

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 Friday, 2 September 2011
10 The hearing starts at 9.30 a.m.
11 (Open session)
12 COURT USHER: All rise. The International Criminal Court is now
13 in session.
14 PRESIDING JUDGE TRENDAFILOVA: Good morning to everyone. Please
15 be seated.
16 On behalf of the Chamber, I greet everyone who is in the
17 courtroom and in the public gallery as well. Court Officer, would you
18 call the case, please.
19 COURT OFFICER: Good morning, Madam President, your Honours.
20 This is the Situation in the Republic of Kenya, in the case of the
21 Prosecutor versus William Samoei Ruto, Henry Kiprono Kosgey, and
22 Joshua Arap Sang, case number ICC-01/09-01/11. Thank you, your Honours.
23 PRESIDING JUDGE TRENDAFILOVA: Thank you, Court Officer.
24 Yesterday, we were quite well organised, so we could advance in
25 our schedule. Today we shall move ahead, already starting with the core

1 part of our Confirmation of Charges Hearing, the presentation of the
2 parties of their cases and the evidence supporting their cases. We shall
3 start first with the Prosecutor.

4 Ms. Tai, I see that you're present today on behalf of the Office
5 of the Prosecutor. Did you make some estimations as of how time -- how
6 much time you would need to present your case? Because today we have
7 five sessions of one hour and a half.

8 MS. TAI: Understood.

9 PRESIDING JUDGE TRENDAFILOVA: So that the Bench could make
10 some -- some calculations and to see how we're going to proceed to the
11 end of the day.

12 MS. TAI: Yes. Good morning, Madam President, your Honours. We
13 have made some calculations, and I would like to state very roughly that
14 we believe it would take approximately five hours.

15 PRESIDING JUDGE TRENDAFILOVA: Five hours, which means three
16 sessions and something in addition.

17 MS. TAI: Exactly.

18 PRESIDING JUDGE TRENDAFILOVA: Okay. Thank you very much,
19 Ms. Tai. If we're going to spend around three sessions and half an hour
20 with your case, then Defence will be ready to proceed with their cases.
21 Of course, yesterday I made a suggestion that the Defence teams present
22 their cases in the order as the Prosecutor has defined it, first the case
23 Mr. Ruto, then of Mr. Kosgey and finally of Mr. Sang, but I think that
24 flexibility is a good approach. If the Defence teams would find another
25 way to organise themselves, for example, starting with the case of --

1 just as a matter of example, of Mr. Sang, the Chamber wouldn't object to
2 this.

3 Now the floor is over to you, Ms. Tai. Before -- just before you
4 take the floor, I would like on behalf of the Chamber to remind the
5 parties what are our expectations with regard to the presentation of the
6 cases of the parties.

7 The Chamber recalls the provision of Article 69(3), according to
8 which the parties submit evidence which is relevant to the case. I
9 remind also the disclosure decision, the in-depth analysis chart
10 decision, as well as the decision on the schedule for this hearing,
11 according to which the parties are expected to present evidence by
12 showing the relevance of each piece of evidence to the contextual
13 elements of the crimes against humanity and also to the specific
14 constituent elements of each count and also to the mode of liability
15 regarding every suspect.

16 I would also recall that when the parties are referring to
17 evidence, they should give the EVD number and the last four digits of
18 their document ID number or, at a minimum, the page or paragraph number.
19 The parties must also indicate the level of confidentiality of the
20 evidence, that is whether it is public or confidential and whether a
21 closed session is necessary. If a closed session is unnecessary but
22 confidential evidence is going to be displayed on the screens, the
23 parties must wait for the Chamber to instruct the curtains in front of
24 the public seating area to be closed and that the public TV screen is
25 disconnected.

1 The Chamber reminds that during public sessions the parties
2 should refrain from using anonymous witnesses and victims' names. They
3 should refer to them by their respective numbers. At this instance, the
4 Bench also wishes to remind the text of Rule 69 of the Rules of Procedure
5 and Evidence pursuant to which the parties may agree that an alleged fact
6 which is contained in the charges, the contents of a document, the
7 expected testimony of a witness or other evidence is not contested so
8 that the Chamber could proceed without spending time on the said piece of
9 evidence on which the parties do not dispute.

10 Finally, we invite the parties to make efforts to avoid
11 repetitive arguments analysis. Having said this, I invite Ms. Tai, as
12 representative of the Prosecutor's Office, to take the floor and to begin
13 with the presentation of the Prosecutor's case.

14 MS. TAI: Thank you, Madam President. Before I begin, may I
15 briefly introduce our team for today. Before I begin, may I briefly
16 introduce my teammates for today as a composition.

17 PRESIDING JUDGE TRENDAFILOVA: You have some new faces?

18 MS. TAI: I do.

19 PRESIDING JUDGE TRENDAFILOVA: Please go ahead.

20 MS. TAI: This morning, Madam President, your Honours, the
21 Prosecution team is represented by Ms. Karen Corrie, Ms. Lara Renton,
22 Ms. Shamiso Mbizvo, Mr. Alex Whiting, Ms. Grace Goh, and our audio-visual
23 assistant, Mr. Medar Begaliev, as well as myself.

24 PRESIDING JUDGE TRENDAFILOVA: Thank you, Ms. Tai. I would ask
25 all the parties if they have new faces in their teams to -- just for the

1 record to present them and then they will proceed with their presentation
2 or interventions.

3 Now the floor is over to you, Ms. Tai.

4 MS. TAI: Thank you.

5 Madam President, your Honours, through this presentation the
6 Prosecution addresses the chapeau elements of crimes against humanity.
7 We focus here on three points related to organisation and organisational
8 policy.

9 First, we will present the context in which the violence
10 unfolded. Second, we will focus on William Ruto, Henry Kosgey and
11 Joshua Sang's organisational policy. And third, we will identify
12 William Ruto, Henry Kosgey, and Joshua Sang's organisation or network in
13 this particular case.

14 Viewed in its totality, the Prosecution's core evidence supports
15 three findings: That the attacks against the civilian population were
16 committed by a network created by William Ruto and Henry Kosgey, and that
17 it was created pursuant to an organisational policy, and next, that this
18 network qualifies as an organisation within the meaning of
19 Article 7(2)(a).

20 Before I move forward and present the evidence that I just
21 described, the Prosecution would like to elaborate on the context briefly
22 in which the violence occurred.

23 For this segment of the presentation, Madam President,
24 your Honours, we will begin the use of visual aides. They are simply
25 demonstrative. They are not evidence.

1 COURT OFFICER: Before Ms. Prosecutor would continue, I would
2 advise everyone, to be able to view this video presentation you will have
3 to press on the "PC 1" button right in front of you. Thank you.

4 PRESIDING JUDGE TRENDAFILOVA: We're fine.

5 MS. TAI: Thank you. Madam President, your Honours,
6 William Ruto, Henry Kosgey, and Joshua Sang created an organisation of
7 hundreds of people with a specific goal. They had different roles and a
8 clear decision-making process.

9 MR. KIGEN-KATWA: Sorry, we're not able to access the visual aid.

10 PRESIDING JUDGE TRENDAFILOVA: So the team of Mr. Kosgey doesn't
11 have it on the screen --

12 MR. ORARO: We have pressed "PC 1" but it's not coming up. Thank
13 you. It has come on now.

14 PRESIDING JUDGE TRENDAFILOVA: Does everyone have the picture on
15 the screen? Ms. Tai, please proceed.

16 MS. TAI: Thank you. William Ruto and Henry Kosgey adopted the
17 policy of the organisation -- it's okay? -- and capitalised on
18 ethnic-based associations and existing tensions to meet their own needs.
19 They had political needs of gathering large blocks of voters who would
20 vote for them and a need to expel those who would not. Joshua Sang
21 contributed by harnessing these tensions through his broadcast at
22 Kass FM.

23 This, Madam President, your Honours, is the lens through which we
24 view the organisation, in this case, the network, its policy, and its use
25 of preparatory meetings and events.

1 Witnesses have supported this view, stating that William Ruto
2 gained supporters mainly by exploiting these long-lasting tensions,
3 sentiments about land allocation, and, namely, that the Kalenjin were
4 eager to take back their land from the foreigners.

5 Witness 2 tell us he identifies William Ruto as stating, and I
6 quote:

7 "That the Kikuyus had to be evicted from the region, the Eldoret
8 North constituency, and in particular the Rift Valley. Accordingly,
9 after listening to William Ruto, the Nandis' thinking was that the Kikuyu
10 will be evicted from the region and that they would recover their land."

11 The citation for this, your Honour, is EVD-OTP-00222 and can be
12 found specifically at page 137, paragraph 35. It is confidential.

13 Witness 0004 supports Witness 0002, supports that fact, and
14 states:

15 "Ruto then told the local Kalenjin and Luhya leaders to evict all
16 the Kikuyus living in Eldoret North constituency because they were
17 campaigning against him. He told them that the Kikuyus have oppressed
18 the local people and now it was time for the Kikuyu to be evicted to
19 their homeland in Central Province."

20 This witness understood that to mean that the Kikuyu should be
21 permanently evicted from the Rift Valley. He understood it that way
22 because in 1992, the Kikuyus were chased away.

23 That can be found at EVD-00239 at 0090, 0091, paragraph 35, and
24 it's the same classification.

25 A public source, Human Rights Watch, corroborates this fact,

1 concluding, and based on its own investigation, that divisive campaigning
2 did not by itself cause the existing tensions to boil over into violence,
3 but in the days preceding the election, local elders and ODM organisers
4 in many communities around Eldoret called meetings where they declared
5 that electoral victory for Kibaki would be the signal for war against
6 local Kikuyu. They told community members a PNU victory should be seen
7 as conclusive proof of electoral fraud and that all the Kikuyu were
8 complicit in it.

9 That can be found at EVD-00002, excuse me, at 287, 0288.

10 Thus Madam President, your Honours, the violence clearly did not
11 occur overnight. It was not spontaneous. It occurred as a direct result
12 of William Ruto, Henry Kosgey, and Joshua Sang's creation of an
13 organisation to achieve their goal of gaining power and creating a
14 unifying voting bloc. In this case, this policy was also their common
15 plan as required under the mode of liability. I will address that in a
16 separate presentation.

17 Directing your attention back to organisational policy, it is
18 well established that together Article 7(2)(a) and the elements of crime
19 require that an attack against the civilian population be carried out
20 pursuant to an organisational policy in which the organisation actively
21 promotes or encourages such an attack. The Prosecution submits that the
22 network created by William Ruto, Henry Kosgey, and Joshua Sang qualifies
23 as such an organisation. It qualifies because it integrated hundreds of
24 people following a common goal with defined roles and with a clear
25 decision-making process.

1 The organisational policy of this network was two-fold. Number
2 one, to expel from the Rift Valley those that were perceived to be PNU
3 supporters, and second, to gain power and create a uniform ODM voting
4 bloc.

5 The method that was used by this network was to inflict fear and
6 to systematically destroy homes and property, leaving their targets with
7 no alternative but to permanently relocate. As best stated by
8 Witness 0004, Ruto said that those people who did not support the ODM or
9 think like them should pack their things and leave the Rift Valley.

10 That can be found at 00239 at 0090, paragraph 31. And again, it
11 is confidential.

12 This fact is corroborated by yet another witness who said that
13 Ruto said that the Kikuyus had to be evicted from the region.

14 That reference is 00222 at 137, paragraph 35. And the same
15 designation would apply.

16 Another witness tells us -- he describes an ODM rally and tells
17 us that the majority of the speakers generally spoke about the need to
18 win the 2007 elections. They advised people to be vigilant in the face
19 of possible election rigging. They were saying that they were taking
20 power, and they dwelt on the possibility of rigging and what would happen
21 if that was done. That can be found at 00306 at 0046.

22 We emphasise here that the end goal, if you will, for this
23 network was not this particular election, the election that occurred in
24 2007. Instead, the organisational policy, as well as their common plan,
25 was focused on obtaining a large amount of voters favourable to their

1 case for the long term, for this election and for others that followed.

2 Next we answer the question of what exactly is an organisation.

3 As this Chamber is well aware, the majority has held that to qualify as
4 an organisation, it needs to be considered whether the group has the
5 capability to perform acts which infringe on basic human values. In the
6 spirit of efficiency, the Prosecution will elaborate on that particular
7 aspect in writing, as Madam President requested, on the 16th of
8 September.

9 Through the course of this presentation, we will describe the
10 organisation, the network and describe how those factors have been met.

11 With respect to the organisation, the Prosecution directs the
12 Chamber to the visual aides as its structure is best explained visually.

13 Now, by 2007, William Ruto was the head of a multifaceted
14 network. He was a prominent politician and referred to as a Kalenjin
15 leader. He alone was the recognised leader in the Rift Valley and
16 responsible for overseeing the attacks in that area. However, he did not
17 act alone but instead acted together with Henry Kosgey and Joshua Sang.

18 This network had five components, each of which we will address
19 in turn.

20 Beginning with William Ruto, Witness 0008 refers to him and the
21 power and influence that he held. Witness 0008 tells us that as a
22 leader, he had the power because it had been given by the people. So he
23 had to order those organisations like the elders, like Kass FM, and in
24 short, he was the patron of all those structures and he had the power.
25 That can be found at EVD-00543 at 0528, 0530. That's the same

1 designation.

2 Witness 0002 corroborates this fact and states:

3 "Ruto seemed to be very powerful even though he was not
4 contesting for the presidential position in 2007. He spoke about various
5 political affairs and asked the people to support the recently created
6 ODM party that he was representing, the Kalenjins. He said he was the
7 representative of the Nandis and told them that the ODM was their party."

8 Citation EVD-00222 at 137, paragraph 32. Same designation.

9 Likewise, Henry Kosgey in 2007 was a prominent politician. He
10 was an elected Member of Parliament representing Tinderet constituency in
11 the Nandi District for four separate terms. On the ground, Kosgey's
12 authority was subordinate to Ruto, and Kosgey himself remained
13 responsible for the attacks executed in the Nandi District.

14 Quoting Witness 0006: "Kosgey is powerful because he had been a
15 politician for a long time and had money, but ultimately Ruto was more
16 powerful than Kosgey."

17 EVD-00382 at 0025, paragraph 167. Same designation.

18 This -- this political component did not consist only of
19 William Ruto and Henry Kosgey. Other politicians supported them by
20 promoting their policy and their plan. Witness 0008 tells us that one
21 supporting politician said at a public gathering:

22 "No. These elections will be rigged. If you have never known as
23 locals, this thing will be rigged, and what we will do is just expel
24 these people. There is nothing else. We have no compromise. In fact,
25 the money, the money that you are claiming you have raised will first be

1 used to wage war against these people. These people, the Kikuyu, the
2 Kamba, and the Kisii, those people who are against us."

3 Citation 00543 at 645, lines 1103 through 1107. Same
4 designation.

5 Together, the participation of these politicians encouraged their
6 supporters to galvanise behind William Ruto's plan, but their support did
7 not end there.

8 William Ruto, Henry Kosgey, and other politicians actively
9 participated in planning and financially supporting these attacks.

10 Witness 0006 describes a meeting attended by William Ruto,
11 Henry Kosgey, and other politicians where they would "be getting
12 assistance to buy weapons, materials for producing bows and arrows, and
13 also arrange for transportation to move people to areas where a lot of
14 Kikuyu and Kisii are located." He said, or he heard Henry Kosgey state
15 that the money would be available to buy food for bribes, and to pay
16 people to participate in this exercise.

17 Citation 00382 at 0015, paragraphs 95 and 101. The same
18 designation.

19 Now, secondly, this network had a second component. It had an
20 avenue to broadcast their message, and that avenue was Joshua Sang who
21 used his role in the media as his weapon. Joshua Sang furthered the
22 network's organisational policy to expel PNU supports by disseminating
23 the network's message.

24 Madam President, your Honours, this -- Mr. Sang's role will be
25 covered by my colleague Ms. Corrie in her mode of liability presentation.

1 We have structured it this way to adhere to -- to avoid duplication and
2 repetitiveness.

3 So moving forward to the third component, that would be funding.

4 This network received funding from a variety of different
5 sources. First, Ruto funded the network himself. Witness 0004 describes
6 the message that he received from one of Ruto's subordinates. This
7 subordinate arrives from Besiebor. He addressed the group, telling them,
8 "Receive greetings from Minister Ruto. He wants you to fight for your
9 community." He said that Ruto had given him something, something to hand
10 over to the people. He then sees a bundle of notes being handed over.

11 Citation 00239 at 100, paragraph 102. Same designation.

12 Other witnesses corroborate this fact and describe Ruto handing
13 out money, the amount of which varied depending on the skills that that
14 particular person could offer.

15 00551 at 0849. Same designation.

16 And lastly, Witness 0002 describes what he saw on the
17 14th of December at a meeting at William Ruto's house in Sugoi:

18 "When the meeting was over and as the youth were getting out of
19 the room, Ruto gave each of them 4.000 Kenyan shillings." He states and
20 admits that he also got these 4.000 Kenyan shillings, because "giving
21 money to those attending the meeting was Ruto's way to greet everyone,
22 everyone who had been to his house."

23 00222 at 0141. The same designation.

24 Second, Henry Kosgey funded the network. Witness 0006 states
25 that Henry Kosgey handed out money at a planning meeting in December.

1 Quoting this witness: "Everyone who was there received money. They were
2 given this money by Henry Kosgey."

3 00484 at 0200 through 0201.

4 This fact is corroborated by another piece of evidence. A
5 non-ICC witness tells us that William Ruto and Henry Kosgey separately
6 financed the youths to commit the violence, violence which did not take
7 place prior to such funding.

8 EVD-00508 at 0726.

9 Third, businessmen also funded the network. Witness 0004 states,
10 and I quote:

11 "The businessmen provided the funding, and they supplied food and
12 livestock to the attackers. Suppliers included farmers who supplied
13 maize and other sacrifices."

14 00239 at 0097, paragraph 84.

15 Now, together, these different sources for the funding can best
16 be illustrated by Witness 006 who states that these funds were basically
17 used to compensate people "like your salary" for attending the meetings,
18 or to purchase weapons, or to purchase raw materials to make weapons, or
19 to otherwise sustain the attacks.

20 00484 at 0201.

21 Now, fourth, as illustrated in the visual aide, the fourth
22 component of the network is rooted in the elders, some elders. In 2007,
23 the participation of some elders gave the network a certain degree of
24 legitimacy and allowed the network to capitalise on the Kalenjin
25 tradition of demanding strict respect and obedience from the youth.

1 Quoting Witness 0008, this witness explains that:

2 "Yes, we normally follow the rules as Kalenjin. We adore the
3 rules that the elders have put in place. We believe in it very much,
4 because that is actually the core of our being."

5 00541 at 474, lines 1036 through 1039.

6 A public source, Human Rights Watch, states, based on their
7 investigation, to cite just one of many typical examples, a Kalenjin
8 councillor reportedly told a rally in the town of Soi that, if elected,
9 the ODM would remove the roots of the local Kikuyu communities so that
10 there would only be one tribe there.

11 They go on to state that largely as a result of this ethnic
12 rhetoric, many Kalenjin supporters believed that once elected, the ODM
13 would find a way -- they would find a way to redistribute most or all
14 land owned by Kikuyu back to them.

15 00002 at 0286.

16 Now, these elders participated and supported the network in many
17 different ways. First, they provided financial support. At these
18 meetings, they discussed how much money the Kalenjin elders had, and they
19 questioned what type of contribution could these people make.

20 00542 at 0494, 04 -- excuse me, through 0498, lines 346 through
21 522.

22 Second, some elders played a pivotal role in planning, planning
23 which included recruiting local coordinators. One witness states that
24 Kalenjin elders "recruited coordinators all over. These coordinators
25 were meant to fulfil the agenda of the Kalenjin elders."

1 00542 at 0522, lines 1346 through 1350. And confidentially
2 designated.

3 For the remaining portion of my presentation, in the interests of
4 economy, I would like to point out that my sources are confidential
5 unless designated otherwise.

6 PRESIDING JUDGE TRENDAFILOVA: So then you're going to refer only
7 when there is an exception to what you said.

8 MS. TAI: Exactly.

9 PRESIDING JUDGE TRENDAFILOVA: Fine.

10 MS. TAI: Thank you.

11 Third, some elders also coordinated youth and led attacks.
12 Witness 0004 described the role of one elder, his role in an attack at
13 Turbo: "Elders were present during the attack on Turbo and were
14 directing that nobody should leave." One elder was seen leading this
15 group and telling them, his followers, to defend the community and to
16 stay around. At the end of the attack at Turbo, this group was directed
17 by the elder to walk around, to see that there was no enemy left.

18 00239 at 0098, paragraph 92.

19 Fourth, and finally, some elders conducted blessings to protect
20 perpetrators. Witness 0002 describes the role of a traditional elder at
21 Ruto's home on the 14th of December of 2007:

22 "His job," referring to the elder, "was to bless Ruto, and the
23 three commanders, Cheruiyot, Cheramboss and Koech, and the weapons. He
24 also blessed the other participants before the upcoming fight so that
25 everyone would be able to carry out their duty when the time came."

1 00763 at 0263, paragraph 42.

2 Moving forward, the last component is the military component. It
3 consisted of former members of the Kenyan military and police. It
4 included three commanders or generals, as they were referred to, all of
5 whom reported to William Ruto or Henry Kosgey. Each of the -- each of
6 these three commanders were responsible for specific geographical areas
7 in the Rift, two of which are relevant here.

8 One Witness tells us that, on the 14th of December, at a planning
9 meeting, that General Koech was the commander for the South Rift, and
10 that General Cheruiyot was the commander for the North Rift, and that
11 Cheramboss was in charge of the Central Rift.

12 This witness, and I quote, tells us:

13 "I heard about these three generals on the meeting of the 14th.
14 They were saying for the North Rift we have General Cheruiyot. He is
15 monitoring and he is monitoring the way the work is progressing, and
16 Cheramboss in Central."

17 00489 at 0451, lines 1554 through 1576.

18 Other witnesses, Witness 0002 and 0008 report again that the
19 first commander was Augustin Cheruiyot. He was responsible for the
20 North Rift and that included the greater Eldoret area, Turbo, and
21 Kapsabet.

22 The references for that are 00548 at 0736 through 0748, lines 367
23 through 379, as well as 00222 at 0141, paragraph 67.

24 And yet another witness identifies that Cheruiyot was appointed
25 as a commander for the North Rift Valley in a meeting held on the

1 30th of December of 2006.

2 00543 at 0556, line 1006.

3 And other witnesses corroborate that Cheramboss was present at
4 multiple planning meetings.

5 Those cites, Madam President and your Honours, start with 00162
6 at 1369, line 361, coupled with 00382 at 0024 through 0025, paragraphs
7 154 to 173.

8 To further describe the structure, below Ruto, and in some
9 instances Kosgey, these three commanders led hierarchical organisations
10 in their respective area -- their respective geographical areas. Each
11 hierarchy contained a horizontal layer of subordinates and direct
12 perpetrators.

13 Witness 0008 describes the command structure which placed
14 William Ruto, as demonstrated on the visual aide, above area commanders
15 Cheramboss, Koech, and Cheruiyot, who -- they were, in turn, above the
16 local coordinators. So these three commanders supervised the local
17 coordinators below them. However, Ruto used this hierarchy to control
18 the commanders and the local coordinators. He used it to control the
19 organisation.

20 Briefly, the subordinates, I would like to address their role and
21 their duties and their participation in the attacks.

22 Witness 0008 recounts his arrival in Yamumbi in the same vehicle
23 as his local coordinator, a local coordinator who later decapitated two
24 babies. 00553 at 0899 through 0901.

25 Witness 0008 tell us that the local coordinator was the one that

1 was leading that particular team.

2 00553 at 0901.

3 Other subordinates were assigned different duties. Some
4 identified PNU supporters' homes and businesses for attack. In Nandi,
5 Witness 0006 tells us that one subordinate identified houses to be
6 attacked in early December, and I quote:

7 "Yes. He reported that on the 14th, and he had already reported
8 on the 6th that he had finished identifying the houses."

9 00486 at 0275 through 278, lines 622 through 720.

10 Similarly in Turbo, Witness 0004 describes how Ruto's
11 subordinates defined their targets. "These people, they moved with their
12 attackers and that they helped identify Kikuyu homes and property. The
13 Kikuyu houses were burned because the Kalenjin wanted to evict them."

14 00239 at 0098, paragraph 91.

15 And finally, other subordinates were responsible for leading
16 attacks. These people were the ones that were in front with the guns.
17 Witness 0008 states, and I quote:

18 "We have the local coordinators. They are participating and
19 doing all the structure, explaining how we go. Somebody who has a gun to
20 steer these people, these people who had simple weapons in behind, so in
21 case we find any steep resistance, it's the ones in front that go first,
22 to clear the front for those to move behind them."

23 00556 at 0966-0968.

24 In addition, William Ruto supported the military structure. He
25 did so by providing logistical support in a variety of ways. First, he

1 ensured that his subordinates could communicate. Witness 0008 relates
2 that local providers were provided phones. These phones were being
3 provided by the coordinators for the entire area, and the mobiles were
4 from the top, from Ruto himself.

5 00556 at 967, 0970, lines 824-874.

6 He also ensured that his subordinates had gas. Witness 008
7 states that Ruto ordered a subordinate to bring the gas cylinders.

8 00552 at 0853, lines 76 through 90.

9 And significantly, Ruto himself ensured that they had guns.

10 Witness 0002 states, and I quote:

11 "I cannot tell who paid for the guns, but it was Ruto who decided
12 their destiny. While Ruto was distributing them, he was saying, 'These
13 are for Mount Elgon, these are for South Rift,' et cetera."

14 It appeared to him that these people were familiar with what was
15 going on and that they knew what was going to happen.

16 00222 at 0143, paragraphs 81 and 84.

17 To further motivate their subordinates, William Ruto,
18 Henry Kosgey, and Joshua Sang guaranteed their success. They promised
19 perpetrators immunity. Witness 0006 states Kosgey was putting the
20 perpetrators at ease, saying, "Don't worry. We will be in power later
21 on, and we will take care of you then."

22 00483 at 0175.

23 They also promised monetary rewards. Witness 0002 corroborates
24 this fact and states that: "Perpetrators would get 50.000 Kenyan
25 shillings for killing a Kikuyu," and that they could acquire a piece of

1 land.

2 00796 at 0116 through 0117.

3 This same witness identified that the person who would pay the
4 reward was Ruto.

5 In conclusion, Madam President, your Honours, viewing the network
6 in its totality, the Prosecution's core evidence establishes that, first,
7 this network had the capability to perform acts which infringe on basic
8 human values. Core evidence illustrates that the network was under a
9 responsible command, William Ruto, and had an established hierarchy in
10 the five areas illustrated.

11 Second, that Ruto and Kosgey's network possessed the means to
12 carry out a widespread or systematic attack against the civilian
13 population. Their means were their access, their use of capital, guns,
14 other weapons, and manpower, and in fact, they did carry out such
15 attacks.

16 Third, they exercised control over part of the territory of a
17 state. Here, all the attacks occurred in the Rift Valley. Ruto and
18 Kosgey being members of parliament and William Ruto being the most
19 prominent Kalenjin politician.

20 Fourth, the groups only purpose was criminal. Their whole
21 intention and the whole purpose of the plan was to attack PNU supporters.

22 Fifth, Ruto, Kosgey, and others articulated their intention to
23 attack PNU supporters, these people who are part of the civilian
24 population in the locations that were attacked.

25 And last, the attackers, the direct perpetrators, are Ruto and

1 Kosgey's subordinates. They, too, are part of the group, and they fulfil
2 the five factors identified above.

3 Collectively, the Prosecution's core evidence thus establishes
4 substantial grounds to believe that this network qualifies as an
5 organisation within the meaning of Article 7(2)(a).

6 Madam President, your Honours, the Prosecution will address in
7 detail the eight meetings and events upon which it relies, the meetings
8 and events that were used to implement the plan. However, in the
9 interest of judicial economy and to avoid repetition, they will be
10 addressed at one particular point in the presentation to follow on the
11 mode of liability.

12 Thank you. I have nothing further.

13 PRESIDING JUDGE TRENDAFILOVA: Thank you very much, Ms. Tai. The
14 Prosecutor's team has until the break half an hour, so is someone else
15 from your team ready to proceed.

16 MS. TAI: We are ready to proceed, and we will --

17 PRESIDING JUDGE TRENDAFILOVA: Okay. And what will be the
18 subject matter of your presentation?

19 MS. TAI: I apologise, your Honour. The subject matter is going
20 to be widespread and systematic attacks, that chapeau element, and it
21 will be presented by Ms. Corrie. Thank you.

22 PRESIDING JUDGE TRENDAFILOVA: Ms. Corrie, you have the floor.
23 Thank you very much, Ms. Tai. Ms. Corrie, you have the floor.

24 MS. CORRIE: I will now turn on my microphone. Thank you. The
25 Prosecution will now present its submissions on the contextual elements

1 of the crimes which are charged as crimes against humanity.

2 The sources discussed herein are confidential unless otherwise
3 noted.

4 As your Honours can see on the visual display, there are two
5 components to the contextual elements of the crimes charged.

6 PRESIDING JUDGE TRENDAFILOVA: There is nothing on the display.

7 MS. CORRIE: There is nothing on the display.

8 PRESIDING JUDGE TRENDAFILOVA: Does everyone have on the screen?

9 The -- the member of Mr. Sang's Defence team. There is a problem. If
10 you're so kind, Court Officer. Just a little bit of break till everyone
11 is fine with the screen.

12 Madam Chana, do you have on your screen? Okay.

13 Now the floor is over to you.

14 MS. CORRIE: Thank you. And again, as I hope now everyone can
15 see on the visual display, there are two components to the contextual
16 elements of the crimes charged.

17 I will first address how the evidence establishes that the crimes
18 were committed as part of an attack against a civilian population.

19 As you can see, Article 7(3) of the elements of crimes defines an
20 attack against a civilian population a course of conduct involving the
21 commission of acts referred to in paragraph 1 against any civilian
22 population, pursuant to or in furtherance of a State or organisational
23 policy to commit such an attack.

24 I will address only that the attack was directed against a
25 civilian population. As you just heard, my colleague Ms. Tai addressed

1 the organisational policy behind these attacks.

2 Your Honours, the Prosecution submits that the evidence
3 establishes that members of the network attacked civilians living in the
4 Uasin Gishu and Nandi Districts who were perceived to support the PNU.

5 As you will hear in the presentations on the crimes charged,
6 network perpetrators attacked perceived PNU supporters in their homes and
7 businesses, as they were going about their daily lives. While limited
8 evidence suggests that at times some victims took up arms to defend
9 themselves, the evidence overwhelmingly shows that most victims did not
10 fight back and that those who survived fled to protect themselves. These
11 people were not combatants. They were civilians.

12 I will next address how the evidence establishes that the crimes
13 were committed as part of a widespread or systematic attack.

14 First, the evidence establishes that the crimes were widespread.
15 Chambers of this court, including this Chamber, have held that an attack
16 is widespread where it is massive, frequent, carried out collectively
17 with considerable seriousness, and directed against a multiplicity of
18 victims. It entails an attack carried out over a large geographical area
19 or an attack in a small geographical area directed against a large number
20 of civilians.

21 As will be discussed in upcoming presentations on the specific
22 crimes, the evidence establishes that the network planned to and, in
23 fact, did commit crimes in a number of specific locations in the
24 Uasin Gishu and Nandi Districts, which are highlighted on the map in the
25 visual display. The northernmost point, Turbo town, and the southernmost

1 point, Nandi Hills town, are separated by approximately 62 kilometres.

2 Additionally, the network's attacks targeted and impacted
3 thousands of people - a massive attack against a large number of victims
4 under any definition.

5 I direct your attention to the visual display showing the numbers
6 of people killed throughout Kenya during the post-election violence. It
7 shows that in Uasin Gishu and Nandi Districts alone, over 230 people were
8 killed.

9 The source for this is EVD-PT-OTP-000376 at page 0690 and
10 pages 0695 through 0707.

11 The next slide shows the reported injuries by district. As you
12 can see, in the Uasin Gishu and Nandi Districts, over 1.000 people were
13 injured during the violence.

14 The main source for this is public source EVD-PT-OTP-00004 at
15 pages 0425 through 0426.

16 The next slide shows the number of persons who were internally
17 displaced in Kenya during the violence by province. As you can see,
18 throughout the Rift Valley, over 400.000 persons were displaced. The
19 evidence indicates that network perpetrators forcibly displaced tens of
20 thousands of these people from their homes in the Uasin Gishu and Nandi
21 Districts. The sources for these statistics will be addressed in
22 upcoming presentations.

23 This displacement involved massive property destruction. It was
24 reported that in the Uasin Gishu District alone approximately 52.000
25 homes were destroyed. The highest number of houses destroyed in any

1 single location in Kenya during the post-election violence. Again, these
2 sources are addressed in upcoming presentations.

3 In each location targeted by the network, perpetrators committed
4 the crimes charged. The following slides highlight the crimes committed
5 in each location relevant to the crimes. The sources are addressed again
6 in upcoming submissions.

7 In Turbo town, network perpetrators forcibly displaced thousands
8 of perceived PNU supporters and killed at least four people during the
9 attack. In the greater Eldoret area, network perpetrators committed
10 similar crimes. They destroyed the homes and property of perceived PNU
11 supporters giving them no alternative but to flee.

12 They also killed people in each area. In Kimumu, network
13 perpetrators killed at least six people. In Langas, at least 30 people
14 died as a result of the attack. In Yamumbi, network perpetrators killed
15 at least three people. In Huruma, at least 14 people died as a result of
16 the attack. In Kiambaa, network perpetrators killed between 17 and
17 35 people when they attacked and burned the Kenya Assemblies of God
18 Church. In Kapsabet, network supporters forcibly displaced an estimated
19 7.500 people and killed at least three people. And in Nandi Hills, at
20 least three people were killed and thousands of others were forcibly
21 displaced.

22 Your Honours, all of these figures demonstrate that the crimes
23 were widespread in that they occurred over a large geographical area and
24 impacted thousands of people.

25 Additionally, your Honours, the evidence establishes that the

1 crimes charged were systematic. Indicia of systematicity delineated by a
2 majority of this Chamber are listed in the visual display.

3 In this case, evidence from witness testimonies, NGO reports and
4 other sources demonstrates that the attacks were well organised, that the
5 suspects had planned them in advance and subsequently coordinated their
6 commission. The evidence shows that they were not random or spontaneous.

7 Several specific factors demonstrate this. One factor, as
8 identified by Pre-Trial Chamber I, is the existence of a state or
9 organisational policy. And my colleague Ms. Tai has made submissions on
10 this issue.

11 Another factor is that during the planning of the crimes, the
12 suspects and their subordinates planned the attacks to ensure that they
13 affected the largest number of perceived PNU supporters.

14 Prosecution witnesses explained that Ruto, Kosgey, and other
15 network members selected target locations with high populations of
16 perceived PNU supporters and then identified their specific homes and
17 properties within those target locations. During the attacks, they also
18 pointed out the target properties and ensured that they were attacked.

19 Kosgey also helped to ensure that the attacks would be systematic
20 by holding meetings every two days with the local leaders in Nandi
21 District. According to Prosecution Witness 0006, leaders of the violence
22 in Nandi District were told to meet with Kosgey every two days to review
23 the preparations that they had made.

24 This is found at EVD-PT-OTP-00382 at 0015, paragraph 102, and
25 EVD-PT-OTP-00486 at 0282, lines 868 through 887.

1 Regular meetings concerning their plans helped to ensure that the
2 commanders were all comparably equipped and prepared to execute the
3 attacks.

4 Prosecution witnesses also gave evidence that the attacks were
5 executed systematically. Each attack involved a local commander and
6 subordinates. Prior to the attacks, network perpetrators converged at a
7 meeting point with local coordinators to organise for the attack. In
8 some cases they would be transported to the target locations in
9 prearranged vehicles, while in other cases they would advance on foot.
10 At the target locations, they with attack from a variety of directions.
11 In the course of the attacks, they routinely burned the homes, businesses
12 and property of perceived PNU supporters and killed some of them. They
13 regularly used fuel, supplied by the network, to burn properties. They
14 also erected roadblocks around the target locations, attacking and
15 sometimes killing perceived PNU supporters trying to escape.

16 Additionally, they planned to deploy network perpetrators
17 systematically. Those who already had military training were sent to
18 locations that would require more manpower, while untrained perpetrators
19 with traditional weapons were deployed to areas that were assessed to
20 have less risk. Plans were also made to deploy reinforcements between
21 the Uasin Gishu and Nandi Districts.

22 Finally, Ruto and Sang communicated with network perpetrators as
23 they committed the attacks, facilitating systematic execution of the
24 crimes. Prosecution witnesses described that Ruto was in contact with
25 network subordinates by telephone. He gave them instructions and sought

1 reports on their progress. For example, Prosecution Witness 0001
2 describes seeing a network subordinate receive a phone call after which
3 that subordinate said that he and Ruto had discussed that "the Kikuyu
4 have to go. They have rigged the election."

5 This is found at EVD-PT-OTP-00155 at pages 920 through 922.

6 Sang also helped coordinate the attacks. He used Kass FM's
7 broadcasts to instruct network perpetrators on where to attack, obtain
8 updates on their progress and direct network perpetrators to areas that
9 needed additional reinforcement. For example, Witness 0002 told the
10 Prosecution:

11 "Sang seemed to have information -- seemed to have someone
12 informing him about what it was being done to the Kikuyus in several
13 areas. Kass FM played a very big role on telling the youth from
14 different places what to do."

15 This is found at EVD-PT-OTP-00222 at page 0146, paragraph 105.

16 Your Honours, all of these factors establish that the crimes
17 committed by members of the network cultivated by Ruto and Kosgey,
18 together with Sang and others, were committed systematically in the
19 Uasin Gishu and Nandi Districts.

20 Finally, your Honours, the evidence establishes that Ruto,
21 Kosgey, and Sang knew that their conduct was part of the widespread and
22 systematic attack against the civilian PNU supporters in the Uasin Gishu
23 and Nandi Districts.

24 First, Ruto, Kosgey and Sang knew about the widespread and
25 systematic nature of the attacks against civilian PNU supporters because

1 the suspects planned for the attacks to be widespread and systematic.

2 As was explained in the presentation on the organisation involved
3 in these attacks and as will be described in the presentations on the
4 modes of liability of the suspects, it was the suspects who developed and
5 disseminated the plan to attack perceived PNU supporters. They selected
6 attack locations with high populations of perceived PNU supporters. They
7 cultivated a large and geographically diverse network of perpetrators to
8 commit these attacks. They ensured that network perpetrators had the
9 tools to carry out the attacks, including weapons, fuel, and
10 transportation to the target locations.

11 The suspects also knew about the widespread and systematic nature
12 of the attacks because they oversaw the execution of the attacks. As was
13 already discussed, this applies particularly to Ruto and Sang who helped
14 coordinate them.

15 In conclusion, your Honours, the Prosecution submits that the
16 evidence establishes substantial grounds to believe that the crimes
17 planned and directed by Ruto and Kosgey, together with Sang and others,
18 were part of a widespread and systematic attack against the civilian
19 population of perceived PNU supporters in the Uasin Gishu and Nandi
20 Districts, and that Ruto, Kosgey and Sang all knew that the crimes
21 committed by the network subordinates were part of such an attack.

22 This concludes the Prosecution's presentation on the contextual
23 elements of the crimes. Thank you.

24 PRESIDING JUDGE TRENDAFILOVA: Thank you, Ms. Corrie. Now we
25 have about 14 minutes. Ms. Tai, you can proceed with the other members

1 of your team addressing the contextual elements of the specific acts.

2 MS. TAI: Thank you, your Honour. Our next presentation is --
3 will be presented by Ms. Lara Renton on the subject of murder.

4 PRESIDING JUDGE TRENDAFILOVA: Thank you. Ms. Tai, are you going
5 to have some presentation on the screen? Okay.

6 MS. RENTON: Madam President, there is a component that is visual
7 and there is also an audio component, and we have brought that to the
8 technicians' attention prior to the session.

9 PRESIDING JUDGE TRENDAFILOVA: Yes, as requested by the Chamber.

10 MS. RENTON: Yes.

11 PRESIDING JUDGE TRENDAFILOVA: Thank you.

12 MS. RENTON: Good morning, Madam President and your Honours.

13 PRESIDING JUDGE TRENDAFILOVA: Good morning.

14 MS. RENTON: On behalf of the Prosecution, I will address you on
15 counts 1 and 2, concerning the crime of murder as a crime against
16 humanity, pursuant to Article 7(1)(a) of the Rome Statute. References to
17 evidence are confidential unless I indicate otherwise.

18 The elements of crimes stipulate that this crime has three
19 elements, the second and third of which are contextual elements common to
20 all crimes against humanity. Considering that my colleagues Ms. Tai and
21 Ms. Corrie have already addressed your Honours on these common elements,
22 the Prosecution's submission on this crime and the other crimes with
23 which the suspects are charged will address only their specific elements.

24 PRESIDING JUDGE TRENDAFILOVA: Would you slow down a little bit
25 for the interpreters, please. And just to agree that we are going to

1 make a break at 11.00.

2 MS. RENTON: Right. Yes, of course. This presentation therefore
3 focuses on the first element, the only specific element of the crime of
4 murder. This is displayed for ease of reference on the screen now. This
5 element is: The perpetrator killed one or more persons.

6 Your Honours, over 1.000 civilians were killed in the
7 post-election violence that occurred in Kenya.

8 This statistic can be found at EVD-PT-OTP-00338 at 0048. This is
9 a public document.

10 As your Honours can see in the visual displayed on the screen,
11 over half, in fact, close to three-quarters, of these victims were from
12 the Rift Valley. As my colleague Ms. Corrie briefly mentioned, in the
13 Uasin Gishu and Nandi Districts, over 230 people were killed. The source
14 for this is EVD-PT-OTP-00376 at page 0690, and pages 0695 to 0707.

15 As the evidence in the Prosecution's amended list of evidence and
16 in-depth analysis chart establishes, and as I will described in further
17 detail during the course of this presentation, a deliberate part of the
18 plan conceived by William Ruto and Henry Kosgey, together with
19 Joshua Sang and others, was for civilian supporters of the PNU to be
20 attacked with violence, including murder. And this is in fact what
21 happened. Civilians perceived to be supporters of the PNU were
22 intentionally and knowingly attacked and killed as a result of the
23 execution of the network's plan.

24 In each specific location addressed in the amended document
25 containing the charges, the evidence establishes that perceived PNU

1 supporters were killed in the post-election violence. As I briefly
2 summarise the main attacks, the locations will be displayed and
3 highlighted on the map on the screen in front of you.

4 Turbo town was attacked on 30 December 2007 from all directions.
5 Network perpetrators poured petrol onto houses and businesses believed to
6 belong to perceived PNU supporters and set them on fire. Prosecution
7 Witness 0004 gives evidence that at least four people were killed in this
8 attack. The source for this is EVD-PT-OTP-00239 at pages 0097 to 0099.

9 Various locations in the greater Eldoret area were attacked and
10 roadblocks were erected on all major roads. Network perpetrators used
11 petrol to burn homes and businesses, attacked perceived PNU supporters
12 with machetes, and shot those trying to escape with arrows. At least 50
13 people died in the attacks in the greater Eldoret area in locations such
14 as Kimumu, Langas, Yamumbi, and Huruma. In one of the particularly
15 horrifying example of the killings that occurred, Prosecution witnesses
16 0001 and 0008 both reported seeing three network perpetrators chop a baby
17 to death in Langas.

18 This is at EVD-PT-OTP-00158 at pages 1156 through 1162, and also
19 EVD-PT-OTP-00556 at pages 0955, 0956.

20 According to the report from the commission of inquiry into
21 post-election violence, and I quote:

22 "The incident which captured the attention of both Kenyans and
23 the world was the deliberate burning alive of mostly Kikuyu women and
24 children huddled together in a church in Kiambaa on 1 January 2008."

25 This is at EVD-PT-OTP-00004 at page 0420. This is a public

1 document.

2 Kiambaa residents and people from neighbouring areas perceived as
3 PNU supporters had sought refuge in the Assembly of God Church in the
4 days presiding the attack. Network perpetrators armed with traditional
5 weapons attacked the Kiambaa area on 1 January 2008, chased inhabitants
6 towards the church, forced them inside, and then poured fuel on the
7 church and mattresses, using the mattresses to block the doors. Between
8 17 and 35 people were killed from being trapped inside or in attempting
9 to flee.

10 The following video depicts the aftermath and gives some idea of
11 the terrifying and brutal nature of the attack.

12 This is an excerpt of video EVD-PT-OTP-00451. It can be played
13 publicly, and to listen, please use your headphones.

14 (Video-clip played)

15 "This is a scene of utter devastation. Just outside the church,
16 there are two bodies on the ground. The Red Cross is here collecting the
17 bodies, taking them to the main mortuary. But this is the site of the
18 church where it once stood. You can still smell and taste the smoke in
19 the air. Over here is the door, the entranceway which was initially
20 barred, attackers coming in with huge mattresses that they dragged in.
21 They put paraffin along here and then they set them alight.

22 "This church at the time was packed with hundreds of people, many
23 of them women and children, who had flocked here for fear of being
24 attacked in the aftermath of this election. And you can see the
25 devastation that's been left behind. We've got charred bicycles in front

1 of me. Items of clothing strewn around. I've just passed a children's
2 shoe just in the corner there. And literally, you get a real sense of
3 how much panic there must have been here. There were just corrugated
4 iron sheets strewn all around and occasionally you'll see an item, a
5 shoe, a piece of clothing, a cooking pot, that gives some indication that
6 people were living here.

7 "I've spoken to one woman who described how she was trying to
8 make an escape out of a window that was in this area here. She had three
9 children with her. She had her three-year-old in her arm. As she tried
10 to come through the window, the attackers were on the other side, they
11 grabbed her baby from her, and they threw the three-year-old back in.
12 The child died in the inferno that blazed behind here."

13 In Kapsabet, immediately following the announcement of the
14 presidential election results, network perpetrators started attacking,
15 looting, burning homes and businesses, and attempted to attack perceived
16 PNU supporters seeking refuge at a local police station. No less than
17 three people died.

18 Finally, network perpetrators attacked Nandi Hills with arrows
19 and petrol bombs, looting and burning the homes and businesses of
20 perceived PNU supporters, and erecting roadblocks to prevent them from
21 escaping. At least three people were killed. A non-Prosecution witness
22 saw one man burned in his car and others cut into pieces.

23 This at EVD-PT-OTP-00760 at 0248.

24 The evidence in the Prosecution's amended list of evidence and
25 in-depth analysis chart establishes that network perpetrators knowingly

1 and intentionally killed people during the period and in the geographic
2 area relevant to the charges. Prosecution witnesses describe seeing
3 members of the network cultivated by William Ruto and Henry Kosgey,
4 together with Joshua Sang and others, kill people. They also give
5 evidence that they heard network perpetrators describe how they killed
6 people.

7 For example, Prosecution Witness 0008 described seeing a network
8 coordinator kill two very young children on arrival for the attack in
9 Yamumbi, and I quote:

10 "I saw with my two eyes, two babies being slashed."

11 This is at EVD-PT-OTP-00553 at page 0898.

12 Another witness, Prosecution Witness 0004, gives evidence that he
13 heard youths, who had attended a network meeting the day before, had
14 attacked the Eldoret towns of Langas and Huruma and had burnt houses and
15 killed perceived PNU supporters, including with bows and arrows.

16 This is at EVD-PT-OTP-00239 at page 100. Sorry, 0100.

17 According to this witness, and I quote: "The youths told us that
18 the attack was successful and that they would return at night to attack
19 again."

20 This is also at EVD-PT-OTP-00239 at page 0100.

21 Two days later, this same witness met about 20 "warriors"
22 returning from Eldoret. They told him that when they arrived in Huruma
23 they broke into the Kikuyu houses, took them out and hacked them to
24 death, and then burnt their houses. The ones who tried to escape were
25 shot by arrows.

1 This is EVD-PT-OTP-00239 at page 0101.

2 Is this a convenient moment?

3 PRESIDING JUDGE TRENDAFILOVA: Do you have a lot?

4 MS. RENTON: I'd probably say another five to ten minutes.

5 PRESIDING JUDGE TRENDAFILOVA: Let us resume our session after

6 the break. So we start at 11.30 sharp.

7 COURT USHER: All rise.

8 Recess taken at 10.59 a.m.

9 On resuming at 11.30 a.m.

10 (Open session)

11 COURT USHER: All rise.

12 PRESIDING JUDGE TRENDAFILOVA: Please be seated. We resume our

13 session, and we shall finalise the presentation on the elements of

14 murder.

15 MS. RENTON: Yes, thank you, your Honour.

16 PRESIDING JUDGE TRENDAFILOVA: You have the floor. Just before

17 you start, I welcome Mr. Hooper.

18 MR. HOOPER: That's very gracious of you, Madam President, thank

19 you.

20 PRESIDING JUDGE TRENDAFILOVA: Is there someone new from the

21 Defence teams who has joined us?

22 MR. HOOPER: There is Professor Kindiki, who sits next to me --

23 PRESIDING JUDGE TRENDAFILOVA: Professor Kindiki, welcome to the

24 courtroom, Professor.

25 MR. KINDIKI: Thank you, Madam President.

1 PRESIDING JUDGE TRENDAFILOVA: No one else is a new face?

2 MR. ORARO: Madam President, we have Ms. Gissou Nia.

3 PRESIDING JUDGE TRENDAFILOVA: Acting as your assistant?

4 MR. ORARO: She's sitting in in place of Liane, who is engaged on
5 other issues currently.

6 PRESIDING JUDGE TRENDAFILOVA: Okay. Thank you, Mr. Oraro.

7 MR. ORARO: Thank you, Madam President.

8 PRESIDING JUDGE TRENDAFILOVA: So you have the floor. Sorry, on
9 behalf of the Bench, associate legal officer Niccolo Pons joined us.
10 Finally the floor is over to you.

11 MS. RENTON: Thank you, Madam President.

12 PRESIDING JUDGE TRENDAFILOVA: There is something on --

13 MR. HOOPER: Sorry. It was just that your Honour was good enough
14 to inquire about new faces and I hadn't appreciated that there were that
15 number of new faces behind me today. And of course, there there's also
16 Philemon Koech, member of the Kenya Bar, from Nairobi, sitting in the
17 middle at the back there, and our legal assistant Judy Mionki.

18 PRESIDING JUDGE TRENDAFILOVA: Thank you, Mr. Hooper. For the
19 record it is important that we keep an eye on new appearances.

20 Please, finally, sorry, take the floor.

21 MS. RENTON: No problem. The evidence establishes that these
22 killings were deliberate and were used in furtherance of perpetrating the
23 other grave and systematic crimes of deportation or forcible transfer of
24 population and persecution. Members of the network were instructed by
25 the three suspects, William Ruto, Henry Kosgey, and Joshua Sang, to kill

1 perceived PNU supporters and were provided with the weapons necessary to
2 do so. For example, according to Prosecution Witness 0008, at a rally in
3 early December 2007, attended by several thousand people, Ruto told the
4 audience to barricade the roads and kill the enemy in the event that PNU
5 leader Kibaki was announced the winner of the election.

6 This is at EVD-PT-OTP-00551 at pages 0829 through 0835.

7 At a later meeting in December, the same witness told the
8 Prosecution that Ruto told the perpetrators to kill PNU supporters,
9 destroy their property and displace them from the Kalenjin land. Ruto
10 promised that he would pay perpetrators for every PNU supporter that they
11 killed and every house that they destroyed.

12 This is at EVD-PT-OTP-00552 at pages 0851 to 0863.

13 Another witness, Prosecution Witness 0002, told the Prosecution
14 that on 31 December 2007, Sang issued a message to the Kalenjin over the
15 radio, saying, and I quote, "Come out. Go to Turbo. You know their
16 whereabouts in Turbo," and threatened those that did not participate by
17 saying, again I quote, "When we have finished with the Kikuyu, we will
18 come back to those who do not participate." This witness confirmed that
19 because of Sang's statement on the radio, a number of network
20 perpetrators, himself included, went to Turbo to kill perceived PNU
21 supporters and destroy their homes.

22 The source for this is EVD-PT-OTP-00763 at page 0271, and at
23 EVD-PT-OTP-00791 at pages 0041 through 0046.

24 In other words, the victims of the attacks were deliberately
25 selected and targeted and their killings were intentional. They were

1 murdered.

2 Your Honours, the visual now displayed on the screen depicts the
3 various meetings and events where the attacks were planned and
4 coordinated as addressed in the amended document containing the charges.
5 Prosecution witnesses in attendance at some of the planning meetings at
6 Ruto's house described how guns were distributed to network perpetrators
7 and confirmed that arrows and machetes distributed at a meeting at Ruto's
8 house were used to kill people.

9 For example, at a meeting in early December 2007, Prosecution
10 Witness 0006 indicated that Kosgey told those in attendance that money
11 would be provided to buy weapons, for materials to make bows and arrows,
12 to buy food, for bribes, to pay people to participate, and to arrange
13 transport to take people to, and I quote, "areas where a lot of Kikuyu
14 and Kisii are located."

15 This is at EVD-PT-OTP-00382 at page 0015.

16 At the same meeting, Ruto said that weapons were needed to arm
17 former soldiers to "do the work" and promised to obtain these weapons.

18 This is at EVD-PT-OTP-00382 at pages 0015 to 0016 and page 0025.

19 Prosecution witnesses 0002 and 0008 also give evidence that Ruto
20 provided network perpetrators with cylinders containing gas and said that
21 they were to be used in places where you find Kikuyu people, including
22 to, and I quote, "burn the big houses belonging to the Kikuyus."

23 The citation for this is EVD-PT-OTP-00552 at pages 0851 to 0863,
24 and also EVD-PT-OTP-00555 at pages 0929 to 0934, and finally, also
25 EVD-PT-OTP-00222 at pages 0142 through 0144.

1 Your Honours, all of this evidence, when viewed together as a
2 whole, establishes that William Ruto, Henry Kosgey, and Joshua Sang
3 planned or reasonably anticipated that perceived PNU supporters would be
4 killed in the execution of the common plan and that they equipped
5 perpetrators mentally and physically to do this. These killings were not
6 merely a consequence of the attacks committed by network perpetrators
7 but, rather, were used to instill fear, persecute, and force those
8 perceived to be PNU supporters to flee from the Rift Valley.

9 Your Honours, the evidence I have just referred to are mere
10 examples of the killings committed by network perpetrators in the
11 Uasin Gishu and Nandi Districts following the announcement of election
12 results on 30 December 2007. The evidence as a whole, as included in the
13 Prosecution's amended list of evidence and in-depth analysis chart,
14 establishes substantial grounds to believe that members of the network
15 cultivated by William Ruto and Henry Kosgey, together with Joshua Sang
16 and others, killed one or more persons. Additionally, the evidence
17 establishes that the subjective element which requires both intent and
18 knowledge under Article 30 of the Statute was present for all of the
19 suspects.

20 At all material times to the charges, the three suspects had
21 control over the network and the crimes they committed in the
22 Rift Valley. This makes William Ruto, Henry Kosgey, and Joshua Sang
23 criminally responsible for committing murder, constituting a crime
24 against humanity as charged. The modes of liability underpinning the
25 criminal responsibility of the suspects will be covered by my colleagues

1 in later submissions.

2 This concludes the Prosecution's presentation on the crime of
3 murder, counts 1 and 2 in the amended document containing the charges.
4 My colleague Ms. Corrie will now present the Prosecution's submissions on
5 counts 3 and 4 concerning the crime of deportation or forcible transfer
6 of population.

7 Thank you, Madam President.

8 PRESIDING JUDGE TRENDAFILOVA: Thank you, Counsel. Let us
9 proceed with the other member of the team.

10 Ms. Corrie. I'm sorry I didn't address you by your name, but to
11 make it easier for us to identify exactly who is who, you could be kind
12 to provide us with a list of the participants for every day on behalf of
13 your team.

14 MS. CORRIE: Of course.

15 PRESIDING JUDGE TRENDAFILOVA: So, Ms. Corrie, please go ahead.

16 MS. CORRIE: Madam President, your Honours, I will present the
17 Prosecution's submissions on counts 3 and 4 concerning the crime of
18 deportation or forcible transfer of population as a crime against
19 humanity pursuant to Article 7(1)(d) of the Rome Statute.

20 The Prosecution submits that the evidence establishes substantial
21 grounds to believe that from on or about 30 December 2007 to the end of
22 January 2008, in the Uasin Gishu and Nandi Districts, Ruto and Kosgey,
23 together with Sang and others, committed through other persons the crime
24 of deportation or forcible transfer of population.

25 During this presentation, the Prosecution will present the core

1 of its best evidence concerning these crimes. This evidence establishes
2 that Ruto and Kosgey, together with Sang and others, developed a plan
3 pursuant to which members of their network would expel perceived PNU
4 supporters from the Rift Valley. They then organised and equipped
5 network perpetrators to execute this plan. And on 30 December 2007,
6 following the announcement of the presidential election results, network
7 perpetrators forcibly displaced thousands of perceived PNU supporters
8 from their homes.

9 Your Honours, the crime of deportation or forcible transfer of
10 population as a crime against humanity pursuant to Article 7(1)(d) of the
11 Statute has five elements. Again, there should be a visual display
12 accompanying this, and I hope that it's working, though it doesn't appear
13 to be on my computer. And now it does. Hopefully everyone has that
14 displayed.

15 May I proceed?

16 PRESIDING JUDGE TRENDAFILOVA: Please.

17 MS. CORRIE: Thank you. This presentation will focus on the
18 first three elements, the specific elements --

19 PRESIDING JUDGE TRENDAFILOVA: Ms. Corrie, let the Court Officer
20 just check the computers with everyone so that we do not interrupt you.

21 Can we proceed, Court Officer?

22 The floor is over to you.

23 MS. CORRIE: Thank you, Madam President. Again, this
24 presentation will focus on the first three elements, the specific
25 elements of the crime of deportation or forcible transfer of population.

1 The first element of this crime is that the perpetrator deported
2 or forcibly transferred without grounds permitted under international law
3 one or more persons to another state or location by expulsion or other
4 coercive acts.

5 The elements of crime states that the term "forcibly" is not
6 restricted to physical force but may include threat of force or coercion,
7 including that caused by fear of violence.

8 Your Honours, the crime most predominantly covered by victims of
9 the 2008 post-election violence in Kenya was forcible displacement. As
10 you can see on the visual display, nationally it was recorded that over
11 660.000 persons were internally displaced. Over 400.000 of these
12 internally displaced persons, or IDPs, were from the Rift Valley.

13 This statistic can be found at EVD-PT-OTP-00442 at page 0245.

14 A significant number of these IDPs were Kikuyus perceived to
15 support the PNU. As one report states:

16 "The events of the first months of 2008 have dramatically altered
17 the ethnic make-up of many parts of Kenya. Scores of communities across
18 the Rift Valley, including most of Eldoret itself, are no longer home to
19 any Kikuyu residents."

20 This can be found at EVD-PT-OTP-00002 at 0306.

21 Within the Uasin Gishu and Nandi Districts, thousands of persons
22 perceived to support the PNU were forcibly displaced from their homes by
23 members of the network cultivated by Ruto and Kosgey, together with Sang
24 and others. Perceived PNU supporters fled to areas they believed would
25 be safe, including police stations, churches, and IDP camps.

1 In each specific location addressed in the amended document
2 containing the charges, thousands of people were forcibly displaced from
3 their homes by the violence.

4 In Turbo, thousands of displaced persons took shelter at local
5 police posts. This includes a police post on the border between Turbo
6 and Western Province.

7 The following video purportedly shows an IDP camp that developed
8 at a police station in Turbo. This video is at EVD-PT-OTP-00245. It was
9 recently reclassified as public. And again, my understanding is that to
10 hear the audio with this video we must all put our headphones on, please.

11 (Video-clip played)

12 "This is a camp in Turbo police station. This camp has
13 approximately 3.000 people who are internally displaced. Mostly these
14 are people from Kikuyu community in -- coming in two districts,
15 Uasin Gishu District and the Lugari District in Western Kenya.
16 Uasin Gishu is in Rift Valley. Lugari District is in Western Province."

17 MS. CORRIE: In the greater Eldoret area, perceived PNU
18 supporters were chased away, were left with no alternative but to flee
19 and relocate following the destruction of their homes and property. As
20 one attacker told Human Rights Watch, the attackers were "urged to drive
21 all Kikuyu out of Eldoret town."

22 The source for this is EVD-PT-OTP-00002 at pages 0290 through
23 0291.

24 And I forgot to mention at the beginning of my presentation, all
25 sources that I am discussing are confidential unless mentioned otherwise.

1 An IDP camp developed at Eldoret ASK Showground which purportedly
2 held as many as approximately 19.400 people.

3 This is at EVD-PT-OTP-00006 at 1025 through 1026. This source
4 and, I forgot to mention, the previous source are both public.

5 Other IDP camps rose around Eldoret housing primarily Kikuyus.

6 As to Kiambaa, prior to the attack on the 1st of January, 2008,
7 the Kenya Assemblies of God Church at Kiambaa was a location to which
8 people had fled from other locations, seeking safety from the attacks.

9 As attackers descended on Kiambaa village and burned the homes of
10 perceived PNU supporters and the church at Kiambaa, hundreds of Kiambaa
11 residents fled to the area and relocated to safer places, including IDP
12 camps. One news report indicated that:

13 "The village, where an estimated 1.000 people lived, is now a
14 ghostly, forlorn shadow of its former self. Most of its inhabitants have
15 fled to safer places."

16 This is EVD-PT-OTP-00323 at page 00008. And this, I believe, is
17 a public source.

18 According to another report, most intended not to return.

19 "The displaced are adamant that they do not have a future in
20 Kiambaa. The trauma that they experienced, that they are still living
21 through, makes returning impossible."

22 This is at EVD-PT-OTP-00345 at page 0072. And I believe this is
23 also a public source.

24 As to Kapsabet, as a result of the attacks, approximately 7.500
25 IDPs from Kapsabet town and surrounding areas sought refuge in the police

1 station in Kapsabet town.

2 The main sources for this are EVD-PT-OTP-00004 at pages 0422
3 through 0423, and EVD-PT-OTP-00001 at 0071 through 0072. And both of
4 those sources are public.

5 Finally, Nandi Hills town saw the largest number of IDPs in the
6 area. Perceived PNU supporters from Nandi Hills town and surrounding
7 areas sought refuge at the police station in Nandi Hills town and a
8 nearby field, which at its height housed approximately 32.000 IDPs.

9 The main source for this is EVD-PT-OTP-00001 at 0075, paragraph
10 246. This is a public source.

11 Other areas housing IDPs also reported receiving people fleeing
12 from Nandi Hills.

13 Evidence from Prosecution witnesses and other sources establishes
14 that in each of these locations it was network members who forcibly
15 displaced people who were perceived to support the PNU. Network members
16 used a variety of tactics to forcibly displace PNU supporters.

17 First, when they attacked, network perpetrators invaded target
18 locations from multiple sides, brandishing weapons, including machetes
19 and bows and arrows, and shouting Kalenjin war cries.

20 Second, as my colleague Ms. Renton described in her presentation
21 on the charges of murder, in each location network perpetrators killed
22 perceived PNU supporters.

23 Third, in each location, network perpetrators destroyed the homes
24 and businesses of PNU supporters. According to the CIPEV final report,
25 52.000 homes were destroyed in Uasin Gishu District alone.

1 The source for this is EVD-PT-OTP-00004 at page 0424.

2 Network perpetrators typically destroyed homes and businesses by
3 burning them. Prosecution Witness 0002 also describes that the
4 perpetrators destroyed food supplies "so they had nothing to eat."

5 The source for this is EVD-PT-OTP-00222 at page 0148,
6 paragraph 118.

7 The attacks, murders and destruction caused PNU supporters to
8 flee to safety. They also prevented PNU supporters from returning to
9 their homes, because they were now without shelter, livelihood or
10 sustenance.

11 The Prosecution's evidence establishes that the forcible
12 displacement of perceived PNU supporters was not merely a consequence of
13 the network perpetrators' attacks. Rather, the forcible displacement was
14 the specific goal of Ruto, Kosgey, and Sang, and members of the network.
15 As my colleague Ms. Tai explained in her presentation on the
16 organisational policy behind the attacks, the goal of Ruto, Kosgey and
17 Sang was to remove PNU supporters from the Rift Valley. They incited and
18 organised the removal of those perceived to support the PNU, to create a
19 solid voting bloc in the Rift Valley that would favour them in future
20 elections.

21 Ruto and Kosgey specifically instructed network members on their
22 policy to expel the perceived PNU supporters from the target locations,
23 indoctrinating them with rhetoric disparaging the perceived PNU suppose.

24 For example, Prosecution Witnesses 0001, 0002, and 0008 stated
25 that Ruto instructed network members to evict or displace PNU supporters

1 from the Rift Valley during a major planning meeting at Ruto's home in
2 Sugoi on the 14th of December, 2007.

3 This is found at EVD-PT-OTP-00222 at page 0140, at
4 EVD-PT-OTP-00551 at page 840, at EVD-PT-OTP-00552 at page 0868, and at
5 EVD-PT-OTP-00150 at pages 0611 through 0614.

6 In these same sources, Witness 0008 explained that by "displace,"
7 Ruto meant that they were to make sure that the target population was
8 removed and could not return.

9 Similarly, Witness 0021 gave evidence that Kosgey incited members
10 of the network by saying that people had to get rid of the weeds.

11 This is at EVD-PT-OTP-00507 at page 0724.

12 By "weeds," Kosgey was referring to perceived PNU supporters.

13 Sang also helped indoctrinate network members with the goal to
14 forcibly displace PNU supporters from the Rift Valley. Like Kosgey, Sang
15 referred to perceived PNU supporters as weeds and encouraged listeners to
16 remove perceived PNU supporters from the Rift Valley by force. After the
17 announcement of the presidential election results, Sang used radio
18 broadcasts to help ignite the network's forcible displacement of the
19 target population. For example, Prosecution Witness 0002 said that when
20 the presidential election results were announced, Sang broadcasted in
21 substance that the elections had been stolen, their rights had been
22 denied, and that "the best thing to do" was to expel the perceived PNU
23 supporters using "any arm at their disposal."

24 This can be found at EVD-PT-OTP-00222 at page 0146.

25 The evidence also establishes that Ruto and Kosgey equipped

1 network perpetrators with the tools necessary execute the forced
2 displacement of perceived PNU supporters, including weapons and fuel to
3 destroy PNU supporters' homes and businesses.

4 They also selected towns for attack that had the highest
5 population of perceived PNU supporters. For example, Prosecution
6 Witness 0008 explained that network perpetrators targeted Kiambaa farm
7 because "this farm is owned by the Kikuyus only. No Kalenjin is there."

8 This can be found at EVD-PT-OTP-00553 at pages 0892 through 0894.

9 Similarly, they appointed network subordinates to identify
10 perceived PNU supporters' homes and businesses within each target
11 location to ensure that these properties were attacked.

12 The evidence shows that network subordinates and direct
13 perpetrators adopted this policy.

14 Your Honours, it is all of this evidence, when viewed as a whole,
15 which establishes that Ruto and Kosgey, together with Sang and others,
16 deported or forcibly transferred without grounds permitted under
17 international law one or more persons to another state or location by
18 expulsion or other coercive acts.

19 I will now move to the second and third elements of the crime of
20 deportation or forcible transfer of population. Again, as shown in the
21 visual display, these elements are that such person or persons were
22 lawfully present in the area from which they were so deported or
23 transferred and that the perpetrator was aware of the factual
24 circumstances that established the lawfulness of such presence.

25 Because these two elements are similar, I will address them

1 simultaneously.

2 The Prosecution submits that the evidence establishes that
3 perceived PNU supporters who were driven from their homes by members of
4 the network were lawfully present and that Ruto, Kosgey, Sang, and the
5 other members of their network knew this fact.

6 Your Honours, the Prosecution has not become aware of any
7 evidence that the displaced PNU supporters had populated the target
8 locations illegally. Neither do any of the materials disclosed by the
9 Defence indicate this. Moreover, most evidence describes their forced
10 displacement of the perceived PNU supporters as their removal from their
11 homes, workplaces and business locations, and that the destroyed houses
12 and other properties were owned by or belonged to the victims who were
13 evicted. For example, prior to the violence, Kikuyus had owned farms in
14 the Kiambaa village since the 1960s.

15 The source for this is EVD-PT-OTP-00001 at page 0073, which is a
16 public source, and EVD-PT-OTP-0031 throughout.

17 The evidence further establishes that Ruto, Kosgey, Sang, and
18 other members of the network viewed the target locations, homes, and
19 businesses as belonging to those perceived to support the PNU. They
20 specifically saw to it that network subordinates identified homes and
21 businesses belonging to perceived PNU supporters within each target
22 location to ensure that these properties were attacked. For example,
23 according to Prosecution Witness 0006, at a December 2007 meeting
24 attended by Ruto and Kosgey, Kosgey asked a subordinate, "Have you
25 finished identifying the Kisii and Kikuyu houses in Kapsabet area?"

1 This can be found at EVD-PT-OTP-00485 at pages 0223 through 0226.

2 It must be noted that the common plan exploited a longstanding
3 belief within the Kalenjin community that other communities had unjustly
4 been given access to land originally inhabited by the Kalenjins. Thus,
5 when discussing the plan to expel perceived PNU supporters, members of
6 the network sometimes described the forcible displacement as a way to
7 recover the lands taken by the Kikuyus or referred to the land as "our
8 land."

9 However, this does not establish that the target populations were
10 unlawfully residing or working in the areas from which they were evicted.
11 Rather, the evidence establishes that the perceived PNU supporters
12 lawfully inhabited the areas from which they were expelled and that Ruto,
13 Kosgey, Sang and other members of the network were aware of this when
14 they forcibly displaced these people.

15 Your Honours, this concludes the Prosecution's submissions on the
16 charges of deportation or forcible transfer of population.

17 I will now turn the floor over to my colleague Ms. Renton who
18 will present the Prosecution's submissions on counts 5 and 6 concerning
19 the crime of persecution.

20 PRESIDING JUDGE TRENDAFILOVA: Thank you very much, Ms. Corrie.
21 Let us proceed with the last count regarding the acts of persecution.

22 MS. RENTON: Thank you, your Honours. For the record my name, is
23 Lara Renton and I am presenting the third and final crime with which the
24 suspects are charged, the crime against humanity of persecution. This
25 crime is charged under counts 5 and 6 in the amended document containing

1 the charges. Again, all sources are confidential unless otherwise
2 indicated.

3 I'm hoping that we have a visual. I'm just checking.

4 PRESIDING JUDGE TRENDAFILOVA: Yes, we do.

5 MS. RENTON: Thank you.

6 PRESIDING JUDGE TRENDAFILOVA: Please.

7 MS. RENTON: Your Honours, under Article 7(1)(h) of the Statute
8 and elements of crimes, persecution as a crime against humanity has six
9 elements, which, for ease of reference, are displayed on the screen.
10 These are the first three, and then the second three will come soon.

11 This presentation will focus on the first four elements, the
12 specific elements of this crime.

13 The first element is that the perpetrator severely deprived,
14 contrary to international law, one or more persons of fundamental rights.

15 As your Honours have heard, it is the Prosecution's submission
16 that the evidence included in the amended list of evidence and in the
17 in-depth analysis chart establishes substantial grounds to believe that
18 William Ruto, Henry Kosgey, and Joshua Sang committed or contributed to
19 the commission of the crimes against humanity of murder and deportation
20 or forcible transfer of population.

21 The Prosecution submits that in the execution of those crimes,
22 that is, by killing persons that they perceived to be supporters of the
23 PNU political party, by destroying their property, and by forcibly
24 expelling them from their homes, network perpetrators severely deprived
25 these people of their fundamental rights, contrary to international law.

1 These fundamental rights, displayed on the screen now, include the right
2 to hold opinions without interference, the right to life, the right to
3 property, the right to freedom of movement, and finally, the right not to
4 be forcibly evicted or displaced from one's home.

5 I will now move to the second and third elements of the crime of
6 persecution, which, for ease of reference, are again displayed on the
7 screen. Because these two elements are inter-related, I will address
8 them simultaneously.

9 The visual displayed on the screen now shows a map of the
10 locations of the attacks addressed in the amended document containing the
11 charges. As your Honours have heard, the attacks committed in the
12 Uasin Gishu and Nandi Districts were aimed at expelling perceived PNU
13 supporters from the area in order to create a pro-Kalenjin and pro-ODM
14 voting bloc. As such, the suspects instructed and the network
15 perpetrators duly directed the attacks against a specific segment of the
16 Rift Valley's population - perceived PNU supporters. Effectively this
17 meant that those targeted by network perpetrators were members of the
18 Kikuyu, Kamba and Kisii tribes. That the network intended to target
19 perceived PNU supporters is evident from the planning and execution of
20 the attacks.

21 First, as my colleague Ms. Corrie described, there is evidence
22 that Ruto, Kosgey, and Sang used derogatory rhetoric to whip up hatred
23 against the target group and to encourage the future attacks. This
24 rhetoric focused entirely on perceived PNU supporters, namely, members of
25 the Kikuyu, Kamba and Kisii tribes. Prosecution Witness 0002 describes

1 that Ruto used words which insinuated that Kikuyus are invaders or
2 thieves.

3 This can be found at EVD-PT-OTP-00222 at pages 0137 to 0138.

4 A non-Prosecution witness also heard Ruto telling a large crowd
5 of people at an ODM rally that they should not accept the electoral loss
6 and should, and I quote, "chase the spots out of Nandi and Uasin Gishu."

7 This is at EVD-PT-OTP-00509.

8 Prosecution and other witnesses give evidence that Sang and
9 Kosgey referred to perceived PNU supporters as weeds.

10 This is at EVD-PT-OTP-00163 at pages 1475 to 1476, and page 1482,
11 and also at EVD-PT-OTP-00507.

12 Prosecution witnesses also give evidence that Sang aired
13 statements from callers during the radio show "Lene Emet," describing the
14 Kikuyu disparagingly.

15 Second, the evidence indicates that during the planning meetings,
16 the network planned future attacks to specifically target towns that had
17 the highest population of perceived PNU supporters. Your Honours, the
18 visual now displayed on the screen depicts the various meetings and
19 events where the attacks were planned and coordinated as addressed in the
20 amended document containing the charges. For example, Prosecution
21 Witness 0008 describes how, as early as December 2006, at a meeting at
22 Ruto's home in Sugoi, Ruto and other network members distributed maps
23 that identified villages for attack in the Uasin Gishu
24 and Nandi Districts, including Turbo town, the greater Eldoret area,
25 Kapsabet town, and Nandi Hills. The witness indicated that these towns

1 all had a high population of Kikuyus when they were selected as targets
2 for the attacks.

3 This is at EVD-PT-OTP-00543 at pages 0528 to 0529, page 0531, and
4 pages 0555 through 0564, and also at EVD-PT-OTP-00556 at pages 0959 to
5 0960.

6 Network subordinates were also appointed to identify the homes
7 and businesses of perceived PNU supporters within each target location to
8 ensure that only these and not Kalenjin properties were attacked.

9 For example, according to Prosecution Witness 0001, a list of
10 30 to 35 Kikuyu houses was drawn up at one of the planning meetings and
11 signs were placed outside of Kalenjin houses so that the attackers knew
12 not to attack those houses.

13 The source for this is EVD-PT-OTP-00162 at pages 1397 to 1401,
14 and at EVD-PT-OTP-00825 at pages 0245 to 0246.

15 Prosecution Witness 0006 also confirmed that members of the
16 network who lived in certain areas and knew where the Kikuyu lived helped
17 the attackers identify the Kikuyu houses in those areas.

18 This is at EVD-PT-OTP-00489 at pages 0421 to 0424.

19 Finally, the evidence indicates that during the execution of the
20 attacks, members of the network followed through on the plans and
21 instructions given by Ruto and Kosgey, Sang and others, and specifically
22 attacked the preselected towns, physically targeting perceived PNU
23 supporters and destroying their homes and businesses.

24 The diagram on the screen now displays the roadblocks erected in
25 and around the specific locations addressed in the amended document

1 containing the charges. Witnesses confirmed to the Prosecution that the
2 attackers set up these roadblocks leading in and out of targeted
3 locations and asked questions of persons attempting to pass or demanded
4 identification in order to determine their identity. If the person
5 indicated or their identification led the attackers to suspect that they
6 were perceived PNU supporters, they were killed.

7 Prosecution witnesses 0002 and 0004 also indicated that the
8 attackers had informants who were walking with them from house to house
9 identifying the Kikuyu.

10 This is at EVD-PT-OTP-00794 at pages 0088 through 0090, and also
11 at EVD-PT-OTP-00239 at page 0101.

12 Other sources also give evidence establishing that attacks were
13 specifically targeted at perceived PNU supporters. For example, a
14 Kalenjin man told Human Rights Watch of his participation in the murder
15 of several Kikuyu people in Eldoret town the evening after election
16 results were announced. As he described it, he was part of a group that
17 had attended a community meeting in the Kapsoya area of Eldoret, where
18 speakers urged those present to drive all the Kikuyu out of Eldoret town.
19 As the group set off down the road, and I quote, "If we met a Kikuyu, we
20 just beat him. I saw five people die that day personally. They attacked
21 using all forms, arrows, pangas, and even beating with any crude tool."

22 The source for this is EVD-PT-OTP-0002 at pages 0290 to 0291, and
23 this is a public document.

24 Your Honours, all of the evidence when viewed as a whole
25 establishes substantial grounds to believe that in executing the crimes,

1 the network targeted a specific group of persons and that those persons
2 were targeted on political grounds, that is, their perceived political
3 affiliation to the PNU.

4 Finally, I will address the fourth and final element specific to
5 the crime of persecution, and that is that the conduct was committed in
6 connection with any act referred to in Article 7(1) of the Statute or any
7 crime within the jurisdiction of the court.

8 The Prosecution submits that the crime of persecution is
9 inextricably linked with the crimes of murder and deportation or forcible
10 transfer of population. To execute the network's plan and accomplish the
11 suspects' ultimate objective, members of the network used whatever means
12 necessary, including killing and forcible displacement, and did so
13 against a specific group of people on the basis of their political
14 affiliation.

15 Your Honours, all of the evidence when viewed together and
16 incorporating the Prosecution's earlier submissions on murder and
17 deportation or forcible transfer of population establishes substantial
18 grounds to believe that members of the network cultivated by Ruto and
19 Kosgey, together with Sang and others, killed and deported or forcibly
20 transferred one or more persons; that in doing so they severely deprived
21 those persons of fundamental rights; that they targeted these persons by
22 reason of their identity as a group; that such targeting was on political
23 grounds, namely, their support for a rival political party; and that they
24 did so in connection with an act referred to in Article 7(1) of the
25 Statute, namely, murder and/or deportation or forcible transfer of

1 population.

2 The Prosecution submits that the facts as established through the
3 evidence and as charged should be confirmed under different counts to
4 encompass the entire range of criminal conduct perpetrated by the network
5 and for which, the Prosecution contends, the suspects are criminally
6 responsible.

7 The conduct qualifying as murder and deportation or forcible of
8 population further qualifies as persecution since it satisfies the
9 additional specific elements requiring the targeting of a group on
10 political grounds and in connection with an act referred to in
11 Article 7(1). The Prosecution intends to make further submissions on
12 this point in written submissions that Madam President noted the Chamber
13 will allow the parties to make following the conclusion of the hearing.

14 This concludes the Prosecution's submission on the crime of
15 persecution and on all counts with which the suspects are charged in the
16 amended document containing the charges. Thank you.

17 My colleague Ms. Tai will now begin the Prosecution's
18 presentation on mode of liability.

19 PRESIDING JUDGE TRENDAFILOVA: Thank you, Ms. Renton. If I
20 correctly pronounce your name. Thank you for your presentation. Now,
21 Ms. Tai, you have 35 minutes to start developing individual criminal
22 responsibility issue.

23 MS. TAI: Understood. Your Honour, actually in the interests of
24 the time, the Prosecution would like Ms. Corrie to present the mode of
25 liability as to Joshua Sang. I believe it can be concluded by 1.00 and

1 that would be a better stopping point.

2 PRESIDING JUDGE TRENDAFILOVA: It's your decision and the
3 distribution of work among your team.

4 MS. TAI: Thank you.

5 PRESIDING JUDGE TRENDAFILOVA: Then the floor is over to you,
6 Ms. Corrie.

7 MS. CORRIE: Thank you. Madam President, your Honours, the
8 Prosecution has charged Joshua Arap Sang under Article 25(3)(d) of the
9 Rome Statute for making contributions to a crime committed by a group
10 with a common purpose.

11 The Prosecution submits that its evidence establishes substantial
12 grounds to believe that Sang intentionally contributed to the crimes
13 committed by Ruto and Kosgey's network. Sang did so with the aim of
14 furthering their crimes.

15 As before, all of the evidence discussed in this presentation is
16 confidential unless otherwise specified.

17 To establish that Sang is liable for the crimes charged pursuant
18 to Article 25(3)(d), the Prosecution must establish five elements, which
19 are listed in the visual display.

20 The Prosecution submits that the first element, that crimes
21 within the jurisdiction of the court were committed, has been established
22 during the presentations on the specific crimes. To avoid repetition, I
23 will not address the first element here, and instead ask your Honours to
24 incorporate by reference the previous submissions.

25 The Prosecution additionally submits that the second element,

1 that the crimes were carried out by a group of persons acting with a
2 common purpose, has already been established in the submission of my
3 colleague Ms. Tai in her presentation on the organisation and the
4 organisational policy behind these crimes and as she will present in her
5 submissions on the mode of liability as to Ruto and Kosgey.

6 In this presentation, I will focus on the remaining three
7 elements of Sang's liability. I will show that the evidence establishes
8 substantial grounds to believe that Sang contributed to the crimes
9 charged, that his contributions were intentional, and that he made these
10 contributions with the aim of furthering the network's crimes.

11 First, the evidence establishes substantial grounds to believe
12 that Sang contributed to the crimes charged in a variety of ways.

13 Sang was able to make significant contributions to the crimes
14 because he was a popular broadcaster on the Kalenjin-language radio
15 station Kass FM where he hosted his regular morning programme
16 "Lene Emet." Access to the airwaves was inherently valuable, as radios
17 were cheap and very common. Radio broadcasts were a very effective way
18 to disseminate information quickly to large groups of people.

19 By 2007, Sang was well positioned to take maximum advantage of
20 this communication medium. Sang was well known as a radio presenter in
21 the Kalenjin community since at least the 2005 constitutional referendum
22 in Kenya, when he used his show to campaign against the referendum and to
23 make remarks inciting hatred of and violence towards Kikuyus. One
24 witness, Prosecution Witness 0002, describes that the Nandi people
25 rewarded Sang for his role in defeating the 2005 constitutional

1 referendum with dairy cows.

2 This information is at EVD-PT-OTP-00222 at page 0147.

3 By 2007, Sang was the leading Kalenjin radio broadcaster.

4 Prosecution Witness 0001 estimated that in 2007, most of the Kalenjin
5 population listened to Sang's programme "Lene Emet."

6 This is at EVD-PT-OTP-00146 at pages 0397 to 0398.

7 Prosecution Witness 0008 similarly stated that "Lene Emet" was
8 the most popular programme on Kass FM by 2007.

9 This information is at EVD-PT-OTP-00540 at pages 0434 through
10 0438.

11 Sang's popular programme made him famous within the Kalenjin
12 community. Prosecution Witness 0002 describes that the Nandi population
13 considered "Ruto, the man to lead them, and Sang, the other one."

14 This information is at EVD-PT-OTP-00222 at page 0147.

15 This prominent position allowed Sang to make significant
16 contributions to the crimes charged both during the pre-election period
17 and during the execution of the crimes following the announcement of the
18 presidential election results.

19 Prior to the 2007 presidential election, Sang contributed to the
20 planning and organisation of the crimes. The evidence establishes that
21 he did this in several ways. As they are discussed, they will appear on
22 the visual display.

23 First, through his radio programme "Lene Emet," Sang helped
24 indoctrinate listeners, members of the network, with rhetoric against the
25 PNU and its supporters. Witnesses describe that he referred to perceived

1 PNU supporters using derogatory terms such as "weeds," and encouraged his
2 audience to remove perceived PNU supporters from the Rift Valley by
3 force. According to Prosecution Witness 0008, the rhetoric against
4 perceived PNU supporters built hatred among Sang's audience that made
5 people ready to "burst" to "finish these people" by the time of the
6 election.

7 This evidence is found at EVD-PT-OTP-00540 at pages 0434 through
8 0438.

9 The evidence also establishes that Sang pressured his listeners
10 to support the network and its goals. According to Prosecution
11 Witness 0005, Sang urged people to support the ODM and said that "anybody
12 going against this should be dealt with."

13 This information is at EVD-PT-OTP-00306 at 0059.

14 Besides broadcasting this message in his own words, Sang also
15 broadcasted the calls of designated network perpetrators. Sang's show
16 was a call-in show during which listeners could call the station and
17 their views would be aired. Ruto and Kosgey's network took advantage of
18 this format by designating people at meetings to call "Lene Emet" and
19 spread the network's propaganda. Witness 0028 confirmed that Sang
20 broadcasted the views of callers who, in substance, promulgated the
21 message of the network, that Kikuyus had oppressed the Kalenjins and
22 should leave the area which stirred a negative mood and violence within
23 the Kalenjin community.

24 This is found at EVD-PT-OTP-00514 at page 0738.

25 In these ways, Sang helped to indoctrinate perpetrators with the

1 network's anti-PNU message, instilling them with the anti-PNU sentiment
2 which would fuel their loyalty to the network and their attacks on PNU
3 supporters.

4 The evidence also establishes that Ruto fully integrated Sang and
5 his Kass FM broadcasts into the network's plan. Prosecution Witness 0008
6 said that Ruto instructed network members to listen to Kass FM,
7 specifically to the morning radio broadcast. This was likely a reference
8 to Sang's programme, the regular morning programme on Kass FM.
9 Witness 0008 further described that Ruto instructed network members that
10 anybody found turning to stations besides Kass FM "will be punished."

11 This information is at EVD-PT-OTP-00551 at pages 0831 through
12 0836.

13 In addition to the use of Kass FM to spread the network's
14 message, the network used Kass FM in other ways. For example, they had
15 Kass FM broadcast information about when and where network events would
16 be held. Kass FM also contributed to fundraising for the network.

17 After the announcement of the presidential election results, Sang
18 contributed directly to the network's commission of crimes. During the
19 attacks, Sang's weapon was his voice as he used his broadcasts to provoke
20 and coordinate the violence.

21 First upon the announcement of the election results, Sang called
22 on perpetrators to begin the attacks and broadcasted the locations to
23 attack.

24 According to Prosecution Witness 0002, when the election results
25 were announced, Sang stated on air in substance that "the elections had

1 been stolen and our rights denied." As a result, the best thing to do
2 was to bring the Kamama out of the Rift Valley by force. He told people
3 that they should "get their weapons from where they were kept and, if
4 necessary, to use any arm at their disposal to evict the Kikuyus."

5 This information can be found at EVD-PT-OTP-00222 at page 0146.

6 Prosecution Witnesses 0001 and 0008 also describe that Sang
7 delivered the same message using parables and metaphors.

8 This evidence is at EVD-PT-OTP-00818 at pages 0103 through 0105
9 as to Witness 0001, and as to Witness 0008 at EVD-PT-OTP-00561 at
10 pages 1099 through 1102.

11 Additionally, Sang's broadcasts used coded language signaling
12 that members of the network should attack PNU supporters and indicating
13 where network perpetrators should attack. According to Prosecution
14 Witness 0006, Sang would use the word "Kamurkelter" followed by the name
15 of a particular place, such as Kapsabet, to indicate that perceived PNU
16 supporters were there and that network perpetrators should proceed to
17 that location and attack.

18 This information is at EVD-PT-OTP-00489 at pages 0405 through
19 0414.

20 Perpetrators who had attended the meetings understood the coded
21 language.

22 Additionally, as network perpetrators executed the attacks, Sang
23 sought updates on their progress and broadcasted live calls from direct
24 perpetrators. Prosecution Witness 0008 explained that Sang asked in
25 Kalenjin dialect about what happened in different locations such as "What

1 have you done there in Eldoret?" And "What have you done there in
2 Kiambaa?" Telling his listeners to "finish them." And directing
3 perpetrators to areas that needed more fighters, saying "We have a
4 weakness" in a particular place. "Where are the youths?"

5 This information can be found at EVD-PT-OTP-00560 at pages 1072
6 through 1075, and at EVD-PT-OTP-00561 at pages 1101 through 1102.

7 Similarly, Prosecution Witness 0002 described that Sang
8 congratulated network perpetrators for the work they had carried out in
9 specific areas. This is at EVD-PT-OTP-00793 at pages 0076 through 0078.

10 Sang's broadcasts encouraged the attacks to continue and
11 pressured all network members to participate. His broadcasts also
12 facilitated the efficient deployment of network perpetrators during the
13 attacks. In the words of Prosecution Witness 0002, "Sang's role was to
14 inform people in certain areas where their assistance in the war against
15 the Kikuyu was most needed." This is at EVD-PT-OTP-00763 at page 0269.

16 Prosecution Witness 0002 also explained that Sang helped mobilise
17 additional resources that went to Turbo. My colleague Ms. Renton
18 described this witness's account in her presentation on the crime of
19 murder. The witness further told the Prosecution that Sang broadcasted
20 that people from a certain area should go to Turbo and "carry out the
21 work" because the youths from that area are "scared." This witness
22 indicates that Sang used the term "the work" to mean to evict and kill
23 the perceived PNU supporters, steal their livestock, and destroy their
24 homes and other belongings. The witness gave evidence that Sang also
25 said, "When you have finish the work in Turbo, go back and kill young

1 people who refused to carry out the work that we agreed." This
2 information is at EVD-PT-OTP-00791 at pages 0041 through 0046.

3 Your Honours, all of these factors demonstrate that Sang
4 contributed to the crimes of the network.

5 I will now turn to the remaining two elements of the mode of
6 liability of common purpose. As you can see in the visual display, these
7 are that the suspect's contributions were intentional and that the
8 suspect contributed to the crimes with the aim of furthering the criminal
9 activity or purpose of the group. As the same evidence establishes these
10 two elements, I will address them simultaneously.

11 That Sang's contributions were intentional and were aimed at
12 furthering the network's crimes is first demonstrated by Sang's
13 participation in at least four meetings and other events with Ruto and
14 other network members at which speakers incited violence against
15 perceived PNU supporters and planned the network's crimes.

16 For example, Prosecution Witnesses 0002 and 0008 describe that
17 Sang participated in the planning meeting held on 14 December 2007 at
18 Ruto's Sugoi home. The witnesses gave evidence that Sang served as the
19 master of ceremonies, announcing the roles that attendees would play in
20 the planning and execution of the attacks.

21 This evidence is at EVD-PT-OTP-00763 at page 0263 as to
22 Witness 0002, and at EVD-PT-OTP-00559 at pages 1043 through 1047 as to
23 Witness 0008.

24 Sang's participation at such meetings shows that he was aware of
25 and embraced the network's common plan, its goals, its methods, and the

1 roles that he and other members of the network played.

2 That Sang's contributions were intentional and were aimed at
3 furthering the network's crimes is also established by his specific use
4 of his broadcasts to air the message of the network. It is also evident
5 from his conduct during the attacks, encouraging and coordinating network
6 perpetrators' attacks against perceived PNU supporters. This included
7 the use of coded language and his broadcasting updates from perpetrators
8 during the attacks. This evidence establishes that Sang was aware that
9 network members were attacking perceived PNU supporters and that he
10 contributed to these crimes as they occurred.

11 Finally, Sang's unique position as a popular broadcaster within
12 the Kalenjin community demonstrates that his contributions were
13 intentional and were aimed at furthering the criminal activity of the
14 group. Sang's messages had the ability to reach and impact thousands of
15 listeners, and in fact, the evidence indicates that Sang knew that his
16 audience obeyed instructions that he gave in his broadcasts. For
17 example, according to Prosecution Witness 0001, on the 26th of December,
18 2007, the day before the election, Sang announced on Kass FM that a
19 specific vehicle was transporting forged ballot papers to a particular
20 location, and that very vehicle was attacked shortly thereafter.

21 This information is at EVD-PT-OTP-00163 at pages 1418 through
22 1482, and pages 1485 through 1487.

23 Your Honours, all of this evidence viewed together as a whole
24 establishes that Joshua Arap Sang contributed to the crimes of the
25 network, that he made his contributions intentionally and that did so

1 with the aim of furthering the criminal activities of Ruto and Kosgey's
2 network.

3 This concludes the Prosecution's presentation on the mode of
4 liability of Joshua Sang. Thank you.

5 PRESIDING JUDGE TRENDAFILOVA: Thank you, Ms. Corrie. I would
6 suggest that if there is nothing else to be added to the presentations
7 made up until now, that we adjourn the hearing and we start at 20 minutes
8 past 2.00 p.m. sharply.

9 Are there some objections or proposals on behalf of any? So we
10 adjourn the hearing, and we invite you at 2.20 to the courtroom.

11 COURT USHER: All rise.

12 Luncheon recess taken at 1.20 p.m.

13 On resuming at 2.19 p.m.

14 (Open session)

15 COURT USHER: All rise.

16 PRESIDING JUDGE TRENDAFILOVA: Good afternoon. Please be seated.

17 I hope everyone had a good, relaxing lunchtime. Do we have some
18 new faces in your team, Ms. Tai?

19 MS. TAI: (Microphone not activated) ... we have one additional
20 person, Mr. Andrew Max is joining us for the Prosecution this afternoon.

21 PRESIDING JUDGE TRENDAFILOVA: Yes. Thank you very much.

22 MR. ORARO: Madam President, we have one additional person,
23 Matthew Ryder, our consultant.

24 PRESIDING JUDGE TRENDAFILOVA: I'm sorry, would you speak a
25 little bit louder, please?

1 MR. ORARO: We have one additional person, Matthew Ryder who is
2 our consultant. He is a QC from England.

3 PRESIDING JUDGE TRENDAFILOVA: Mr. Ryder, if I am properly
4 pronouncing your name, have you filed power of attorney with the
5 Registry?

6 MR. RYDER: I understand that the consultant forms were put in a
7 very long time ago. I have been filed with the Registry as a consultant
8 for quite a long time. Today or yesterday additional forms were put in
9 in accordance with the counsel support service to ensure that the
10 relevant forms are with you prior to me making any address to the Court.

11 PRESIDING JUDGE TRENDAFILOVA: Yes. You have to have filed power
12 of attorney with the Registry in order to be able to speak in court.

13 MR. RYDER: Yes. I -- if I may say so, Madam President, I wasn't
14 intending to be speaking and addressing the Court today, and we would
15 make sure that all of that was done before if there was any question of
16 me addressing the Court.

17 PRESIDING JUDGE TRENDAFILOVA: Thank you very much indeed. Thank
18 you.

19 Now, we have resumed our session already, and it is the floor to
20 be -- to be over to Ms. Tai to finalise the presentation of the
21 Prosecutor's team on the modes of liability, and in particular, with
22 regard to Mr. Ruto and Mr. Kosgey. Please, you have the floor.

23 I'm sorry, my legal officer, I forgot to mention for the record,
24 Mr. Mohamed El Zeidy is with us today as well, but just because he's
25 behind the screen I just omitted mentioning his name.

1 The floor is over to you.

2 MS. TAI: Thank you.

3 Madam President, your Honours, the Prosecution presents its core
4 evidence in this presentation that will establish the substantial grounds
5 to believe that William Ruto and Henry Kosgey acted as indirect
6 co-perpetrators pursuant to Article 25(3)(a). They are responsible for
7 the crimes alleged.

8 The Chamber has requested many times that we will present facts
9 on only one occasion. I will do my best not to repeat the facts already
10 stated by myself and my colleagues.

11 The broad question, your Honour, and where we start here is --
12 and what we seek to answer is why William Ruto and Henry Kosgey? Really,
13 why them? We answer that question first by looking at who they are.

14 William Ruto and Henry Kosgey used their position and stature in
15 the Kenyan context to commit these crimes alleged. Each are in their own
16 right influential members of the Kalenjin community. Ruto himself was
17 regarded as the most influential Kalenjin figure and, similarly, Kosgey
18 was an old-time Kalenjin politician. Together they had held great
19 authority, influence and power, power over their supporters.

20 They used this power to gather their supporters, and then they
21 used their influence to invite them to meetings, some of which were held
22 at their homes. Once there, each of them, William Ruto and Henry Kosgey,
23 made essential contributions to make sure that their plan to target PNU
24 supporters was executed.

25 Ruto developed the plan. He then gave money, made insightful

1 statements, and coordinated transportation to and from those attacks, and
2 gave out weapons, intentionally selecting those individuals with the best
3 skills, former soldiers.

4 THE INTERPRETER: Your Honours, the interpreters do not have the
5 text that Ms. Tai is reading. Would it be possible to have it delivered
6 to them? Thank you.

7 MS. TAI: (* Overlapping speakers) ... to gather network
8 subordinates, use anti-PNU rhetoric, and gave his own money and collected
9 money from others to support their plan.

10 Through this presentation, we will show how they spread their
11 plan at these particular meetings, and significantly, how these same
12 meeting attendants later executed the planned attacks.

13 The common features of these meetings are best explained with the
14 use of visual aides. We would be directing the attention of the Chamber
15 to these visual aides to demonstrate how they --

16 PRESIDING JUDGE TRENDAFILOVA: Ms. Tai, I'm very much sorry.
17 Please excuse me, but I have received a message from the interpreters
18 that they would be very grateful to have your written notes.

19 MS. TAI: Yes.

20 PRESIDING JUDGE TRENDAFILOVA: As you used to do this. These
21 were not submitted, obviously, to the interpreters.

22 MS. TAI: My understanding, Madam President, is that it's being
23 submitted right now.

24 PRESIDING JUDGE TRENDAFILOVA: Well, let us see what is -- what
25 is the message from the interpreters. Do you have the written notes?

1 THE INTERPRETER: No, your Honour. The document has not yet
2 reached the booth.

3 MS. TAI: Madam President, I will make sure that they do get it
4 immediately, but I don't know how to e-mail them. So if I can send it to
5 Chuka and he can forward it to them, we will have it to them in moments.
6 Thank you.

7 PRESIDING JUDGE TRENDAFILOVA: Yes, thank you. So up until then,
8 I ask you to speak very slowly --

9 MS. TAI: I'll do my best.

10 PRESIDING JUDGE TRENDAFILOVA: -- Ms. Tai, in order for the
11 interpreters to be able to do their job. You can proceed, please.

12 MS. TAI: Thank you. The first meeting that the Prosecution will
13 discuss is a meeting that William Ruto hosted at his home in Sugoi, in
14 the Uasin Gishu District, on the 30th of December, 2006. There's a
15 visual aide for that particular meeting. At this meeting, Ruto and his
16 subordinates began inciting and planning the violence. According to
17 Witness 0008, the agenda of the meeting was to "plan for war." At the
18 meeting, Ruto discussed the funding and the sourcing of weapons for the
19 violence. Attendees of this meeting included seated and aspiring members
20 of parliament, area chiefs, youths, officials from Emo, farmers,
21 businessmen, and former members of the military. This meeting was
22 started with using the slogan: "It is now Kenyans versus Kikuyus." And
23 maps were distributed indicating the areas that were densely inhabited by
24 Kikuyus.

25 Ruto also discussed providing transportation for the attackers,

1 and some of those network perpetrators who later committed the attacks
2 attended this meeting. They attacked the greater Eldoret area following
3 the announcement of the presidential election.

4 Second, we turn to September 2007, when the second significant
5 planning meeting was held at the Sirikwa Hotel in Eldoret. At this
6 meeting, Ruto and other subordinates incited violence against the
7 Kikuyus. For example, according to Prosecution Witness 0001, one
8 councillor who attended the meeting told the attendees, "We are ready to
9 kick the Kikuyu out. The Kalenjin need to join hands with others to kick
10 the Kikuyu out of our land."

11 This can be found at EVD-00153 at 0820 and 821.

12 During this meeting, Ruto and other subordinates discussed how
13 they would get money, obtain weapons, and transport the attackers to
14 support the attacks. Network subordinates who attended this meeting
15 later received these resources as planned and some were involved in the
16 network's attacks on Eldoret.

17 The third meeting, Madam President, your Honours, occurred again
18 at Ruto's Sugoi home in November of 2007. At this meeting, Ruto incited
19 violence against the Kikuyu once again. For example, according to
20 Prosecution Witness 0001, Ruto, taking advantage of these long-standing
21 disputes over possession of the Rift Valley, incited hatred of the
22 Kikuyus.

23 This fact can be found at EVD-00152 at 760 through 768.

24 Similarly, Witness 0008 states that again Ruto used the phrase:
25 "It is Kenyans versus Kikuyu." He told attendees that the election would

1 be rigged and that "We are going to fight these people because there are
2 no other ways." And that "These people meant the Kamba, the Kisii, and
3 the Kikuyu." They are the targeted community.

4 This fact can be found at EVD-0 -- 00548 at 733, 736, and again
5 at 748.

6 Ruto also discussed the mobilisation of additional manpower and
7 provided guns to a few of those attendees. And finally, he invited some
8 to attend future meetings on the 6th and 14th of December. Network
9 perpetrators who attended this meeting were later involved in attacks on
10 Kapsabet and the greater Eldoret area.

11 Fourth, the next major event that we turn to was a rally that was
12 held at Kipkarren Salient Trading Centre on the 6th of December. At this
13 rally Ruto incited violence again against the Kikuyu. According to
14 Prosecution Witness 0008, Ruto told the crowd that when the violence
15 begins, "all the youth should converge in all trading centres to receive
16 instructions. You do the yelling, you do the barricading, and then you
17 confide to all trading centres to receive your instructions."

18 This can be found at EVD-00557 at page 0978.

19 Some network subordinates who attended this meeting were later
20 involved in the attack again on the greater Eldoret area.

21 Next we turn to the Nandi District where the next major event was
22 held in December 2007, again where planning -- plans were made at the
23 home of Samson Cheramboss. Both William Ruto and Henry Kosgey attended
24 and spoke at that meeting. At that meeting, divisional commanders who
25 would oversee the attacks in Nandi District were announced. They also

1 discussed acquiring more money, weapons, and reinforcements from
2 different areas. Ruto announced to the group that he had already
3 acquired weapons and further discussed plans for attack.

4 Kosgey also informed the attendees that they would get assistance
5 to buy weapons and materials for making bows and arrows. In addition,
6 Kosgey discussed transportation to move network perpetrators during the
7 attacks to other areas where a lot of Kikuyu and Kisii were located.

8 Other network subordinates including Cheramboss discussed sending
9 reinforcement to areas where lots of Kikuyu were known to inhabit.

10 Kosgey also discussed funding. According to Prosecution
11 Witness 0006, Kosgey would act as a treasurer, informing the group "that
12 we have marshalled the funds already."

13 This can be found at EVD-00483 at pages 0172 and 173.

14 Kosgey also paid 1.500 Kenyan shillings to each attendee at this
15 meeting. Witness 0006 tells us that this money was like his salary for
16 attending.

17 Significantly, Kosgey also informed attendees that they would
18 protect the attackers from prosecution after the attacks. According to
19 Witness 0006, Kosgey told the attendees:

20 "This plan was very dangerous and it will come at great cost,
21 because, you know, after a war, people are arrested and put in gaol. But
22 don't worry, we will be in power later, and we will take care of you
23 then."

24 This evidence can be found at EVD-00483 at pages 174 and 175.

25 And finally, Kosgey arranged to meet with the divisional

1 commanders every two days. According to Witness 0006, these meetings
2 would allow Kosgey and the divisional commanders the opportunity to
3 update each other on how their work was progressing in different areas.

4 This can be found at EVD-00483 at 175 and 176, and again at 189
5 through 190.

6 Some of these network perpetrators attending this meeting
7 participated in the attacks on Kapsabet town and Nandi Hills.

8 The next major planning meeting occurred on the 14th of December,
9 and again was held at Ruto's Sugoi home. This meeting was attended by
10 thousands of people from a variety of areas in the Rift Valley. Ruto
11 used this meeting to deliver the plans and to also give them equipment to
12 execute these attacks. Several Prosecution witnesses tell us that Ruto
13 incited violence against the target -- targeted population of PNU
14 supporters. For example, according to Witness 0008, Ruto told the
15 attendees:

16 "I have tried this day to make sure that you are all together, to
17 make sure that this war is already on and we do not have to spare a
18 chance again. It's now Kenyans versus the Kikuyus, and the elections
19 will be rigged. And we are going to fight these people because there is
20 no other way."

21 The citation for this is EVD-00548 at 737.

22 Witness 0008 goes on to state that Ruto said, "This time around,
23 we are wiping these people, even the women."

24 The citation for this is EVD-00552 at page 0876.

25 Significantly at this meeting, Ruto saw that the weapons,

1 including guns, were distributed to attendees and that the structure for
2 coordinators for each region was further explained. He also used his
3 subordinates to distribute fuel to the attackers for them to use in the
4 coming attacks. And finally, Ruto paid the attendees.

5 Some network subordinates and perpetrators who attended this
6 meeting were involved in the attacks on Turbo town and the greater
7 Eldoret area, including the Kiambaa church area.

8 The seventh meeting was held in the Nandi District at the
9 Kabongwa location. Both Ruto and Kosgey attended and spoke at that
10 meeting. Ruto greeted the crowd of attendees as heroes, and he said that
11 he was also ready for war. He emphasised that they would take over the
12 government and that the Kikuyus should just go back home. He also
13 confirmed that he managed to get some weapons and indicated where they
14 would be stored. Ruto then told the crowd that he needed to leave very
15 quickly because he had to go to similar meetings in other areas of the
16 Rift Valley.

17 Kosgey also spoke at this same meeting. According to
18 Witness 0006, he told attendees:

19 "I am very happy now because I see that we are here with real men
20 and that the work is going on. It is being done with the good work that
21 we are doing in this area. We do not want to fail."

22 This can be found at EVD-00485 at 0223.

23 Then, Kosgey sought updates from subordinates who were assigned
24 to identify houses of PNU supporters in the Kapsabet area, and Kosgey
25 also paid attendees.

1 Some network perpetrators who attended this meeting were later
2 involved in the attacks on Kapsabet town as well as Nandi Hills.

3 And finally, there is an eighth meeting that was held in
4 December of 2007, again at the home of Samson Cheramboss. Ruto and
5 Kosgey were both present and spoke during this meeting. Ruto told the
6 attendees that had acquired a limited amount of guns and that most people
7 would use bows and arrows. Kosgey also addressed the attendees. He paid
8 them and instructed a subordinate to mobilise more manpower for the
9 attacks. He also told attendees that they had enough fuel for the
10 vehicles, vehicles that would transport network perpetrators to the
11 locations of attack.

12 Some network perpetrators who attended this particular meeting
13 participated in the attacks on Kapsabet town and Nandi Hills.

14 Madam President, at this time I would like to show some
15 information that is confidential that I do -- I believe would best be
16 presented in a private session, and I have alerted the Court Officer of
17 my intention prior to the session.

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

19 Court Officer, would you make the necessary arrangements so that
20 we go from public session into private session.

21 (Private session at 2.45 p.m.)

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- 25 (Open session at 2.55 p.m.)

1 COURT OFFICER: Madam President and your Honours, we're back in
2 open session.

3 PRESIDING JUDGE TRENDAFILOVA: Ms. Tai, you can proceed. Now we
4 are in open session.

5 MS. TAI: Thank you. Madam President and your Honours, I will
6 now proceed to summarise very briefly how the eight elements of indirect
7 co-perpetration are met by the facts in this case. Several elements have
8 been discussed in previous presentation. For example, the first
9 requirement that the suspect be part of a common plan or have an
10 agreement with another person. The factual basis for both of these
11 elements have been addressed and I will not repeat them here.

12 The third element requires essential contributions. I will
13 address them in order.

14 As identified in the visual aide before you, we will identify
15 Ruto's five essential contributions. The factual basis for these five
16 contributions were addressed in previous presentations, most specifically
17 in my presentation regarding organisation as well as organisational
18 policy, and I will not repeat them here but briefly just identify what
19 they are.

20 First, Ruto planned and implemented the common plan in the entire
21 Rift Valley. Witness 0006 tells us that the mastermind of the plan to
22 remove the Kikuyu and the Kisii in the big area was Ruto.

23 Second, Ruto created and coordinated a network of perpetrators to
24 support the implementation of the common plan.

25 Third, Ruto directly negotiated and supervised the purchase of

1 guns, as well as crude weapons, and provided funding for the network.

2 Fourth, Ruto gave instructions to these direct perpetrators as to
3 whom they had to kill, who they had to displace, and whose property it
4 was that they had to destroy.

5 And fifth, Ruto established a rewarding mechanism promising fixed
6 amounts of money to be paid upon the successful murder of PNU supporters
7 or the destruction of their property.

8 Moving forward to address Kosgey's essential contributions, the
9 factual underpinnings of which were also detailed in my previous
10 presentation and will not be repeated.

11 To summarise, first and similarly to Ruto, Kosgey capitalised on
12 his position as a MP for the Tinderet constituency and his position as a
13 veteran Kalenjin politician. He exploited this influence to promote,
14 together with Ruto, the creation of the network.

15 Second, Kosgey also fuelled the network and common plan by the
16 use of anti-PNU rhetoric to create anti-PNU sentiment within the network
17 and fear amongst their supporters.

18 One non-ICC witness tells us that Henry Kosgey would incite in
19 Kalenjin saying that the people had to get rid of the "weeds," and he
20 used inflammatory rhetoric in every meeting.

21 That can be found at EVD-00057 at 0051 through 0524.

22 Third, Kosgey represented Ruto in his absence at events and
23 actively organised the modalities of the implementation of the common
24 plan. He did this by supporting Ruto in the Nandi District.

25 Likewise, his organisation of reinforcements for the attacks in

1 the Nandi and Uasin Gishu districts is stated in the words of one
2 witness, "I found out that there was a strategy during this meeting and
3 that there were divisional commanders. I believe that the commanders had
4 already planned things such as how to go to war, how to pass, and how to
5 move groups around, to arrange for reinforcement if needed."

6 That can be found at EVD-00382 at 0015, para 102, and finally, on
7 pages 25 and 26, paragraphs 167 and 168 respectively.

8 Fourth, Kosgey was responsible for the attacks, that is, the
9 implementation of the common plan in the Nandi District.

10 This fact is also supported by a public source not previously
11 mentioned. KNHCR identified Kosgey specifically and stated that he was
12 one of the alleged perpetrators and planners of post-election violence,
13 because he had held several meetings with -- with the Nandi Hills area
14 councillors and other opinion leaders. The meetings, it is believed, was
15 for planning and organisation of violence.

16 The reference for that is EVD-00001 at 0186.

17 The next question that we address was or is: Were these
18 essential contributions coordinated? The answer is yes. They ensured
19 that their contributions would result in murder, deportation, and
20 persecution.

21 They ensured their co-ordination in many ways. First, through
22 the meetings previously described. The efforts of the co-perpetrators
23 ensured the coordinated construction of roadblocks and the distribution
24 of weaponry, and most significantly, attacks on multiple locations in a
25 very short time-frame, which was necessary to implement their common plan

1 of expelling PNU supporters.

2 Aside from the meetings, their essential contributions were
3 coordinated by virtue of the organisational structure that we have
4 described. Subordinates provided funding, weapons, food, transportation,
5 and fuel to the direct perpetrators. They also organised and supported
6 those below them, those direct perpetrators. These subordinates arranged
7 for the transportation so that the crimes could be effectively committed.

8 Witness 0006 identifies a subordinate in Nandi Hills who provided
9 vehicles. Kosgey arranged or asked him to arrange for vehicles and paid
10 the fuel. This witness tells us: "I know that, because I saw Kosgey
11 calling Kata and giving him money."

12 That can be found at EVD-00382 at 0025, paragraph 156 to 158.

13 Another Prosecution witness identifies coordinators who patrolled
14 killings and other coordinators that were involved in ferrying the youth.
15 There was also communication between them to distribute reinforcements
16 during the attacks.

17 The next element to be addressed is control over the network.
18 Once again, the Prosecution would incorporate facts stated in previous
19 presentations on the nature of the organisation and will not repeat them
20 here.

21 Briefly, Ruto and Kosgey controlled the network by virtue of
22 their positions within the network as well as within their community.
23 They operated as the hug -- hub of the organisation whereby they alone
24 obtained information received from various sources at different locations
25 in the Rift Valley. They alone shared plans and progress from group to

1 group regarding specific targeted locations. They reported to group
2 members in different areas about the progress of their plan in different
3 areas. And finally, they financially supported the attacks.

4 Ruto and Kosgey's control over the network was recognised by
5 their subordinates and their direct perpetrators. One Prosecution
6 witness states that Ruto controlled the organisation to such a degree
7 that he could have frustrated the commission of crimes. I quote:

8 "They considered Honourable Ruto to be the leader of that
9 community. If he said -- or if he had come out and said, 'Don't take
10 this matter any further,' no war could have happened. If he stood and
11 even went on radio to call upon his community members not to do this, to
12 commit any evil, nothing would have happened."

13 That fact is located at EVD-00155 at 0939, lines 791 through 802.

14 In contrast, subordinates in the network exercised very limited
15 control over their crimes. They were limited to information as it
16 related to their specific area only. Nevertheless, they adopted the
17 network's organisational policy to expel PNU supporters and execute the
18 attacks. Their control was limited to the crimes that they themselves
19 committed.

20 One Prosecution witness tells us, from the perspective as a
21 direct perpetrator, that they had no choice, really. Those who had come
22 to Turbo came to kill the Kikuyu and destroy their homes. "If we had not
23 gone there, they would have turned on us. So we had to participate in
24 the war."

25 The reference for that is EVD-00763 at 0271, paragraphs 94 and

1 95.

2 I would now direct your attention to the fourth element of mode
3 of liability as set forth by this Chamber. Ruto and Kosgey created and
4 organisation a hierarchical apparatus of power. This, too, has been
5 dealt with in the Prosecution's previous submissions on organisation and
6 will not be repeated here.

7 Next, the fifth element requires that Ruto and Kosgey were able
8 to secure the execution of crimes by almost automatic compliance of the
9 physical perpetrators with the instructions given by them.

10 Here Ruto and Kosgey ensured the near automatic compliance with
11 their instructions in a number of ways. As previously explained, they
12 occupied prominent positions and held positions of power. They
13 indoctrinated network perpetrators to accept and agree with their plan
14 and then they trained them. They referred to their targets in a
15 derogatory manner and then created localised co-ordination structures
16 headed by local subordinates to ensure this compliance, this level of
17 compliance. They paid them, they promised them rewards for murdering
18 civilians, they promised them rewards for destroying homes, they promised
19 them rewards for burning down people's homes, and then they instilled a
20 fear of punishment should there be noncompliance with their instructions.

21 Two examples of derogatory language used by Ruto is set forth in
22 the statement of Witness 0002. "Ruto said that the Kikuyu were the
23 enemies of all the communities in Kenya and that, as a result, nobody
24 should vote for the political parties headed by Kikuyus. If anyone voted
25 for the Kikuyus, Ruto said, it meant that those people had a mental

1 problem."

2 The source for that is EVD-00222 at 0137 through 138, paragraphs
3 36 and 37 respectfully.

4 Another example is how they trained their perpetrators. Another
5 Witness, Witness 0006, tells us that Henry Kosgey went on to greet them
6 in a way that would motivate them, and he said that "We have finished all
7 of the planning. We have enough money." Asking a commander whether
8 everything in his area was ready, confirming it was ready he said, "Yes.
9 We have given these young men special treatment," and, no, he did not
10 have any problems in his area.

11 That can be found at EVD-00488 at 0373 and 0374, lines 815
12 through 856 respectively.

13 Next, they created localised co-ordination structures that also
14 ensured this near automatic compliance. They did this by choosing
15 specific people, people that had lived there themselves that were
16 familiar with the geographical area. These people, knowing who lived
17 where, were chosen to identify houses before the attack. This, too,
18 ensured that the attacks occurred with the greatest level of efficiency.

19 The next element requires that Ruto and Kosgey intended the
20 crimes -- intended to commit the crimes or were aware that the crimes
21 would occur in the ordinary course, that they would be aware of the
22 widespread and systematic context in which the crimes would occur. This,
23 too, has been addressed in this presentation as well as many others.

24 Through oral and written submissions, Ruto had given instructions
25 to perpetrators to carry out murders, displacement, and destruction of

1 property against the supporters and you, too, have heard many examples
2 supporting this element. That will not be repeated here.

3 The seventh element of mode of liability requires that the
4 suspect and the other co-perpetrators be made truly aware and accept that
5 implementing the common plan will result in the fulfilment of the
6 material elements of the crime. Their mutual awareness and acceptance of
7 the crimes is best demonstrated by the overt acts of planning,
8 distributing fuel, distributing weapons, training, and anti-PNU rhetoric
9 that was made at different meetings and rallies.

10 For example, Witness 0008 directs our attention to one meeting in
11 September where he says that Ruto spoke and that, during this meeting,
12 they discussed what preparations should take place in the South Rift and
13 that they had marked and targeted maps. The people there were saying
14 that they were prepared to follow their leader at any cost, and Ruto was
15 saying that, yes, this is necessary.

16 That can be found at EVD-00547 at 0699-6 -- excuse me, 0712,
17 lines 145 through 276.

18 Several Prosecution witnesses also confirmed that weapons were
19 discussed and they were distributed at various meetings in Nandi as well
20 as in Uasin Gishu.

21 These people relate that when they saw the guns, and after what
22 they had been told at the meetings, that they thought that the guns were
23 going to be used to evict the Kikuyus from the Rift Valley. They could
24 not think of any other reason why the guns would be there. Moreover,
25 they tell us that Ruto himself said that these guns were meant to be used

1 in the areas where the enemies lived, where they lived in large number.

2 That citation can be found at EVD-00222 at 0143, paragraphs 81
3 and 82.

4 For this element we also rely on various statements that have
5 been referred to in the Prosecution's presentations indicating their
6 awareness. These statements, in various shapes and forms, indicate that
7 these perpetrators -- that they made statements to these perpetrators to
8 attack PNU supporters and to expel them from their land, killing them if
9 necessary.

10 One witness tells us: "How does Ruto know that somebody killed,
11 or that somebody else killed somebody else, or if property was
12 destroyed." He tells us, referring back to the structure, "Well, it's
13 because we had a co-ordinator structure, and that they were supervising
14 the war." So they clearly knew.

15 That can be found at EVD-00552 at 0851 through 0855, lines 24 to
16 180 respectively.

17 We also know this because they obtained and distributed funds and
18 other means as described to other subordinates and perpetrators. There
19 were requests, specific requests, by Ruto to recruit ex-soldiers who were
20 already trained. This made it easier.

21 We also can see that they were aware of the authority that they
22 had over their network. We can see this by virtue of their statements
23 and by virtue of their contributions as previously discussed.

24 Just one moment, your Honour.

25 The last element, your Honour, element 8, is the requirement that

1 Ruto and Kosgey had such power and that they exercised such functions
2 within their organisation, their network, that enabled them to jointly
3 exercise control over the commission of the crimes.

4 Once again we rely on our previous submissions that establish
5 their crucial positions of authority in their community, in their
6 political party, and their leading roles demonstrated in various meetings
7 and events. Clearly they were aware of the positions that they occupied.

8 And lastly, this fact is supported by evidence, their constant
9 attendance at meetings, their constant financing of the organisation, and
10 their systematic co-ordination of resources.

11 Your Honours -- Madam President, your Honours, collectively, all
12 of the evidence that the Prosecution has described, viewed in its
13 totality, establishes the eight elements of indirect co-perpetration.
14 The Prosecution has identified the essential contributions, the
15 co-ordination, and their intent. These crimes were committed clearly
16 with the aim of furthering the network's criminal activities.

17 Thank you.

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

19 This brings the end of the presentation of the Prosecutor's case.

20 I thank you for the concise and organised manner by way of which we could
21 save quite some time, and we could advance with our schedule.

22 Now, I have to turn to the Defence teams and to make the point
23 that, as of this moment on, the floor is over to you. Of course, as I
24 said and I've explained in the beginning of the hearing, we expect the
25 Defence teams to follow the order of the Prosecutor's case, first that

1 the Defence of Mr. Ruto is going to present its case, evidence to object
2 to the charges, to challenge the evidence presented by the Prosecutor,
3 then the Defence team of Mr. Kosgey, finally of Mr. Sang. However, this
4 is without prejudice to a decision different to be taken after you have
5 consultations amongst yourselves.

6 Now it's 3.25 almost. The current session -- court session is to
7 end at 4.00 p.m. Then we shall have a break of 30 minutes, and then we
8 have two additional court sessions of one hour and a half. Exactly the
9 time that is allotted to the first Defence team to present its case, to
10 object to the Prosecutor's charges, to the evidence presented, and that
11 we start tomorrow morning with the questioning of the first witness of
12 the two witnesses that Mr. Kosgey's Defence team is presenting.

13 Now the floor is over to you.

14 MS. TAI: I'm sorry to interrupt.

15 MR. HOOPER: I'm sorry --

16 PRESIDING JUDGE TRENDAFILOVA: Excuse me, Mr. Hooper. Ms. Tai,
17 you wanted to add something. I understood --

18 MS. TAI: Yes, my apologies.

19 PRESIDING JUDGE TRENDAFILOVA: I understood that you have
20 finished --

21 MS. TAI: I am.

22 PRESIDING JUDGE TRENDAFILOVA: -- your presentation.

23 MS. TAI: I am. I just have one procedural matter to address.

24 PRESIDING JUDGE TRENDAFILOVA: Yes.

25 MS. TAI: We have not -- the Prosecution has not formally, on the

1 record moved for submission of all items of evidence identified on its
2 list of evidence and I would just like to move that formally into the
3 record, please.

4 PRESIDING JUDGE TRENDAFILOVA: You would like to move the list --

5 MS. TAI: The items of evidence that are identified on our list
6 of evidence.

7 PRESIDING JUDGE TRENDAFILOVA: Of course.

8 MS. TAI: Just formally.

9 PRESIDING JUDGE TRENDAFILOVA: Of course, this is fine for the
10 record. Thank you.

11 Now, Mr. Hooper, I'm sorry. I have just interrupted you. The
12 floor is over to you.

13 MR. HOOPER: Yes. Thank you very much. My first application is
14 that we adjourn now for half an hour in order that we can have
15 discussions amongst ourselves, as your Honour suggested, and also that we
16 can reflect on the extent, if any, that we may request a further
17 adjournment in order for us to go away and consider the submissions that
18 have been made over today and to discuss those, of course, with the
19 accused, which is part of the reason, I assume, why he's here. That's
20 the first reason.

21 There's good reason for it as well. I know your Honour's keeping
22 us rather somewhat under the lash. We don't resent that in any way,
23 because we realise that these are cases that need to be expedited. On
24 the other hand, there is perhaps an element of equality of arms, and
25 coming as we do, now consistently, towards the end of the day rather than

1 the beginning, we're perhaps a little less fresh. I was wondering in
2 those circumstances whether your Honour would -- and the Tribunal would
3 be gracious enough to consider rising until whatever, 20, 30 minutes, I'm
4 saying 30 minutes because of the way the tapes operate in this court, and
5 then we could sit, and subject to any further submission, and I'm not
6 saying there will be one, perhaps allow us to address the Court at least
7 for an hour and a half and then break for the day and come back tomorrow
8 to complete -- to complete the Ruto submissions if those haven't been
9 concluded by then. This would be of assistance. I think your Honour
10 knows, and I hope appreciates, some of the difficulties. Self-imposed or
11 not, it's the interests of the accused that matter here that have
12 bedevilled us over the recent weeks.

13 PRESIDING JUDGE TRENDAFILOVA: I understood you, Mr. Hooper. So
14 let us not be repetitive about the arguments.

15 With regard to your first suggestion, I have to confirm with my
16 colleagues, although I do not believe that they will object that now we
17 have a break of 30 minutes. Of course I shall ask the interpreters as
18 well, because we depend on the way they themselves feel when we take
19 decision of this kind, and thereafter we shall proceed with two-hour
20 session if the interpreters would be favourable about this change, then
21 one break, and we shall finish as scheduled today.

22 I am not inclined, but subject to a discussion with my
23 colleagues, to accept your proposal that we terminate for the day our
24 sessions and shift them for tomorrow, because in the decision on the
25 schedule that was issued on the 25th of August, we made a very clear

1 point, that as soon as we finish with some of the items on the schedule
2 we're going to move ahead with the next one to come, and we have
3 instructed the parties to be ready to intervene in such a situation.

4 You made another comment regarding the expeditiousness of these
5 cases. Maybe you meant the two cases stemming from the Kenyan situation.

6 The expeditiousness is a principle that is applicable to every criminal
7 proceedings. The equality of arms is equally applied in every criminal
8 proceedings, so there is no special intention in striving on behalf of
9 the Chamber to expedite these two cases, and in particular this case.

10 But still we have to adhere to what we have decided in the schedule, what
11 I have made clear in the introductory remarks, and these are the
12 expectations of my colleagues, but still let me once again concur with
13 them.

14 MR. HOOPER: Yes. But I did --

15 PRESIDING JUDGE TRENDAFILOVA: Mr. Hooper.

16 MR. HOOPER: I'm sorry, I thought you were --

17 PRESIDING JUDGE TRENDAFILOVA: No. Excuse me, let me first
18 confer and thereafter you will have the floor, because since yesterday as
19 if -- you're making suggestions along these lines and the Judges, since
20 yesterday, are not inclined to accept them, but let me ask them.

21 (Trial Chamber confers)

22 PRESIDING JUDGE TRENDAFILOVA: I'm addressing not only Mr. Hooper
23 but all parties and the legal representative, as well the public in the
24 gallery, that my colleagues are willing to grant the half-hour break so
25 that you confer amongst yourselves, but thereafter we shall proceed as

1 planned. And of course we have to exhaust all the time that was -- that
2 was granted very graciously by the Registry consulting all the different
3 units of the Registry, the interpreters, the security officers, the court
4 staff, the reporters, the stenographers, and we are not willing to delay
5 proceedings because our expectation is that throughout the five months
6 since the first initial appearance, the Defence teams have been gradually
7 organising themselves for these days to spend in this courtroom
8 throughout the Confirmation of Charges Hearing.

9 This is the decision of the Chamber. You wanted to take the
10 floor, Mr. Hooper, or maybe after the break.

11 MR. HOOPER: No. I was merely going to say that I had understood
12 your Honour to say at the outset that if we made good time, then the
13 final session could fall away. I may have misunderstood that. And it
14 seemed that it was in line with the Chamber's original idea that with
15 expedition -- it was the carrot, I thought, that was hung in front of us.

16 PRESIDING JUDGE TRENDAFILOVA: Mr. Hooper, you're right. You're
17 right. Your memory serves you perfectly well but we were mainly
18 referring to the Saturdays. We would like not to use the second Saturday
19 that was granted to the Chamber, on the 10th of September, and if
20 possible, for example, if we advance so very much tomorrow, the last
21 session of the Saturday. So that is the explanation that I am giving you
22 on behalf of the Chamber.

23 MR. HOOPER: And can I just clarify that it's not Mr. Kosgey's
24 witnesses, as I understand it, that are scheduled to appear tomorrow,
25 that's what appears on the transcript. I see your colleague to your

1 right agreeing with me --

2 PRESIDING JUDGE TRENDAFILOVA: (* Overlapping speakers) ...

3 MR. HOOPER: It's Mr. Ruto's witnesses who are to appear --

4 PRESIDING JUDGE TRENDAFILOVA: I'm not sure that the nodding of
5 my dear colleague Judge Kaul should be perceived and should be
6 interpreted as an agreement with you.

7 MR. HOOPER: Well, he's not dissenting unnecessarily.

8 PRESIDING JUDGE TRENDAFILOVA: So, Mr. Hooper, thank you very
9 much. We shall come back at 4.00, and we are going wait for your
10 decision who is going to start first after you have half an hour to
11 confer.

12 COURT USHER: All rise.

13 Recess taken at 3.31 p.m.

14 On resuming at 4.00.

15 (Open session)

16 COURT USHER: All rise.

17 PRESIDING JUDGE TRENDAFILOVA: Please be seated.

18 Now, Mr. Hooper, are you going to be the speaker of the Defence
19 teams to inform the Chamber about your discussion and proposal to us.

20 MR. HOOPER: Yes. Well, we had a discussion, a fairly short
21 discussion, and I'm addressing the Chamber first, of course, on behalf of
22 the Honourable William Ruto.

23 Now, in order to do so, may I in fact start my address, because
24 of course we had anticipated that the Prosecution would certainly weave
25 into their opening the dreadful atrocity that occurred at Kiambaa church,

1 and I'd like, in fact, if I may, to start off with a transcript of a
2 video which was, in fact, one of the relatively few pexo documents that
3 were provided us. The evidence registration number is KEN-OTP-0028-0055
4 and then -8 at the end of that. And it's page -- the second page of
5 that, which concludes with -- well, it's document 0042-0225. And of
6 course, in order to facilitate our preparations, the EVD numbers have
7 recently changed, and so I'm afraid there may be some mis-numbering on my
8 part as a consequence of that, because we haven't, and I know this is a
9 problem shared by my colleagues, all been able to convert from one number
10 to another in our notes. But the EVD number I've now been handed is
11 EVD-PT-OTP-00378. And if we can have that on the screens, I'd be
12 grateful.

13 PRESIDING JUDGE TRENDAFILOVA: So, Court Officer.

14 What you have dictated is on the screen, Mr. Hooper. Yes.

15 MR. HOOPER: (Microphone not activated) ... formally announcing
16 documents or not. It's on the screen. I'm not looking at my screen at
17 the moment.

18 You can see from the first page of this document that it's dated
19 the 1st of January, 2008. The location is Kenya. The language is in
20 English, and it's clearly a television extract, and I'm just going to
21 read the text that you can see on the screen into the transcript. The
22 start of the transcript.

23 "View of anchorwoman presenting news. The following text appears
24 on the screen." I'll just pause there. We do have a video, but I think
25 it's quicker to approach this through transcripts, and that's true of all

1 our videos if there's any reference to them.

2 PRESIDING JUDGE TRENDAFILOVA: Mr. Hooper, just for a moment, we
3 were informed that the Defence did not notify the Registry of any videos
4 to be played.

5 MR. HOOPER: And I'm not playing any videos, not least of all
6 because of the time.

7 PRESIDING JUDGE TRENDAFILOVA: Okay.

8 MR. HOOPER: And the same applies to documents. I can refer to
9 documents and, indeed, often their referencing may be better and more
10 swiftly and competently done in a closing brief in due course. So
11 that's, I hope, an acceptable procedure.

12 So let me pick up. There is a video of this matter that is
13 extant --

14 PRESIDING JUDGE TRENDAFILOVA: Yes. Mr. Hooper, the
15 Court Officer is making a point that you didn't indicate, as required by
16 the Chamber, what is the level of confidentiality of the document that
17 you are referring to.

18 MR. HOOPER: I'm grateful for that. It's a public document.

19 So let me just start again. It's the view of the anchorwoman
20 presenting news. The following text appears on the screen. It's a
21 repeating news ticker beneath the main picture:

22 "Breaking news. Tens of displaced people burnt to death in
23 Eldoret church, 200 people had taken refuge in the church.

24 "Anchorwoman: ODM leaders, led by Member of Parliament-elect
25 William Ruto, appealed to all Kenyans to remain calm and observe

1 peace ... as the country continues to witness the electoral violence
2 across the ... country.

3 "Cut to view of William Ruto. The following text appears on the
4 screen (repeating news ticker). Breaking news: Kenya Assemblies of God
5 Church set ablaze. Armed mobs numbering thousands marching towards
6 Burnt Forest. Tens of displaced people burnt to death in Eldoret church,
7 200 people had taken refuge in the church."

8 "William Ruto speaking: We have said very clearly and loudly
9 that we want a peaceful nation. We are asking Kenyans, wherever they are
10 across the country, that we want to protest against what happened to us
11 in this country but we want to do it peacefully. We abhor any acts of
12 violence. We ask Kenyans to shun and to avoid any acts of violence, any
13 acts of looting, any acts of destruction of property which is
14 unnecessary. We are telling our people across the country that burning
15 property, destroying life, engaging in acts of violence is ... actually
16 against the democracy we are fighting for. We want every Kenyan to be
17 heard, to participate in ... freedom of association and freedom of
18 expression but within the limits of peace."

19 January the 1st, 2008. With violence that started and sprung out
20 on the 30th, as we know, 30th of January. I'm sorry, 30th of December.

21 The core of the Prosecution case here is liability through
22 indirect perpetration through common plan, and as we heard just a short
23 while ago, various indicia of the existence of common plan have to be
24 proven at this stage. One of the matters that was relied on by the last
25 of my friends for the Prosecution in their address to you was this issue

1 of, well, said witness -- well, it's only one of one witness, it's either
2 witness of one or two or three or four or five or six or seven, and we
3 hear references repeatedly to another source or another witness. You can
4 almost count the witnesses in the -- on one hand, the ones that are
5 consistently referred to. And one of these witnesses says that, oh, --
6 all William Ruto would have had to say was "Stop it" and it would have
7 stopped.

8 Well, there he is. Not a matter that the Prosecution has adduced
9 in this case whatsoever, saying "Stop it," on the 1st of January, as
10 clearly as he can. And as it is television, as loudly as he can, because
11 he reaches all those interested ears. And it didn't stop. No more than
12 it didn't stop in Mombasa, and it didn't stop in Nairobi, and it didn't
13 stop in two-thirds of the regions of this vast country, a country of half
14 a million square kilometres. The Rift Valley is about the size of
15 England. We're talking big distances, and yet here's the Prosecution
16 trying to impose a sense of control through their case theory, and what
17 we're going to address today is largely this case theory. And what we're
18 going to say is if the Prosecution, as they have, choose to try and erect
19 a culpability through the plan, through the concept of a common plan,
20 then they have to construct something that is a solid matrix that not
21 only you the Judges can follow but the suspects, too, and their lawyers,
22 and it needs to be sufficiently defined step-by-step so that the case can
23 be proven. We return to this in due course. And this they have, we say,
24 failed to do, and these charges should not be confirmed, because they've
25 failed to appropriately address the issues they have to address.

1 This church, this terrible and ghastly event at the church.
2 Emotion runs through this case. There's no doubt about that, and I can
3 assure the Chamber, as I think you had the benefit of seeing yesterday
4 when Mr. Ruto addressed you, and the other suspects here, you could cut
5 the atmosphere in this Chamber with a knife, and as they spoke, I wonder
6 how many people wondered in their mind's eye, having heard them and
7 listening to them, Hmm, I wonder if this Prosecution has got it right?

8 We are not here and we're not concerned with proving a prima
9 facie case. We're above that. The Prosecution have to bring this
10 higher, to a substantial grounds for belief, and our submission is that
11 they haven't achieved that.

12 Now, so far as the confirmation, this process, is concerned, the
13 Chamber will, I know, be aware, we certainly are, that it's an unfamiliar
14 process, unique to the International Criminal Court. No other
15 international institution has this kind of process, and no national court
16 that I can think of has anything quite like it. And there's only been a
17 few cases that have passed through the Pre-Trial Chambers in the
18 international court in its relatively short life. So that's no surprise,
19 but the consequence is there's relatively little jurisprudence to assist
20 us and to assist those of suspects and the like who come and are brought
21 to this court, often at -- from very different life circumstances and
22 arrive, as I'm sometimes minded to tell them, on planet ICC, somewhere
23 very different from where they've been. It takes a while to pick up
24 speed. I think we all recognise that.

25 This is the first case actually initiated by the Prosecution.

1 There have been other cases here that have been referred by Security
2 Council or referred by States, but this is the first proprio motu, as the
3 lawyers call it, reference by the State -- reference, I'm sorry,
4 investigation by the Prosecutor, and it's therefore unique for that
5 reason.

6 Now, given that the Prosecutor himself, and I don't personalise
7 this in any way, that the Prosecutor himself has initiated the case, this
8 confirmation process is an even more important element that it normally
9 would be in protecting the rights of the suspect, and this hearing, it's
10 obviously the first time the suspects have had an opportunity to assist
11 the Chamber. I say that, but I stress, as you've seen from the
12 documents, strangely served as an incriminating document, the witness
13 statement of -- or interview of William Ruto in November of last year,
14 where he came all the way from Kenya to present himself to assist the
15 Prosecutor here and he was interviewed.

16 There's nothing incriminating in that interview from one -- the
17 first page to the last, but for some reason it was served, I don't know
18 if it was a technical reason or a mistake, as an incriminating document
19 where he sets out quite clearly his position, and that is from the late
20 afternoon of the 28th of December, all the way through January, from then
21 on, from December 28th, before the election results, he's away from the
22 Rift Valley. He's in and at his home in Nairobi, and on the 28th, 29th,
23 30th, 31st, the disputed days, he's actually at the KICC where the vote,
24 the big vote, was being counted. And it's an odd feature of this
25 election that it seemed, as I understand it, that the general election

1 for the national assembly of ordinary MPs from constituencies, which
2 Mr. Ruto, of course, stood for the first time as an ODM MP. That seems
3 to have gone perfectly satisfactorily. No suggestion there of any
4 shenanigans, Mr. Ruto for his (* indiscernible) or anything like that.
5 It was the presidential election that caused the problem. And whether it
6 was people's hopes dashed or, as we maintain, a corruption of the
7 process, it led to the extraordinary results that -- that we know about.

8 We're acutely aware, and it may that some parties in this
9 courtroom regret, that this not a trial, not even a mini-trial. It is
10 for, I suppose, the lawyers and perhaps to a great extent your Honours
11 very much a technical and procedural exercise, but it must be apparent
12 that there's deep emotion in this case. And as I submitted yesterday,
13 one only has to put oneself in the shoes of someone like William Ruto,
14 who, if his words on the 1st of January in that television interview were
15 genuine, is a very different man to the man we've heard spoken about now
16 for several hours in that particular way by the Prosecutor.

17 And the trial itself, because this is no trial, and many
18 misunderstand that outside this court, so I say it again, is possibly if
19 there is to be a trial, if there is confirmation, going to be a very long
20 time in the future. It's the nature of these trials, and it can't be
21 escaped. And as for a final judgement, even -- even longer in the
22 future. And in the meantime, Mr. Ruto, whose aspirations include
23 standing for the presidency of his country in the elections of next year,
24 who has otherwise the life of an active politician, family man and the
25 rest of it, in Kenya, it's going to be a very, very difficult period in

1 time.

2 So what is this process about? Is it just a look-see at the
3 Prosecutor's dossier? Is that to be the end of it, or is it an
4 opportunity for the Chamber to look at the broader pool of material than
5 that which is presented to it by the Prosecutor? And the Statute by
6 Article 61(6), as we know, provides us, the Defence, the opportunity to
7 challenge the case and to bring evidence before the Chamber, and it
8 allows the Defence to object to the charges, to challenge the evidence
9 presented by the Prosecutor and to present evidence.

10 And the Defence do object to the charges, do challenge the
11 evidence presented by the Prosecutor, and as you know, will present
12 evidence. And it's important, in our submission, that that opportunity
13 is provided to a suspect given the drastic affect that it has, for
14 example, on my client's life and his aspirations as a future leader of
15 his country, and in any event, better to stop a bad case now than have it
16 drag on for years at huge personal expense, emotional expense,
17 inconvenience, and the huge drain on the limited resources of this court.

18 The duty, as we know, on the Prosecutor is to produce sufficiency
19 of evidence, to establish substantial grounds to believe that the suspect
20 committed the crimes charged. In the Katanga confirmation decision on
21 the charges, filing 717, the Chamber relied on "internationally
22 recognised human rights jurisprudence for its interpretation." It's
23 referring here to the Lubanga case. "For its interpretation of the
24 evidentiary standard of substantial grounds to believe."

25 "In the current case," and this is the Katanga Chamber speaking,

1 "the Chamber sees no compelling reason to depart from its application as
2 established and therefore considers that in order for the Prosecution to
3 meet its evidentiary burden under Article 61(7) of the Statute," and this
4 is the significant part of it, "it must present concrete and tangible
5 evidence which demonstrate a clear line of reasoning underpinning its
6 specific allegations."

7 And when we come and when we look at the notion of common plan,
8 that notion of logic is -- is central to the approach, in our submission,
9 of the Court.

10 I'm not -- and it's not my intention this afternoon to instruct
11 you, the Judges, how you should view the evidence. That's not my
12 function. I'm here to make submissions that are aimed on behalf of
13 Mr. Ruto to lead this Chamber to accept that the Prosecution theory
14 behind this common plan is a departure from the reality of what happened
15 in 2007, early 2008. The Prosecution case is -- is built, as we know, on
16 those seven statements, and even -- I say the seven statements that
17 the -- the Bench will be more than aware when I refer to that, as I will,
18 I suspect, repeatedly, that I'm referring to the principle, in fact, only
19 seven Prosecution statements of anonymous witnesses that have been laid
20 before the Court. The Prosecution case, however which way one comes to
21 it, essentially rests on that evidence. There's very little evidence
22 outside that, very little indeed. And none that without it would be able
23 to sustain the evidential burden in any event.

24 We submit that when we come to those statements, you should be
25 very cautious in the way in which they are approached.

1 Those are witnesses that we understand have provided statements,
2 they've given long interviews, very long interviews some of them. Those
3 interviews are heavily redacted for the Defence, as you know, and no
4 witness's name has been revealed to us in respect of them. They are, we
5 understand, witnesses that have been put into a protective regime by the
6 Prosecutor or by the Court, a protective regime that no longer has them
7 living in Kenya. Whether that's right or not, I don't know. I'm relying
8 on newspaper reports and the like. You have the references.

9 But one aspect of that protection, it may be viewed as necessary,
10 is that it may, and in our submission undoubtedly does in this context,
11 brings a possible incentive -- brings an incentive to a witness to
12 provide evidence that he might not otherwise do, and by that I mean lie,
13 because to be treated as a witness by this court has, we know, some
14 disadvantages. But in this context and in other African cases that are
15 before this court, it brings distinct advantages. And that should not be
16 overlooked in respect of a case that comes from the African continent
17 or -- nor anywhere similar or presented with some of the difficulties
18 that can be faced there. And the potential mendacity, we say, of those
19 witnesses shouldn't be overlooked. They have considerable interests to
20 serve.

21 And it is to be noted that already at this early stage,
22 witnesses, witnesses in this context who gave evidence, for example,
23 before commissions in Kenya, have been moved to recant their allegations
24 and have accepted that what they said on oath before their own government
25 commissions amounted to lies, were lies. And there's material, as you

1 know, in respect of that that have been served, and I can provide it at
2 some length to you here, but let me just refer to -- to one that's -- I
3 don't ask for it to be called up. This is an OTP reference, and it's
4 0045-0178. Capital News this is, and the headline is "'We were paid to
5 nail Ruto,' say witnesses."

6 This is a political man who is a suspect, and again that is
7 something not to be underestimated as something capable of potent
8 mischief in this case in terms of allegations that might be brought
9 against him.

10 Well, we're not going to hear and have not heard from any of
11 those witnesses, witnesses that I criticise harshly in their absence.
12 The Prosecutor, we know, has no duty in the course of this kind of
13 hearing, a confirmation hearing, to call witnesses, and Article 61, which
14 guides the procedure in a confirmation hearing, expressly permits the
15 Prosecutor not to call witnesses if he so wishes and to rely on
16 statements instead. We submit that that is still, nevertheless, a choice
17 that the Prosecutor has. He can call the witness or he cannot, subject,
18 of course, to the Chamber's view.

19 At the end of it all it's for the Chamber to assess the witness
20 or to assess the evidence, whichever it gets the benefit of. But the
21 Prosecutor here could have sought to call his witness, could have had
22 them questioned, and the Chamber could have been better placed -- well,
23 would certainly be better placed to assess their value. And that, in a
24 case, we say, where all the poison, because that's how it's viewed by the
25 Defence, all the poison comes from a handful of witnesses. That's the

1 sensitivity of the issue to the Defence.

2 It was observed in the Lubanga case, formally the decision on the
3 Prosecution application for the admission of prior recorded statements of
4 two witnesses, decision of the 15th of January, 2009, at paragraph 29:

5 "The live questioning of a witness in open court on all aspects
6 of his or her evidence can have a material impact on the Chamber's
7 overall assessment of the evidence as oral testimony is, for obvious
8 reasons, of a different nature to a written statement. Most importantly,
9 the evidence can be fully investigated and tested by questioning, and the
10 Court is able to assess its accuracy, reliability, and honesty by in part
11 observing the conduct and demeanour of the witness."

12 Now, without that opportunity, we submit, the statement must be
13 necessarily of a lower currency, that it would be automatically of a
14 lower currency than if you had the opportunity to assess it. And this is
15 particularly true in respect of prosecutorial statements. After all,
16 that's where the burden of proof lies. Not on the Defence. Defence
17 statements actually fall into a different category in these
18 circumstances, but the Prosecutor has the burden to prove this case at
19 this stage to a substantial degree on his -- on his evidence. So if he
20 chooses to call or not call seven witnesses and only seven witnesses in a
21 case as substantial as this, then that's his choice. There maybe other
22 issues, protective issues and the like. But as I said, our understanding
23 is that these are protected witnesses.

24 In the Katanga case, in the confirmation decision, that's
25 decision 428, at paragraph 74, it was said and it's accepted quite

1 clearly that "it is up to the competent Chamber to decide on the
2 probative value of any piece of evidence introduced for the purpose of a
3 confirmation hearing or the trial." So we also accept that evidence
4 adduced in this way is a matter of weight rather than admissibility.

5 Again in the Katanga confirmation, at paragraph 194, the Chamber
6 said:

7 "Lastly, the Chamber is of the view that any dispute about the
8 credibility of such evidence," and this is at confirmation, "could not
9 arise from issues of admissibility but from issues related to the
10 appropriate weight to accord to that evidence. "

11 Anyway, the Defence are left in a position where regretfully
12 we're not in a position to test the evidence at this stage, not only to
13 create -- as a service to the suspect but a service to the Court,
14 perhaps, in the long-run.

15 At paragraph 108, the Chamber stated that in respect of evidence,
16 non-oral evidence:

17 "The party's inability to cross-examine a Prosecution source is
18 simply one factor in the Chamber's determination of the probative value
19 accorded to the evidence in question."

20 So all that, we submit, suggests that non-oral testimony also has
21 an intrinsic deficiency to it, particularly if it's being produced by a
22 Prosecutor with a burden of proof on him or her.

23 There's another factor, though, to bring that evidence down
24 another rung and that is its anonymous nature. These are anonymous
25 witnesses for whatever reason. In the Abu Garda confirmation decision at

1 paragraph 51:

2 "The Chamber may determine that the evidence will have a lower
3 probative value if the Defence does not know the witness's identity.

4 One. And only a summary of the statement and not the entire statement."

5 Let me read that again because I put a comma in a wrong place.

6 "... the Chamber may [...] determine that evidence will have a lower
7 probative value if the Defence does not know the witness's identity and
8 only has a summary of the statement, and not the entire statement, may be
9 challenged or assessed."

10 So we have there the recognition of the problem of anonymous
11 witnesses, but we also have another third element and that is when the
12 Defence aren't provided even with the statement of the witness that the
13 Prosecutor wants to rely on. We don't have it because its redacted.
14 Whether that's in a summary form or whether it's a redacted statement
15 surely makes logically no difference at all because the Defence is
16 automatically prejudiced in either case, and for that reason, the margin
17 of tolerance that the Court extends surely extends to that as well in
18 favour of the Defence.

19 So here we have a Prosecutor, seven witness statements that have
20 been repeatedly, endlessly referred to. That's their case. We don't
21 accept that those witnesses are witnesses of truth. The Prosecutor
22 hasn't produced them before you for you to assess nor for us to question
23 at this stage, a significant stage in the procedure. That's their
24 choice. They want to proceed with anonymous statements which prejudice
25 the Defence, and they want to produce redacted statements, even to the

1 point, as we'll see, where dates of meetings have been taken out. Public
2 meetings have been taken out.

3 In any event, we say that logically the weight of that material
4 in the Prosecutor's efforts to climb the -- to get over the fence of
5 substantial grounds, makes that job that much harder for them.

6 We say that evidence in that form, even at this stage, even with
7 the express allowance of Article 61 for the Prosecutor does not mean,
8 when you look at the rest of the material in the round, including the
9 Defence material it necessarily provides the Chamber with that sufficient
10 evidence to establish substantial grounds, and particularly when those
11 statements and those particular allegations of the meetings, of
12 furnishing of guns, all the rest of it, when those particular allegations
13 are totally unsupported by any other grounded evidence in the case.

14 In these opening matters relating to the evidence which I'll come
15 to briefly in a moment, I say "briefly," which I'll come to in a moment,
16 there's a further issue that concerns us which we've touched on already
17 and that is the failure of the Prosecutor, we say, to investigate
18 exculpatory matters. We've referred to it before. The duty, we know, is
19 the duty imposed on the Prosecutor, a mandatory duty imposed by
20 Article 54, and I'll read it out. We're familiar with it, but it's so
21 central to the logic behind this court.

22 Article 54: "Duties of powers of the Prosecutor with respect to
23 investigation.

24 "The Prosecutor shall:

25 "(A) In order to establish the truth, extend the investigation to

1 cover all facts and evidence relevant to an assessment of whether there
2 is criminal responsibility under this Statute, and, in doing so,
3 investigate incriminating and exonerating circumstances equally."

4 That is a remarkable section of the Statute. It's remarkable
5 because of the extent of the duty it places on the Prosecutor of this
6 court to investigate incriminating and exonerating circumstances equally.

7 They haven't done so in this court. You only have to look at the
8 so-called pexo filings in this case to realise that basically what
9 happens, and we've seen it in another cases in this court, if the
10 Prosecutor trips over something that turns out to have an exonerating
11 nature to it, then it goes into the pexo bin, really, and eventually
12 finds its way to us. I'm not being too cynical about this. I've
13 actually heard a department head of investigation here saying just that
14 more or less.

15 So what do we have? We don't have any exculpatory statements or
16 exonerating statements. Now, logically that could be because there are
17 none. None could be obtained. But that's not the case. Our submission
18 is you don't have to turn over very many stones in the Rift Valley to
19 come across this evidence. Our own statements, Defence statements, are
20 an indication of that.

21 There's no evidence here that the Prosecutor's approached any of
22 the notables and the people that you or I given a week's investigation
23 duties in Kenya would do. This isn't clever stuff. It's basic stuff.
24 And if you went to a locality, Eldoret, or wherever it was, you'd go and
25 knock on certain doors if you're looking for information. And it's our

1 submission that if you'd done that, you'd have some across a fair fistful
2 of statements from people on the way of an exonerating nature, and the
3 fact that there isn't even one is a very, I think, brave question mark
4 against the nature of the Prosecution's investigation.

5 So we know and you know because we only have to go through some
6 of the Rule 77 -- or I do, perhaps you don't, Rule 77 material which
7 won't be accessible perhaps necessarily to the Bench, but it's not
8 difficult, in fact, from one's own knowledge to know that there have --
9 there were and have been many expressions from many sources that the
10 Kenyan election violence was spontaneous. So why haven't we received one
11 statement from the Prosecution to that effect? It is surprising, isn't
12 it?

13 So overall -- and there is material. I'd go so far to say
14 there's bountiful material relating to that particular aspect of the
15 case, and it underscores what for us is dereliction in the nature of the
16 Prosecution case. There's also the material which I've referred to
17 already to the witnesses who have recanted, stating that they were
18 induced to provide false testimony before internal Kenyan committees.
19 For, I stress, political reasons. That was their motive, stated motive.

20 So what we have instead then in the absence of a proper, if the
21 Court accepts that submission, a proper broad, fair-handed inquiry by the
22 Prosecutor is necessarily a one-sided view of the situation. And it's a
23 complicated situation to take a one-sided view of. This is not a simple
24 situation at all. This is not simple crime. We have a narrow, biased
25 view of the events in Kenya, which is, itself, a prejudice to the suspect

1 if it's a narrow, one-sided view. And it's arguably of even more concern
2 when that presentation of viewpoint is done in the course of a proprio
3 motu self-starting Prosecution investigation.

4 So that is, we say, another reason for the Chamber to approach
5 this confirmation and in particular the statements, the handful of
6 statements, the seven statements, the core material, that it is only
7 right and fair in those circumstances that that material is approached
8 with a great deal of care and caution with the question why are they so
9 stand-alone, those statements? And those statements have to be seen in
10 the round, in the general context of no -- no evidence in support of what
11 they say in respect of meetings, telephone calls, of statements made by
12 William Ruto. No receipts, no tracking of money transfers, no record of
13 mobile phone linkage between the parties. And this is an investigation
14 at the international level, and the Defence surely have a reasonable
15 expectation that that kind of vigorous inquiry would be conducted. It
16 would be done at a national level on serious crime. Why is it not done
17 here?

18 No transcripts. It's an extraordinary feature of this case that
19 part of the five constituent parts of this so-called network has the
20 grand name "Media" and the media boils down to the unfortunate Mr. Sang
21 here, a man who is on the radio speaking on a daily basis in a country
22 that is highly sophisticated. Kenya is not Somalia. Kenya is a
23 sophisticated country with a high GNP, going places. Those of you who
24 have been to East Africa will know this. So, this is a sophisticated
25 country operating sophisticated mechanisms and many of those mechanisms

1 are capable of basic inquiry by the authorities.

2 So where are the telephone calls linking Ruto with these people.

3 Where are the transcripts of the radio announcements made by Mr. Sang?

4 There's not one. And the only material we've gathered or have been

5 provided by the Prosecutor in respect of announcements and transcripts by

6 Mr. Sang, and this is also central, of course, to Mr. Ruto's case, are

7 not incriminatory but exculpatory. So it's a surprise in a case like

8 this to pick up a document served as an incriminating document and to

9 turn the pages and find the opposite case presented. A total absence of

10 transcripts. Is this substantial evidence? Is this case based in

11 respect of these six, seven witnesses, whatever interest or mendacity

12 they may have, and absent all the basic tools that a proper investigator

13 would have used and employed. And we say it reduces it all. That's the

14 context that those statements have to be viewed in.

15 And also, we've not seen any contemporaneous allegations made at

16 the time. We've seen no complaints, say, in the months prior to December

17 2008, this extraordinary spectre of Mr. Ruto for a year or more plotting

18 and planning the possible corrupt election. Where are the independent

19 voices raised on the way against that kind of behaviour?

20 The document containing the charges, if I can come to that, and

21 can I come first of all to -- of course we're dealing here with counts 1,

22 3, and 5. Count 1, as we remind ourselves, is the crime against humanity

23 of murder. Count 3, the crime against humanity of deportation or

24 forcible transfer, and here we're concerned solely with forcible

25 transfer, if at all. And the third is, of course, the crime against

1 humanity of persecution.

2 It's -- it's that final count, persecution, that I seek to
3 address you on now. And in that count, you will see that the persecution
4 is identified as being that they targeted civilians based on their
5 political affiliation, committing, and here we have it, murder, torture,
6 deportation or forcible transfer. And what we submit is that the torture
7 element should not be there and yet it's been included in that count.
8 May I say I'm grateful to the OPCD, who have served us very well, for
9 drawing my attention to this point and it's certainly a valued and -- a
10 valued contribution.

11 You know very well that you yourselves refused to issue the
12 summons in view of the Prosecution's allegations of torture, and that was
13 a rejection of that when you were looking at the material at, as it were,
14 a lower standard of proof than it is now. So we would say it's a wholly
15 inappropriate charge. The element of torture should be removed.

16 There's a second reason for that, a second ground for that, and
17 that is that when --

18 PRESIDING JUDGE TRENDAFILOVA: Mr. Hooper, excuse me. You were
19 referring to count 5.

20 MR. HOOPER: (Microphone not activated) ...

21 THE INTERPRETER: Counsel's microphone, please. Counsel's
22 microphone.

23 MR. HOOPER: Yes, it's count 5, persecution, which is
24 particularised as being committed, targeting civilians and committing
25 murder, torture and deportation or forcible transfer in order to effect

1 that. And we submit that torture shouldn't be there because you
2 yourselves have rejected it, and secondly, it would be contrary to
3 Article 101 of the Rome Statute, which I've got somewhere.

4 And Article 101 is rather similar or analogous to speciality in
5 extradition cases. Those of you familiar with that would be -- or those
6 of us familiar with that would not be unfamiliar with -- in fact, it is
7 headed "Rule of Speciality." So what it says is that a person
8 surrendered to this Court "shall not be proceeded against, punished or
9 detained for any conduct committed prior to surrender, other than the
10 conduct or course of conduct which forms the basis of the crimes for
11 which that person has been surrendered." And that applies also in
12 respect of a situation as we have here, where it's a response to a
13 summons.

14 So the suspects, none of them, have responded to a summons which
15 included that particular crime. And the only way in which the
16 Prosecution could have proceeded in that over and above the first
17 ground -- our basis of the first ground for objection, was that the Court
18 may request a waiver from the State, but that has to be obtained prior to
19 the charge, and that's too late, obviously, at this stage.

20 So that's the submission, and we -- well, the submission is that
21 the relief we request is that, in any event, the torture element be
22 removed from count 5.

23 The next matter that I'd seek to address the Chamber on again
24 relates to those charges and relates to the multiple charging that we say
25 is an error on the charging document. The -- the authorities available

1 on this issue, we submit, show that it's wrong to charge where there is
2 the same basis for a charge reflected in other charges, and in respect of
3 this count, count 5, we can see that the element there of persecution,
4 omitting torture now which we've addressed, is murder and deportation or
5 forcible transfer. And the two elements of committing murder and the
6 other -- well, the element of committing murder and the element of
7 deportation or forcible transfer of population is already contained in
8 counts 1 and 3, which charge those specific offences.

9 So the factual allegations as concerns persecution are identical
10 to those concerning murder and forcible transfer and are thus subsumed
11 within those charges. And so the Pre-Trial Chamber, your -- this Chamber
12 should only confirm the charge of persecution.

13 The, perhaps, clearest authority in respect that is a decision in
14 Bemba, decision pursuant to Article 61(7)(a) and (b) of the Rome Statute
15 on the charges of the Prosecutor against Jean-Pierre Bemba Gombo,
16 filing 424 of the 15th of June, 2009. The Chamber underscored that: "it
17 intended it make it clear that the prosecutorial practice of cumulative
18 charging is detrimental to the rights of the Defence since it places an
19 undue burden on the Defence. The Chamber considers that as a matter of
20 fairness and expeditiousness of the proceedings, only distinct crimes may
21 justify a cumulative-charging approach and ultimately be confirmed as
22 charges. This is only possible if each statutory provision allegedly
23 breached in relation to one and the same conduct requires at least one
24 additional material element not contained in the other."

25 So we say that that doesn't apply here. And that is my

1 submission of those specific -- those charges.

2 Throughout my submissions from now on, and doubtless through
3 those of my fellow counsel here who will address you in due course, will
4 be a concern as to the nature of the document containing the charges.

5 One doesn't really need to go to any particular point. You can
6 open at any page and just put your finger on it and then ask yourself
7 whether the clause or paragraph you're looking at has specificity or not.
8 Has it enough detail, sufficient and fair detail or not? And almost
9 always the answer will come back, I submit, no, it hasn't.

10 The document containing the charges is the most significant
11 document at this stage. It will be overtaken by any confirmation
12 decision you make in terms of any future trial or potential trial. It's
13 certainly the most important document facing us now and remains a highly
14 significant document.

15 There is a great need for specificity. It's there to enable the
16 suspect or accused to see the plain case against him, and in my
17 submission, this isn't a document for lawyers, just for lawyers, it's a
18 document for suspects too.

19 I don't need to go through the various articles, but I refer to
20 them, Article 61 and 67, of course, of the Statute, Rules 121 -- Rule
21 121, Rules of Procedure, and Regulation 52, all deal with this important
22 element of -- of specificity, which in its way is a form of disclosure,
23 in its way.

24 And it becomes extremely important when -- both for a Chamber and
25 for a suspect or an accused, when a case is built on 25(3)(a), liability,

1 indirect perpetration. That is committing the crime not directly
2 yourself, not yourself stabbing someone, but basically getting someone
3 else to do it for you, and having control over that person, with some
4 other added ingredients as well. And that form of indirect perpetration
5 is basically carried in a vehicle called common plan, and common plan has
6 ingredients which we'll come to in due course, well known to the Chamber,
7 I know, but which require, as we can gather from the efforts made of
8 several hours today, the effort by the Prosecutor to show a clear
9 hierarchical structure and a clear interrelationship, a clear
10 demonstration of a suspect's capacity to exercise control indirectly or
11 directly. And from a suspect's point of view, from the Defence point of
12 view, and doubtless even from the Chamber's point of view, we need to
13 know in respect of whom one has this control, these links, these
14 relationships. We need the person sufficiently identified in order to
15 defend. We need it to determine whether, for example, Mr. Ruto's
16 contribution to these matters was essential.

17 There are very few names in this document. There's the accused's
18 name -- the suspects' names repeated. I think three others in all.

19 It's not only a matter of putting the defendant fairly on notice
20 by disclosing him not only of the charges but the underlying facts to
21 those charges in a clear way, more essential, as I submit, in case of
22 common plan, but also to limit Prosecution so that it does not have the
23 opportunity, the unfair opportunity, later to add or change the factual
24 basis underlying the charges.

25 The Prosecution do not need to call or rely on any of these seven

1 witnesses. If this case is confirmed and we go to trial, they can call a
2 whole new batch. So it's all the more important that the Prosecutor, if
3 there is to be a confirmation here, has -- that the Defence are not put
4 at that disadvantage, that the Prosecution does not later or anytime
5 alter the factual basis of these complex charges.

6 An ICTY case, Kupreskic, an Appeals Chamber judgement there, on
7 the 23rd of October, 2001, paragraph 92. Yugoslav case, obviously, and
8 dealing with this general principle which it's really impossible to
9 disagree with, in our submission, stated:

10 "It is not acceptable for the Prosecution to omit the material
11 aspects of its main allegations in the indictment with the aim of
12 moulding the case against the accused in the course of the trial
13 depending on how the evidence unfolds."

14 That's contained in, as I say, the Prosecutor and Kupreskic,
15 Appeals Chamber, Defence motion seeking the amendment of the document
16 containing the charges. It's also quoted in there, and that's a Katanga
17 decision of this court, 574, with approval.

18 So there's a further case of assistance which will be known to
19 you, and that is the Bemba decision, which someone has glaringly
20 highlighted for me here so I can read it even at this stage of the
21 evening. And that is, in fact, a decision of the Confirmation Chamber,
22 with which this Chamber will in part be familiar, at paragraph 2008 --
23 sorry, 208:

24 "The Chamber notes Article 61(3) of the Statute and
25 Regulation 52(b) of the Regulations and highlights the basic principles

1 on framing a document containing the charges, the DCC. These principles
2 establish, inter alia, that a DCC must state the material facts
3 underpinning the charges, and that the material facts underpinning the
4 charges shall be specific enough to clearly inform the suspect of the
5 charges against him or her so that he or she is in a position to prepare
6 properly his or her defence. The Chamber believes that it is the duty of
7 the Prosecutor to furnish all facts underpinning the charges."

8 And this is a very important part that I come to here as well as
9 an observation made by the Chamber in this case, and that is this:

10 "Any deficiencies cannot be compensated by the Chamber. In
11 addition, the Chamber considers that where the Prosecutor is able to do
12 so, he should identify the method of commission of the crime or the
13 manner in which it was committed."

14 And that, of course, dealt with -- well, I don't think I need
15 turn to the facts. They're known to this Chamber.

16 So we're concerned at the lack of detail that we see in this
17 document, and if I can just take one. And I have a hard copy document.
18 Maybe -- I don't know if the Chamber has the hard copy documents.
19 They're sometimes useful. I see. It's sometimes more useful than the
20 electronic copy.

21 PRESIDING JUDGE TRENDAFILOVA: You recall our decisions,
22 Counsel Hooper.

23 MR. HOOPER: Thank you very much. So let's just -- may I invite
24 you to look at paragraph 25. There's a number of examples here.

25 "To execute their plan, Ruto and Kosgey, together with Sang and

1 others" - "others" is a very common word throughout this document, it
2 doesn't help us at all - "created a network of perpetrators." That's
3 another phrase that appears fairly regularly throughout the document.
4 And again, we are not greatly assisted by that.

5 So we have various words or euphemisms throughout this document,
6 "Network," "others," "perpetrators" of the direct and non-direct kind,
7 "attackers," "network perpetrators," "supporters." There's various
8 others. "Subordinates." None of these words help the Defence, and none
9 of them, we submit, help you the Judges, and more importantly, all of it
10 creates an intrinsic vagueness in respect of the notion of plan, which
11 has to be, we say, a matrix that's clear, definable, recognisable, and
12 which demonstrates clearly to the accused those with whom he is
13 participating directly and indirectly, and we don't find it in the course
14 of these pages.

15 At 24, for example, from at least 2006, "from at least," what
16 assistance is given to anyone with that phrase? "Until January of 2008,
17 Ruto and Kosgey, along with Sang and others," who are those others? Who
18 are the people that these suspects are meant to have directly worked
19 together with and planned with from as early a stage as that? "Planned
20 to expel individuals, namely, members of the Kikuyu, Kamba and Kisii
21 ethnic groups," and then in brackets it has "later referred to as PNU
22 supporters."

23 The PNU, as a party, in fact, didn't come into being until
24 September of 2007. That's weeks, just weeks before this -- this matter
25 that's concerning us. So this very basic, very basic, assumption or

1 allegation, assertion on the part of the Prosecution is wrong -- forgive
2 me one moment.

3 (Defence counsel confer)

4 MR. HOOPER: We have the dates and the documents in support of
5 that assertion, and I'll come back to that in due course.

6 But that's interesting. Right at the beginning -- and this is
7 another problem throughout this document as we'll come to see, in our
8 submission, and that is the variation in what the Prosecution say is the
9 objectives of the plan. The objectives of this plan are central to the
10 Prosecution case, and yet they change paragraph by paragraph.

11 These are a plan to expel members of the Kikuyu, Kamba and Kisii
12 ethnic groups, later referred to as PNU supporters. So what is it, is it
13 a plan to expel individuals, members of the Kikuyu, the Kamba, and the
14 Kisii? Significant, because they're Mr. Ruto's neighbours, for example.
15 Or is it a plan to expel PNU supporters? And Kalenjin, for example,
16 could vote and did vote PNU, not solely those groups.

17 "To execute their plan," 25, "Ruto, Kosgey, Sang and others
18 created a network of perpetrators," "the network," as it's defined here,
19 "by capitalising on existing entities in the Kalenjin community. By
20 December 2006, the network consisted of pro-ODM political figures." Who
21 are they? Media representatives. Who are they? Mr. Sang. He's the
22 media representative. Well, it's the only one we've ever heard of being
23 alleged. Financiers. Who are the financiers? Tribal elders? Who are
24 they? Is it that document that we just saw that came on the screens, the
25 two names on it? Is that it? Local leaders. Who are the local leaders?

1 Former members of the Kenyan police and army. Is that the two or three
2 people that we hear about in witness statements, or is it more than that?

3 And all this is very important, because plan leads to structure,
4 which leads to organisation, which leads, of course, to eventually the
5 issue of jurisprudence as well.

6 So we submit that this is a fairly inadequate document, and I've
7 only gone to the very early paragraphs. I could spend the week going
8 through this document with uncontrived criticism of it in its lack of
9 specificity. And we'll see it again and again in the course of Defence
10 submissions.

11 It's not so different to perhaps consideration of joint criminal
12 enterprise, when again a complicated structure is proffered to a Court.
13 That's not really part of this Court's concern now, but certainly the
14 situation is sufficiently analogous for the Court to be assisted by
15 example from the case of Karemera et al., where it was held that the
16 Defence must be informed with whom the defendant is alleged to have
17 participated in a joint criminal enterprise. Entitled, we say, a
18 suspect, to be informed of his own conduct as well as those of his
19 alleged co-perpetrators or subordinates or accomplices or whatever it may
20 be, and this document doesn't provide that information.

21 It's necessary, as may be repeated when we come later to look at
22 the nature of plan and personal liability, that such information is
23 required by us, the Defence, to perform basic tasks in a trial, and that
24 is to verify whether the actual physical perpetrators were
25 co-perpetrators, for example. Down the end there, down the end of the

1 line. They don't all have to be named. We realise that. Whether they
2 or the subordinates or the accomplices were controlled by one or more
3 members of the common plan as opposed to action occurring independently
4 of this plan.

5 If you've got a group of angry youths running down Turbo streets,
6 perhaps in their hundreds, gathering numbers as they go, what's the
7 relationship between any one of those and, say, in this case,
8 William Ruto? How are we going to determine that? So there's very good
9 cause for the Defence to say that this document falls significantly below
10 the standard that a document containing the charges should bear, and if
11 we may say so, falls below the standard of documents containing charges
12 that a number of us associated with other tribunals at different times
13 have seen. It falls below those standards.

14 We hope that coming to consider confirmation the Chamber will not
15 uphold a particular charge or allegation that lacks particularity and, on
16 the basis of the Bemba case, it doesn't seek to add it, which is the
17 Prosecutor's job, which has been failed in, we say.

18 So there are charges here which the Chamber can approach at the
19 end of the day and not confirm, we say, for lack of specificity.

20 I'd now like to come to consider the -- or make Defence
21 submissions following the sample draft model chart that we have that
22 starts with, of course, well, crimes against humanity, of course, and the
23 common contextual elements.

24 PRESIDING JUDGE TRENDAFILOVA: Mr. Hooper, if you're tired
25 because you speak already one hour and a half, we can take a break.

1 MR. HOOPER: Yes.

2 PRESIDING JUDGE TRENDAFILOVA: And then you can proceed.

3 MR. HOOPER: Certainly.

4 PRESIDING JUDGE TRENDAFILOVA: Because I was -- I saw that you're
5 looking at the -- at the clock.

6 MR. HOOPER: I'm good on time, yes.

7 PRESIDING JUDGE TRENDAFILOVA: No, no, no. It's fine. You can
8 proceed, but we just want to grant you half an hour break.

9 MR. HOOPER: No, I don't mean -- I'm gracious. I'm in fact
10 moving on to another area, and it's a very opportune time to take the
11 break.

12 PRESIDING JUDGE TRENDAFILOVA: Okay. So we shall start at 6.00
13 sharp.

14 MR. HOOPER: That's five minutes later than we need to, but ...

15 COURT USHER: All rise.

16 Recess taken at 5.23 p.m.

17 On resuming at 6.00 p.m.

18 (Open session)

19 COURT USHER: All rise.

20 PRESIDING JUDGE TRENDAFILOVA: Please be seated. We resume the
21 session.

22 Who is going to take the floor on behalf of the Defence? You
23 proceed, Mr. Hooper, or someone else?

24 MR. HOOPER: No, we don't have the Prosecution facilities, so
25 we -- it's one of us, I think, in the main. We don't have --

1 PRESIDING JUDGE TRENDAFILOVA: You do have.

2 MR. HOOPER: So I'm moving on to the sample for a draft model
3 chart on the presentation of incriminating and exculpatory material which
4 is the argument flowchart, I suppose, crimes against humanity.

5 Attack. Well, clearly we concede that there were attacks,
6 certainly attacks that clearly fell within national jurisdiction in any
7 event.

8 Widespread. We don't concede widespread. I think it's a matter
9 for proof by the Prosecutor. What we do draw the Chamber's attention to
10 is the very limited temporal line of three days.

11 The other matter that we raise is in relation to paragraph 21 of
12 the -- paragraph 21 of the -- of the document containing the charges. I
13 think this recurs elsewhere, but the -- the numbers quoted there,
14 paragraph 21, are not supported by the suggested source or basis.

15 We -- we also note just very briefly that in respect of
16 paragraph 75, and this of course is -- is or may not be a matter for
17 consideration subject to your findings of fact, but at paragraph 75
18 dealing with Turbo, you may recall the DCC refers to at least four people
19 were killed. Those are the four people Mr. Ruto referred to yesterday as
20 people who voted for him, and's one of the problems. Who were the
21 victims, and who were the attackers? And there's no clear line here, and
22 we're thrown back then on to issues of proof in respect of the matrix for
23 plan and for indirect perpetration.

24 Systematic has an element of organisation within it. We say not
25 systematic but spontaneous. I mean, every crime involves a degree of

1 organisation even by one person, more so by others. We're not concerned
2 with the usual word or the word "organised." We're dealing with somebody
3 very far beyond that. I mean, no one is suggesting that the London and
4 Birmingham riots of a month ago was organised or to the extent that it
5 could amount, if there had been such crimes, crimes against humanity, and
6 yet it involved, as all of us have seen from our televisions, huge
7 amounts of youths who were able to do what they did largely because of a
8 vacuum of law and order. That vacuum, sadly, subsisted also, as we know,
9 in Kenya in the face of far greater problems.

10 We say spontaneous. What we disagree in terms of being directed
11 against a civilian population, direction has again a particular meaning
12 and loading, and a principal argument that we have and submit is that it
13 was not an attack directed against a civilian population pursuant to or
14 in furtherance of a state or organisational policy to commit such attack,
15 which of course is the same theme and involves the same or similar issues
16 of law and fact as the issue of jurisdiction.

17 Knowledge of attack, item 5. I've no submission to make on that
18 other than that one notes that the assertion of that at paragraph 40 of
19 the DCC, I was interested to see that such an essential element of -- of
20 this document, paragraph 40, if you go, in fact, to the material in
21 support of it, it doesn't -- doesn't begin to show any knowledge on the
22 part of William Ruto at all. It's quite misapplied material.

23 Now, I acknowledge that other parts of the document are clearly
24 premised or illustrative of allegations of alleged knowledge, but it may
25 reflect the rather careless approach that's gone into this document.

1 Systematic. Well, as we submit, these were spontaneous matters,
2 which is also, of course, very relevant to the organisational element,
3 because if spontaneous, they were not organisational. And there's a
4 number of matters which we -- we would refer to. We'd -- in terms of
5 that, in terms of spontaneity.

6 And I'll just find my note, yes, in relation to this. Well,
7 there's various elements, and these aren't exhaustive, that we'd seek the
8 Court's attention.

9 First of all, it's the time period over which events in the Rift
10 occurred, or in terms of these particular allegations. You're dealing
11 there with the 30th, 31st, and 1st of January, that it was at a time,
12 obviously, of high feeling in the aftermath of contested elections and a
13 clear belief in the minds of possibly the majority of the Kenyan
14 population and a large number of observers that, in fact, it was a stolen
15 election.

16 These matters did not start in the Rift. They started in
17 Nairobi. Media images, at least for a time, were sent across the country
18 of those Nairobi problems, and one can't help but reflect -- or I can't
19 help but reflect of the contagious effect of those incidents in London
20 and how they reverberated across my country not very long ago largely
21 because of media exposure, perhaps, and imitation. So there is an
22 imitative element here.

23 And of course when I say "Nairobi," that is not an area that it's
24 ever suggested William Ruto has any significant influence despite his
25 ranking as a politician. And what of Mombasa, Mombasa, in this huge

1 country, half a million square kilometres. No one is suggesting that he
2 influenced events there, but there were tragic events there.

3 And this is not, of course, a matter which is new, sadly, to the
4 election scene in Kenya. It's not suggested William Ruto was organising
5 violence in other places at other times in Kenya.

6 So we're left, really, with a situation, aren't we, with that
7 history and those geographical observations, where the presumption should
8 be that these were spontaneous until the Prosecution can satisfy you to
9 that high degree that they were not. You always feel as a defendant, and
10 I'm sure any suspect here does, that he's out here to prove something and
11 he's not. It's the Prosecution that bring these allegations. None of
12 these gentlemen wanted to come the 8.000 or more kilometres from
13 East Africa to be here. It's the Prosecution who have put them here, and
14 it's only fair the Prosecution discharge those burdens such as they have
15 at this court at this stage.

16 So, let's presume that these were spontaneous. That's the right
17 foot to start on, we say, and then look at the evidence and the quality
18 of the evidence that suggests they were not.

19 Our principal argument, though, here is that the Prosecution
20 material does not show it was an attack on a civilian population pursuant
21 to or in furtherance of a State or organisational policy. And we're back
22 on the ground we were at yesterday in terms of written submissions.

23 Our argument stands whether the criterion favoured to be applied
24 is that of the -- what I'd say the orthodox customary law view or the new
25 view, the wider view of the majority of -- of the Pre-Trial Chamber. And

1 you know our argument, and we argue that one has to be cautious in making
2 new law and that if new law is to be made, it should be made in these
3 circumstances not by Judges but by the States Parties in addressing a
4 treaty which was born with a particular view.

5 The Chamber, whatever its reflections may be in respect of the
6 criterion to be applied, has an opportunity, in any event, to review its
7 application to the particular facts of the case as demonstrated by the
8 Prosecution to the standard necessary here in a confirmation hearing.
9 It -- it has, in other words, to apply that criterion to findings as to
10 the nature and extent of the organisational nature of this thing called
11 the network.

12 The broader criteria, the one that handicaps the Defence, if you
13 like, provides at paragraph 93 of its majority decision a list of
14 non-exhaustive criteria. Even with that application we say there should
15 caution and that even applying that criteria to the material that's being
16 produced before this Chamber is not this sufficient to show substantial
17 belief or sustain substantial belief.

18 Now, the core of the Prosecution case is the concept of
19 organisation. Before I move from that, I can just indicate that in
20 relation to this issue of spontaneous, there are a number of statements
21 that were taken in the course of commissions of inquiry on the
22 post-election violence held in Kenya that supported the fact that it was
23 spontaneous.

24 For example, reference KEN-OTP-0005-4283, "Verbatim Report of
25 Commission of Inquiry on Post-Election Violence Held at the Eldoret

1 Mayor's Parlor on the 5th of August '08." Interview of Charles Chamwoma,
2 subregional coordinator in Uasin Gishu District. Member of the District
3 Security Intelligence Committee, the DSIC. And it's his transcript
4 that's referred to. He says the violence was not planned but
5 spontaneous. It was the result of the delay in what had been boiling on
6 over a period of time. And it goes on, "I did not get any indication.
7 We received support."

8 If there was any planning or organising of such a thing, we would
9 have known. He's the intelligence man in the area. There's no one of
10 that quality that is being produced before you, of course, by the
11 Prosecution.

12 Or the statement at KEN-OTP-0014-0177, the signed statement of
13 Mr. Limo, Chairman of the Law Society of Kenya, North Rift Branch. "The
14 violence that erupted was neither planned nor organised ... the
15 planning ... could not have escaped the attention of the security
16 agencies of this country."

17 A security agency largely controlled by Kikuyu in a sophisticated
18 country that Kenya is. It's extraordinary to suggest that William Ruto,
19 a leading public figure, would be holding public meetings for a year or
20 so and no one would know. There we are.

21 "The violence cut across," this man says, "the tribal divide."
22 Some Kikuyu who were ODM were not affected. Some Kalenjin in PNU were
23 affected.

24 It's simplistic to suggest that it was ethnically centred party
25 politics, because it's not that. There's members of different

1 ethnicities in the various parties.

2 Statement of James Kimisol (* phon), coordinator at Eldoret
3 Catholic diocese offices. I'll put the full reference in in due course.
4 "I have not succeeded," he said, "in finding out whether there was an
5 organ and planning of the violence, no concrete evidence to support
6 preplanning, violence erupted spontaneously.

7 On OTP-0033-0511, this is a web article that -- it's the
8 Prime Minister, who is looking back on the 2008 violence and with the
9 hope -- with hope at 2009, an article with the "Los Angeles Times." He
10 says: "The deaths were the result of the people's revolution ... we're
11 not willing to accept election rigging." "I don't think it was in our
12 power to stop what happened. It was a State-sponsored terrorism. The
13 shoot-to-kill orders from the police were responsible for more than half
14 of the deaths. These were spontaneous not organised."

15 A voice from the other side, I suppose, to some extent, but why
16 have we had no statements provided by the Prosecutor when you can stumble
17 over all the names you wish in that respect in any media search or troll?

18 So the network at paragraph 43 of the document containing the
19 charges relates there to a multifaceted organisation. "The Network," of
20 course, was not its name. And that's not without -- that's not something
21 not to be noticed. This is an organisation without a name, not something
22 you could join, perhaps. The name "Network," the word that is being used
23 by my friends in the Prosecution office, is a word and phrase that was
24 drafted on Mr. Ocampo's desk. That's where the word "the Network" comes
25 from. It doesn't exist. It never existed until it was drafted here.

1 There's no name. There's not some little Kalenjin secret name. There's
2 no name. This organisation. There's not many organisations that exist
3 in Africa that don't have a name.

4 It's not a militia group. It doesn't control territory. It has
5 no defined structure, and, we would submit, no command. There is no
6 organisation. If you package something in a particular way, I suppose it
7 begins to get a degree of credibility, and this is something that's being
8 packaged, but it's artificial, and it's the gathering together of
9 disparate matters by people who don't understand the country, who have
10 gone there with a biased pro moto (* phon) viewpoint and have gathered
11 together these disparate groups and labelled them the network. That's
12 our view and take of how this came about.

13 These are different people throughout the evidence meeting at
14 different -- different people meeting at different -- different people at
15 different meetings, yes. Some organisation, wholly transitory. This is
16 on the Prosecution case, because the Defence don't accept that many of
17 these meetings took place and those that did were bona fide. And all
18 this notion of a network, the network, of the people meeting and
19 discussing what the Prosecution rely on in this case as its foundation
20 are those seven anonymous witnesses. Nowhere else. No supporting
21 evidence of meetings, no supporting evidence of policy, no media and this
22 in a country with a very active if not intrusive media, no indication of
23 Mr. Ruto's role in any criminal sense outside this evidence, this limited
24 evidence. And we say it's just too loose and too amorphous to really
25 stand up. But let's look at the Prosecution approach to the

1 organisation.

2 So if there is to be an organisation, it has to have a policy --
3 and we will complete -- we'll use our time tonight. We'll use our full
4 time.

5 The organisational policy. We start at 41 -- but before we get
6 to 41, can we go back to 24, paragraph 24.

7 I mentioned earlier this afternoon that the so-called PNU
8 supporters referred to in paragraph 24 and existing from at least 2006 as
9 the object of the plan to expel, the PNU didn't come into existence until
10 2007, when it was registered on the 23rd of August of 2007. And that's
11 EVD-PT-D10-00106. And the ODM, for its part, was -- came into existence
12 on the 26th of September, 2007.

13 So obviously the objectives of 2006 and most of 2007, we say,
14 obviously it's misapplied there in terms of the facts. But what's the
15 goal, because the goal, of course, becomes policy according to the
16 Prosecution. To create a Kalenjin and pro-Kalenjin voting bloc that
17 would serve their interests in any election, to punish and prevent the
18 Kikuyu, Kamba and Kisii ethnic groups from benefitting from the
19 anticipated electoral victory, et cetera, by inflicting fear and
20 committing the crimes alleged.

21 We move on, then, to the organisational policy of the network at
22 (b) at 41, where it's described in this way: To punish and expel from
23 the Rift Valley those perceived to support PNU, namely Kikuyu, Kamba and
24 Kisii, and to gain power and create a uniform ODM voting bloc.

25 We go to paragraph 100, 101. Ruto and Kosgey, Sang and others

1 adopted and implemented an organisational policy while committing
2 widespread and systematic attacks against PNU supporters to punish by
3 inflicting fear, including the crimes alleged.

4 And in the second paragraph 101, by systematically inflicting
5 fear, killing, looting, burning. An expansion, in other words, of the --
6 of the policy to killing.

7 Now, in terms of that object in any event suggested in paragraph
8 43 -- 41, to gain power and create a uniform ODM voting bloc, to punish,
9 et cetera, we submit that there's an inherent lack of logic, and this in
10 a context where the Prosecutor has a duty to provide an inherently
11 logical case.

12 Why plan to attack those who support the PNU after the election?
13 What's the point in that? After the election. Why attack a group,
14 Kikuyu, Kamba, Kisii, who together make up over half the votes available
15 nationally and which if you're going to ever stand or have a hope of
16 standing for president you're going to want to glean? Where's the sense
17 in that? Where is the logic in that as a plan, as a plot? Why should
18 William Ruto, a man with high political ambitions, alienate himself in
19 such a dramatic way from a core constituent in the Kenyan electoral body?
20 A core element of the national assembly? And why is it that this plan is
21 contingent on a false and stolen election and it's a plan that starts
22 over a year in advance of that?

23 It's an extraordinary thought, isn't it, all that effort and
24 risk, and risk, because there is risk in this, within any country, of
25 plotting and planning this kind of thing at this scale contingent on a

1 future happenchance a year in advance? Does it make sense? And yet that
2 is the policy, the policy of this plan that this organisation is
3 essentially created to implement.

4 Why an attack on an opposition party or group that did not and
5 could not threaten Mr. Ruto's position in the Rift in terms of his
6 political position? Manu, as you heard him say the other day, got the
7 largest vote within his area, as one can see, reference EVD-PT-D09-0001 -
8 and I'm sorry if I'm speaking too quickly for the booths - where the
9 election results would demonstrate that in Rift there are 49
10 constituencies, 26 within a Kalenjin area, 23 are ODM, 15 in the Rift of
11 PNU, and three Kalenjin are not ODM, Kalenjin area. But in terms of his
12 own position seeking election as a MP, not as a president, as an MP, and
13 for the first time as an ODM MP, didn't exist before September, why would
14 he in those circumstances be concerned for his personal position? It's
15 reflective of motive, but it's policy here, you see, reflecting a motive
16 which doesn't really stand up.

17 The constituent components of the Prosecution theory relating to
18 this network is set out, as we can see, from the document containing the
19 charges from 46 onwards. And perhaps I can turn to those. And at 46 we
20 have the beginning of the -- the five headings that the Prosecution say
21 constituted the nature of the organisation. And at 46, we see that the
22 political component provided the network with leadership, et cetera.
23 Ruto's position. And at 48 we have this general statement: That in
24 December 2007, other ODM-affiliated MPs participated in planning and
25 financially supporting the PEV attacks.

1 So this is the political component outside Ruto's own political
2 personality. Who are other ODM-affiliated MPs participating in the
3 planning and financially supporting?

4 And it's important to remember that the ODM is not part of the
5 network. The ODM is not suggested to be part of the network by the
6 Prosecution. What one's dealing with, say the Prosecution, are from the
7 time people who may be ODM, but we really don't know whether they were
8 all ODM on the Prosecution's own -- own account. And, of course, there
9 was no ODM MP, in any event, until the election, the election of the
10 28th of December. So it suddenly sprung into life, it would seem, with
11 that status.

12 There's not a lot of care and thought, in our submission, that's
13 gone into this document in pasting these rather disparate so-called
14 elements together.

15 What about the financial side? Because I'm not going to go
16 through all of this in detail, you will be relieved to hear. The
17 financial side is dealt with at 53, paragraph 53, in a rather cursory
18 way. In addition, it goes to Kass FM fundraising. The network received
19 financial support for the attacks from a variety of sources including
20 Ruto, Kosgey, and other ODM supporters. And who are they? Supporting
21 organisations. Who are they? And businessmen. Who are they?

22 In the evidence there's a reference to a charitable organisation
23 called Emo, E-m-o, which subsisted for some time with wholly charitable
24 objectives, and it's been somehow brought into this. But if there is a
25 financial backing and structure here, and we are dealing with high crime

1 in a high court, then why is it that there's no receipts, no records, no
2 money transfers, nothing at all?

3 Emo itself was only registered very late. I don't have the
4 document at hand. December 2010. That's very late, but there we are. I
5 don't have the document. You may be interested to see it. It doesn't
6 matter. It can be produced in due course, and I'm -- I move on.

7 The military. Of course, if you're going to have a structure and
8 organisation, one that's going to do great violence, then if you're a
9 Prosecutor you will be scouting around for military, and sure enough, we
10 find at paragraph 57 that a military element is spoken of. The network,
11 it says, had a military component consisting of former members of the
12 Kenyan military police. Note the word "former."

13 And then in paragraph 58 we have a military structure that
14 included three commanders or generals. So commanders or generals, and no
15 names, and then their responsibility and that Ruto was the head of that
16 component.

17 All this information, by the way, in terms of the organisation's
18 working and structuring comes entirely from our seven witnesses and from
19 nowhere else. No intelligence reports, no one else. No contemporaneous
20 observations at the time. The military element.

21 And Ruto, I've not heard of any military background he may have.
22 I've not even asked him. I haven't seen any evidence of that. But he
23 provided logistical support including telephones to subordinates. Who?
24 When? And the rest of it. Guns and gas fuel to perpetrators. Who were
25 they? Coordinating transportation. There's loose references in terms of

1 the witnesses. Again, that's the extent of it.

2 What about the tribal element? It's there, paragraph 56. Both
3 in respect of the tribal element and the military element the Defence are
4 calling evidence that will address issue or issues. And in respect of
5 the tribal element, again specificity, which is so absent throughout this
6 document, we find again that the Kalenjin community generally supported
7 ODM. ODM came in again, I remind all of us, in September 2007.

8 By utilising tribal elders. Which tribal elders? Is that the
9 one or two we saw on that document that was produced by the Prosecution?
10 Why isn't it here in this document?

11 The network capitalised on the Kalenjin tradition of demanding
12 strict respect and obedience from their youth. Well, when Mr. Ruto went
13 on the television and called for his supporters to stop, it doesn't seem
14 to have had very much effect. Again, the elders participate. When and
15 who?

16 There will be, as I say, some witnesses in respect of this, but
17 there's two documents that I'd seek to show you very briefly that may
18 assist, Prosecution witnesses. Can I call the first one up, please?
19 This is EVD-PT-OTP-00399. This is confidential? Apparently
20 confidential. I don't know why. It doesn't have any names on it, but
21 there we are. Partially redacted, perhaps, but there's no names or
22 anything on this that will identify outside --

23 PRESIDING JUDGE TRENDAFILOVA: So you have to be careful,
24 Mr. Hooper. I rely on your assessment. You have to be careful given the
25 level of confidentiality.

1 MR. HOOPER: Yes.

2 PRESIDING JUDGE TRENDAFILOVA: I rely on your professional
3 assessment.

4 MR. HOOPER: Well, I'll play it safe, I think. So we'll -- we'll
5 just look at it in court probably as well. I can deal with it, in any
6 event, as far as listeners and viewers are concerned, because I can
7 relate what it is. It's -- I suppose it could be a handwriting problem.
8 I'm not sure who drafted this, but this is the first document, and this
9 is a document -- is it up on the screen? Thank you. It's produced by
10 Witness 0008, Witness 0008 -- hello?

11 PRESIDING JUDGE TRENDAFILOVA: Ms. Tai would like to take the
12 floor.

13 MS. TAI: Yes, I'm sorry to interrupt, but I don't believe it
14 would be appropriate a particular person's handwriting on the screen with
15 the public. That would potentially expose that person. That document is
16 confidential.

17 MR. HOOPER: When we got there - thank you very much - I was
18 going to say confidential. It is confidential and --

19 PRESIDING JUDGE TRENDAFILOVA: When it is confidential, the
20 public cannot --

21 MR. HOOPER: Yes. No, they can't see it.

22 PRESIDING JUDGE TRENDAFILOVA: -- follow it, yes.

23 MR. HOOPER: They can't see the handwriting in case they identify
24 the writer. Anyway, it's headed, you'll see, "Coordinated structure,"
25 and the relevance of this document is that it comes from 0008,

1 Witness 0008.

2 PRESIDING JUDGE TRENDAFILOVA: Mr. Hooper, there is proposal if
3 you insist that you use in the courtroom this document, we can go into
4 private session.

5 MR. HOOPER: No, don't need to.

6 PRESIDING JUDGE TRENDAFILOVA: So it's your right.

7 MR. HOOPER: No, it just eats up time and I've got 12 minutes or
8 so before --

9 PRESIDING JUDGE TRENDAFILOVA: No, no, you have till --

10 MR. HOOPER: No, I'm giving way to others, so I've got limited
11 time.

12 So this document which you see in front of you on the screen on a
13 confidential basis, as will be the next one --

14 PRESIDING JUDGE TRENDAFILOVA: It's not on the screen. It's not.
15 It can't be on the screen. No. It can't be on the screen.

16 MR. HOOPER: All right. Well, let -- Madam President, I think I
17 can deal with it without it coming up on the screen.

18 PRESIDING JUDGE TRENDAFILOVA: Yes, because you give us the EVD
19 number and the four digits, and it's important that the Chamber --

20 MR. HOOPER: Yeah, I've given the EVD and I can describe it
21 because it's --

22 PRESIDING JUDGE TRENDAFILOVA: The Chamber --

23 MR. HOOPER: It's a handwriting issue.

24 PRESIDING JUDGE TRENDAFILOVA: Yes. The Chamber can use it
25 thereafter.

1 MR. HOOPER: And though mine is, as you can see, redacted, the
2 relevant part of it is the structure. This is Witness 0008, and you see
3 that the patron at the top is the Honourable Ruto, he's described, and
4 under him we have commanders, and under those administrative
5 coordinators, and under them, local coordinators. That's his structure.
6 That's number 8, I understand -- number 6. And if I've made a mistake on
7 the numbers, it's -- it doesn't lose the point I'm making.

8 Line of communication, this document is, and this is by another
9 witness. And this is EVD-PT-OTP-00399, and we have at the top -- well,
10 at the bottom. You have to go from the bottom on this one. It has
11 Raila. That's Raila Odinga, the Prime Minister, the current serving
12 Prime Minister of Kenya. This is this structure. And you go down. You
13 have Ruto and Kosgey, Honourable Kosgey, Honourable Ruto. And then we go
14 down to Cheruiyot, Cheramboss, Koech. South Rift, Central Rift and North
15 Rift. And then we come down to divisional commanders. Two things: The
16 actual structuring is clearly different, the nominations are different,
17 and we have here Raila Odinga as the named chief man, commander.

18 Witnesses elsewhere have mentioned Mr. Odinga, one claiming that
19 he said the waves of calm, they will be swept away. Meaning perhaps the
20 Kikuyu? Who knows. Others claiming that -- one other witness claiming
21 that the finance or finance had come from Raila Odinga. And the point I
22 make here is not to implicate Raila Odinga, but to indicate that it would
23 seem the Prosecution does not accept that account. As far as we know,
24 there's been no effort to bring Mr. Odinga before this court, but more
25 than that, between these two witnesses, there is a significant change in

1 structure, and this against an inner context where the Defence have very
2 little indications of structure and precious little from this document
3 containing the charges.

4 The media element, one's dealt with, but I will come back to
5 again because it is just so extraordinary.

6 I have a document here which was served as incriminating material
7 relating to Kass FM. It's -- I don't have the head document here, but I
8 have page numbers.

9 There is no transcript available that demonstrates Kass FM
10 actually being demonstrated by a transcript -- Mr. Sang at Kass FM being
11 demonstrated through a transcript of a recording of a radio programme of
12 his inciting or in any way doing anything like that. Not even a
13 recording made, for example, by one of these irate witnesses who were
14 listening to him. Not even a complaint to the Kenyan broadcasting
15 authority or control. And these things are controlled. Of course they
16 are in Kenya. People are sensitive to these issues. It would be
17 extraordinary if somebody was making these kinds of statements that the
18 Prosecution witnesses claim Mr. Sang was making and there hadn't been
19 very deep reverberations within the system.

20 Instead, we do have this incriminating document. I don't find
21 one part of it incriminating, and I refer you to it: EVD-PT-OTP-00471.
22 And I'm looking at -- and I got this rather late off the photocopier, I'm
23 afraid, so I haven't been able to quite select the particular passage I
24 was looking for but this will do because it makes the point. It's
25 KEN-OTP-0048-0136. Source Kass FM, Nairobi, Kalenjin, 30th of January,

1 2008. And this is a BBC monitoring that's come -- been picked up by the
2 BBC. This is a summary or extract of transcript.

3 31st of January, hosted -- I quote:

4 "... hosted Orange Democratic Movement, MP Isaac Ruto. He called
5 for peace and urged the Kalenjin to be careful not to be blamed for
6 genocide. The presenter was Joshua Arap Sang. Following is the text of
7 the interview:

8 "Presenter: Yesterday, more than 100 members of parliament from
9 various parties met in search for peace. We understand that meetings
10 like the ones you had yesterday have been going on. Can you shed some
11 light on the talks you've been having as MPs?

12 "Ruto: It's time for all of us, as Kenyans, to come together and
13 talk because we are not happy when there is fighting everywhere. We are
14 no longer placing emphasis on the party in which we are elected. As the
15 chosen team meets, we're also speaking to find solutions so that children
16 can go back to school, people can farm, and the sick can go to the
17 hospital, and people can get on with their lives. We have agreed to talk
18 about peace."

19 And it goes on and on. Later:

20 "Ruto: Also, we want peace first because it's hard to talk when
21 people are fighting. That is why all the MPs have come together."

22 And it goes on.

23 As an incriminating document it is a very strange find indeed,
24 and I haven't found one sentence anywhere, anywhere, that links Mr. Sang
25 with whom we are allegedly associated in this desperate criminal way that

1 is out of kilter, inappropriate, inciteful, and yet that's the repeated
2 allegation.

3 No territory, as we've said, no hierarchy.

4 Ruto's influence, a tribal elder. Be cautious about putting too
5 much weight on the nature of a tribal elder. It may not be too different
6 to being elected to a club or the like. It doesn't necessarily carry
7 with it authority. If we look our document containing the charges, at 66
8 we see it -- 62, I'm afraid. We see it there set out. I'm sorry, I've
9 got the wrong reference there. Oh, yes, I've dealt with that.

10 His influence. Well, influence must be limited because he's
11 absent. Witness, for example, the video of Ruto at the Kenyan
12 International Conference Centre, the KICC, when the poll results are
13 coming in. He's not anywhere near the Rift Valley. A long way the
14 Rift Valley from Nairobi, and he was nowhere near there, nor was he there
15 from the 29th to the 31st.

16 There are statements made by him, and perhaps I can be permitted
17 to have made some comment about those. There will be more, I hope, we
18 can include in our final submissions. There are efforts to calm the
19 situation, quite in contrast to the picture that was painted this
20 morning, and those efforts stand completely at odds with the basic core
21 theory that the Prosecution are trying to advance in his regard.

22 The preparatory meetings and events occupy paragraph 65 to 70 of
23 the document containing the charges. You will learn or hear from
24 witnesses, there are photographs and the like, but in any event, Mr. Ruto
25 lives in a house where you cannot approach it without being seen and

1 observed. When I say "observed," this is Africa, and you don't go
2 anywhere without people noticing you. And is it really possible or
3 credible that he was having these ethnically hostilely centred meetings
4 in this house, hundreds or even thousands attending, with his Kikuyu
5 neighbours sprinkled outside, his Kisii and other neighbours outside?
6 None of this was noticed? And anyway, these meetings, there will be a
7 witness dealing with some of that information.

8 We're a bit handicapped there, and again, from what I said
9 earlier, it's my submission the Court will, I hope, make some allowance
10 for the fact that we lack specific dates in respect of meetings.

11 The individual responsibility, paragraph 99. And I'm coming to
12 individual responsibility here with some observations.

13 Ruto and Kosgey intentionally engaged with the awareness that
14 implementation of their common plan would, in the ordinary course of
15 events, lead to the commission of crimes and they were aware and accepted
16 the risk.

17 We'd submit it's an unacceptable basis for liability. Dolus
18 eventualis, and as established by the Pre-Trial Chamber in the Bemba
19 case, it should be dolus directus, knowing that the offence would be
20 committed in the ordinary course of events in line with Article 30.

21 Head-note to 117, paragraph 117. I think it's 117. Yes. Again,
22 we see there at 6: Ruto and Kosgey were mutually aware and mutually
23 accepted that implementing their common plan might result in the
24 realisation of the crimes charged. "Might result," again, is a form of
25 liability which, in our submission, should not be accepted. It should be

1 would or must.

2 I am aware of the time and other matters that need to be
3 addressed.

4 We have -- just give me one moment.

5 Organised and hierarchical apparatus of power. We can do perhaps
6 no better than refer you to a decision I'm sure you have in your minds
7 but important to mention it, and that's the decision on the confirmation
8 of charges in the Germain Katanga and Mathieu Ngudjolo case, paragraph
9 511. The Chamber finds that the organisation -- this is 512.

10 "The Chamber finds that the organisation must be based on
11 hierarchical relations between superiors or subordinates. The
12 organisation must also be composed of sufficient subordinates to
13 guarantee that superiors' orders would be carried out if not by one
14 subordinate then by another. These criterion ensure that orders given by
15 the recognised leadership would generally be complied with by their
16 subordinates."

17 513: "It is critical that the chief or the leader exercises
18 authority and control over the apparatus and that his authority and
19 control are manifest in subordinates 'compliance with his orders. His
20 means for exercising control may include his capacity to hire, train,
21 impose discipline," just pausing there, imposing discipline is perhaps
22 significant, "and provide resources to his subordinates. The leader must
23 use his control over the apparatus to execute crimes which means that the
24 leader as the perpetrator behind the perpetrator mobilises his authority
25 and power within the organisation to secure compliance with his orders."

1 In 515 they say this:

2 "In essence, the leader's control over the apparatus allows him
3 to use his subordinates as a mere gear in a giant machine in order to
4 produce the criminal result automatically."

5 In that, we can see the reflections of where these crimes of
6 humanity started and the object that they had. Even watered down
7 considerably, we still have that need of control. Subordinates a mere
8 gear in a giant machine. We come back to lack of specificity, because
9 unless we understand the machine and see the cogs and see the
10 relationship between the cogs and see how a decision at one end results
11 in automatic compliance, then we don't have a sufficient structure or
12 organisation. We don't have a sufficient plan. And that is what we
13 suggest this lack of specificity leads to. It's too blurred, too
14 general, not specific. It doesn't enable either the Bench or the Defence
15 to answer crucial questions as to the relationship in hierarchy, for
16 example, in control and ability to punish.

17 A question, for example. In -- under common plan, Mr. Ruto must
18 have an essential contribution. It's necessary for him to have that as a
19 prerequisite to controlling the crime, but if we look at our paragraph
20 98 -- if I can find it. On a different document. We look at our
21 paragraph 98 and see in which -- the central contribution is
22 structured -- oh, it's 105. "Using his authority as a top Kalenjin
23 leader and MP to mobilise supporters." Is that an essential
24 contribution? Who were they? In what way? Using anti-PNU rhetoric at
25 preparatory meetings. This is the PNU that came into existence, we

1 remind ourselves, in August 2007. To create an atmosphere of anti-PNU
2 sentiment and fear. Is this an essential contribution? Provoking --
3 providing direct perpetrators with weapons and other logistical
4 necessity. What evidence is there that even if he provided, which is
5 denied, weapons to X, that X provided them to the perpetrators who
6 committed crimes with them? Where's the connection? Where's the
7 evidence? Where the chain here? Financing the network. In what way?
8 In what way was that money spent? Where's the evidence that that money
9 was spent in a particular way, if there was money. Et cetera. Providing
10 instructions. Again it all breaks down without the particularity, the
11 specificity that we say is necessary.

12 Could these killings have been committed without that
13 contribution? Essential role.

14 We have, I think, about 20 minutes left of our time, and with
15 your Honours' leave, the Chamber's leave, I'd invite Ms. Buisman to
16 address the Court on the concepts involved in indirect perpetration and
17 liability. She's addressed a Court before, in the Katanga case, on this
18 subject. She's done considerable research into the matter, if I can put
19 it like that. It's very much her area and the Defence would be best
20 served, and I'm sure the Chamber will be, by hearing her submissions, my
21 understanding of them. And it will take no more, I hope, than the time
22 we have allocated.

23 PRESIDING JUDGE TRENDAFILOVA: Thank you, Mr. Hooper. Thank you
24 very much indeed for your presentation.

25 MR. HOOPER: Thank you, ma'am.

1 PRESIDING JUDGE TRENDAFILOVA: Yes. And now the floor is over to
2 you.

3 MS. BUISMAN: Thank you, your Honours. Good evening. I will be
4 very brief, but I would like to distribute some authorities even though I
5 may not actually refer to them given the time.

6 I may actually elaborate a little bit in our brief, but I will
7 give all the points tonight. But if there is no time to -- to use a
8 particular authority, then I hope you (* indiscernible). So I don't know
9 if someone can distribute this --

10 PRESIDING JUDGE TRENDAFILOVA: Just a moment. Again the
11 interpreters are extremely polite. They are making a kind of a sign that
12 we could have a little bit of time. How much time do you need so that
13 you make a proper presentation?

14 MS. BUISMAN: Well, ideally 15 minutes.

15 PRESIDING JUDGE TRENDAFILOVA: Fifteen?

16 MS. BUISMAN: Yes, but we have someone else also --

17 PRESIDING JUDGE TRENDAFILOVA: So you have the time then till
18 7.30.

19 MS. BUISMAN: Well, maybe 20 minutes.

20 PRESIDING JUDGE TRENDAFILOVA: Yes, 20 minutes, of course. No,
21 but it's the regular time because the session is one hour and a half.
22 Thank you anyway. Please go ahead, Ms. Buisman.

23 MS. BUISMAN: But if I can ask someone to distribute these
24 binders, that if everyone has --

25 PRESIDING JUDGE TRENDAFILOVA: Can I ask the Court Officer to be

1 of assistance to the Defence team.

2 THE INTERPRETER: Message from the English booth: Madam
3 President, might I come down and pick up one of the binders, please, for
4 the interpreters.

5 PRESIDING JUDGE TRENDAFILOVA: Would someone assist the
6 interpreters or someone is going to come down. Thank you very much.
7 Would you keep one binder, please, for the interpreters, Court Officer.
8 Thank you. In addition to -- to the one for ... they will come. They
9 will come any minute.

10 Ms. Buisman, would you explain the nature of this -- these
11 documents? I hope that these are not new pieces of evidence.

12 MS. BUISMAN: These are authorities that I may refer to in the
13 course of my presentation, so I thought it would be useful for everyone
14 to have them, and -- because the names are spelled out. So that's the
15 idea. I wasn't sure what the procedure was going to be, so I thought at
16 least it would be nice for everyone to have this list in case I refer to
17 it.

18 PRESIDING JUDGE TRENDAFILOVA: These are academic papers, as I
19 see.

20 MS. BUISMAN: There are academic papers. There are authorities.
21 There's jurisprudence of the ICTY, for instance.

22 PRESIDING JUDGE TRENDAFILOVA: You can.

23 MS. BUISMAN: And there is jurisprudence of the ICC --

24 PRESIDING JUDGE TRENDAFILOVA: Yes, please go ahead.

25 MS. BUISMAN: And this is all where this notion that I'm going to

1 talk about has been discussed.

2 PRESIDING JUDGE TRENDAFILOVA: Yes, we've seen this. Please, the
3 floor is over to you.

4 MS. BUISMAN: Your Honours, the Honourable Ruto has been charged
5 under 25(3)(a) and we submit this is a liability that does not exist. It
6 does not exist in the Statute of the ICC. It does not exist in any
7 domestic jurisdiction. It's been rejected explicitly by the other
8 tribunals, including the ICTY and the Special Court for Lebanon.

9 The only time this mode of liability, which often referred to as
10 indirect co-perpetration, joint control, or common plan liability, this
11 mode of liability, we submit, is a creation of the Pre-Trial Chamber of
12 this court, and it was started with the Lubanga Pre-Trial Chamber, then
13 followed by the Katanga Chamber, which was the same Pre-Trial Chamber,
14 and now it has been routinely charged.

15 What it actually does, it merges two modes of liability that are
16 actually acknowledged in the Statute. There is -- on the one hand, there
17 is indirect perpetration, and then there is also co-perpetration, and if
18 you actually look at the Statute, 25(3)(a), so I just read it out:

19 "In accordance with this Statute, a person shall be criminally
20 responsible and liable for punishment for a crime within the jurisdiction
21 of the Court if that person:

22 "(a) Commits such a crime, whether as an individual, jointly with
23 another, or through another person ..."

24 So we submit this is clearly -- there's three modes of liability
25 under this -- this provision. First, there is direct perpetration;

1 second, there is joint perpetration; and third, there is indirect
2 perpetration. And in fact, the Katanga Pre-Trial Chamber has merged
3 these two and has said that "or" can also be read as "and." We submit
4 that that is actually against, well, the meaning of this article and
5 actually the direct text, which obviously, we submit, is against
6 Article 31 of the Vienna Convention. It's also against the intention of
7 the drafters, because if we look at the history, there's definitely no
8 real discussion of this. There's actually been a lot of debate on the
9 liability modes, and actually they came with Article 22, which is very
10 clear. I read it out.

11 "A person shall not be criminally responsible under the Statute
12 unless the conduct in question constitutes, at the time it takes place, a
13 crime within the jurisdiction of the court."

14 Which means this is actually the legality principle which was
15 taken very seriously by the drafters.

16 So we submit that if you have a provision in the Statute which
17 says something very explicitly and then you actually merge two modes
18 which is contrary to customary law, contrary to any practice anywhere,
19 then we have a problem.

20 I just want to explain why this mode is so controversial. You
21 have, on the one hand, the co-perpetration which requires a plan, and it
22 requires co-perpetrators who jointly commit a crime. It's themselves who
23 commit this crime.

24 Then there's indirect perpetration, and this is through another.
25 This is actually explored by someone who's called Roxin. That's a German

1 academic. It's also on the list. And he -- he has sort of looked at
2 indirect perpetration as going further than just through another.

3 In, for instance, common law systems, through another can only be
4 if someone else is not criminally liable. So already we extend by saying
5 someone can be criminally liable, but we say that's still in agreement
6 with the drafters of -- of the Statute.

7 But now we go for control of the organisation, and what does that
8 actually mean? It means that it's not necessarily a subordinate. It can
9 be the subordinate of your subordinate, and then if someone falls out
10 because he doesn't want to participate, you get the automatic compliance
11 by someone else, and so you get a liability for someone you have
12 seriously no relationship with. The idea of this was to have people on
13 the top liable for a whole range of crimes committed by an unlimited
14 number of people. And actually, in our case this is very clear. I mean,
15 we already don't know the specificity, as Mr. Hooper has already pointed
16 out, but on top of it, there is this problem that you have two or more
17 people planning a crime and then this crime can be perpetrated by X, Y,
18 Z. It's like a family tree, and we don't know where it ends.

19 So we are requesting your Honours either to put some serious
20 requirements to this mode of liability, and I mean by that to include the
21 element of command -- like a relationship of command responsibility.
22 Command responsibility can be effective control, and so it's either a
23 military or a civil effective control liability, because the way it's
24 phrased now, the mode is actually contradictory. On the one hand, you
25 can be found liable for the crimes committed by someone in the line of

1 one of your co-perpetrators, not even his subordinate, but the
2 subordinate of -- and we don't know the co-perpetrators. We can have we
3 don't know how many, and then so you can have a really far line.

4 And so this to us is contradictory to the idea of control. On
5 the one hand, they say you have to control the crime. And there is, of
6 course, the control of the will, which is the most direct control, and
7 that is through another person. But if then you go further and it's
8 through the organisation but then also through the subordinates of the
9 subordinates of your co-perpetrator, where is the control?

10 And I'm not the only one. This is definitely -- there's some
11 academics who would support that view, that if you are going for
12 indirect -- at least indirect perpetration, that there should be this
13 relationship between you and the actual perpetrators.

14 And in terms of international co-perpetration -- or I mean
15 indirect co-perpetration, I can point out to you that those courts who
16 have actually dealt with the issue have explicitly stated that this does
17 not exist under customary international law. There's no state. There's
18 been an Argentinian case, and this is also in the list of authorities,
19 that has dealt with this issue explicitly and it was overturned by the
20 Supreme Court.

21 There's also been case law in the ICTY. There's Stakic. The
22 Appeals court said this is not an existing mode of liability under
23 customary international law. And now also there is a case in the Special
24 Tribunal for Lebanon, again explicitly stated that this does not exist
25 under customary international law.

1 So we have very, very sparse academic support for this mode of
2 liability. And, in fact, there is one very enthusiastic supporter who,
3 with the greatest of respect -- his name is Dr. Olasolo, and he is
4 definitely published on the issue. It's also in this list of authority,
5 but he cannot be counted. He's a wonderful academic but he cannot be
6 counted as an independent support for this mode of liability because he
7 was part of the Pre-Trial Chamber that drafted this mode of liability.

8 So on this basis and mainly, first and foremost, on the basis of
9 the Statute itself and, second of all, because it's not supported, as I
10 said earlier, by any case law anywhere. It wasn't the intention of the
11 drafters to have this very wide mode of liability. It's still very much
12 in dispute because although we've had Pre-Trial Chambers accepting this
13 mode, in fact creating this mode, because it wasn't the Prosecutor
14 alleging this, it was the Pre-Trial Chamber which itself said, well, this
15 is the correct kind of mode that we should charge the person with.

16 So it's clearly a creation of the Pre-Trial Chamber, and we ask
17 you not to follow it. There's no binding precedent in the court, and
18 there is -- at this moment it's not yet been established. It's not been
19 confirmed by any Trial Chamber or an Appeals Chamber in this court.

20 In the alternative, we ask you to at least at a minimum indicate
21 very clearly that there must be that direct relationship in terms of
22 command responsibility, effective control between the perpetrator and
23 the -- the perpetrator behind it, as they call it in -- Roxin has again
24 mentioned that. And also to -- to make it very clear that *dolus*
25 *eventualis* is not included, because the way it is phrased now, it would

1 be -- it's a stretch, as I said. So it's a very thin line between the
2 actual plan and you having no control over the actual perpetrators
3 that's -- it's a very thin line with *dolus eventualis*. And I think
4 that's also clear when you look at the subjective elements, I'll just
5 read it out.

6 So the subjective elements under Article 30, we ask you then to
7 firmly establish that this must also be applied to this mode of liability
8 and that the suspects must be mutually aware and mutually accept that
9 implementing their common plan will result in the realisation of the
10 objective elements of the crime. So it is a will result rather than may
11 result.

12 Thank you very much.

13 PRESIDING JUDGE TRENDAFILOVA: Thank you, Ms. Buisman, if I
14 pronounce correctly your name.

15 We are at the end of our session. I would like to thank the team
16 of the Prosecutor that so organised and expeditiously presented their
17 case. I would like to thank the Defence team of Mr. Ruto, who quite
18 willingly to keep up with the schedule so that some of the Saturdays
19 we're not sitting here in the courtroom proceeded with their
20 presentation.

21 Tomorrow we shall start with the witness -- I made a mistake,
22 Mr. Kosgey. It's not your witness. It's the witness of Mr. Ruto.
23 Sometimes we do make such mistakes.

24 We have two witnesses for tomorrow, and they are the witnesses
25 presented by the Defence team of Mr. Ruto. We shall start tomorrow. We

1 shall resume our session at 9.30, as in the schedule.

2 So if the parties, the participants, do not have any issue to
3 raise? I'm looking with a question.

4 So the session is adjourned, and we shall meet tomorrow morning
5 at 9.30 in Courtroom I. Have a good evening.

6 COURT USHER: All rise.

7 The hearing ends at 7.27 p.m.

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