

Trial Hearing
Witness: KEN-OTP-P-0536

(Open Session)

ICC-01/09-01/11

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 and Joshua Arap
5 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, 2 October 2013
10 (The hearing starts in open session at 9.12 a.m.)
11 THE COURT USHER: All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
15 Court officer, please call the case.
16 THE COURT OFFICER: Good morning. Situation in the Republic of Kenya, in the
17 case of The Prosecutor versus William Samoei Ruto and Joshua Arap Sang, case
18 number ICC-01/09-01/11, and for the record we are in open session.
19 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
20 Appearances?
21 MR STEYNBERG: Good morning, Mr President, your Honours. The appearances
22 for the Prosecution remain the same.
23 PRESIDING JUDGE EBOE-OSUJI: Thank you.
24 Defence?
25 MR KHAN: Mr President, your Honours, good morning. The Defence for Mr Ruto

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1 remains as it was last week.

2 MR KIGEN-KATWA: Mr President and your Honours, Mr Sang's team remains the
3 same as last week.

4 MR NDERITU: Good morning, Mr President, your Honours. I appear for the
5 victims; participating victims. My learned friend, Mr Orchlon Narantsetseg from
6 OPCV, is assisting me, together with my case manager, Carolin Herzig. Thank you.

7 PRESIDING JUDGE EBOE-OSUJI: Thank you.

8 And also let the record reflect that Mr Ruto and Mr Sang are in the courtroom.

9 First, housekeeping matters. As we all know, we've lost some time in the trial due to
10 events beyond our own control. We are making efforts to make up for lost time, and
11 part of those efforts are the cancellation of the break initially scheduled for 7 to 11
12 October. We have now cancelled that. We will sit through, as we already
13 announced.

14 In addition, we will also be sitting extended hours today and tomorrow. We
15 are -- so we are already starting earlier than normal today. We will do the same
16 tomorrow. We will also possibly sit extended hours on Friday.

17 I had also announced in the last status conference, I believe it was, that we would not
18 be sitting on Wednesday, 9 October. Again, in effort -- as part of the efforts to make
19 up lost time, we will keep that under review. If the court is available, we may also
20 revisit that question and sit on Wednesday, the 9th. The reason I say "If the court is
21 available ..." is because the reason for the initial indication of not sitting on that day
22 was because of the use of this courtroom by another Chamber. We will liaise with
23 that Chamber. If it is possible for us to sit on that day, we will sit.

24 Mr Kigen-Katwa, you left us with a question at the last meeting on whether we -- the
25 trial schedule will be varied beyond 1 November, I take it?

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1 MR KIGEN-KATWA: Yes, Mr President.

2 PRESIDING JUDGE EBOE-OSUJI: The intention at the moment is not to vary the
3 schedule - the calendar - in that manner. The idea is to remain as initially indicated
4 in the judicial calendar of sitting, of course pending any developments that may occur
5 in future. At the moment, the idea is to keep that schedule as indicated originally.
6 Thank you.

7 MR KIGEN-KATWA: Thank you, Mr President. I appreciate. With your
8 permission, Mr President, could I say something in respect to the extended time for
9 sitting today and possibly tomorrow?

10 Mr President and your Honours, we - my client and my team - appreciates the Court's
11 desire and wish to extend time to catch up with the time that was lost owing to the
12 adjournment the past few days, and in the same spirit, Mr President and your
13 Honours, we are happy on our side to have the time extended to include Saturdays.
14 Mr President, may I observe that our -- the obligation to -- we were obliged at the
15 confirmation proceedings to conduct the hearings on Saturday and we have come to
16 get used to that and we do not mind having to proceed on Saturdays.
17 Thank you, Mr President and your Honours.

18 PRESIDING JUDGE EBOE-OSUJI: Your inclination is noted.

19 MR KIGEN-KATWA: Most obliged, Mr President and your Honours.

20 MR KHAN: And, Mr President, can we echo those sentiments on behalf of Mr Ruto.
21 We spoke with Mr Ruto this morning and we are anxious to move this case forward.
22 Of course there was an unavoidable and very necessary adjournment last week, but
23 your Honours if the Court wish as we go forward to further extend sitting hours - I
24 note that during the confirmation I think on some days the Court sat until 7
25 p.m - we're happy from the Defence point of view, if it accommodates the Court's

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1 view of the interests of the proper administration of justice and the interpreters and
2 other court staff -- we are happy to extend sittings further from the Defence
3 perspective. Likewise, we would also be content to sit on weekends if the Court
4 thought that was desirable and necessary to finish one witness, let the witness leave
5 and then start with another witness on Monday.

6 So, your Honours, you are assured of maximum flexibility from the Defence as far as
7 possible.

8 PRESIDING JUDGE EBOE-OSUJI: Again, thank you for indicating that. That will
9 be kept in mind when we come to the point of making such a decision. Thank you.

10 MR STEYNBERG: Thank you, Mr President and your Honours.

11 On that point, the Prosecution stands available to work as hard as you require us to.

12 All I ask is that the interests of the witness should also be taken in account in deciding
13 how long we are going to sit. A confirmation hearing is one thing, when we are
14 dealing with counsel who are being paid to appear and being paid to do their work,
15 but the impact of sitting six -- over six hours during a day on the witness should also I
16 submit be taken into account.

17 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. We also keep in mind
18 the International Labour Organisation standards on these things, but we will take that
19 into account when we come to it. Thank you.

20 MR STEYNBERG: That having been said, the Prosecution is ready to continue with
21 the witness currently under examination.

22 PRESIDING JUDGE EBOE-OSUJI: On that note, we will now call in the witness and
23 we will bring down the shades and do that. Thank you.

24 (Closed session at 9.21 a.m.)

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22 (Open session at 11.51 a.m.)

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

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

25 This is the Chamber's ruling on the application of the Victims' counsel, Mr Nderitu, to

1 ask questions of this witness.

2 The Chamber's first decision on the conduct of proceedings provides, among other
3 things, as follows: "Where an application has been made and leave granted, the
4 Legal Representative may ask questions of a particular witness after the Prosecution
5 has finished its examination-in-chief or cross-examination, as the case may be."

6 In this case, Mr Nderitu, the Victims' counsel, had indeed made an application to ask
7 questions of this witness in light of her status. In his application, Mr Nderitu had
8 indicated areas to cover in his examination. The Legal Representative, Mr Nderitu,
9 was authorised to meet with the witness and gather evidence in preparation of his
10 examination-in-chief in Court, if need be. Having heard the submissions of the
11 parties, the Chamber considers that Mr Nderitu's proposed questions have not been
12 covered by the Prosecution in their examination and therefore will not be a repetition,
13 generally speaking, of the evidence received thus far by the Chamber.

14 Moreover, the Chamber considers that the suggested areas of examination relate to
15 the alleged harms to the victim -- or the witness has suffered as a victim.

16 Consequently, the evidence she would give in this regard could be relevant in
17 accordance with Regulation 56 of the Court's Regulation in relation to reparation.

18 Consequently, pursuant to Article 68(3) of the Statute and Rule 91 of the Rules, the
19 Chamber authorises Mr Nderitu to examine the witness.

20 That is the end of the ruling.

21 We will now go back into private session for Mr Nderitu to begin his examination of
22 the witness.

23 MR NDERITU: Much obliged.

24 (Private session at 11.55 a.m.)

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- 5 (Redacted)
- 6 (Redacted)
- 7 (Closed session at 1.08 p.m.)
- 8 (Redacted)
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- 25 (Open session at 1.10 p.m.)

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

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

3 Mr Steynberg.

4 MR STEYNBERG: Thank you, your Honours. I'm grateful for this opportunity.

5 Your Honours may recall that - I think it was last Friday, on the 20th - the issue of the
6 24-hour rule arose in the context of the Court's previous order regarding the
7 disclosure of documents for the use in cross-examination. We were also dealing
8 with the issue of 24 hours in respect of the redactions required or necessary to the -- to
9 the transcripts for this witness.

10 Now, the Chamber didn't rule on that, but unfortunately the situation which the
11 Prosecution had anticipated might arise and for reasons of which it required
12 clarification of this issue has most unfortunately now come to pass, and perhaps
13 before I get to that I could just remind your Honours and those present of what the
14 ruling was and how we arrived at that ruling.

15 It is dealt with in paragraph 24 of the Chamber's filing or Decision number 847,
16 corrigendum, and this arose from a Prosecution submission requesting that, as in the
17 cases of Lubanga and Katanga, any documents that the Defence intended to use or
18 show the witness during the course of cross-examination should be supplied to the
19 Prosecution and the parties and the Chamber three days prior to the commencement
20 of cross-examination. The experience in those two prior cases had indicated that this
21 was necessary in order to conduct investigations into the provenance and authenticity
22 of those documents so that, when they were tendered in court and when they were
23 put to the witnesses, the Prosecution was enabled to make an informed objection
24 when necessary.

25 In response, the Defence objected to the three-day request, and in paragraph 32 of

1 their filing 795, they state as follows:

2 "Proceedings before this Court are adversarial. On this basis, no party should be
3 required to signpost its cross-examination in advance. During the OTP case the
4 Defence submits that the use -- that use may be made by the Defence teams of any
5 document that is already in evidence. This includes the transcript of the witnesses
6 who have already testified, subject to applicable protective measures.

7 The Defence further submits that for all the material the Defence team propose to use
8 in cross-examination, whether or not it is in evidence, such material be notified, plus
9 copies provided to the OTP, CLR, Judges and witnesses immediately prior to the
10 commencement of cross-examination." So those were the two opposing submissions
11 that were put before the Chamber.

12 The Chamber's decision was as follows, and I quote again from paragraph 24 of 847,
13 decision 847:

14 "As regards documents to be used during cross-examination that are not already in
15 the evidence, the party intending to make use of such documents shall provide a list
16 of the documents, and where the documents are already not part of the case record
17 copies thereof to the Chamber, the other parties and participants, no later than 24
18 hours before the commencement of cross-examination."

19 When I raised this issue last Friday - and at that stage all I was asking for was clarity
20 on whether or not the 24 hours would include or exclude weekends and public
21 holidays - my learned friend again raised the issue of the fact that it did not want
22 to -- wish to provide documents while the examination-in-chief was still ongoing, and
23 I'm quoting from line 5 of transcript -- edited transcript 34 at page 32, "There's a real
24 risk and every experienced practitioner knows it - and that may have disclosed itself
25 with the vigour with which my learned friend sought Defence cross-examination

1 material yesterday - that the Prosecution will not use it in the right way, but will use it
2 to inform examination-in-chief which is going to hamper the Defence ability to test
3 the case properly and is in our respectful submission not the purpose that the
4 Court ..." -- "... not the purpose that the Court rendered its decision." That's how it
5 reads.

6 Now, at 11.17 this morning, the Prosecution received from the Defence the list of
7 material that it intends to use. The list contains no fewer than 78 separate
8 documents, of which 68 are new documents. The new documents alone total some
9 1,600 pages. There are also included five videos, two of which are approximately
10 half-an-hour long and the metadata doesn't reflect what language they are in which it
11 should do, but regardless of that as we had feared this is a substantial volume of
12 documents which will take a substantial time to peruse, to digest and to investigate.
13 Now, I point out, with respect, your Honours, that your Honours' ruling was that the
14 copies should be disclosed to the other parties no later than 24 hours before the
15 commencement of cross-examination.

16 Now, there's been no -- there's no application before your Honours for the
17 adjournment of the cross-examination from my learned friends, so I presume that
18 they intend to commence immediately therewith.

19 In my submission, your Honours, this is completely unacceptable. What in fact this
20 represents is a deliberate decision by my learned friends to ignore the express terms
21 of this ruling. They made their argument at the appropriate time and they lost.

22 The argument was that they should hand these matters over at the beginning of their
23 cross-examination and the Chamber ruled against it. They re-raised this argument
24 on the last occasion inappropriately, in my submission, because this is a matter which
25 has already been ruled upon.

1 Now, it will be impossible even in the time remaining today to go through all of these
2 documents, and as loathe as I am to waste the Court's time, especially after the
3 extraordinary efforts which this Court has made to make up time, it would appear
4 that unfortunately an adjournment would be almost unavoidable in these
5 circumstances.

6 But really I submit that the behaviour of my learned friends is worthy of censure from
7 the Court. There's a clear ruling and they have clearly chosen to ignore it. And I
8 note, for instance - I made inquiries with CMS - that these documents were released
9 substantially earlier to CMS than we received them, I don't know why we were not
10 given them at the same time and I note that we've been out of court now for a
11 week-and-a-half; adequate time for my learned friend to make this disclosure. So I
12 can only conclude that it was a deliberate choice not to do so until we had finished
13 our evidence-in-chief.

14 From my brief inspection of the chain of custody, we are not dealing with documents
15 that were received yesterday. Many of these documents have been in the Defence
16 possession since at least May this year, if not earlier. I think there were four or five
17 documents right at the end which appear to have been received on the 27th, still well
18 before the 24-hour mark.

19 Now, my learned friend has complained on numerous occasions about disclosure,
20 and it is conceded the Prosecution has not always met its disclosure dead-lines, but
21 we have never deliberately withheld documents in order to place our opponents at a
22 disadvantage, which is what I submit appears to have happened here.

23 So, your Honours, my request is for the following: I request that your Honours seek
24 clarity on the reasons why my learned friend did not disclose these documents at the
25 appropriate time, whether this was a deliberate choice or whether this was as a result

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1 of some extraneous circumstance, and take the appropriate action. I also request that
2 the Prosecution be given adequate time to inspect these documents before any of
3 these documents are put to this witness.

4 Thank you, your Honours.

5 PRESIDING JUDGE EBOE-OSUJI: Just so we know the parameters of your request,
6 you've indicated remedies you seek. Would they also exclude -- your remedies,
7 would they exclude disallowing use of the material that may not have been properly
8 disclosed within the time indicated? This is not indicating a ruling, but just asking
9 you a question.

10 MR STEYNBERG: Your Honours, that is certainly a remedy within your Honours'
11 remit. However, one places a high weight on the fairness of proceedings and
12 normally, where a prejudice can be remedied through an appropriate opportunity to
13 deal with it, one would not take an irreparable remedy as the first step.

14 MR KHAN: I'm grateful, your Honours.

15 In my submission, your Honour, there's -- I understand the concerns my friend has
16 raised. In fact, both parties lost. The Prosecution wanted evidence to come three
17 days in advance. The Judges rejected that. They rejected the Defence contention.
18 But the real question in our submission is what prejudice, if any, has been suffered?
19 The starting point is cross-examination has not started. There is no breach of the
20 order of the Trial Chamber. Cross-examination has at this moment not started. If
21 my learned friend wishes and says that there is real prejudice, then the appropriate
22 relief, of course, fully consistent with the terms of the Trial Chamber's order, is to
23 grant an adjournment to 11.17 tomorrow morning. But, your Honour, we say that is
24 not necessary. What is sauce for the goose, as they say, is sauce for the gander. We
25 have complained vociferously that a hallmark of this Prosecution's case is late

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1 disclosure.

2 Now, your Honour, we're not attempting to file suit and commit similar breaches of
3 statutory responsibilities or the Trial Chamber's orders, but the fact of the
4 matter is this: The first issue is we gave the material or a first tranche of
5 material to the legal officer, in compliance with the Trial Chamber's order,
6 more than three days before cross-examination. It is not possible - we do not
7 have a crystal ball - to determine what evidence is going to be put to a witness
8 to confront the witness until the witness has testified. The same legal officer
9 that has told the Prosecution the time in which we informed him of material
10 and we uploaded it will also be able to bear witness and can speak to the
11 Prosecution with me not being present, as has happened before, that that list
12 has been changed in the course of testimony. It is not as it was, and the
13 reason it's changed is because the evidence of the witness has also changed in
14 the box from that which she told the Prosecution on previous occasions.
15 Your Honour, the other matter is this - and I'm dealing with it out of order - this is a
16 decision of mine. It's not a decision of the team; I'm responsible, I'm lead counsel,
17 and it's a decision that was impelled upon me by the reality that I face. Your Honour,
18 there is the Trial Chamber decision which is quite specific, that material should be
19 disclosed as a starting point 24 hours before cross-examination starts. It has not
20 started.

21 The second aspect, your Honours, is as the --

22 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, does -- I've just received a note that
23 the tape has only eight minutes left.

24 MR KHAN: I'm grateful.

25 Your Honour, as the Katanga and Lubanga Trial Chambers noted -- and I have, in fact,

1 an extract from 14 September, the Katanga decision, that the Chamber notes that the
2 Court Statute framers does not provide for reciprocal disclosure regime, and at
3 paragraph 37 of their decision of 14 December, it talks about the tension between the
4 irreducible elements of a fair trial, which include the right to silence on the one hand,
5 and the obligations of disclosure, which are not easy always to solve.

6 But, your Honour, in deciding this matter, it's important to, in our respectful
7 submissions, to bear in mind that the Prosecution have been granted something here
8 that they've not been granted in any previous case, which is proofing.

9 Your Honour, I have to be very -- even more attentive to the material that I disclose to
10 the party opposite if I'm not going to be putting it to the witness, because once they
11 have that material that may be relevant to many different witnesses, under the order
12 of the Court, they may be entitled to use that Defence disclosure --

13 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, you -- are you explaining why you did
14 not meet the 24-hour requirement? Because it seems to me that what you're saying is:
15 Yes, you know the requirement but you refused to follow it because of all the reasons
16 you're now outlining. Is that what you're saying?

17 MR KHAN: Your Honour, that's not what I said at all.

18 PRESIDING JUDGE EBOE-OSUJI: I'm trying to understand.

19 MR KHAN: Your Honour, the order of the Court was specific: We must give
20 disclosure 24 hours before cross-examination. That order can be met. If there is
21 prejudice, the Prosecution can start cross-examination at 11.17. We would have been
22 completely consistent with the order of the Court and the Prosecution would have
23 time. But, your Honour, the point is this -- and one needs to be fair. My learned
24 friend last week made it very clear. In fact, at 2 p.m. we have a hearing in chambers
25 in another court dealing with disclosure relating to 540, Prosecution Witness 540.

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1 Now my learned friend said just a few days ago, before we broke, "Well, your
2 Honours, the Defence can start cross-examination even without getting access to that
3 material." Your Honour, how does it sit well in the mouths of the Prosecution to say
4 that when today, if your Honours want us to start cross-examination, we can, we are
5 prepared to do so, but we do not have material that is relevant to the preparation of
6 the Defence or potentially exculpatory, and pursuant to an order of a judge elsewhere,
7 I have to sit somewhere like a schoolboy and copy out in longhand Prosecution
8 disclosure which, even at this moment, I can't do because it's in Kalenjin and in
9 Swahili. But, your Honours, we're asked to continue with cross-examination in
10 those pernicious circumstances. Your Honour, we'll do so. If the Court require us
11 to continue, we'll do so.

12 But in dealing with the mischief, your Honours, we do not need to decide
13 admissibility. Both in the Prosecution of Charles Taylor, the Prosecution managed to
14 successfully prosecute and convict him, and in the Prlic case at the ICTY, in
15 circumstances where the Defence handed over files immediately after
16 examination-in-chief finished. But, your Honours, evidence that is used to confront
17 a witness does not automatically become admissible.

18 PRESIDING JUDGE EBOE-OSUJI: That's the wrong argument, Mr Khan. The
19 argument is an explanation as to why the 24-hour dead-line wasn't met, not to make
20 arguments that are saying, well, the 24-hour requirement was wrong.

21 MR KHAN: Your Honour --

22 PRESIDING JUDGE EBOE-OSUJI: That is what you are effectively arguing.

23 MR KHAN: Your Honour, I was dealing with the prejudice point of the Prosecution
24 because we know from human rights law that there are breaches and substantial
25 breaches. In assessing the prejudice, evidence can also be admitted de bene esse,

1 conditionally. Its admissibility can be decided later. The Prosecution will have
2 maybe two days to consider the material before re-examination. But, your Honours,
3 my learned friend Mr Faal spoke to my learned friend, counsel for the victims, before
4 this witness started testifying, and the estimation, I'm told by Mr Faal, was two to
5 three hours. That was the estimate my learned friend for the victims gave
6 previously. So, your Honours, there's never a precise science on these matters. My
7 learned friend, as we saw quite clearly at the outset, grossly miscalculated, and it
8 happens. There's no blame.

9 PRESIDING JUDGE EBOE-OSUJI: Perhaps that was -- would have been your
10 answer. Why don't we stop it now. It looks like -- one second.
11 Can you try and wrap it up.

12 MR KHAN: So, your Honour, in these circumstances the Court is left, we say, with
13 an option. If the Prosecution really say that there is prejudice, the case -- if one
14 wants to be very strict about matters, it can be put back to 11.18. We say the order of
15 the court in criminal proceedings, it has in-built imprecision regarding when
16 Prosecution are going to actually finish. The time estimates given by my learned
17 friend have already proven to be overly hopeful and they were shown that even
18 before the forced adjournment because of the terrorist attack in Nairobi.
19 My learned friend for the victims was much shorter than three hours. And, your
20 Honours, in these circumstances I think the Defence approach was absolutely
21 responsible. It was -- and given the molding or the changing account of the witness,
22 making selections as to what evidence would be finally used to confront her, your
23 Honours, it wasn't able to do that -- to do anything other than what we've done in this
24 precise case.

25 Your Honours, if of course -- there are less unusual cases where time estimates can be

1 more readily predicted. Of course, one would hope this would not happen. Your
2 Honours, of course, I apologise if there's any inconvenience caused, but I think in the
3 scheme of things it really is not a massive -- you know, it's inconvenient, but, your
4 Honour, counsel in many cases have dealt with matters.
5 Your Honours, we can proceed on cross-examination. As my friend said, we could
6 proceed in relation to 540. If there's prejudice, your Honours on a case-by-case basis
7 can decide what the prejudice is. And, your Honours, evidence can also be used to
8 confront without being admitted, and it can be admitted de bene esse, or alternatively,
9 at the end of re-examination - which would be probably in two-days' time at the
10 earliest -- your Honours may hear submissions on admissibility then. So there'd be
11 no possible prejudice to the Prosecution, we say, whereas in the circumstance of this
12 case, I couldn't have done more, consistent with my duties and obligations - I hear
13 laughter - consistent with my duties and obligations to provide effective
14 representation, and in relation to that I cannot compromise, unfortunately. Your
15 Honours, I do apologise once again if this caused an inconvenience.

16 PRESIDING JUDGE EBOE-OSUJI: Let us -- quickly, Mr Steynberg, you have 30
17 seconds and then --

18 MR STEYNBERG: In 30 seconds, your Honours. The imprecision is built into the
19 order, which is why the order says, "at least 24 hours." If there is any doubt, my
20 learned friend should err on the side of caution. That's my first submission.
21 Secondly, his assertion that the breach has not yet been made is presumptuous, in my
22 submission, because it presumes that the Court will grant an adjournment before
23 cross-examination starts. Of course, he's not even asked. So my submission is
24 those responses do not hold any water. Thank you, your Honours.

25 PRESIDING JUDGE EBOE-OSUJI: Let's -- we don't have any more time. We will

1 leave it at that. We are adjourning for the lunch break and we will come back at
2 three o'clock today.

3 THE COURT USHER: All rise.

4 (Recess taken at 1.34 p.m.)

5 (Upon resuming in open session at 3.10 p.m.)

6 THE COURT USHER: All rise.

7 Please be seated.

8 PRESIDING JUDGE EBOE-OSUJI: Mr Khan?

9 MR KHAN: Mr President, with your leave, just two very brief matters I had
10 forgotten earlier.

11 Your Honour, I put in a filing dated 1 October that was put before the Single Judge in
12 the other matter, and in that at paragraph 5 - it was confidential, but inter partes - I
13 said that, "The filing is submitted on an urgent basis, given that the Defence's
14 cross-examination is likely to commence within two days on 3 October 2013." So
15 that was my assumption at the time.

16 And, your Honours, it's now 3 p.m. At the time of these assessments, we didn't
17 know until today I think - unless it was notified previously, but I missed it - that the
18 Court would sit until 5 p.m. today. So your Honour -- yesterday.

19 But, your Honour, it's now 3 p.m., so actually in the scheme of things the prediction
20 that I made was actually not wildly out at all. My learned friend for the victims has
21 not finished his questioning of the witness, we were due to finish at 4 o'clock and in
22 these circumstances, and given my filing before the Single Judge, it's my submission
23 that - always it's a guesstimate, it's always a degree of prediction - the assessment was
24 not far out at all.

25 So, your Honours, I just took the liberty of raising these matters to bring it to the

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1 Bench's attention. I'm grateful, and once again of course we apologise for the
2 inconvenience caused.
3 Your Honour, on a related matter we're due a decision from the Single Judge in
4 another matter by 4.30 or 5 p.m., whenever the Court finishes sitting, but in any event
5 and independent of any other decision of the Chamber I will not be asking for an
6 adjournment on those grounds. I'll wait to see what the material is, and hopefully
7 we'll be able to prepare before the witness is released and then we can ask the witness
8 questions relating to that material once we've had sight of it, which we have not had
9 sight of thus far.

10 So, your Honours, that's just to let the Chamber know information that may be
11 relevant to the issues before you.

12 I'm grateful.

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

14 (Trial Chamber confers)

15 PRESIDING JUDGE EBOE-OSUJI: The Chamber will render its ruling on the matter.
16 In the decision, the first decision on the conduct of proceedings general directions, the
17 Chamber had indicated as follows, quote, "As regards documents to be used during
18 cross-examination that are not already in evidence, the party intending to make use of
19 such documents shall provide a list of the documents, and where the documents are
20 not already part of the case record copies thereof to the Chamber, the other parties
21 and participants, no later than 24 hours before the commencement of
22 cross-examination," unquote.

23 This morning at 11.17 hours, the Ruto Defence communicated its list of documents
24 intended for use in its cross-examination. The Prosecution objected that the
25 communication might happen out of time if the Ruto Defence commenced its

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1 cross-examination before 11.17 hours tomorrow. As a remedy, the Prosecution
2 recommended in such an eventuality an adjournment so that the cross-examination of
3 the Ruto Defence may commence at 11 -- after 11.17 hours tomorrow morning.
4 The Chamber's ruling is that there will not be an adjournment of the case so that the
5 Defence commences its cross-examination at 11.17 hours tomorrow. Such an
6 adjournment would be warranted if good cause is shown and remedy -- and there is
7 prejudice to be remedied. In the submissions of the parties, we have not heard good
8 cause why the documents were not disclosed before the required 24-hours dead-line.
9 The ruling of the Chamber in that circumstance is that no use of new documents may
10 be made in the cross-examination of this witness by the Ruto Defence if - if - the Ruto
11 Defence commences its cross-examination before 11.17 hours tomorrow. The only
12 documents that may be used in such an eventuality would be documents that were
13 already in the case record. That would be document numbers 1 through 9 on the list
14 communicated this morning.
15 Now, this leaves the Defence - both Defence - the option to arrange among themselves
16 and reorganise themselves with a view to possibly the Sang Defence starting their
17 own cross-examination earlier, provided that that does not prejudice -- result in
18 prejudice to Mr Sang himself. It's up to the Defence to agree on that matter.
19 Now, in the event of inability to reorganise in that way, it is to be noted that in
20 disallowing them the use of the older documents the Chamber is not precluding those
21 documents from use in this case. It is just that they will have to be explored with
22 other witnesses, or to be introduced through other appropriate means.
23 That is the ruling of the Chamber.
24 MR KHAN: Your Honour, if clarification could be given? Do I understand it
25 correctly that the prohibition is to use any new documents - any documents on our

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1 list - that are not part of Prosecution disclosure until 11.17 tomorrow, but after 11.17
2 tomorrow, when the Prosecution have been given 24 hours, of course we can use
3 them? Am I correct in that?

4 PRESIDING JUDGE EBOE-OSUJI: The clarification is if the cross-examination
5 commences before - commences before - 11.17 hours, not if the Prosecution -- sorry,
6 let me rephrase. The clarification is if the cross-examination commences after 11.17
7 hours tomorrow, then you may use those documents. If you commence after 11.17
8 hours, you may use the documents. You may not use the documents if you
9 commence cross-examination before that time and then delayed introducing the
10 documents later in the cross-examination.

11 MR KHAN: Well, your Honour, in those circumstances let's see what my learned
12 friend -- how long he takes, but even as the Prosecution noted it would be a
13 Draconian measure, we say, that would prevent the Defence the right because of my
14 decision and my miscalculation in part due to the, if I can say so --

15 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, you are arguing with a ruling. That is
16 not appropriate and you know it.

17 MR KHAN: No, your Honour, I'm not arguing the ruling. I'm not arguing the
18 ruling. I'm confused, so I have every right in my respectful submission to seek
19 guidance from the Bench.

20 Your Honour, there are two options available for me. The first of course is to wait
21 and see how long the Legal Representative for the Victims takes, so it may be moot if
22 the case is that cross-examination does not start before 11.17.

23 The second possibility is seeking now immediately leave to appeal this decision,
24 because it's an issue that cannot be remedied later on and there are some documents
25 that simply cannot be raised with anybody else.

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1 The third is to seek an adjournment not only upon the current basis, but your
2 Honours we've been bending over backwards dealing with late Prosecution
3 disclosure, including my willingness today to start cross-examination - in
4 circumstances where very few counsel would start cross-examination - when I have
5 not got evidence which your Honours say is material relevant to the preparation of
6 the Defence.

7 Your Honours, when the Prosecution have not given us that which your Honours say
8 we're entitled to and there is inextricable delay because of a consent from another
9 Judge, your Honours, we say that the balance of justice heavily militates in favour of
10 adjourning the matter in those circumstances to allow the Defence to get that material
11 in order to effectively confront this witness.

12 Your Honours, of course it would have the added advantage that it would make sure
13 that the Defence cross-examination did not start before 11.17, and so the material that
14 we have investigated and we have brought before the Court, which is critical to a
15 witness that we have said from the outset is not honest in important particulars, can
16 be put to the witness and your Honours can determine.

17 Your Honours, if we are prevented from doing this, I want to say very clearly this
18 trial will not be fair. And so, your Honours, my application --

19 PRESIDING JUDGE EBOE-OSUJI: Mr Khan - Mr Khan - can you please sit.

20 MR KHAN: Well, your Honours, perhaps let's wait, with your leave, and see where
21 we are at the end of the questioning by the Legal Representative of Victims - and I can
22 also consult with my learned friend, Mr Katwa Kigen - but, your Honours, I thought
23 it only right to raise in the strongest possible way the concerns --

24 PRESIDING JUDGE EBOE-OSUJI: Mr Khan. Mr Khan, the submissions are
25 beginning to get a little -- could you just sit. If you need to consult with your

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1 colleague, you do that, but we will not take any more submissions on that matter.

2 MR KHAN: Indeed, your Honour, that's what I was saying. Perhaps we can raise
3 it later. At the moment I will consult with my friend and we can raise it later, if
4 necessary.

5 PRESIDING JUDGE EBOE-OSUJI: Consult with your friend, yes.

6 MR KHAN: I'm grateful.

7 PRESIDING JUDGE EBOE-OSUJI: Mr Nderitu -- we can go now into closed session
8 so we can continue with the examination.

9 (Closed session at 3.24 p.m.)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Private session at 3.26 p.m.)

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22 (Redacted)

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17 (Redacted)

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22 (Closed session at 4.22 p.m.)

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5 (Recess taken at 4.22 p.m.)

6 (Upon resuming in open session at 4.34 p.m.)

7 THE COURT USHER: All rise. Please be seated.

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

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

10 The Chamber will make an oral ruling on a matter.

11 The Chamber notes a recent confidential notification dated 15 August 2013 from the
12 Ruto Defence and the Prosecution's confidential response to it, dated 23 August 2013,
13 respectively numbered document numbers 856 and 871 in the case record. The only
14 relief sought that this ruling concerns is a request by the Prosecution to strike a
15 portion of paragraph 3 of the Ruto Defence filing which the Prosecution considers to
16 be "false and unsubstantiated."

17 The Prosecution notes that it has discussed the content of this filing with the Ruto
18 Defence, who did not withdraw the statement in the paragraph 3 complaint against.
19 The Chamber considers it unnecessary to strike any portion of the Ruto Defence filing.
20 The filing itself is confidential and the Chamber has been fully apprised of the parties'
21 views regarding the impugned statement in paragraph 3.

22 The Chamber sees no reason why this submission should be treated differently from
23 any other contested submission in a filing, and accordingly rejects the Prosecution's
24 request to strike the statement from the Defence filing.

25 That said, the Chamber continues to stress the importance of dignified and decorous

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1 submission by all counsel in the case. That's the end of the ruling on that matter.
2 Moving back now to the witness, we now -- the Prosecution has completed its
3 examination-in-chief, so too has Victims' counsel. Pursuant to the Chamber's earlier
4 ruling, the Defence have reorganised themselves with a view that the Sang Defence
5 will proceed with cross-examination immediately. The cross-examination will be
6 back in private session so, court officer, if you can please bring down the shade and
7 bring the witness so that cross-examination will proceed. Thank you.

8 (Closed session at 4.38 p.m.)

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15 (Private session at 4.40 p.m.)

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- 9 (Redacted)
- 10 (Redacted)
- 11 (Redacted)
- 12 (Redacted)
- 13 (The hearing ends in closed session at 5.04 p.m.)