decision.

21 "You have to be clear. I will not prosecute because elections.
22 I will not prosecute because parties or might -- this community or this
23 community. My focus is who ordered the crimes and the crimes are not
24 about political parties. I'm not making political (* indiscernible)
25 here. You will vote so you will make the political decisions. When you

1 vote, you decide. But I follow the evidence to understand who order
2 these crimes. Who ordered to attack and remove these people? Who
3 ordered to kill people? That's the only thing I do."

4 MS. HAMBRICK: In the interests of time, we have cut the clip
5 short, but certainly Madam President and your Honours can listen to the
6 entirety at your leisure.

7 In conclusion on this point, the Defence submits that given the
8 unreliable and incredible nature of the information provided to the
9 Prosecution by these career witnesses, we submit that the Prosecution has
10 not discharged its burden of providing substantial grounds to believe
11 that Mr. Sang has contributed in any substantial way to any alleged
12 network with any alleged meetings in respect of any of the crimes
13 committed during the period of post-election violence in Kenya.
14 Therefore, we request that you do not confirm the charges brought against
15 Mr. Sang.

16 I now turn to a different topic entirely, and that is the
17 question of individual criminal liability of Mr. Sang under
18 Article 25(d)(3) of the Statute.

19 Mr. Sang has been charged for actions taken in his capacity as a
20 journalist, as a broadcaster, but we must keep in mind that Kenyan
21 vernacular media is not what is on trial here. Mr. Sang, an individual,
22 is who is on trial, and we submit that this form of accessory liability
23 cannot be used to confirm the charges against Mr. Sang, especially when
24 jurisprudence in relation to hate speech is evaluated and analysed
25 *vis-a-vis* the alleged comments that Mr. Sang or others made over Kass FM.

1 I will make briefly four points. First, Mr. Sang lacked the
2 requisite *mens rea* to contribute to a crime against humanity. The
3 Prosecution asks the Chamber to infer Sang's intention primarily from
4 meetings which we submit never occurred.

5 Secondly, there is no nexus as required between Sang's broadcasts
6 and the commission of crimes. The Prosecution has shown neither a causal
7 link between the words spoken on air and the conduct of unnamed
8 perpetrators during the post-election violence, nor a temporal link
9 between the same. I refer you generally to two ICTR cases, Nahimana and
10 Bikindi. I will have to come back in more detail to those in our written
11 submissions.

12 Thirdly, political speech, political rhetoric, especially during
13 democratic elections is protected. This is also upheld by the Bikindi
14 and Nahimana judgements.

15 Fourthly, Mr. Sang cannot be held liable for the views of others
16 expressed over Kass FM. Journalists by their nature have a right to
17 publish the views of others on their programmes. I would draw your
18 attention to recent events where the BBC has interviewed individuals such
19 as Saif Qadhafi and recall the comments that Saif Qadhafi made on air and
20 broadcast by the BBC. We submit that there is no difference between the
21 actions of Mr. Sang at Kass FM and the BBC *vis-a-vis* the comments of
22 Saif Qadhafi were such comments ever aired on Kass FM at all.

23 In conclusion, your Honours, Madam President, we submit that the
24 Prosecution has not shown that under Article 25(3)(d), Mr. Sang can be
25 held liable for contributing in any way to the commission of crimes as

1 charged. Thank you.

2 PRESIDING JUDGE TRENDAFILOVA: Thank you, Ms. Logan.

3 Now we came to the point when we will proceed with the
4 questioning of the first witness of Mr. Sang.

5 Court Officer, would you kindly proceed with inviting the witness
6 to the courtroom.

7 MS. HAMBRICK: At this time I will hand over to my colleague
8 Mr. Joel Bosek.

9 PRESIDING JUDGE TRENDAFILOVA: Yes, it's the team to organise its
10 presentation to the best of your client.

11 (The witness entered court)

12 WITNESS: WITNESS KEN-D11-P-0002

13 PRESIDING JUDGE TRENDAFILOVA: Good afternoon.

14 THE WITNESS: Good afternoon, your Honour.

15 PRESIDING JUDGE TRENDAFILOVA: Would you for the moment take a
16 seat.

17 THE WITNESS: Thank you, your Honour.

18 PRESIDING JUDGE TRENDAFILOVA: Just to give you some
19 explanations.

20 THE WITNESS: Thank you, your Honour.

21 PRESIDING JUDGE TRENDAFILOVA: You're now before
22 Pre-Trial Chamber II of the International Criminal Court. You're called
23 to give testimony in the case of the Prosecutor against Mr. Ruto,
24 Mr. Kosgey, and Mr. Sang. You're going to be questioned first by the
25 Defence team of Mr. Sang, who has invited you to be one of his live

1 witnesses to give testimony before this Chamber of the court.
2 Thereafter, if the other Defence teams would have a question to pose on
3 you, at the end it will be Prosecutor, but finally it's always the
4 Defence to ask, if need be, any new questions.

5 I would like in addition to inform you that pursuant to the
6 statutory documents of the International Criminal Court, the witnesses
7 shall make a solemn undertaking as to the truthfulness of the evidence
8 that they are going to provide to the Court. Thus you're required to
9 give an undertaking as to the truthfulness of what you're going to tell
10 us. I would also like to inform you that again pursuant to the statutory
11 documents of our institution, the International Criminal Court, the court
12 has jurisdiction over the offence of giving false testimony, and also it
13 has jurisdiction if the witness refuses to comply with the directions of
14 the Court provided in Rules 65 and 171 of the Rules of Procedure and
15 Evidence.

16 Do you understand --

17 THE WITNESS: Yes, your Honour.

18 PRESIDING JUDGE TRENDABILOVA: -- your obligations and the
19 expectations of this Chamber regarding your testimony?

20 Finally, although we have received the report of the Victims and
21 Witnesses Unit, according to which the Victims and Witnesses Unit have
22 explained to you the right of witnesses appearing before this Court
23 against self-incrimination as provided by Rule 74 of the Rules of
24 Procedure and Evidence, but still this Chamber finds its duty to once
25 again to clarify to you first that you may object to making any

1 statements that might tend to incriminate you, and this is provided by
2 Rule 74(3)(a).

3 Second, we have to assure you that the evidence provided in the
4 responses to the questions that are going to be put to you, the
5 information, the evidence, will not be used for the purposes of any
6 investigation and prosecution before this court, only if you commit the
7 offence against the administration of justice or for misconduct before
8 the Court, the court still has jurisdiction to deal with these cases.

9 After having said that, now I invite to you stand up only for the
10 purposes of swearing in, and I would ask the Court Officer to assist you
11 in this.

12 COURT OFFICER: I solemnly declare.

13 THE WITNESS: I solemnly declare.

14 COURT OFFICER: To tell the truth.

15 THE WITNESS: To tell the truth.

16 COURT OFFICER: The whole truth.

17 THE WITNESS: The whole truth.

18 COURT OFFICER: And nothing but the truth.

19 THE WITNESS: And nothing but the truth.

20 PRESIDING JUDGE TRENDABILOVA: Thank you. Now, please be seated.

21 THE WITNESS: Thank you, your Honour.

22 PRESIDING JUDGE TRENDABILOVA: Now I would like you to identify
23 yourself, please, to everyone who is in this court and who is following
24 the proceedings on the internet also by stating your full name, the date
25 and place of your birth, your marital status, the languages spoken, and

1 your occupation, current occupation. You have the floor.

2 THE WITNESS: Thank you, your Honour. My name is Professor
3 Paul Kiprono Chepkwony. I was born on the 10th of November, 1970, to
4 Kericho county village called Kapsaos. At the moment I live at Kiongo (*
5 phon) village, Ainamoi constituency, Kericho county. I am married with
6 four children.

7 I am an associate professor in the department of chemistry and
8 biochemistry, Chepkoilel University College which is under Moi University
9 in Eldoret. At the university as well I'm a member of the academic
10 management team, as well as the branding committee. I also happen to be
11 an inventor, and I've trained as a computer systems administrator in
12 Germany and traditional Chinese medicine in China. I'm also motivational
13 speaker, and one of the countries I visit every year for this purpose is
14 the United States of America where, among other things, I talk about
15 alcohol, drug abuse, and how to rehabilitate drug addicts, as well as
16 research and development in the field of herbal or homeopathic medicine.
17 At my place of work I stay at the village called Oasis, in Uasin Gishu
18 county. Thank you, your Honour.

19 PRESIDING JUDGE TRENDAFILOVA: Thank you, Professor Kiprono, for
20 the thorough presentation of any data related to you.

21 Now the floor is over to the Defence team of Mr. Sang. I ask you
22 to please speak and to ask your questions slowly so that the interpreters
23 can do their job.

24 MR. BOSEK: Thank you very much, Madam President. And good
25 afternoon, Madam President and your Honours.

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1 Questioned by Mr. Bosek:

2 Q. Professor Chepkwony, I'm turning to you. Tell this Honourable
3 Court where you obtained your university degrees and which years up to
4 your Ph.D. in case you have any?

5 A. Mr. Defence, I obtained my first degree, bachelor of science
6 chemistry major from the Jomo Kenyatta University of Agricultural and
7 Technology in 1993. And then proceeded on for master of science in
8 chemistry at Nairobi University, and I obtained it in 1997. I did obtain
9 my Ph.D. in organic chemistry in 2002 at the Jomo Kenyatta University of
10 Agriculture and Technology.

11 Q. Now that you have told this Honourable Court that you are a
12 motivational speaker and sometimes that you teach, kindly tell us as to
13 how many media houses in Kenya that broadcast in Kalenjin language.

14 A. We have Chamgei FM, Radio Njili (* phon), Kass FM, and Sayare
15 Radio stations.

16 Q. Where are those stations based within the Republic of Kenya?

17 A. Kass FM International is based in Nairobi. Chamgei is based in
18 Nairobi as well. Radio Njili is based in Kericho, Kericho county.
19 Sayare Radio is based in Eldoret.

20 Q. And what of the KBC, that is Kenya Broadcasting Communication --
21 or Corporation, sorry, does it also have Kalenjin vernacular programmes
22 by any chance?

23 A. Ah, Mr. Defence, I forgot we have national radio station KBC
24 based in Kisumu. It also broadcasted -- it broadcasts in Kalenjin but
25 for a limited length of time.

1 Q. Okay. You've named five media houses that broadcast in Kalenjin
2 language. Have you ever visited any of these media houses?

3 A. I have visited four of them; namely, Kass FM International,
4 Chamgei FM, Radio Njili, and Sayare Radio station.

5 Q. Okay. I'm interested in your interaction with Kass FM
6 International. When are -- or how many times have you been there, and
7 what was the purpose of your being at Kass FM International, in case you
8 have ever been there?

9 A. I do not remember exactly how many times I have given talks on
10 Kass FM. However, I have been invited in many occasions to give talks on
11 how to improve academic performance in secondary schools, drug, alcohol
12 abuse and how to rehabilitate addicts. I was also invited one time
13 because I was a parliamentary candidate in 2007 to present a vision for
14 my constituents.

15 Q. Professor Chepkwony, during your presence at Kass FM
16 International, have you ever interacted with one Joshua Kirwa Arap Sang?

17 A. Yes, Mr. Defence.

18 Q. And what kind of interaction did you have with
19 Mr. Joshua Arap Sang?

20 A. It was that between a professional broadcaster and a resource
21 person and that is myself.

22 Q. Was he, like, interviewing or can you explain to this Honourable
23 Court as to whether you went there as a guest speaker and Arap Sang
24 guided you in addressing the audience?

25 A. Yes, Mr. Defence, I went as a resource person and the

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1 interviewer, and it was more than one time has been Mr. Joshua Sang.

2 Q. And tell this Honourable Court what kind of -- or during your
3 interviews and during the course of your teaching, are there people who
4 will in one way or another ask you questions?

5 A. Yes, Mr. Defence. Most of the programmes for which I have been
6 invited to at Kass FM are live radio programmes in which callers call
7 live to the studio to ask questions directly to me when I am a resource
8 person.

9 Q. How do they call? They make telephone calls? Is that what
10 you're saying?

11 A. They make telephone calls, but they also do send SMS or short
12 message texts.

13 Q. I'm interested in the ones that you have said make telephone
14 calls, and I want to ask you this question, Professor, as to whether you
15 are able to establish as to who is calling. Is there a gadget that will
16 show the name of the person who is calling at Kass FM?

17 A. Usually the caller's identity is not known.

18 Q. Yes.

19 A. The person at the station will just pick a phone call and ask the
20 caller to identify himself or herself.

21 Q. So one will not be able to identify who is calling. Is that what
22 you're telling this Honourable Court?

23 A. Yes, Mr. Defence.

24 Q. Okay. Kindly address the Honourable Court. I'm sorry, I should
25 have told you earlier.

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1 Let's go on. Other than being -- having gone to Kass FM as a
2 presenter, do you also, in one way or another, listen to Kass FM
3 International?

4 A. Yes, my Honours, I do listen to Kass FM International.

5 Q. Okay. How often do you listen to Kass FM radio?

6 A. As often as every day.

7 Q. So you listen to it while you're in your house maybe?

8 A. And also while I'm driving to work, I have a car radio which is
9 more or less permanently tuned to Kass FM.

10 Q. Are you able to identify the voice of Mr. Arap Sang?

11 A. Very well, my Honours.

12 Q. And have you ever had Mr. Joshua Arap Sang inciting people to
13 violence or speaking about violence or advocating violence in any way?

14 A. No, my Honours.

15 Q. Tell me -- or tell this Honourable Court, sorry, whether you're
16 able to identify Joshua Arap Sang?

17 A. Yes, my Honours. Joshua Arap Sang is a short Kenyan male about
18 1 metre high and he's the one seated to the right -- to the left of
19 Mr. Defence. That is Joshua Arap Sang.

20 Q. So he's somebody you've known for a while and quite well.

21 A. Yes, my Honours.

22 Q. It should be "Your honours," sorry. "Your Honour." You are
23 addressing the Honourable Court. Just say, "Your honour."

24 A. All right. Thank you for the correction.

25 PRESIDING JUDGE TRENDAFILOVA: The counsel is correct. It is the

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1 Chamber, it is the Court that needs your explanations and information in
2 order for us to take a decision at the end.

3 THE WITNESS: Thank you for that correction. I'll deal with it
4 appropriately. Thank you.

5 MR. BOSEK:

6 Q. In the course of listening to Kass FM, have you heard
7 Joshua Arap Sang or any other broadcaster use the following words:
8 Number one, "kimurgelda"; number two, "kamama"?

9 A. No, my Honour.

10 Q. Just say "your Honour."

11 A. Oh, sorry. No, your Honour.

12 Q. So you've never heard him utter such words?

13 A. No, your Honour.

14 Q. Do you speak the Kalenjin language?

15 A. Very well. Very eloquently.

16 Q. And that's your first language?

17 A. Yes, your Honour.

18 Q. And which sub-tribe of the Kalenjin community do you come from?

19 A. I come from the Kipsigi sub-tribe of the Kalenjin.

20 Q. Which are the other sub-tribes that you know of, other than the
21 Kipsigis?

22 A. There are another nine sub-tribes; namely, the Nandi, the Keiyo,
23 the Tugen, Marakwet, Pokot, Sabot, Tiriki, Ogiek, and Sengwer, or
24 Cherangan (* phon), if you wish, is another name.

25 Q. This word "kimurgelda," what does it mean in the ordinary

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- 1 Kalenjin language?
- 2 A. Your Honour, please let me know how the word has been written.
- 3 Q. It is written k-i-m-u-r-g-e-l-d-a.
- 4 A. Your Honour, is it one word?
- 5 Q. It is one word.
- 6 A. If it is one word, your Honour, that word does not exist. The
- 7 closest that it would be "mur gelder" as two words. Where "mur" means in
- 8 Kalenjin "dirty," "gelder" is "tooth," and it is used in reference to
- 9 someone with brown teeth or fluorosis. So as the word is written, it
- 10 doesn't exist, but had it been split into two and "ki" deleted, it would
- 11 have been somebody whose teeth are brown or with fluorosis.
- 12 Q. Among the Kalenjin, are there people with such fluorosis or "mur
- 13 gelders"?
- 14 A. Majority of Kalenjin from South Rift and especially from Bomet
- 15 county have brown teeth because the water down South Rift is full of
- 16 fluoride, and therefore there are many Kalenjins with fluorosis and they
- 17 are referred to as "mur gelder."
- 18 Q. And then this word "kamama," what do you have to say about it?
- 19 A. Your Honour, please, remind me again how it is written.
- 20 Q. K-a-m-a-m-a.
- 21 A. It is one word, your Honour?
- 22 Q. Yes, it is one word.
- 23 A. If it is one word, it is pronounced and I would like to pronounce
- 24 it correctly, "kamama." I'm pronouncing it very carefully because the
- 25 Kalenjin language is full of intonations. "Kamama" is in fact a Kalenjin

1 name and there is one Member of Parliament who is a Kalenjin, in fact
2 he's the Member of Parliament Baringo East, and he is referred to as --
3 by that name.

4 Q. What does this word or this name mean in the literal Kalenjin
5 language?

6 A. The closest which I guess should have been referred to is "kap
7 mama," as two words, k-a-p, "kap" in Kalenjin is "home of," "mama" is
8 "uncle." So "kap mama" is "home of an uncle," which is basically a
9 brother to one's mother. So the word is very honourable.

10 Q. Are you suggesting to this Court that it is an affectionate name?

11 A. Yes, your Honour. "Kap mama" is a very respectful name. The
12 brother to my mother is "mama," and when I add the word "kap," it refers
13 to his home, and it's so proud to be associated with my uncle's home.

14 Q. So you've mentioned that there's a Member of Parliament from the
15 Kalenjin community by that name?

16 A. His name in full, your Honour, is Asman Kamama, and "kamama" is a
17 name of a person in Kalenjin tribe.

18 Q. Tell this Honourable Court, Professor, whether you've been
19 associated by ODM party by any chance?

20 A. Your Honour, in 2007 I did run during the nominations of ODM, and
21 I lost.

22 Q. So you lost in the ODM nomination. Is that what you're saying
23 in?

24 A. Yes, your Honour.

25 Q. And then was that the end of your political ambition?

1 A. I moved on to a party called United Democratic Movement, UDM,
2 which I vied for the Ainamoi parliamentary seat in 2007, December.

3 Q. Tell this Honourable Court how you went campaigning, trying to
4 claim the seat for Ainamoi constituency?

5 A. Your Honour, it was a very exciting experience. I criss-crossed
6 through the entire Ainamoi, from the western flank to the eastern flank
7 across, and of course through Kericho town, and it was such a wonderful
8 experience meeting whole tribes and races of the (* indiscernible)
9 Ainamoi.

10 Q. Did you also by any chance go to any radio station to sell
11 yourself as a candidate or your party -- your new party, that is the UDM?

12 A. Yes, your Honour. I did visit Kass FM International around the
13 time just before election time.

14 Q. Just before election time. And at Kass FM International, who did
15 you meet or who was interviewed by you? Who guided your interviews at
16 Kass FM International?

17 A. My host, your Honour, was Joshua Arap Sang.

18 Q. Were you alone or were you in company of other people other than
19 Joshua Arap Sang?

20 A. On that day, your Honour, Joshua Arap Sang had invited other
21 members, other individuals from ODM. There were two individuals both of
22 whom are Members of Parliament. One is now Member of Parliament for
23 Konoin, and another one is Member of Parliament for KU South. Both came
24 into the studio and were jointly at the studio, but I came from UDM.

25 Q. Your party was UDM, and there were people from ODM?

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1 A. Yes, your Honour.

2 Q. And you were being interviewed on -- what kind of an interview
3 transpired at --

4 A. Your Honour, it was about our election manifestos to our
5 electorate.

6 Q. Yes. So each of you was presenting the values that were
7 contained in your party manifesto. Is that what you're telling this
8 Honourable Court?

9 A. Yes, your Honour.

10 Q. Before we go further than that, I want to take you back again and
11 ask you whether Mur Gelder or Kamama are derogatory in any way. Are they
12 derogatory words?

13 A. Kap Mama, as I said, is used every day. It has good intentions,
14 and it is never derogatory. Anyone with brown tooth or teeth, if you
15 wish, knows that or she is referred to as Mur Gelder, as two words, by
16 the way. And again, it is not considered derogatory.

17 Q. And are they coded words?

18 A. Your Honour, they are not coded words.

19 Q. Let me take you back again to the issue of politics. When you
20 were in ODM, do you remember a time when ODM as a party had nomination
21 contest for the people wanted to have it as a ticket to presidential
22 seat?

23 A. Yes, your Honour.

24 Q. You remember there were like how many people who had wanted --
25 who contested in ODM for presidential ticket?

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1 A. I was in fact at Kasarani as an observer. There was
2 Honourable Raila Odinga, Honourable William Ruto, Honourable Nyagah, and
3 the Mbita MP. Sorry, I've forgotten his name. There were four in total.

4 Q. What of Honourable Musalia Mudavadi?

5 A. Yes, there was also Honourable Musalia Mudavadi, so there were
6 five in total.

7 Q. Let me take you back again --

8 PRESIDING JUDGE TRENDAFILOVA: Counsel, just to remind you that
9 you're not supposed to give the answers to the witness. This is point
10 number one.

11 MR. BOSEK: I'm most obliged.

12 PRESIDING JUDGE TRENDAFILOVA: And we also ask you not to be
13 repetitive, and you -- although the witness quite clearly explained the
14 meaning of the words, you asked him again. So just let us really follow
15 what we have agreed to be the way to question the witness.

16 MR. BOSEK: I'm most guided, Madam President.

17 Q. In the ODM presidential nomination, who emerged the winner, or
18 who garnered more votes from the Kalenjin areas? Or let me call it
19 Rift Valley areas.

20 A. It was Honourable Raila Odinga.

21 Q. So let me take you back again. Do you know somebody by the name
22 of Major -- retired Major-General John Koech?

23 A. I know him very well. He's my neighbour. He lives at the
24 village across my village called Saoset village. He retired as a
25 lieutenant-general. So I know him very well.

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1 Q. Do you by any chance know whether he's interested in politics or
2 what does he do?

3 A. He ran during 2007. In fact, I ran against him and he lost
4 during the nominations, as well as I did.

5 Q. So according to the results of the nomination, how -- what was
6 the performance like?

7 A. General Koech was number three after me. I was second. The
8 winner is the late MP for Ainamoi, then I was second. General Koech was
9 third.

10 Q. During the presidential ODM campaigns or nomination campaigns,
11 you have told this Court that you were an observer, and what of Koech,
12 was he leaning on any side within the five candidates that you have
13 mentioned?

14 A. I do not know, your Honour.

15 Q. Professor Chepkwony, are there any Members of Parliament from the
16 Kalenjin community who are not in ODM?

17 A. Yes, your Honour. There are four of them. One is MP for
18 Kachileba. The other is MP --

19 Q. Sorry, do you know their names and maybe their parties?

20 A. Yes, your Honour. The MP for Kachileba is Honourable Samuel
21 Poghisio who was elected on ODM Kenya party. Marakwet East MP is Linah
22 Jebii Kilimo, elected on KENDA party. Baringo East, Honourable Asman
23 Kamama, elected on for people ticket, and Honourable Professor Helen
24 Sambili, elected MP Mogotio on United Democratic Movement.

25 Q. Can you confirm to this Honourable Court that all those people

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1 you have mentioned and all those places you have mentioned are within the
2 Rift Valley?

3 A. Your Honour, they are all within Rift Valley, and specifically
4 within Kalenjin boundaries.

5 Q. Professor Chepkwony, are there also areas within the Rift Valley
6 province that have Members of Parliament, not necessarily Kalenjins, who
7 are from other parties, say PNU?

8 A. Yes, your Honour.

9 Q. Can you name said places within the Rift Valley?

10 A. Just a few that I can remember. One is Molo, Nakuru town,
11 Naivasha, Subukia.

12 Q. Let me go back again to your interviews when you are selling your
13 party manifesto. What kind of conduct was -- how did Joshua Arap Sang
14 come across? Was he somebody who strike you as being sympathetic to ODM
15 or any political party for that matter? Can you just explain to the
16 Honourable Court?

17 A. Every time I went to the station, Sang would tell the audience
18 including the resource person that he was not meant to take sides. Two,
19 he would remind listeners as well as the resource person or the guest
20 about the station's policy.

21 Q. As a last question, you know very well why we are in this
22 Honourable Court today. What do you think was the course -- or let me
23 put it to you this way: Are you -- or is it within your knowledge that
24 there have been a number of election violence in Kenya previously before
25 the 2007? Is it within your knowledge?

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1 A. Yes, your Honour. To a smaller extent, 1997, 2002 went quietly.
2 2002 went quietly. 2007, there was a major eruption of violence.

3 Q. What do you think was the cause of violence? Was it something
4 that was planned, was it spontaneous, and I mean, just --

5 PRESIDING JUDGE TRENDAFILOVA: Again, please, do not give the
6 answers, Counsel.

7 MR. BOSEK: I'm most obliged, most excellent Madam President.
8 I'll refrain from that.

9 THE WITNESS: Your Honour, the violence in 2007 was spontaneous.

10 MR. BOSEK:

11 Q. This kind of violence were witnessed in how many or in which
12 areas of Kenya?

13 A. In total, seven (* sic) provinces experienced violence. The
14 eruption began initially at Kibera, spread to Kisumu, Mombasa. Then
15 other areas followed suit.

16 Q. You're saying in seven provinces.

17 A. Six. I said six.

18 Q. Six provinces. Sorry. How many provinces do we have in Kenya?

19 A. We have eight provinces.

20 Q. So are you saying that it was a nation-wide kind of crisis?

21 A. More or less.

22 Q. And what do you mean by the word "spontaneous"?

23 A. It means instantaneous.

24 MR. BOSEK: Madam President, your Honours, I've got no further
25 questions for the witness. I can hand over to -- avail him for

1 cross-examination.

2 PRESIDING JUDGE TRENDAFILOVA: Thank you very much, Counsel. We
3 have four minutes left. We shall take the last break now before we
4 finish the court sessions for today, and when we resume with our third
5 session, it will be the Defence teams, if any of the answers of the
6 witness were related to -- to the other two suspects, namely to Mr. Ruto,
7 to Mr. Kosgey, to address some questions, and it will be the Prosecutor
8 to proceed.

9 Now we suspend the hearing, and we shall be in half an hour back
10 to the courtroom.

11 COURT USHER: All rise.

12 (The witness stands down)

13 Recess taken at 5.56 p.m.

14 On resuming at 6.31 p.m.

15 (Open session)

16 COURT USHER: All rise.

17 PRESIDING JUDGE TRENDAFILOVA: Please be seated.

18 MS. CHANA: Madam President, I would --

19 PRESIDING JUDGE TRENDAFILOVA: Yes, Madam Chana.

20 MS. CHANA: I would like to express my interest at this stage
21 that I would like to question this particular witness, and my questioning
22 will be along the lines of the questions I asked the witness --
23 Mr. Ruto's witness. So ...

24 PRESIDING JUDGE TRENDAFILOVA: You, Madam Chana, consider that
25 the answers to your questions will have an important impact on the

1 representation of the victims.

2 MS. CHANA: Very much so, Madam President. I --

3 PRESIDING JUDGE TRENDAFILOVA: Okay. Just a moment.

4 MS. CHANA: Yes.

5 (Trial Chamber confers)

6 PRESIDING JUDGE TRENDAFILOVA: So the Chamber authorises you to
7 ask your questions.

8 MS. CHANA: Most obliged.

9 PRESIDING JUDGE TRENDAFILOVA: Now we proceed with the
10 representative of the Prosecutor. Ms. Tai, will it be you or --

11 MS. TAI: Thank you, Madam President. It will be Ms. Corrie who
12 will examine this witness on behalf of the Prosecution.

13 PRESIDING JUDGE TRENDAFILOVA: So, Ms. Corrie, the floor is over
14 to you.

15 MS. CORRIE: Thank you, Madam President --

16 PRESIDING JUDGE TRENDAFILOVA: I'm sorry. We're tired at the end
17 of the day. Please, Court Officer, do usher the witness into the
18 courtroom.

19 The Defence teams didn't express any intention to put some
20 questions to the witness?

21 MR. ORARO: Madam President, we do not intend to put any --

22 PRESIDING JUDGE TRENDAFILOVA: (* Overlapping speakers) Yes. So
23 thank you. Thank you, Mr. Counsel.

24 MR. KILUKUMI: Madam President and your Honours, on behalf of
25 Honourable Ruto we have no questions for that witness.

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1 (The witness takes the stand)

2 PRESIDING JUDGE TRENDABILOVA: Thank you. Thank you, Mr. --
3 Counsel. We resume our session, Witness Kiprono. Professor, you are
4 still under oath and you are aware of your obligations while you're still
5 under oath.

6 So, Ms. Corrie, please take the floor.

7 MS. CORRIE: Thank you, Madam President.

8 Questioned by Ms. Corrie:

9 Q. Good afternoon.

10 A. Good afternoon, your Honour.

11 Q. I'd like to start by asking you some questions about how you came
12 to testify here. How did you come to testify on behalf of Mr. Sang?

13 A. Your Honour, Mr. Joshua Sang called me about two weeks or so. He
14 told me that there were allegations made against him by the Prosecutor
15 ICC for which he requested me to be his witness, if I did not mind, for
16 two reasons. One, because I happen to be a resource person from time to
17 time at Kass FM International, and that he is also aware that I do listen
18 to Kass FM International, and that the allegations were related to
19 utterances that are purported to have been made on Radio Kass FM
20 International by Joshua Sang.

21 Q. And so after Mr. Sang called you, did you agree to testify right
22 then or later?

23 A. When Mr. Sang called me, I sought clarification, and he told me
24 that he needed, if I did not mind, to take me to a team of his lawyers so
25 the lawyers would tell me what my obligations would be.

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1 Q. And so did you meet with that team of lawyers?

2 A. Yes, your Honour.

3 Q. When did you first meet with that team of lawyers?

4 A. About two weeks -- slight -- slightly under two weeks ago,
5 your Honour. I do not remember exactly which dates.

6 Q. So that was in the month of August?

7 A. Well, I need to do my math, but under two weeks from now.

8 Q. And do you recall the names of the people in that team of
9 lawyers?

10 A. Yes, your Honour.

11 Q. Can you please tell us who they were?

12 A. Kigen-Katwa, Joel Bosek Koech, and a lady called Criselda.

13 Q. And Mr. Katwa and Mr. Bosek, are they the same lawyers that are
14 with us in the courtroom today?

15 A. Yes, your Honour.

16 Q. And when you met with them, what did you discuss?

17 A. When I met with them, they told me that Joshua Sang had suggested
18 to them that I was willing to be his witness subject to certain
19 clarifications, which the lawyers were willing to give me that.

20 Joshua Sang, it was alleged, had made utterances on radio inciting
21 members of the Kalenjin community to evict members of the Kikuyu
22 community, Kisii community, and Kamba communities from Rift Valley and
23 that ODM as well belonged to Kass FM. They asked me whether I had heard
24 of such utterances and the answer was no. I was then requested whether I
25 could agree to be Sang's witness, and I said I agreed.

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1 Q. And at that time, how much did you discuss the substance of the
2 testimony that you gave today?

3 A. That is as far as it went, your Honour.

4 Q. Did you meet with any of the members of Mr. Sang's team of
5 lawyers after that initial meeting?

6 A. Please repeat your question, your Honour.

7 Q. Did you meet with any members of Mr. Sang's legal team after that
8 meeting two or so weeks ago?

9 A. We met another two (* sic) times, your Honour, a few days later.

10 Q. So you met another two times a few days later. Both of the
11 meetings were a few days later?

12 A. Sorry, your Honour?

13 Q. I'm sorry. Were both of these meetings a few days after the
14 first one?

15 A. Yes, your Honour.

16 Q. And what happened -- let's address each of those one at a time.
17 When was the first -- when was the next meeting you had after the initial
18 meeting?

19 A. It was a few days after the first meeting, your Honour, but I do
20 not know the date.

21 Q. What happened at that second meeting?

22 A. During the second meeting I was being given clarifications on the
23 things that I needed to get ready, including my passport, and basically
24 that I needed to also prepare to get leave from the university.

25 Q. Did you discuss the substance of your testimony here today at

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1 that meeting?

2 A. No, your Honour.

3 Q. All right. And then the third meeting that you had, when was
4 that third meeting with Sang's team of lawyers?

5 A. I said there was another one meeting, your Honour.

6 Q. I'm sorry. I thought you said there were an additional two
7 meetings. Okay. My apologies.

8 At either of these two meetings where you met with Sang's
9 attorneys did you make a written statement about your testimony?

10 A. No, your Honour.

11 Q. Since your arrival in The Hague, have you spoken with any of the
12 members of Sang's legal team?

13 A. No, your Honour.

14 Q. After agreeing to testify for Mr. Sang, did you speak to him at
15 any point after that?

16 A. No, your Honour.

17 Q. So between the first day when you -- when you agreed with
18 Mr. Sang that you would testify and now, have you spoken with him at all?

19 A. No, your Honour.

20 Q. Okay. Now, you mentioned that Mr. Sang was the person who called
21 you to see if you would testify. Can you please describe for us what
22 your relationship is, briefly, with Mr. Sang.

23 A. I know Mr. Joshua Sang as a professional broadcaster with Kass FM
24 International, and from time to time he seeks professionals from the
25 community to provide various topical issues at Kass FM International, and

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1 I am one of them.

2 Q. I'm sorry. You said during your direct examination that you've
3 known him for a while and quite well. Do you have a relationship with
4 him outside of his work with Kass FM?

5 A. No, your Honour.

6 Q. So I just want to make sure I understand. Your testimony is that
7 your relationship to him is strictly professional?

8 A. Yes, your Honour.

9 Q. All right. And you said you've been listening to Kass FM for
10 quite some time; is that right?

11 A. Yes, your Honour.

12 Q. And you also mention there are a number of different Kalenjin
13 language radio stations. Why do you listen to Kass FM?

14 A. I listen to Kass FM specifically for certain programmes,
15 especially in the morning. Lene Emet is one of them, which is hosted by
16 Joshua Arap Sang.

17 Q. And could you briefly tell the Court why you listen to that show?

18 A. I listen to that show because it covers topical issues,
19 especially emerging -- the issues of the day at that time.

20 Q. And since when have you been listening to that show?

21 A. I don't remember exactly from what time, but -- but it's -- it's
22 been at least from 2006.

23 THE INTERPRETER: A message from the interpreters: Could the
24 speakers be asked to respect the five-second rule, please.

25 MS. CORRIE: Thank you. My apologies.

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1 Q. How long have you been listening to Mr. Sang's show Lene Emet?

2 A. Your Honour, I just said from about 2006.

3 Q. And what are you doing when you listen to that show?

4 A. What am I doing? The question is not clear, your Honour. Please
5 make it clear.

6 Q. Certainly. When you listen to the radio programme, is that the
7 only thing you're doing, or do you listen to any -- or doing anything at
8 the same time?

9 A. Usually the programme is in the morning when people are driving
10 to work -- to work, and basically I listen to it as I drive to work.

11 Q. You also gave us evidence that you have been on Mr. Sang's show
12 before. When, if you recall, was the first time that you were on his
13 show?

14 A. I do not remember, your Honour.

15 Q. Do you have any approximation of the year?

16 A. No -- no, my Honour.

17 Q. Do you recall if it was before 2008?

18 A. Yes. I have been at Kass FM before 2008.

19 Q. Do you recall if you were there in 2007?

20 A. Yes, your Honour. I was at Kass FM in 2007.

21 Q. Now, have you ever worked for Kass FM?

22 A. No, your Honour.

23 Q. Have you ever worked as a -- or at a radio station in any
24 capacity?

25 A. No, your Honour.

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1 Q. Have you ever operated any of the technology used to broadcast
2 radio programmes?

3 A. Your Honour, I would like to be guided on this. Is it the
4 gadgets like this which usually I used at the radio station? Is that
5 what you mean, your Honour?

6 Q. My question is more about the technology used by the people who
7 work at the station?

8 A. No. No, your Honour.

9 Q. Besides Mr. Sang, do you know any of the other people who work at
10 Kass FM?

11 A. I know Chepkemboi (* phon) as one of the news readers.

12 Q. Do you know any of these people outside of their work on the
13 radio station? And by that I mean, do you know them besides just
14 listening to them on radio?

15 A. I don't know them, your Honour.

16 Q. Have you ever heard of a man named Joshua Chepkwony?

17 A. Yes, your Honour.

18 Q. And who is that person?

19 A. I have heard that he is the chairman of Kass FM International,
20 your Honour.

21 Q. Now, obviously the two of you share a similar name. Are you
22 related in any way?

23 A. No, your Honour. Chepkwony is from Tugen sub-tribe and I am from
24 the Kipsigi sub-tribe. But we are not related, your Honour.

25 Q. In addition to Mr. Sang, do you know any of the other suspects in

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1 this case?

2 A. Generally yes, your Honour, but not specifically.

3 Q. So let's go with one of them. Have you ever met Mr. Ruto before?

4 A. Yes, your Honour.

5 Q. And could you please tell the Court when was the first time that
6 you met him?

7 A. I met Honourable Ruto in 2000 (* sic), when I was still a member
8 of ODM, and I can give you one example. I met him during the nomination
9 for presidential candidacy at Kasarani in 2007, towards the end of the
10 year.

11 Q. Now, I just want to clarify. You said first, I think, that you'd
12 met him first in 2000. Is that your testimony, that you'd met him for
13 the first time in the year 2000?

14 A. I just specified 2007, your Honour.

15 Q. Thank you. And so the first time you met him, to make sure I
16 understand correctly, that was at a political function?

17 A. Yes, your Honour.

18 Q. And that was when you were seeking the nomination for the ODM MP
19 position from Ainamoi constituency?

20 A. Yes, your Honour.

21 Q. Did you win that nomination?

22 A. I lost, your Honour.

23 Q. And do you know the name of the person that you lost to?

24 A. His name is late Kimutai Too, David Kimutai Too. He passed on
25 2008.

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1 Q. So after you did not win the nomination for that position from
2 ODM, did you run for the same MP position under any other party ticket?

3 A. Yes, your Honour. I ran on United Democratic Movement, UDM
4 party.

5 Q. Who was the founder of UDM?

6 A. The founder of UDM, among others, is Honourable Ruto.

7 Q. Now, after Mr. Too passed, what happened with his MP position?

8 A. His brother stood on ODM ticket against me, and I still ran on
9 UDM ticket, and he won. I still came in second.

10 Q. Are you running for political office now?

11 A. Now or next year, your Honour?

12 Q. My apologies. In the upcoming 2012 elections?

13 A. Yes, your Honour. I will be running as governor for Kericho
14 county, your Honour.

15 Q. And are you running on the ticket of any political party?

16 A. Yes, your Honour, I'll still be running on United Democratic
17 Movement.

18 Q. And are any of the suspects members of that party?

19 A. Any of the suspects?

20 Q. Yes.

21 A. Not for now, your Honour. As -- there is a parties' bill in
22 Kenya which wouldn't require someone to be a member of two parties.
23 Right now, Honourable Ruto is in ODM, and I am in UDM, so he's not a
24 member of UDM.

25 Q. Is Mr. Ruto involved with the UDM in any way at this time?

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1 A. There have been reports that he may move to UDM, but he hasn't
2 moved to UDM yet because the law will not allow him to be a member of two
3 parties at the same time.

4 Q. Have you begun your campaign yet?

5 A. Yes, your Honour.

6 Q. And in your campaign at this time, is Mr. Ruto working with you
7 in any way?

8 A. No, your Honour.

9 Q. All right. Now, since meeting Mr. Ruto for the first time in
10 2007, could you briefly summarise your relationship with him?

11 A. My relationship with Ruto was that between members of the same
12 party, ODM, that time. But since I moved to UDM, there hasn't been any
13 political relationship.

14 Q. Other than a political relationship, do you interact with him in
15 any way?

16 A. No, your Honour.

17 Q. Now, you've testified that during the time that you were
18 listening to Kass FM and Lene Emet, you've never heard the use of any
19 coded language; is that right?

20 A. Yes, your Honour.

21 Q. In the period before the 2007 post-election violence, did you
22 ever attend any meetings where people discussed planning that violence?

23 A. I did not, your Honour.

24 Q. Did you ever discuss the planning of that violence with anyone?

25 A. No, your Honour.

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- 1 MS. CORRIE: May I have a moment, your Honour?
- 2 PRESIDING JUDGE TRENDAFILOVA: Take your time, Ms. Corrie.
- 3 (Prosecution counsel confer)
- 4 MS. CORRIE: Thank you for your indulgence, your Honour.
- 5 PRESIDING JUDGE TRENDAFILOVA: Proceed.
- 6 MS. CORRIE:
- 7 Q. I wanted to ask you some questions about your work background.
- 8 You said that you are -- you're involved in chemistry?
- 9 A. Yes, your Honour.
- 10 Q. And you're also a motivational speaker?
- 11 A. Yes.
- 12 Q. Have you ever done any studies in linguistics?
- 13 A. No, your Honour.
- 14 Q. And are you in any way an expert in Kenyan vernacular languages?
- 15 A. I am not an expert, but as far as my Kalenjin language is
- 16 concerned, those are straight -- they're straightforward words or
- 17 statements which I would say, yes, I'm sure about.
- 18 Q. I wanted to also ask you about your contact or lack thereof with
- 19 Mr. Sang during the period from when he first called you to testify until
- 20 now. You said that you haven't spoken to him at all; is that right?
- 21 A. Yes, your Honour.
- 22 Q. So that means you haven't spoken to him on the phone; is that
- 23 correct?
- 24 A. Yes, your Honour.
- 25 Q. Have you communicated with him by any e-mails?

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1 A. No, your Honour.

2 Q. Have you communicated with him by any instant message texts, for
3 example?

4 A. No, your Honour.

5 Q. Okay. And the same question for Mr. Ruto. You say that you
6 don't speak to him outside of politics at all; correct?

7 A. Yes, your Honour.

8 Q. So does that mean again that the only communications you have
9 with him -- let me back up. When you say that you only speak to him in
10 terms of politics, what does that mean? How often do you speak to him
11 about such matters?

12 A. Your Honour, the question you asked me was specific, and I said
13 the -- the contact we had was political, and at that time it was only
14 possible because I was in ODM. I am no longer in ODM. I'm in UDM, and
15 there's no relationship.

16 Q. And so Mr. Ruto doesn't play any role in UDM at this time?

17 A. He has indicated that he may move to UDM in future, but -- but at
18 the moment, he hasn't moved to UDM.

19 Q. And so he hasn't tried to contact any people who are active in
20 UDM as he begins this transition?

21 A. I am not aware about other people, but as far as I'm concerned,
22 he has not contacted me.

23 (Prosecution counsel confer)

24 MS. CORRIE: No further questions, your Honour. Thank you.

25 PRESIDING JUDGE TRENDAFILOVA: Thank you very much, Ms. Corrie.

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1 Someone from the Prosecutor's team? No.

2 MS. TAI: We pass the witness. We're finished.

3 PRESIDING JUDGE TRENDABILOVA: Thank you.

4 Finally, the Defence has the final word, so would you like to --
5 the victims' legal representative, I'm sorry, Ms. Chana, and thereafter
6 the Defence, if they wish to take the floor. Ms. Chana, the floor is
7 over to you.

8 MS. CHANA: Thank you very much, Madam President.

9 Questioned by Ms. Chana:

10 Q. Good evening, Professor.

11 A. Good evening, your Honour.

12 Q. I am the victims' representative, and I represent 327 victims in
13 this case. I would like to ask you a few questions about the
14 post-election violence in 2007, early 2008.

15 If you would, for the purposes of my questioning, confine
16 yourself to the Rift Valley province. Now, irrespective of who committed
17 crimes in the Rift Valley province during that 2006 and 2007 period,
18 would you say that crimes were committed?

19 A. Yes, your Honour.

20 Q. Can you tell us the nature of those crimes, please? What kind of
21 crimes? What would you say happened?

22 A. There were -- people were killed, and there was general crime,
23 but also the police killed people.

24 Q. Okay. So I just -- people were killed. Did anything else happen
25 to your knowledge?

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1 A. People lost property.

2 Q. Lost property?

3 A. Yes.

4 Q. Would you say that there was also the destruction of property as
5 well as -- destruction of property?

6 A. Yes, your Honour, that's covered under loss. You're right.
7 Correct.

8 Q. And looting?

9 A. Yes, your Honour.

10 Q. Would you say there were also a lot of people injured during this
11 violence?

12 A. Yes, your Honour.

13 PRESIDING JUDGE TRENDAFILOVA: Ms. Chana, let us not still put
14 the question into -- the answer into the question, please.

15 MS. CHANA: Yes, thank you. I'm guided.

16 Q. Do you also accept and do you know from your own knowledge that a
17 lot of people are living in the camps?

18 A. I am aware, your Honour, and I'm also aware that there are people
19 who are living with relatives and they are never recorded because they
20 are not in the camps.

21 Q. Yes, but do you know that people -- a lot of people are still
22 living in the camps?

23 A. I am aware, your Honour.

24 Q. Have you ever been to any of these camps during your political
25 movements and campaigning or ...

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1 A. The camps came into being after elections, and that time I wasn't
2 active anymore in political campaigns. But there was a camp in Kericho
3 town, in the middle of Kericho town, and I visited the victims early
4 2008, so I'm aware that people suffered and some are still in camps.

5 Q. And would you -- how would you describe the conditions of the
6 camp, Professor?

7 A. The conditions are horrible, because you find a tiny camp having
8 family of ten and they're all squeezed in there, a daughter here, a
9 father there, a mother there. It's horrible.

10 Q. Well. Thank you very much for answering my questions, Professor.

11 A. Thank you, your Honour.

12 MS. CHANA: Thank you, Madam President.

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

14 The Defence team of Mr. Sang or any other Defence team, would you
15 like to ask some questions, only if need be.

16 MR. BOSEK: Yes, Madam President and your Honours, I have two
17 questions in my re-examination --

18 PRESIDING JUDGE TRENDAFILOVA: Yes.

19 MR. BOSEK: -- to the witness.

20 Further Questioned by Mr. Bosek:

21 Q. About how many times did you go to Kass FM in the year 2007?

22 A. I cannot remember how many times I went to Kass FM in 2007, but I
23 remember that just about election time, in the month of December, I did
24 go to Kass FM, but for a political programme.

25 Q. And that is the time when you were in UDM?

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1 A. That was the time I was in UDM.

2 Q. And this radio programme that Mr. Sang has been hosting,
3 Lene Emet, is it still on or not?

4 A. It is still on.

5 MR. BOSEK: That is all, Madam President. Thank you very much
6 for the opportunity.

7 PRESIDING JUDGE TRENDAFILOVA: Thank you very much, Counsel.

8 Professor Kiprono, do you feel fine?

9 THE WITNESS: Very fine, your Honour.

10 PRESIDING JUDGE TRENDAFILOVA: Not exhausted by the questions put
11 to you?

12 THE WITNESS: I'm perfectly fine, your Honour.

13 Questioned by the Court:

14 PRESIDING JUDGE TRENDAFILOVA: I just would like to ask you two
15 questions, whether I understood you correctly when you said that you have
16 moved to another newly established party, UDM, and when the Prosecutor's
17 representative asked you who was amongst the founders of this party, you
18 mentioned the name of Mr. Ruto. Am I right, because thereafter with
19 regard to some other questions, you said that Mr. Ruto has nothing to do
20 with UDM. So would you give us some clarification about this
21 information?

22 A. Your Honour, during the dying moments of the KANU regime, just
23 before 2002, Honourable Ruto, Kirongo (* phon), and others registered
24 UDM, but it was not formally registered fully as a political party with
25 which to vie on, because it did not go to the stage in which a symbol

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1 would be allocated to a party. So it was basically at the Registrar's
2 office. So this UDM was dormant until 2007, just after the ODM
3 nominations, when a few people went and revived UDM under different
4 leadership. I can tell you the chairman at that time was Cheboi,
5 Reverend Cheboi was the chairman. Ruto wasn't an official then because
6 he was in ODM.

7 So talking about UDM which was revived by another group and they
8 went all the way to a point in which they registered the milk can as a
9 symbol. So Ruto wasn't a member of UDM in 2007, but right now, as I
10 said, there are reports that he may move to UDM.

11 PRESIDING JUDGE TRENDAFILOVA: Thank you very much. I heard
12 this. I just wanted to check whether I understood you correctly when you
13 answered to the Prosecutor's representative.

14 My next question is regarding your description of the
15 post-election violence as spontaneous. How did you decide for yourself
16 that it is spontaneous? What were the criteria leading you to make this
17 conclusion for yourself?

18 A. While I was criss-crossing Ainamoi, using Ainamoi as an example,
19 and Ainamoi is a multi-ethnic constituency with all the tribes in Kenya.
20 Kikuyus who are over 20.000, Kisiis were over 10.000, Luos, Luhyas over
21 4.000. At the time I was seeking votes from all the tribes, there was no
22 tension whatsoever. Voting did take place on 27th December 2007. The
23 parliamentary results from Ainamoi were released slightly after 2.00 on
24 28th. Within that time, presidential results for Ainamoi had not
25 released, and as I conceded defeat, there was no tension whatsoever. The

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1 results took a lot longer for the presidential tally, it took a lot
2 longer, and they were released on 30th. Within that period there had
3 been anxiety, so to speak. And as soon as the presidential result was
4 released, followed by the swearing in of the president, violence erupted.

5 PRESIDING JUDGE TRENDAFILOVA: Professor, we know all these facts
6 because we're in charge of this case since we were seized by the
7 Prosecutor of the International Criminal Court. I was asking about your
8 own assessment of the nature of the violence. Why did you decide that it
9 was spontaneous? We're not disputing whether there was violence or not,
10 but you asserted firmly that it was spontaneous. If you could give me an
11 answer. I do not insist if I am -- if it appears that I am putting some
12 pressure on you. I don't want in any way to -- to put you in a difficult
13 situation.

14 A. Your Honour, you're not putting pressure on me. And I want to
15 say again that it was spontaneous because at no time did I ever sense any
16 tension. There was no planning whatsoever. Furthermore, if we pick 32
17 constituencies in Rift Valley which are predominantly Kalenjin, 48 per
18 cent did not vote for ODM. It was only 52 per cent that voted for ODM.
19 That tells that you it wouldn't have been possible for people to plan and
20 still 48 per cent against the party that was supposedly to plan anything.

21 PRESIDING JUDGE TRENDAFILOVA: Well, thank you. That is your
22 answer. On behalf of my colleagues, there are no questions. We're not
23 going to proceed with this session in order to give a little bit more
24 time for everyone to rest -- do you want to take the floor?

25 MS. CORRIE: Yes, your Honour, if I may. Based on your

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1 questions, we have a few additional questions if it would be all right
2 with the Chamber.

3 PRESIDING JUDGE TRENDAFILOVA: This automatically means that
4 after you, if the Defence would like, they will have the right to ask
5 questions. Go ahead, Ms. Corrie.

6 MS. CORRIE: Thank you.

7 Further Questioned by Ms. Corrie:

8 Q. The first questions are follow-up questions on the Chamber's
9 questions about UDM. Who is the current head of UDM?

10 A. The current head of UDM? You mean the chairman of UDM?

11 Q. Yes.

12 A. His name is General John Koech.

13 Q. And is his current leadership of UDM contested?

14 A. Yes, your Honour.

15 Q. And could you please explain that briefly to the Chamber?

16 A. We had leadership wrangles within UDM whereupon another chairman
17 took over. His name is Mr. Chirchir. And because of that, General Koech
18 went to court and the matter is in court as I speak to you, your Honour.

19 Q. And I just want to confirm the identity of this person John Koech
20 who was, until recently, for certain the leader of UDM. Can you explain
21 briefly who this person is?

22 A. General Koech is a former lieutenant-general with the Kenya army.
23 He is a member and a resident of Ainamoi constituency in Kericho county.

24 Q. Now, previously, during your 2007 campaign to run for the
25 position of MP in Ainamoi constituency, you said you were criss-crossing

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- 1 the constituency to campaign?
- 2 A. Yes, your Honour.
- 3 Q. How did you travel?
- 4 A. By -- I walked as well as drove across.
- 5 Q. Did you have access to any other means of transportation?
- 6 A. Any other means? Like which one, your Honour?
- 7 Q. I don't know if I'm allowed to suggest, but, for example, buses,
- 8 or trains or helicopters?
- 9 A. Your Honour, I had my little car, my little van, 1500 cc Toyota,
- 10 and an old Pajero given to me by a friend of mine. That's all I had.
- 11 But I would also walk into villages to ask for votes. That's all I had.
- 12 But I never used buses.
- 13 Q. During that campaigning time as well, did you support Mr. Ruto's
- 14 political campaign in 2007?
- 15 A. No, your Honour, I didn't. As I said, I moved to UDM as soon as
- 16 I lost in ODM.
- 17 Q. Before you moved to UDM, did you support Mr. Ruto at all?
- 18 A. I was neutral, your Honour. I didn't support anybody.
- 19 Q. So you didn't support the UDM candidate in his constituency?
- 20 A. UDM or ODM?
- 21 Q. UDM.
- 22 A. Before I moved on the UDM, I was in ODM. I don't know whether
- 23 we're understanding each other, your Honour.
- 24 Q. Let me see if I --
- 25 A. Please repeat again.

Witness: Witness KEN-D11-P-0002 (Open Session)
Questioned by Mr. Kigen-Katwa

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1 Q. Let me try to clarify. While you were with ODM, before moving to
2 UDM, did you support Mr. Ruto's campaign?

3 A. I did not, your Honour. I was neutral to all the candidates.

4 Q. For any reason have you ever been to his house?

5 A. No, your Honour.

6 MS. CORRIE: Thank you. That's all.

7 PRESIDING JUDGE TRENDABILOVA: Thank you very much.

8 The Defence? Do you find it necessary to take the floor?

9 MR. KIGEN-KATWA: Madam President, would you allow me to ask
10 questions following the Prosecutor's questions?

11 PRESIDING JUDGE TRENDABILOVA: Yes, of course. You have the
12 right to ask questions --

13 MR. KIGEN-KATWA: Thank you very much, Madam President.

14 Questioned by Mr. Kigen-Katwa:

15 Q. A question has been put to you specifically in terms of your
16 knowledge of General Koech. Do you know him?

17 A. I know him, your Honours.

18 Q. Could you describe the closest proximity you have with him?

19 A. He's about 3 kilometres away from me. He lives about 3
20 kilometres east of Kericho town, along Nakuru-Kericho highway.

21 Q. Thank you. Do you share any political circumstances with him?

22 A. Both of us are in UDM.

23 Q. In the year 2007?

24 A. In 2007, both of us were in ODM. We ran against each other and
25 he came in third. I was second. The late MP was number one.

Witness: Witness KEN-D11-P-0002 (Open Session)
Questioned by Mr. Kigen-Katwa

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1 Q. And when you were ranking one, two, three, you're talking of the
2 ODM nomination process?

3 A. Yes, your Honour.

4 Q. And it is because you lost out in the ODM nomination that you
5 moved to UDM yourself?

6 A. That was not the reason. I wasn't satisfied with the nomination
7 process.

8 Q. Now, did General Koech persist up to the elections?

9 A. Yes, your Honour.

10 Q. And did you?

11 A. I did, but in UDM.

12 Q. And General Koech?

13 A. He remained in ODM.

14 Q. Okay. Were you competitors therefore in the constituency?

15 A. We were competitors.

16 Q. Do you recall him participating in any clandestine meetings to
17 the best of your knowledge?

18 A. No, your Honour.

19 Q. Did he seek votes in equal measure or he had an advantage over
20 you by reason of being a retired military personnel?

21 A. It was in equal measure.

22 Q. Lastly, did you say you supported the first suspect's campaign
23 bid for presidential nomination?

24 A. I did not say so, your Honour.

25 Q. As a matter of fact, did you?

Witness: Witness KEN-D11-P-0002 (Open Session)
Questioned by Mr. Kigen-Katwa

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1 A. I did not, your Honour.

2 Q. And would you say he has near absolute command of people in
3 Rift Valley?

4 A. No, your Honour.

5 Q. Or, in the words of Prosecution, near automatic compliance?

6 A. No, your Honour.

7 Q. What of the third accused -- the third suspect, Mr. Sang? Does
8 he carry the last word if he broadcasted anything at the station?

9 A. No, your Honour.

10 MR. KIGEN-KATWA: I am most obliged, Madam President and your
11 Honours.

12 PRESIDING JUDGE TRENDAFILOVA: Thank you. Thank you, Counsel.

13 Professor Kiprono, the Court thanks you very much for coming to
14 The Hague, all this way, in order to give your information about the
15 events that are the subject matter of the case pending before this
16 Chamber and on which we have to issue a decision dispensing justice. I
17 thank you very much. You're now free to go back to your country, and on
18 behalf of my colleagues, Judge Kaul and Judge Tarfusser, we wish you a
19 safe trip back home.

20 THE WITNESS: Thank you, your Honour.

21 PRESIDING JUDGE TRENDAFILOVA: Court Officer, would you usher the
22 witness to the Victims and Witnesses Unit personnel.

23 (The witness withdrew)

24 PRESIDING JUDGE TRENDAFILOVA: That is all for today. Tomorrow
25 we shall question the second witness of Mr. Sang at 2.30 in the same

1 courtroom. Until then, of course as politeness requires, on behalf of
2 the Judges of this Chamber, I would express our wishes for a relaxing
3 evening. Thank you for participating today. I would like to thank very
4 much Ms. Chana as well, our legal support staff, the interpreters very
5 much, and please accept my apologies for sometimes not being very
6 cautious about someone speaking too fast; the court officers, the
7 security officers, the court reporters, everyone who is contributing to
8 our business today and everyone who is in the public gallery.

9 Have a good evening. The hearing is adjourned until tomorrow,
10 2.30 in the same courtroom.

11 COURT USHER: All rise.

12 The hearing ends at 7.15 p.m.

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