

1 International Criminal Court

2 Trial Chamber V(a) - Courtroom 1

3 Situation: Republic of Kenya

4 In the case of The Prosecutor v. William Samoei Ruto

5 and Joshua Arap Sang - ICC-01/09-01/11

6 Presiding Judge Chile Eboe-Osuji, Judge Olga Herrera Carbuccion

7 and Judge Robert Fremr

8 Trial Hearing

9 Wednesday, 18 September 2013

10 (The hearing starts in private session at 2.05 p.m.)

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7 (Open session at 2.09 p.m.)

8 THE COURT OFFICER: We are in open session, your Honour.

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

10 The Chamber will like to make a special reminder before we
11 proceed with the rest of today's business. The Chamber hereby issues
12 this special reminder as a measure of witness protection.

13 It is an offence against the administration of justice in this
14 Court, pursuant to Article 70 of the Rome Statute, for anyone to do
15 anything intentionally that would amount to corruptly influencing a
16 witness, obstructing or interfering with the attendance or testimony of a
17 witness, or retaliating against a witness for giving testimony in a case
18 before the Court.

19 And apart from any specific provision of the Rome Statute,
20 conducts such as those may also amount to contempt of Court under
21 customary international law or general principles of law recognised by
22 civilised nations, recognised as a source of law applicable before this
23 Court under Article 21 of the Statute.

24 In the result, any revelation of the identity of a witness whose
25 identity has been protected by this Court amounts to an offence in this

1 Court. So too will any attempt to engage in any such revelation. The
2 Chamber therefore reminds everyone inside the courtroom, in the public
3 gallery, in Kenya, and anywhere in the world to do nothing that would
4 reveal or attempt to reveal the identity of a protected witness. The
5 reason for such conduct is immaterial. So too, the manner of gaining
6 access to or arriving at or gleaning such information.

7 Members of the press, bloggers, social media members or
8 participants, and their web hosts are particularly called upon to desist
9 from doing anything that would reveal or attempt to reveal the identity
10 of protected witnesses or to engage in secondary dissemination of such
11 wrongful and illegal information.

12 Such conducts will be investigated and the culprits will be
13 prosecuted. That is the end of the special reminder.

14 With that out of the way, we will now proceed with the matter of
15 the submissions regarding any further measures for protection of
16 witnesses in the courtroom. As indicated at the beginning of yesterday's
17 proceedings, the Chamber would take submissions on the matter in
18 connection with events in the parliament of Kenya. As we indicated
19 yesterday, the submissions will need also to relate to the factual record
20 of the matter as regards whether in fact anything was done in parliament;
21 if so, what, and when was this, and why was this. When I remember that
22 an issue was raised for clarification by Defence counsel as to the why of
23 it, the why of it is not a general matter of discussion. It is in
24 connection with whether any such development may have any bearing on
25 witness protection measures.

1 So I will leave it at that now, open the matter for discussion
2 beginning with the Prosecution who raised the matter in the first place.

3 MR STEYNBERG: Thank you, Mr. President.

4 Dealing with the factual issues first of the what and when, the
5 time-line, as best as I've been able to piece it together in the limited
6 time available and with other developments that have taxed resources, is
7 that on the 5 of September, 2013, the National Assembly of the parliament
8 of Kenya called for a special session to debate a proposed bill -- let me
9 rephrase that. To debate a proposal to put before parliament a bill
10 aimed at, inter alia, withdrawing Kenya from participation in the Rome
11 Statute and the ICC.

12 I have -- I refer to a copy of notice of its order of sitting,
13 headed 11th Parliament, number 60, dated Thursday, September the 5, 2013,
14 at 2.30 p.m., Orders of Business number 8 is the motion, and I will only
15 read part of it.

16 "To repeal the international crimes act and to suspend any links,
17 co-operation, and assistance to the International Criminal Court. This
18 house resolves to introduce a bill within the next 30 days to repeal the
19 International Crimes Act, number 16, 2008, and that the government
20 urgently undertakes measures to immediately withdraw from the Rome
21 Statute of the International Criminal Court adopted by the United Nations
22 Diplomatic Conference on 17 of July, 1998."

23 The --

24 PRESIDING JUDGE EBOE-OSUJI: Do we -- do we have copies?

25 MR STEYNBERG: Indeed, I do have copies of this one because it's

1 a simple one-pager. If I can ask the usher to please hand this to the
2 Chamber and to my learned friends.

3 Thank you, your Honour. Additionally I have before me copies of
4 the Kenyan Hansard publications of parliamentary debates, entry for the
5 5 of September, 2013, which is the record of the debate on this issue.
6 It's a fairly lengthy document, some 42 pages. I haven't made copies,
7 but I can provide -- it's available on-line. I can provide the links to
8 the Chamber if need be. But after the debate of this issue it was
9 resolved, according to the motion, to place the bill within the next 30
10 days before the Chamber for the purpose I've already alluded to.

11 The next development was that this matter was placed before the
12 Senate of the Kenyan parliament on Tuesday, September the 10. A special
13 sitting debated the issue, and as far as I can make out again from this
14 report I have - again, I can provide copies to the Chamber electronically
15 and to the Defence - the -- a request for an amendment was denied and the
16 question put to the parliament was agreed to and resolved, including
17 paragraph 4:

18 "To commence and conclude the process required for the withdrawal
19 by Kenya from the Rome Statute of the ICC adopted by the United Nations
20 Diplomatic Conference on 17 July 1998 ..." et cetera, et cetera.

21 My understanding is that the process will proceed as follows:
22 That sometime within the allotted period the parliamentarians will place
23 before both lower and upper house -- or rather, National Assembly and the
24 Senate the draft bill that will be voted on, and if passed will be placed
25 before the president for signature, at which time it will become law. I

1 am aware that there is some debate in Kenyan legal circles and probably
2 Kenyan political circles as to the correct procedure to follow, whether
3 this is a matter for the executive, whether this is a matter for the
4 parliament, and whether this is a matter in which the constitution might
5 come into play, but I don't think that is the issue which the Chamber's
6 concerned with today.

7 So that therefore, your Honours, deals with the what and when.
8 As to the why, the waters are considerably more murky. One can gather
9 from reading through the debates that there are a number of opinions on
10 this issue, but of course the majority who introduced this motion would
11 be best-placed to explain why, and in this regard I can just quote from
12 an excerpt from the debates and this is attributed to the Senate majority
13 leader, Professor Kindiki who says the following:

14 "Mr speaker, sir, I will also try and shorten my remarks so that
15 other people can contribute to the motion. What has happened, if I can
16 continue from where I left, is that a few people, especially from the
17 non-governmental organisations (NGOs) world decided to convert the misery
18 and the tragedy that befell our country into a money-minting business,
19 where a few citizens have converted themselves into running rings and
20 organisations in the name of victims' support. These are the people who
21 have been responsible and have been used by foreigners to cook-up stories
22 and bring up the kind of friction that is now being witnessed before the
23 International Criminal Court. As I have said, we should all be ashamed
24 as Kenyans. No Kenyan should be clapping or celebrating at such a time
25 as this when our country is going through what is happening at the

1 moment."

2 Now, I raise that because of the relevance to the current debate
3 and that is how what is unfolding in the parliament will affect our
4 witnesses. It appears, at least from this quote, that a version of
5 reality that has been presented from my colleagues on the other end of
6 the room is being used, in part at least, as - the word which comes to
7 mind is an excuse - but as the rationale for this debate. And in my
8 submission, this forms part of a larger culture of intimidation which is
9 being fostered not only by certain quarters of Kenyan society but also
10 now, it seems, has reached the highest echelons of Kenyan authorities.
11 If that is not the case, then it is certainly an interpretation that a
12 witness or somebody proposing to be a witness might place on the matter.

13 And in that regard, your Honours, my submission is this
14 development is, indeed, relevant to issues of witness protection and
15 other privacy-related matters pertaining to this case.

16 PRESIDING JUDGE EBOE-OSUJI: Question: From your analysis of the
17 material so far you have reviewed, both from the order of business or the
18 debates revealed in the Hansard, do these measures before the National
19 Assembly and the Senate have any bearing on this case as it should or
20 should not happen in terms of a reaction?

21 MR STEYNBERG: If I understand the question, your Honour, I
22 should possibly refer to part of the resolution which was passed by the
23 Senate. I quoted earlier paragraph 4, but paragraph 1 does say that it
24 is resolved to continue to co-operate with the ICC regarding ongoing
25 cases before the ICC. Indeed, it would be contrary to the Statute and

1 their undertakings and their obligations under the Statute not to do so,
2 whether they say so or not, that is their obligation. But it appears
3 to -- well, it appears to at least show a recognition of that obligation.
4 To that extent, it is reassuring, but it remains to be seen the extent to
5 which that co-operation is actually provided. And we have reason to
6 believe that in the near future that co-operation will be tested, and
7 hopefully I'll be proved wrong. Maybe I'm just pessimistic by nature.

8 Returning then to the issue of witness protection and in-court
9 protective measures, I had already on a previous occasion informed the
10 Chamber that - and I can confirm as I stand here - at least two of the
11 witnesses who have been contacted in the week or two leading up to the
12 case regarding their participation have specifically referred to this
13 development in the Kenyan parliament as reasons which have caused them
14 great concern. One of them indicated a concern that if Kenya did in fact
15 go through and if this law was passed that he would be living in a pariah
16 state in which international law did not apply and he would therefore
17 have no protection. And although we obviously tried to assure him that
18 that was not the case and that the ICC could still take measures for his
19 protection, including if necessary removal to a non-paria state, in his
20 terminology, we can only speculate as to how far or how much of an impact
21 this has had on all of the witnesses. We are doing our best to keep in
22 contact with witnesses to try and continually reassure them as to steps
23 that are taken and measures that can be put in place both by the OTP and
24 more particularly by the VWU who bear primary responsibility for that.
25 But, your Honours, I think the point is that it is clearly in the eyes of

1 witnesses perceived to be a matter of grave concern, to add to their
2 other concerns relating to the disclosure of their identities, et cetera,
3 which many have already communicated to us.

4 In the present circumstances, the Prosecution submits that the
5 Chamber has sufficient cause to reconsider its earlier decision not to
6 grant an advance permission for the witnesses requested in the first ten
7 witnesses as they then stood, and that in the present circumstances we
8 submit that the Chamber should lean-in favour of granting in-court
9 protective measures for all witnesses, certainly all of the witnesses for
10 which -- for whom the application is still pending, unless there is
11 reason not to.

12 Without wanting to go into details of what transpired this
13 morning, I should perhaps add that in-court protective measures is just
14 the first step; the enforcement of those measures is a matter which --
15 which is also obviously giving rise to concern, but that is a matter
16 which has already been debated.

17 Your Honours, unless there are any further submissions you would
18 like to hear from me on this point, I think that's about all I can add on
19 this issue.

20 PRESIDING JUDGE EBOE-OSUJI: There was a question also indicated
21 yesterday as part of the legal submissions to be made, the second
22 question would be: Does this factor with your -- does these past
23 developments in parliament override the need for individualised
24 assessment of each witness or this rather second instance of each witness
25 for purposes of witness protection measures in the courtroom when you say

1 such measures should be granted to every witness?

2 MR STEYNBERG: Thank you, your Honour, yes, I had perhaps not
3 specifically addressed that. My suggestion is that cumulatively together
4 with evidence that has been brought to the attention of the Chamber
5 consistently over some time of ongoing attempts to interfere, to bribe
6 witnesses, attempts now to expose the -- well, not attempts, exposure of
7 the identity of witnesses, and the developments in the Kenyan parliament,
8 these are matters that affect all witnesses residing in Kenya and, in the
9 Prosecution's submission, are serious enough and cogent enough to require
10 or to lead to a presumption that in-court protective measures are
11 required unless individual assessments show otherwise.

12 I hope that answers your question, your Honour.

13 PRESIDING JUDGE EBOE-OSUJI: That will do. Thank you.

14 Mr Khan.

15 MR KHAN: Mr President, your Honours. Thank you for the
16 opportunity to address this rather novel issue. I must confess that I
17 was a little bit flummoxed yesterday when your Honour, Mr President,
18 raised this issue, and it wasn't clear to me until this afternoon's
19 question what was the origin of the request that the Bench hear
20 submissions. Was it something *proprio motu* that the Bench thought was a
21 good idea, or was it pursuant to some filing from the Prosecution that we
22 haven't seen or that further elaboration was needed. But in our
23 submission there is no merit at all in the Prosecution's contentions.

24 As far as presumptions and almost reversing of the burden is
25 concerned, one only looks at Article 67(1)(i), which deals with reversal

1 of the burden. And this doesn't just apply to the burden of proof; it
2 relates to any other right. It's not for the Defence to rebut a
3 presumption. It's for the Prosecution to prove that a measure is
4 necessary. It is clear that the Defence has a massive interest in this
5 because we do say that whilst individuals suffered in Kenya, whilst
6 individuals suffered in Kenya, the Prosecution have chosen - through
7 error or omission or other reason - a core witness base that are lying.
8 And, your Honours, we have a clear right that those witnesses give
9 evidence in public unless there are exceptional circumstances.

10 Your Honour, I'll come to that in a moment. Your Honour, I've
11 got files to hand to my learned friend for the Prosecution but firstly
12 the Bench which contain what we've managed to print off since your
13 Honour's raised the matter yesterday, that is, the - with the assistance
14 of the court usher perhaps - which are the proceedings in the
15 National Assembly of the Republic of Kenya on the 5 of September and the
16 proceedings in the Senate on the 10 of September. Your Honours, there's
17 a binder of each of their Honours, one for the Prosecution and one for my
18 learned friend for the victims.

19 Now, your Honour, before I go to the material contained in the
20 binder, which is the best we've managed to put together, I make one
21 observation: My learned friend has sent us today a notice of sitting for
22 the 5 of September, but it's important to know this is not the first time
23 this issue has been debated in parliament and it's not the first
24 resolution either that's been passed. And yet, for the previous year,
25 for the previous year, the Prosecution has been silent. And we say, your

1 Honours, the Court needs to be very wary of attempts by the Prosecution
2 to raise these false specters to distract from what we say is an
3 absolutely unworthy case.

4 Your Honours, as far as the actual material, one can see in the
5 public domain from the file before you that it appears that there was a
6 proceedings in the Kenyan parliament on those dates, but within the terms
7 of Article 69(6), in order to find that there's a fact of common
8 knowledge of which judicial notice is taken, it may be that further
9 certified copies of those proceedings will be necessary if it's material
10 to any issue that the Bench really wants to discuss. But, your Honours,
11 it's clear that there were proceedings in parliament on those dates.
12 These are, to the best of our knowledge, they're not certified, at least
13 the Assembly. We believe we've handed up true and complete copies of
14 what's available.

15 What we have done, however, is we have the material of the
16 National Assembly in electronic format and we've printed it off. There
17 is a caveat, just to be very careful about matters, there is a disclaimer
18 that the report - and it's on the electronic version that we've
19 printed - that the information is for information purposes only and "a
20 certified version of the report can be obtained from the Hansard editor,"
21 just to be particular. Your Honour, we do have also an electronic copy
22 of the Hansard report from the Senate, and we've included in the
23 filing - and that contains no such disclaimer, the Senate report, no such
24 disclaimer from the Senate report - and, your Honour, we say that
25 *prima facie* both are authentic documents and the Court can take

1 cognizance of the matters contained therein. But, your Honours, there's
2 no relevance whatsoever to this whole matter. The whole international
3 community wants a vibrant democracy. The whole international community
4 wants a parliament that works and that is robust and has candid
5 discussions. And the subjective concerns of a victim and a witness are
6 of marginal relevance to determine the core issue, which is the
7 presumption. And what my learned friend wishes to displace, a
8 presumption in favour of secrecy, is clearly in contrast to the
9 presumption that does exist in the jurisprudence of this Court, in the
10 statutory regime of this Court, which is a presumption in favour of
11 openness, so a complete 360 -- a complete 180-degree turn needs to be had
12 away from a presumption of openness towards a presumption of secrecy,
13 which is singularly without merit and actually has a massive capacity to
14 cause serious and irredeemable prejudice to the Defence.

15 Your Honour will be aware of the landmark case in England and
16 Wales, the case of Pepper and Hart in 1992. Well, for many years it was
17 not permissible in English Courts to refer to parliamentary proceedings
18 in interpreting a Statute. However, the House of Lords relaxed matters
19 somewhat in 1992 and stated that when a statutory provision is ambiguous,
20 the Courts may properly have recourse to the parliamentary proceedings,
21 very much as we do when we look at travaux préparatoires. But, Your
22 Honour, here we have nothing to interpret. There's no bill, there's no
23 act. There's a resolution. And anybody who's aware with parliamentary
24 democracy knows, for example, that the United States Senate, the United
25 States Congress pass many, many resolutions that are not binding, that

1 have no legal force, and they are not acted upon. The clear evidence in
2 this case is that a resolution was passed more than a year ago. It
3 hasn't been acted upon. Here no bill has even been presented before
4 parliament. Why now all this noise, why now all this fuss, why distract
5 us from the core issue which we say must be the paucity focusing on the
6 Prosecution's evidence or the paucity of that particular case.

7 Your Honour, the other matter and --

8 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, the -- it seems to me that
9 the Prosecution's point on that matter was that -- said that the -- I'm
10 going to my notes, the National Assembly special session was held on the
11 5 of September. That would be -- sorry, sorry. The 5 of September, yes.
12 And the Senate's own special session was held on the 10 of September.
13 Now -- but the Chamber's decision, general decision on protection of
14 witnesses in the courtroom, was rendered on the 3 of September. That
15 would be, it was rendered before these developments. The question now
16 is: Is there cause to revisit the decision of the 3 of September in any
17 aspect as regards protection of witnesses in the courtroom, in particular
18 would these developments be a factor to be taken into account in
19 determining the measures the Chamber needs to take as part of
20 Article 68(1) power to protect the psychological well-being of witnesses.

21 MR KHAN: Your Honour, I'm grateful. The answer is no. The
22 answer is no.

23 Your Honour, in assessing whether or not there's any foundations,
24 any substance to this application, I think it's -- it is fair for the
25 Bench to look at how the Prosecutor framed his submissions this

1 afternoon. And, your Honour, what struck me was that a very key piece of
2 information was only brought out, was only drawn out from the Prosecution
3 not of their own volition but because your Honour had the wisdom to point
4 the Prosecutor in a particular question. Your Honour, there is a duty of
5 candour to the Court, and what really anybody who wants to present the
6 truth to the Court should have started with when framing such a
7 submission is not just a debate but what actually was passed. And, your
8 Honour, paragraph 1 of the resolution of the Senate completely torpedos,
9 completely sinks and exposes the Prosecution's contention --

10 PRESIDING JUDGE EBOE-OSUJI: What does it say?

11 MR KHAN: -- which is that co-operation -- the whole Senate is
12 saying they will continue to co-operate with the ICC with regard to the
13 ongoing cases before the ICC in accordance with the International Crimes
14 Act number 16 of 2008 and other relevant provisions.

15 Your Honour, the next paragraph does not turn a cold: Close the
16 door, shut the door in the face of the ICC. In fact, it's engagement.
17 It says -- paragraph 2, it talks about urgently petitioning the relevant
18 organs of the ICC to continuing, issues of video-conference, and the
19 concern that they legitimately have of the president and the deputy or
20 they had sitting at the same time and being away from the country.

21 Now, your Honours, there's nothing in this document that can be
22 interpreted as impacting on the rights of victims or witnesses. Your
23 Honour, my learned friend has quoted an extract from one honourable
24 member, one honourable senator, Senator Kindiki. Your Honour, let me
25 quote something that was not mentioned and there's a lot, you've got it

1 before you, but you're on page 22 of the Senate debates. What the
2 honourable senator, the same person says that the reasons for the motion
3 are simple, the reasons are simple and the concerns that they have are
4 simple, you have no controlling mechanism of controlling a prosecutor who
5 is unsupervised and through his own whims can drag people through long
6 and expensive processes without any kind of compensation even when
7 they're acquitted.

8 But, your Honour, be that as it may, what another honourable
9 member says at page 23, and he's very clear, it would be wrong to say
10 that the Judges have not been fair. This is not vitriolic unbalanced
11 discussion. The Prosecution may not like it because nobody likes
12 criticism even when it's well-deserved. But what the honourable member
13 Senator Elachi said:

14 "It would be wrong for us to say that the Judges have not been
15 fair; indeed, they have been fair to Kenya. But the Office of the
16 Prosecutor has made the process much more difficult for the country
17 because most of the time the office uses the media to communicate to the
18 country and even to give a statement. That is why the issue has become
19 more politicised. As Kenyans, we want to see a process where the
20 Prosecutor will respect the jurisdiction of the country and also respect
21 the fact that we have a state and a government and there are institutions
22 through which they can communicate."

23 And, your Honour, it goes on.

24 Your Honour, as I said, parliamentary discussions are robust, but
25 in assessing the merit of the question, it is exceptionally --

1 PRESIDING JUDGE EBOE-OSUJI: But if I may --

2 MR KHAN: Yes.

3 PRESIDING JUDGE EBOE-OSUJI: -- wasn't that the usual arrangement
4 all along, that there would be an independent judiciary that's not part
5 of the Office of the Prosecutor that would maintain that balance? That
6 has always been the case, has it not?

7 MR KHAN: Your Honour, I think, as I said, parliament will speak
8 for itself, but the sentiments I read express confidence that the Judges
9 are independent, but they express grave misgivings regarding the
10 thoroughness with which the Prosecution have approached their task,
11 concerns that I for myself do share because I raised it in my opening, a
12 snap-shot of some of what I say are the fundamental failings of that
13 case. So, your Honour, I can hardly sanction or criticise parliament
14 when I've had the same misgivings myself.

15 But, your Honour, there is nothing in this that would impact upon
16 the witness regime. There is an independent victim and witness unit in
17 Kenya independent of Government. Many of the Prosecution witnesses are
18 already outside of Kenya. Ocampo said that even prior to confirmations,
19 I've got no witnesses in Kenya. So what could the possible danger be?

20 And, your Honour, in relation to the person that my learned
21 friend referred to today, the Prosecution for themselves will have to
22 answer and be alive to the realities that for a variety of reasons
23 individuals living in perhaps disadvantaged situations may wish
24 relocation, because that's what he's asking for, a relocation, but it
25 would require a massive stretch of imagination to say that every country

1 that is not a state party is a pariah. The United States of America,
2 India, Russia, China, many noble decent countries with great heritages
3 are not State Parties to the Rome Statute and they are not pariahs.
4 Pariah countries are countries that are dictatorships that do not believe
5 in parliamentary democracy and that suppress the will of the people, not
6 ones that comply with international obligations. But, your Honour, that
7 characterisation --

8 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, the difference - the
9 difference - is that they do not have high-ranking officials before the
10 ICC who are charged in their individual capacities.

11 MR KHAN: Your Honour, it seems difficult for me to understand
12 these constant incantations of this being a unique case, this being a
13 difficult case, the Prosecution having --

14 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, you do say that quite
15 often, mind you, that this is a unique case --

16 MR. KHAN: Yes, but, your Honour, in the sense of --

17 PRESIDING JUDGE EBOE-OSUJI: -- for different reasons.

18 MR KHAN: In the sense of difficult -- investigative difficulties
19 it's not unique, because how can the -- if one just looks at the record
20 and the degree of co-operation and compare it with Sudan, where the
21 Prosecution are running cases despite the criminalisation of even
22 entering that country and in conducting investigations by the Defence or
23 by the Prosecution, look at Libya, look at Libya, are the OTP being given
24 more co-operation or less in Kenya than in Libya? Is the Court more
25 respected in Kenya or in Libya? Your Honour, these are not rhetorical

1 questions. It goes to the reality as opposed to the rhetoric that is
2 being put forward as the truth. And, your Honours, we ask to be very
3 alive to that situation.

4 Your Honour, when it comes to the second question which is the
5 effect any of this may have, we say none. It's completely speculative.
6 I mean, it's completely speculative. Anybody who is in any doubt about
7 the co-operation of Kenya should look at the fact that Kenya -- the OTP
8 have a presence there, the Registry has a presence there, the Defence are
9 operating there. In due course if the Court wish there may be a site
10 visit to Kenya. This is not a country that is in opposition to the ICC,
11 nor is Kenya being dragged kicking and screaming as a naughty school
12 child to the ICC. The deputy president sits behind me not coercively but
13 because of his belief in the rule of law. Now these are, as I said
14 earlier, these are inconvenient truths that somehow created a bit of a
15 bump on the Prosecution's narrative, but they are the truth. They are
16 the truth.

17 Your Honour, when assessing the impact, the Court has to look, we
18 say, at the rights of William Ruto, the rights of the gentleman that I
19 represent. It's a criminal trial and he has a right, a statutory right,
20 to a public hearing, and those restrictions should only be to the extent
21 necessary. The Prosecution, for some unfathomable reason would have you
22 not look at it -- at protective measures, in-court protection on a
23 case-by-case basis but would have carte blanche that we say amounts to a
24 licence to lie because those witnesses are concerned of two things in my
25 respectful submission. One is they will be found out and prosecuted; the

1 other is when the lie is broadcast, maybe we'll get a torrent of new
2 information to the Defence that will assist us in showing the Court that
3 they are lying.

4 Your Honours, the Defence has witnesses under the victim and
5 witness protection scheme of the Court. Why? I have also gone on record
6 in Kenya talking about all parties co-operating with the OTP and the
7 Defence. I have political parties seeking to control which witnesses I
8 can speak to and that witnesses should only go through a particular
9 individual. Your Honour, the main thing is on every situation the Court
10 has an imperative duty, which is to decide whether or not protective
11 measures are necessary or whether or not the interests of justice demand
12 it going publicly and that must be tailored on a case-by-case basis.

13 Your Honour, a blanket, uniform, one-size-fits-all formula will
14 lead to massive injustice. Your Honour, I will, with your leave, refer
15 once again to Blackstone who has observed when assessing this matter, and
16 I quote:

17 "The open examination of witnesses in the presence of all mankind
18 is much more conducive to the clearing up of truth than private and
19 secret examination. A witness may frequently depose that in private
20 which he would be ashamed to testify in a public and solemn tribunal."

21 Your Honour, that principle has been echoed by the European Court
22 of Human Rights in Strasbourg when they held, and it's in one of our
23 previous filings, I'll brief, it is one of the means:

24 "A public trial: One of the means whereby confidence in the
25 courts superior and inferior can be maintained. By rendering the

1 administration of justice visible, publicity contributes to the
2 achievement of the aim of Article 6(1); namely a fair trial, the
3 guarantee of which is one of the fundamental principles of any democratic
4 society within the meaning of the convention."

5 Your Honour, we will not with the Court's leave, and this is our
6 plea, we do not want a -- to run a trial shrouded in secrecy. We want to
7 lift the veil from untruths so the Court can see, the public can see, and
8 hopefully even the Prosecution if they approach it with an open mind will
9 see even before a Defence case is necessary that they do have it wrong.
10 These are not -- this is not -- it would be a real danger, it would be a
11 real danger and I think an injustice to all of us to just push aside the
12 concerns of the Defence as ranting, as rhetoric, and not to pause for a
13 moment and say perhaps, just perhaps, the Defence are telling us the
14 truth. Perhaps, just perhaps, the Defence have got it right and a
15 horrible mistake is underway --

16 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, is it your submission that
17 in these proceedings there's no cause to worry about witness protection?

18 MR KHAN: Your Honour, in every case, in every case, there may be
19 cause to worry for witnesses. I have problems in my Darfur case, I have
20 problems in this case for the Defence. The Victims and Witnesses Unit
21 are -- can provide evidence of that. Your Honour, the issue is not one
22 of concern or not; it's one of proportionality and scale and tailoring
23 the restrictions on a statutory right to the extent necessary rather than
24 starting from a proposition, reversing a burden, and displacing the
25 presumption of publicity with the Prosecution's preferred option: A

1 presumption of secrecy. That -- such a ruling would -- would very
2 seriously undermine the due process rights of William Ruto. He has a
3 right to openness and he has a right for the truth -- for these
4 proceedings to be given in public unless objectively, not subjectively,
5 there are fears and concern.

6 Your Honour, the subjective fears of witnesses that a resolution
7 has been passed which is not law, which has been passed a year ago
8 without consequence, in circumstances when the Defence and William Ruto,
9 the deputy president, are appearing before the Court, is nonsensical.
10 Actions speak louder than words. The Court cannot go or determine its
11 approach to witness protection simply because a litmus test of the
12 subjective fears of a witness or a witness's desires to get relocation to
13 another country as was the case mentioned by my learned friend. It must
14 look at the objectively justified fears. We say objectively there's no
15 reason to impose such a blanket policy. Indeed, such a blanket policy
16 would erode the fundamental rights guaranteed under both Article 66 and
17 Article 67 and in interpreting Article 68 it must be read very much in
18 context of -- to the primacy of the Article 67 rights. That's what
19 trumps everything else.

20 Your Honour, the other matter --

21 PRESIDING JUDGE EBOE-OSUJI: So just to sum up so we can wrap it
22 up on that and move on to anything else you might say, you are not saying
23 that in-court protective measures may not be done. You agree that it
24 should be done to the extent necessary and that there needs -- there
25 needs to be an individualised assessment of each witness and that it

1 should not be done on a blanket basis? That would be the sum of your
2 submission, isn't it?

3 MR KHAN: Your Honour, I wish I had put it so succinctly and so
4 well.

5 PRESIDING JUDGE EBOE-OSUJI: Is there anything else you need to
6 say?

7 MR KHAN: Your Honour, the only other aspect because really we're
8 in the realms of speculation, but even taken at its worst and something
9 materialises that has not materialised, it's very clear what the position
10 is, it doesn't impact upon this case. Even if there was a bill and even
11 if there was withdrawal, the Vienna Convention, Article 70 on the Law of
12 Treaties 1969, and indeed Article 127 of the Statute are clear, that it
13 will not impact on the current case. So, your Honour, that should
14 hopefully give some reassurance to witnesses.

15 But, your Honours, in assessing the merits, we do ask the Court
16 to pause for a moment and at least be open to the idea that maybe the
17 fact that the Prosecution are raising this: Is it because witnesses are
18 really concerned about a resolution in parliament? Is it really because
19 of a discussion in government that has not led to a bill or a law never
20 mind a government approval? Or is it because witnesses are simply, or at
21 least the two mentioned, are seeking an excuse not to come here and lie?
22 Your Honours, we want people to come here and tell the truth. But, your
23 Honours, in assessing the issue on discussion, namely the proportional --
24 the protective measures necessary, we say a very healthy margin of
25 deference must be given to the principle of publicity and it should only

1 be restricted to the issue that is necessary in a diplomatic and
2 pluralistic society and the world in which we wish to live. We say the
3 Prosecution have failed to show good cause and their novel and
4 unsupported contention of reversing a burden of -- a presumption of
5 publicity to a presumption of secrecy should be denied.

6 Your Honour, unless I can assist you further, those are my
7 submissions on this issue.

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

9 Mr Kigen-Katwa.

10 MR KIGEN-KATWA: Mr President and your Honours, we -- the summary
11 that Mr President made is exactly our position, that in determining
12 protective measures, individual situations should be dealt with rather
13 than uniform and general approach to it.

14 Mr President and your Honours, we place our reliance on the
15 provisions of Article 66, 67, and Regulation 20, which create the primary
16 position that trials are to be conducted in the open. And I would like
17 to say that Mr Sang would like to have the proceedings conducted in the
18 open.

19 And we also rely on the provisions of Article 68 that where it is
20 necessary and where all other options have been exhausted is when
21 protective measures should be called in.

22 Mr President and your Honours, it was initially my argument - and
23 I observed that the Court has already noted that - that the issue that
24 has been raised by the Prosecution was determining its decision number
25 920 at particularly paragraph 12 and paragraph 14, where the Court

1 addressed the question of whether or not a general approach should be
2 given to the protective measures. And this Chamber said that the Chamber
3 emphasises that a case-by-case evaluation requires an individualised
4 consideration of the risk in each particular case. It does not consider
5 that generalised assertions regarding the degree of domestic support for
6 trials can be sufficient for these purposes.

7 Mr President and your Honours, the issues that the Prosecutor has
8 raised in respect to what was decided by the Kenyan Senate and
9 Kenyan National Assembly are exactly what was contemplated or what was
10 reflected in this decision when this Chamber said that "generalised
11 assertions regarding the degree of domestic support for trials can be
12 sufficient..." -- "it does not consider that generalised assertion
13 regarding the degree of domestic support for trials can be sufficient for
14 these purposes. However, factors such as security situation in
15 particular territory may be pertinent."

16 It is our position, Mr President and your Honours - and this is a
17 question that you posed to Mr Karim, as to whether or not his position is
18 that no protective measures should be put in place - it is our position
19 that protective measures in deserving cases should be put in place.
20 However, to adopt a uniform position as the Prosecution is suggesting
21 would amount to re-writing the law in the sense that if it were to be
22 determined that all the witnesses are to enjoy protective measures, then
23 the obligation placed on the Chamber in the provisions of Article 68(1)
24 will not be applied in the sense that that Article 68(1) requires that:

25 "In so doing, the Court shall have regard to all relevant

1 factors, including age, gender as defined in article 7, at paragraph 3,
2 and health, the nature of crime," and others, and that "the balance is to
3 be struck. These measures shall not be prejudicial to or inconsistent
4 with the rights of the accused and a fair and impartial trial."

5 Mr President and your Honours, we insist that the invitation that
6 the Prosecution has made to you that you make a generalised approach and
7 give protective measures to all the witnesses is inconsistent with the
8 provisions of the law and would border on asking you to re-write the law.

9 Your Honour, my learned friend from the Prosecution made
10 reference to what was decided in the Kenyan National Assembly and the
11 Kenyan Senate. And Mr President and your Honours, I would like to invite
12 the Chamber's attention to the fact that in the decision of the Senate,
13 particularly what was provided to you at its resolution number 4, the
14 Senate merely said that the process is to be commenced, "commence and
15 conclude the process required for withdrawal by Kenya from the Rome
16 Statute," so that the event of the withdrawal has not occurred, and
17 the -- a point, the same thing was made also by the National Assembly,
18 where it stated that:

19 "This house resolves to introduce a bill within the next 30 days
20 to repeal the International Crimes Act and the government urgently
21 undertakes measures to withdraw."

22 So Mr President and your Honours, the event that the Prosecution
23 is concerned with and is asking you to use to determine and apply a
24 blanket decision has not occurred.

25 Your Honours and Mr President, I would also like to make a brief

1 reference to the substance of what informed the motions, both in the
2 Senate and in the National Assembly, and these are excerpts my learned
3 friend from the Prosecution read portions of it. And I would like to
4 read what -- reference was made to what one Professor Kindiki, a senator,
5 said. When Mr Kithure said this which reflects the consciousness of the
6 Senate of their obligation to this Court, the ICC.

7 "What happened in the year 2007 and 2008 is regrettable. We
8 wanted investigations to be done. What pains me is when I see three
9 Kenyans who are facing criminal charges at The Hague, knowing very well
10 and having participated in general elections 2007, that nobody planned
11 violence, nobody planned anything. It was --"

12 THE INTERPRETER: Mr President, would the counsel be advised to
13 slow down, sir.

14 MR KIGEN-KATWA: (Overlapping speakers)... as I conclude, this
15 motion is not talking about withdrawal of the cases which are pending
16 before the ICC --

17 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa --

18 MR KIGEN-KATWA: Yes, I'm sorry.

19 PRESIDING JUDGE EBOE-OSUJI: -- you are needed to slow down.

20 MR KIGEN-KATWA: Sorry, I slow down. Yes, I will, Mr President.

21 PRESIDING JUDGE EBOE-OSUJI: For the interpreters, that is.

22 MR KIGEN-KATWA: And I apologise for that.

23 This is what Senator Kithure said:

24 "As I conclude, this motion is not talking about the withdrawal
25 of the cases which are pending before the ICC. We have read the law very

1 well. We know that our intention to withdraw from the ICC will take a
2 year. We are however going to -- we, however, we are doing it for
3 posterity for our children. We do not want our children to go to The
4 Hague."

5 And then one other senator, Mr Murkomen said this in recognition
6 of their obligation to this Court again:

7 "One, when the Rome Statute was passed, it was expected that the
8 ICC would be appear Court which would observe greater standards of human
9 rights protection in dealing with matters of justice. However, I have
10 great issue with the manner in which the Prosecutor carried out the
11 prosecution and investigations. When Moreno-Ocampo came to Kenya, I had
12 seen him on television as a scary man with a huge moustache ..." and goes
13 on and on.

14 And then goes on to say that he did not conduct investigations
15 and that is the reason why there was need to have this motion to withdraw
16 from the Rome Statute.

17 And, your Honours, therefore the --

18 PRESIDING JUDGE EBOE-OSUJI: Let me right there --

19 MR KIGEN-KATWA: Yes --

20 PRESIDING JUDGE EBOE-OSUJI: -- Mr Kigen-Katwa.

21 MR KIGEN-KATWA: Yes, your Honour.

22 PRESIDING JUDGE EBOE-OSUJI: He goes on to say that "he did not
23 conduct investigations" - I'm quoting now - "and that is the reason why
24 there was need to have this motion to withdraw from the Rome Statute."

25 And earlier you had also said somebody else, perhaps the same

1 Senator had said:

2 "What pains me is when I see three Kenyans who are facing
3 criminal charges at The Hague ..."

4 Do these -- what do these tell us about the need for these
5 motions to withdraw? Are these why?

6 MR KIGEN-KATWA: Your Honour, I wouldn't want to seem to want to
7 speak for and on behalf of either the Senate as an entity or for
8 Senator Kithure whose quote you have just referred to where he said what
9 happened in the year 2007 and 2008 is regrettable. Is that what --
10 that's what, Mr President, you are referring to?

11 PRESIDING JUDGE EBOE-OSUJI: (Microphone not activated)

12 THE INTERPRETER: Mr President's microphone, please. Microphone,
13 sir.

14 PRESIDING JUDGE EBOE-OSUJI: (Microphone not activated)

15 Sorry. I had my microphone off. I said you -- part of your
16 quote was this:

17 "What pains me is when I see three Kenyans who are facing
18 criminal charges at The Hague ..."

19 Say that as part of the debate on the motions to withdraw from
20 the Rome Statute, does that sentiment implicate the need for the motions
21 to withdraw?

22 MR KIGEN-KATWA: It does not, Mr President and your Honours,
23 because it is the same person who says in his conclusion:

24 "As I conclude this motion -- as I conclude, this motion is not
25 talking about withdrawal of the cases which are pending before the ICC.

1 We have read the law very well, including the obligation to co-operate
2 with the Court. We know what our intention to -- we know that our
3 intention to withdraw from the ICC will take a year. We are -- however,
4 we are doing this -- we are doing it for posterity."

5 And, Mr President and your Honours --

6 PRESIDING JUDGE EBOE-OSUJI: May I --

7 MR KIGEN-KATWA: Yes --

8 PRESIDING JUDGE EBOE-OSUJI: May I ask you on that note, is it --
9 is there any other State Party, to your knowledge, who has withdrawn from
10 the Rome Statute - a State Party - or passed a motion in parliament to
11 withdraw?

12 MR KIGEN-KATWA: I'm not aware, Mr President and your Honours.

13 MR KHAN: Can I help?

14 MR KIGEN-KATWA: Mr President, Mr Karim says he could say
15 something on that. Probably could have his audience after me.

16 PRESIDING JUDGE EBOE-OSUJI: Afterwards I will get to Mr Khan,
17 but you first.

18 My question then is if there is, to your knowledge, no other
19 State Party who had withdrawn, the question arises: Why is this
20 particular State Party in its parliament making a motion to withdraw?

21 MR KIGEN-KATWA: Mr President --

22 PRESIDING JUDGE EBOE-OSUJI: If -- if it has nothing to do with
23 the ongoing cases of having three Kenyans facing charges at The Hague.

24 MR KIGEN-KATWA: As I said again, I do not want to seem to speak
25 for and on behalf of the Senate, but I would seem to see an answer to

1 that issue in the comments made by one Mr Senator Murkomen in the same --
2 the next page of the same thing, where he expresses concern that the
3 Prosecution did not conduct proper investigations. And I would hazard as
4 a speculation that the reason why they thought it necessary to withdraw
5 could be because they have come to the strong conclusion that the
6 Prosecutor did not conduct proper investigations.

7 PRESIDING JUDGE EBOE-OSUJI: It's also -- there's also an
8 indication of faith in the Judges --

9 MR KIGEN-KATWA: Absolutely --

10 PRESIDING JUDGE EBOE-OSUJI: -- so that if there is shoddy
11 investigation, the Judges would do what's appropriate at the end of the
12 day, would it not be the case?

13 MR KIGEN-KATWA: Absolutely, Mr President. But may I say this:
14 By the time you come to the conclusion -- and that is said very well by
15 one of the senators also, Mr President, and with your permission I will
16 make a reference to it, one Senator Nguru (* phon) says this:

17 "Mr Speaker, sir, I want to be sober. This motion was brought at
18 a very wrong time. The implication internationally are that you are
19 trying to hide something. Honestly speaking, as one who might who still
20 end up at The Hague anyway or any other place, I want a process that is
21 devoid of political interference and that does not have any ethnic
22 overtones. Under the circumstances I believe that our brothers," and
23 that's what is -- Mr President, you are alluding to, "under the
24 circumstances I believe that our brothers have got a wonderful chance to
25 be vindicated at The Hague. After the verdict is given that they are

1 innocent, nobody will cry foul and say they were vindicated because the
2 judge happens to come from the same ethnic group with them. In my
3 opinion, we are blind to some issues and raise political temperatures for
4 no reason. Why do we not allow this process which in my opinion have a
5 sixth sense that tells me that they are going to be vindicated and not
6 just locally but internationally so that even as they travel
7 internationally nobody who was suspecting that they were involved in
8 anything will know that these were leaders who were completely innocent."

9 PRESIDING JUDGE EBOE-OSUJI: Speed.

10 MR KIGEN-KATWA: Mr President, reading from that, of course this
11 Senator Nguru was opposed to this motion. However, two issues come up.
12 First of all, Mr President and your Honours, we very much pray that
13 attention be given also to the quality of the arguments that all aspects
14 of this issue are looked at. But two issues I would want to draw the
15 attention of the Chamber to.

16 The first one is that a resolution was eventually made by the
17 Senate as a co-operate decision. And the first resolution is to continue
18 to co-operate with the ICC with regard to the ongoing cases before the
19 ICC in accordance with the International Crimes Act, that's the first
20 thing I wish to say, that there was a commitment to co-operate.

21 The second issue which is more directed to the question you
22 posed, Mr President, is that here there is confidence in this Court. But
23 by the time you get to the point of the judgement, you've been dragged
24 through mud -- not mud actually, through the sewage --

25 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, we are lawyers, you

1 and I, and of course it's not something to be taken lightly, that anyone
2 has been charged. But is there any Defence counsel in the world who
3 would not make that argument for a client, to say: Drop this case, don't
4 let it go forward, because by the time we get to the point of a verdict
5 of not guilty our client would have been dragged through the mud?

6 MR KIGEN-KATWA: Of course any lawyer would want to take the
7 first opportunity to do that, Mr President and your Honours. But even
8 that first opportunity is governed by the various legislations and the
9 statutes that govern the given proceedings. For instance, in our case
10 the Chamber is aware how many times we've made attempts to move a motion
11 either to change the order of the witnesses or to make an argument that
12 there is no case, and we are waiting for the right opportunity to
13 demonstrate - after the -- probably we cross-examining the Prosecution
14 witnesses - to demonstrate that the case which is said to have been
15 organised can only be seen to have been organised on the part of the
16 Prosecution and probably the non-governmental organisations. The
17 planning was not in terms of planning the violence and that the witnesses
18 are lying.

19 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, we do not have a lot
20 of time left and before we adjourn I'd like to give the floor to
21 Mr Nderitu, who has not made any contribution. So I do not know how much
22 longer you have to go, mindful of the time we have.

23 MR KIGEN-KATWA: Mr President and your Honours, I should not be
24 more than seven more minutes, with your permission.

25 PRESIDING JUDGE EBOE-OSUJI: I'm not sure we have that much time.

1 One second.

2 MR KIGEN-KATWA: Could we make it five minutes.

3 PRESIDING JUDGE EBOE-OSUJI: Can you try in say three minutes.

4 MR KIGEN-KATWA: Mr President and your Honours, the first thing
5 within the three minutes I wish to say is that my client, Mr Sang,
6 doesn't sit either in the Senate or the National Assembly. This decision
7 was conducted in democratic process that belongs to the Senate and the
8 National Assembly. If it were to be that his rights as contemplated by
9 Article 66, 67, and Regulation 20 to have the proceedings conducted in
10 the open are prejudiced because of the decision of the Senate and the
11 National Assembly, then he will have been prejudiced in respect to
12 circumstances that he has no hand in and we pray that in balancing the
13 interest of Mr Sang vis-à-vis the decisions of the Senate and the
14 National Assembly and the allegations made by the Prosecution, the Court
15 do -- keep those issues on the balance of the scales.

16 The second issue I wish to say, Mr President and your Honours, is
17 that as will -- as has been seen from the few excerpts that have been
18 picked from the Hansard, the criticism was heavily on the way the
19 Prosecution conducted investigations. And so even as the Prosecution
20 make the argument that, please, give us protective measures because a
21 decision has been made by National Assembly and the Senate, it has to be
22 remembered that that decision was made because of the conduct of the
23 Prosecution. And so the Prosecution in a certain way is asking you to
24 come in as turned on their side in asking that a general rule or a
25 general approach is given to protective measures.

1 Your Honours and Mr President, we would insist that the situation
2 remains that you deal with every situation individualised and that if
3 there is a common perception that the Prosecution did not conduct
4 investigation, they should carry that burden and discharge it on their
5 own.

6 Lastly --

7 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, I need to on that
8 matter -- perhaps Mr Khan also will deal with it, is that the case that
9 there are certain parts of the world, certain democracies in the world
10 where if a case is pending before a court of law, parliament regards the
11 cases as sub judice and therefore will refrain from doing anything or
12 passing any resolution that touches on that case that's ongoing. Is that
13 the case?

14 MR KIGEN-KATWA: Mr President and your Honours, I already said
15 that the Senate was very specific -- the Senate was very specific in
16 their resolution. They said that it is your resolution that the country
17 continues to co-operate with the ICC. And so --

18 PRESIDING JUDGE EBOE-OSUJI: The problem -- the difficulty of
19 course is - and that is the argument of the Prosecution when they raised
20 this thing on the record first time - raises the question whether what is
21 said and done in the Senate, regardless of the good faith of it, might,
22 even unwittingly, create or generate a national mood or community mood
23 even that may make it very difficult for witnesses to feel
24 psychologically able to step up and testify. And here we're talking
25 about the provisions of Article 68(1), that talks about measures to be

1 taken for purposes of protecting the psychological well-being of
2 witnesses. The question is: Can even good-faith debates made in
3 parliament in relation to an ongoing case have a chilling effect on
4 witnesses to the extent that maybe -- there may be ordinary people in
5 society?

6 MR KIGEN-KATWA: I would like to say three things in response to
7 that point, Mr President and your Honours. The first one is that it is
8 my view that the inverse is the position, that the senators and the
9 members of the National Assembly represent their constituencies. And so
10 what they say, they are not the trickle, they are the product of the
11 feeling. And so when they say it is our feeling that the investigator --
12 the Prosecutor did not conduct investigations and we need to stem the
13 likelihood of other people being mistreated by the Prosecutor, that is a
14 reflection of the wishes of the population.

15 The second issue, Mr President and your Honours, is that in the
16 entirety, at least to the extent I have seen, the senators and the
17 members of the National Assembly avoided discussing issues of witnesses.
18 They only dealt with the issue, the principal issue. And so we would
19 very much like that this Court looks at it, that the senators and the
20 members of the National Assembly made whatever decision they made as a
21 matter of principle not as a matter in respect to the witnesses in this
22 case.

23 The last issue I wish to say on that matter is that the
24 Rome Statute allows for a State Party to get out of -- to get out from
25 being a Member State. There is no rider, there's no proviso to that that

1 you cannot get out in the course of proceedings in relation to your
2 country. And in the absence of a specific requirement that they cannot
3 get out, Kenya was entitled to exercise its democratic right to say: We
4 wish to pull out at this point in time.

5 Mr President, assuming I have answered your questions, I would
6 like to say the last two things I wanted to say on this matter. The
7 first one, Mr President and your Honours, is that we would pray that you
8 let the issue of precedent weigh on your mind, that if the Prosecution
9 upon criticism rush to you and say: Since the Kenyan National Assembly
10 and the Kenyan senators criticised us, please issue a blanket protective
11 measures on all the witnesses, then what is the communication from that?
12 It would be telling any other Member State that the moment you criticise
13 the Prosecution, then you run the risk of getting measures taken against
14 you as a state and anybody who is participating in that process. And we
15 pray that that concern does weigh on your minds, Mr President and your
16 Honours.

17 The last one, Mr President and your Honours, is in some way that
18 I'm also surprised the same way that Mr Karim said, at the risk that the
19 connection could come in some common people's minds that the moment the
20 Kenyan National Assembly and the Kenyan Senate took action there was a
21 reciprocal action taken by the Court. We would pray that no action is
22 taken by this Court in reaction to the democratic -- to the exercise of
23 the democratic rights of Kenya, and instead issues of protection of
24 witnesses be dealt on an individual basis as opposed to taking a measure
25 simply because the Kenyan National Assembly and the Kenyan Senate has

1 made a decision. We pray that an annexures should not exist between what
2 the Kenyan National Assembly and Senate has done, there should be no
3 nexus with whatever decision this Court makes. Thank you, Mr. President,
4 but I'm glad to answer any question you may have.

5 PRESIDING JUDGE EBOE-OSUJI: It's not about a blanket tit-for-tat
6 at all. It's about whether there is a need to take certain developments
7 into account in assessing whether to give witnesses protection in the
8 courtroom. That is just the simple matter of it. It's not at all the
9 last suggestion. It's just about whether witness protection measures
10 need to be considered in a certain respect, that's all.

11 MR KIGEN-KATWA: And my answer is that it has to be specific
12 needs, specific to individual depending on the circumstances of the
13 individual witnesses, not a blanket and generalised.

14 PRESIDING JUDGE EBOE-OSUJI: Fair enough.

15 MR KIGEN-KATWA: Thank you. Thank you, Mr. President.

16 PRESIDING JUDGE EBOE-OSUJI: Mr Nderitu.

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

18 I think the question of whether the National Assembly and the
19 Senate did pass the motions is really not in dispute now as I understand
20 it. And therefore, I just want to go first of all to the question of
21 what prompted the two houses to come up with this motion. And I was
22 trying to have a look at the motion that was passed in the Senate on the
23 10 of September as amended and the leader of the Senate majority,
24 Professor Kithure Kindiki begged to move the motion in these words, that:

25 "Aware that the Republic of Kenya promulgated a new constitution

1 on 27 August 2010 which made fundamental changes in the governance of the
2 republic, appreciating that the Republic held its first general elections
3 under the new constitution on 4 March 2013, at which the president and
4 deputy president, amongst other elective office holders were lawfully and
5 popularly elected, fully cognisant of the International Criminal Court,
6 ICC, indictments, further appreciating that the three Kenyans currently
7 facing charges at the ICC, including the president and the deputy
8 president, have fully complied with the ICC's conditions and
9 requirements, concerned that the conduct of the investigations and
10 judicial processes of the ICC in the Kenya cases have been politicised
11 and selectively applied, noting that the 53 Member States of the African
12 Union adopted a resolution during the assembly of heads of state in
13 July 2013 denouncing the approach adopted by the ICC in the Kenya cases
14 and calling upon the ICC to defer the cases to the Kenyan judiciary,
15 further noting that the sitting president and the deputy president of the
16 republic are facing the prospect of prolonged Court attendance at the ICC
17 requiring their physical presence at court at The Hague, cognisant that
18 this situation has serious implications on their sovereignty, good
19 governance, and stability of the republic," and then it goes on.

20 And then it talks about:

21 "The amendment now includes the continuation of co-operation with
22 the ICC with regard to the ongoing cases before the ICC in accordance
23 with the international (Overlapping speakers)..."

24 PRESIDING JUDGE EBOE-OSUJI: Remember, remember to take it
25 slowly --

1 MR NDERITU: Yes, I beg your pardon.

2 Now, the point that I'm trying to make by reading this *in extenso*
3 is that there is specific forecasts on the investigations and judicial
4 processes of the ICC, there is specific forecasts on the sitting
5 president and deputy president, and on the indictments that are currently
6 before this Court. That to me does appear then that there is a very
7 direct nexus between what was done in the Senate and what is before this
8 Court.

9 And it is the same thing, as a matter of fact, that before the
10 Senate got to that amended motion, one of the things that it was seeking
11 to do was to petition the relevant organs of the ICC to consider the
12 possibility of conducting the trial through a variety of methods,
13 including videolink and so on. And the impact of this as I see it with
14 regard to the -- I beg your pardon. Yes, the impact of this is that what
15 the Senate and the National Assembly are in so many words telling
16 witnesses and telling victims is that co-operation with the ICC or
17 participating in the proceedings leaves you, witnesses, leaves you,
18 victims, on your own. On the one hand there is talk about co-operation,
19 but on the other there is an environment that has been created within the
20 country which makes it very, very hostile to go against what Senate and
21 the National Assembly would want to push to become national legislation.
22 That's the way I see it, that if those two moves eventually end up
23 resulting in legislation and resulting in the withdrawal of Kenya from
24 the ICC, then the message is very clear, that you are -- by co-operating
25 with the ICC, you are going against what we see as the law.

1 So it is one thing for the country, in my submissions, to say
2 that it will co-operate; it is yet another for it to actually co-operate.

3 And now turning back to what has been said by my learned
4 colleagues, I would want to make one or two submissions on what my
5 learned colleague Mr Karim Khan said, that the subject -- the subjective
6 concerns of victims and witnesses cannot take centre stage, and it is my
7 submission that these are not subjective concerns of victims and
8 witnesses. When matters do occur like the matters that we have been
9 informed about over the last 24 hours and people have the expectation
10 that their security will be taken into consideration and that there will
11 be effective measures for them, then we have moved away from the realm of
12 subjective concerns to real concerns. And that then turns on to the
13 submissions that were made by my learned friend Mr Kigen-Katwa, where he
14 says that generalised assertions regarding domestic -- regarding the
15 degree of domestic support for trials might not be enough, but, first of
16 all, we need to remember that the developments in Kenya, as I have said,
17 are developments that have the potential of becoming law or becoming
18 domestic law, of which of course this Court then would have to take
19 judicial notice of.

20 And I would want then to end by saying that while the general
21 principle is that a case-by-case approach to protective measures should
22 be taken, that does not mean and is not inconsistent with taking due
23 recognition for various landmark developments, such as the ones that have
24 occurred in Kenya recently, in order to make, yes, case-by-case decisions
25 but which have a *prima facie* content depending on where the witnesses or

1 victims may be residing.

2 I thank you.

3 MR KHAN: Mr President --

4 PRESIDING JUDGE EBOE-OSUJI: Thank you.

5 Mr Khan.

6 MR KHAN: Your Honour, I'm most grateful for the time. It is
7 regrettable that when we talk about landmark moments our attention span
8 is so short. Not a mention about a new constitution --

9 PRESIDING JUDGE EBOE-OSUJI: (Overlapping speakers)... I don't
10 mean -- you will continue in a moment --

11 MR KHAN: Thank you.

12 PRESIDING JUDGE EBOE-OSUJI: -- but how much do you think we are
13 looking at in terms of time?

14 MR KHAN: Well, your Honour, if your Honour is minded to take a
15 break --

16 PRESIDING JUDGE EBOE-OSUJI: For the day.

17 MR KHAN: Your Honours, with your leave Mr Ruto would wish to
18 speak for say two minutes. I'll be about five minutes or thereabouts, so
19 under ten minutes in total definitely.

20 MR STEYNBERG: Your Honour, may I just add that I would require
21 approximately five minutes please to respond to some of the submissions
22 my learned friend had made. He's had the floor for a long time already.
23 If that can be factored in, please.

24 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, two minutes.

25 MR KHAN: Your Honour, not a word about a new constitution, a new

1 chief justice, a new police force, a new government, none of these
2 constitutional implemented policies that the world seems to have
3 recognised, but it appears that they've gone past unfortunately both my
4 learned friend for the victims and also the Prosecution, all of those
5 enactments, that metamorphosis, constitutional tsunami and a new order in
6 Kenya is of no import. That is a very unfortunate event that no comment
7 has been made about what a confidence that gives the people of Kenya.

8 Your Honour, as far as withdrawal is concerned, two countries of
9 course have withdrawn, Sudan withdrew from the ICC Statute in 2008, the
10 United States of course withdrew after signing --

11 PRESIDING JUDGE EBOE-OSUJI: The question was not withdrawing a
12 signature --

13 MR KHAN: Yes.

14 PRESIDING JUDGE EBOE-OSUJI: -- but what State Party had
15 withdrawn.

16 MR KHAN: Yes. Well, your Honour, I said Sudan withdrew in 2008
17 and the United States --

18 PRESIDING JUDGE EBOE-OSUJI: Was Sudan a State Party?

19 MR KHAN: Your Honour, Sudan had signed up -- yes -- well, your
20 Honour, we can verify that. But the point is this: We are trying to
21 avoid a hazard that has not arisen and that is the fundamental problem
22 with this discussion. Kenya has not withdrawn. So putting forward a
23 concern that has not arisen is to put the Defence in a position of
24 responding to a hypothesis that is not there.

25 The reality is Kenya is a State Party. Kenya even has a Judge in

1 this Court. Kenya is co-operating with the ICC. There have been filings
2 from the Kenyan government that if the OTP wish to flesh out concerns,
3 they can file the respective applications and the attorney-general of
4 Kenya can respond, because we say it is an absolute gross distortion of
5 co-operation to discard Kenya as non-co-operating states and somehow say
6 that other states, Libya and all the rest of them, everything is
7 hunky-dory. Kenya is co-operating and that's the truth, and I actually
8 don't know which country would co-operate to this extent.

9 Your Honour, the simple position is, the subjective concerns of
10 witnesses can't trump a statutory right. A witness may take great
11 exception, maybe for much better cause than has been given by the
12 Prosecution, with my ugly face. But that concern that the witness may
13 have cannot somehow allow a screen to be put between me and the witness.
14 It must be an objectively justifiable risk of such a weight, such a
15 nature that requires a core statutory right, the presumption in favour of
16 publicity, to be restricted. And it really is unfortunate that the
17 Prosecutor would even think it appropriate to ask for a blanket policy
18 rather than individualised tailoring of the measures necessary. And,
19 your Honour, that's all I really have time for in the two minutes
20 allotted. With your leave, perhaps Mr Ruto can also address the Bench.

21 PRESIDING JUDGE EBOE-OSUJI: And you say two minutes for Mr Ruto?

22 MR KHAN: Your Honour --

23 PRESIDING JUDGE EBOE-OSUJI: It has to be two minutes, Mr Ruto.

24 MR RUTO: Thank you, your Honour.

25 Mr President, your Honours, I am minded to say something with

1 regard to the issues that have been raised concerning the status of
2 Kenya. Your Excellency, it is very clear in my mind, I am here, I came
3 here voluntarily when summons were issued, it's because I believe in the
4 rule of law and I believe in fairness. Your Honour, the fact that I am
5 here and the fact that a democratically elected deputy president of the
6 Republic of Kenya is here is a confirmation that Kenya believes in the
7 rule of law and belongs to the community of nations that are civilised.
8 It doesn't, in my very humble submission, Mr President, suggest the
9 contrary. Thank you.

10 PRESIDING JUDGE EBOE-OSUJI: Thank you, Mr Ruto.

11 Mr Steynberg, two minutes for you as well.

12 MR STEYNBERG: Yes. Thank you, your Honours.

13 In the first instance I think I need to reformulate my submission
14 earlier. Perhaps -- perhaps it would be better to put like this: It is
15 not necessary to talk about presumptions. My submission is that the
16 evidence before the Chamber -- the cumulative effect of the evidence
17 before the Chamber already is sufficient to constitute *prima facie*
18 evidence in favour of the granting of protective measures, in-court
19 protective measures, for witnesses.

20 Now, there's been much talk of the right to publicity and open
21 trials. But we're not talking about conducting secret trials here. The
22 evidence will be broadcast. We're talking about a limited protective
23 measures, including the protection of the identity -- well, the
24 protection of our identity and steps taken that are necessary to do that.

25 Now, my learned friend has quoted from Blackstone, who was of

1 course a notable jurist, but he wrote in very different times, he wrote
2 in times long before the concept of the protection and the participation
3 of victims and witnesses had come to the fore, as they do now in our
4 modern concept of international justice. My learned friend also
5 mentioned in a different context the need for proportionality --

6 PRESIDING JUDGE EBOE-OSUJI: And there was -- there was no
7 internet at the time of Blackstone.

8 MR STEYNBERG: There was no internet, there were debtor's
9 prisons, rape victims had to face their accusers in court, et cetera,
10 very, very different times. We have, I would like to think, have
11 progressed further beyond that. My learned friend perhaps disagrees.
12 But what we are asking for is limited proportional protective measures
13 for witnesses who will still testify in open court. What they
14 say will be heard except in individual cases
15 where there's a necessity not to, and
16 that is what we are talking about here.

17 The -- the legal effect of the resolution is irrelevant, in my
18 submission. It is the chilling effect, as your Honour pointed out, that
19 is the issue before us at the moment. And my learned friend seeks to
20 portray Kenya as not being a pariah state, and yet in doing so he
21 compares them to Libya and Sudan. I don't know that that advances his
22 argument in this regard much further. But that is the issue here.

23 MR KHAN: Your Honour, I do object to that. I clearly mentioned
24 the United States of America, so counsel should not be misrepresented
25 even though it may be convenient to the opposing party and I object to

1 that.

2 MR STEYNBERG: Yes, misrepresented the United States, who was
3 never a State Party and has not withdrawn as a State Party on that point. So my
4 submission remains that the issues which are the issue of the present debate are
5 important issues, they are relevant to protective measures, and in and of themselves
6 provide sufficient grounds to consider protective measures for all the Kenyan
7 witnesses. Those are my submissions.

8 PRESIDING JUDGE EBOE-OSUJI: We will leave it at that for now. The
9 Chamber will make its ruling on this matter in due course.

10 We will adjourn now and return -- one second. One second.

11 We will adjourn now and reconvene at 10.00, 10.00 tomorrow.

12 THE COURT USHER: All rise.

13 (The hearing ends at 3.50 p.m.)