

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 Friday, 25 October 2013

10 (The witness enters the courtroom)

11 (Upon commencing in open session at 11.37 a.m.)

12 THE COURT USHER: All rise. The International Criminal Court is
13 now in session. Please be seated.

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

15 Court officer, please announce the case.

16 THE COURT OFFICER: (Interpretation) Situation in the Republic of
17 Kenya, The Prosecutor versus William Samoei Ruto and Sang,
18 ICC-01/09-01/11. We are in open session, Mr President.

19 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. Appearances?

20 MR OMOFADE: Mr President, the Prosecution team has been joined
21 by Mr Lucio Garcia, Trial Lawyer; Mr Lorenzo Pugliatti, Associate Trial
22 Lawyer; and the Case Manager today is Grace Goh. The other parts of the
23 team remain the same.

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

25 MR HOOPER: On behalf of Mr Ruto, the team is unchanged.

1 PRESIDING JUDGE EBOE-OSUJI: Sang Defence?

2 MS BUISMAN: Mr President, the Sang team remains the same.

3 PRESIDING JUDGE EBOE-OSUJI: Victims counsel?

4 MR NARANTSETSEG: Mr President, we remain the same.

5 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. Do we have
6 technical problems with the transcript? I'm getting only the French.

7 One moment, please.

8 (Trial Chamber and court officer confer)

9 PRESIDING JUDGE EBOE-OSUJI: Thank you. We are back in business.

10 So we will continue with the witness on the stand. The
11 Prosecution has re-examination to do. But before we do that, some
12 sitting hours announcement. Today, we will go through to 1.00 p.m. but
13 then we will have only one-hour lunch break from 2.00 to 3.00. We will
14 adjourn at that time for the day. And on Monday, as well, we will go
15 until 1.00 p.m. and we adjourn for the day on Monday.

16 On housekeeping matters, we will I'm sure as soon as Mr Omofade
17 completes his re-examination, we will return to the matter of protection
18 measures for Witness 268. Have the parties received the redacted report
19 of the victims and witnesses unit?

20 MR HOOPER: Yes, we have the redacted report.

21 MR OMOFADE: The Prosecution has it as well.

22 PRESIDING JUDGE EBOE-OSUJI: So we will take up that matter after
23 the current -- oh, sorry, Mr Kigen-Katwa?

24 MR KIGEN-KATWA: Mr President, we have also received. But we
25 will be raising an issue about the redactions, and we have given notice
26

1 to the Prosecution.

2 PRESIDING JUDGE EBOE-OSUJI: Yes, I anticipate we will have
3 litigation on the --

4 MR KIGEN-KATWA: Thank you.

5 PRESIDING JUDGE EBOE-OSUJI: -- on the question, generally on
6 protection of the witness, and then if you have any other issue
7 associated with it, we will discuss that at the same time.

8 MR KHAN: Mr President, can I just clarify, page 2 of the
9 transcript, at line 19, as I understood your Honour, we are going to sit
10 until 1.00 p.m., we will then resume at 2.00 p.m. for one hour until
11 3.00, and then at 3.00 we will adjourn for the day; is that correct?

12 PRESIDING JUDGE EBOE-OSUJI: That's correct.

13 MR KHAN: I'm grateful. I just wanted to clarify the transcript.

14 Your honour, the other matter, I've alerted my learned friend, is
15 after this witness I'll be making a short application that may touch upon
16 the schedule for next week or at least for Monday and Tuesday. But, your
17 Honour, I make that later with your leave. But just to give you a
18 heads-up.

19 PRESIDING JUDGE EBOE-OSUJI: Fair enough. We will now go
20 straight to the Prosecutor's re-examination.

21 Mr Omofade, we are in open session.

22 Witness, welcome back. Thank you for rejoining us today.

23 Hopefully this will be the last, very last stretch of your sitting there.

24 You've sat patiently and answered questions. The Prosecution promised
25 for 30 minutes they will ask you questions and that will be the end of it

Witness: KEN-OTP-P-0487 (On former oath) (Open Session)
Questioned by Mr Omofade

Page 4

1 for you. Hopefully that's the end of it. Thank you.

2 THE WITNESS: Thank you.

3 WITNESS: KEN-OTP-P-0487 (On former oath)

4 MR OMOFADE: Mr President, I actually anticipate that it will be
5 less than 30 minutes.

6 PRESIDING JUDGE EBOE-OSUJI: Thank you, please proceed.

7 QUESTIONED BY MR OMOFADE:

8 Q. Good morning, Mr Witness.

9 A. Good morning.

10 Q. I'd like to ask you a few questions about some matters that were
11 explored with you by Mr Hooper when he was cross-examining you. Do you
12 understand?

13 A. Yes.

14 PRESIDING JUDGE EBOE-OSUJI: Mr Omofade, you do know we are in
15 open session?

16 MR OMOFADE: That's correct, your Honour.

17 Q. And the questions will centre around the rallies that you
18 attended back in 2007. Do you remember speaking about that?

19 A. Yes.

20 Q. The first rally, which was not fully attended, as you said, was a
21 PNU rally for Mr Sei Bii. Do you remember speaking about that?

22 A. Yes.

23 Q. You then spoke about an occasion when Mr Kenyatta drove through
24 Eldoret town with his convoy and he happened to address the crowd. Do
25 you remember speaking about that as well?

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Witness: KEN-OTP-P-0487 (On former oath) (Open Session)
Questioned by Mr Omofade

Page 5

1 A. Yes.

2 Q. And then you came to the ODM rally, which is the last of those
3 that you were physically present at, which was in December 2007. Do you
4 remember speaking about that as well?

5 A. Yes.

6 Q. Now, I'd like to ask you whether, now that you've seen the video
7 that was shown to you by the Defence team of Mr Ruto, whether you
8 maintain that the rally was at 64 Stadium or at Huruma grounds? Which
9 one is it?

10 A. I can say it was in Huruma ground.

11 Q. Is there any doubt in your mind that you attended that rally?

12 A. Any doubt? I would like to say that all my minds are on my
13 recollections in mind are -- I had --

14 PRESIDING JUDGE EBOE-OSUJI: Wait, wait, wait. The question the
15 lawyer is asking you was asked you -- or asked you, is whether you are
16 sure that you had attended that rally which you now say happened at
17 Huruma grounds. He's asking whether you are sure in your own mind that
18 you were at that rally.

19 THE WITNESS: I can admit I'm not sure.

20 MR OMOFADE:

21 Q. Well, is there any -- do you have any doubts that you attended a
22 rally in December 2007?

23 A. I attended one but --

24 Q. And do you remember the location of the rally, the ODM rally in
25 2007?

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Witness: KEN-OTP-P-0487 (On former oath) (Open Session)
Questioned by Mr Omofade

Page 6

1 A. I remember -- I remember I attended one, maybe -- at 64 Stadium
2 maybe. Let me correct that because I am confused about this big rally in
3 64 Stadium, and there was another rally which was not a political but it
4 was I think it was DC who was there.

5 Q. And just for the transcripts, could you repeat the last thing you
6 said? You said I think someone --

7 A. District, district commissioner. But that was not a political
8 rally.

9 Q. In any event, the rally that you attended, are you certain that
10 Mr Ruto was there and Mr Odinga was there?

11 A. Yes.

12 Q. And are you certain that Mr Ruto spoke while you were present at
13 that rally?

14 A. Yes, correct, he spoke.

15 Q. And I don't want to ask you about hats or hammers or garments
16 like the Defence has, but let's focus on the words that were said. Is
17 there any doubt in your mind --

18 MR HOOPER: Just a word of caution. This is re-examination.
19 It's not a passport to leading questions, of course, and I'd ask my
20 friend to be very cautious given the evidence this witness has given.

21 PRESIDING JUDGE EBOE-OSUJI: And also, counsel, re-examination
22 should not be understood by any side as to be an occasion to shore up
23 examination-in-chief, after cross-examination. Re-examination should be
24 an exercise used to explore new matters that came up in cross-examination
25 that were not reasonably foreseen or foreseeable during
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Witness: KEN-OTP-P-0487 (On former oath) (Open Session)
Questioned by Mr Omofade

Page 7

1 examinations-in-chief.

2 MR OMOFADE: I bear that in mind, your Honour, and this is all
3 I propose to do.

4 Q. Mr Witness, when you say you heard Mr Ruto make the statements he
5 made at that rally, do you -- can you tell us how the crowd reacted to
6 these statements?

7 MR HOOPER: I'm sorry, but my friend -- I appreciate his
8 difficulty, but he hasn't taken on board the necessary limitations here.
9 We've heard the defendant's evidence -- the witness's evidence both in
10 chief and in cross-examination from the Defence in respect to this, and
11 revisiting those issues in this way rather than as your Honours clearly
12 delineated new issues is not a function that should be discharged now.

13 PRESIDING JUDGE EBOE-OSUJI: The objection is sustained.

14 MR OMOFADE:

15 Q. You -- when you were questioned about this rally, you were asked
16 repeatedly about the word "grabbers." Do you remember that?

17 A. Yes.

18 Q. And you -- you actually gave a Swahili translation of the word
19 you say Mr Ruto used. I believe you said "Wanyakuzi." Do you remember
20 saying that?

21 A. Correct.

22 Q. And it's been suggested to you that grabbers refers to those who
23 had been stealing money from the government. Do you remember that?

24 A. Correct.

25 Q. But when Mr Ruto made this statement, and the crowd reacted, what
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Witness: KEN-OTP-P-0487 (On former oath) (Open Session)
Questioned by Mr Omofade

Page 8

1 did the crowd say?

2 A. They reacted saying that Kikuyus should go back to central,
3 that's what I remember, because it was even -- that thing spread so
4 quickly that even after the two or three days everybody used to say that
5 in Eldoret town.

6 MR OMOFADE: Your Honour, just for the transcripts, line 3, is
7 they reacted saying Kikuyu should go back to central.

8 PRESIDING JUDGE EBOE-OSUJI: But I believe that witness had
9 testified to that before now. Wasn't that the case?

10 MR OMOFADE: Your Honours, I'm trying to elicit the reaction, the
11 response to the suggestion that grabbers meant something else.

12 Q. And was Mr Ruto still speaking when the crowd reacted in this
13 way?

14 A. Yes, I remember, when I (realtime transcript read in error "He")
15 left there when he was still speaking.

16 Q. And --

17 MR HOOPER: I don't know if that transcript is correct. It reads
18 at the moment: "I remember when he left there, he was still speaking."
19 The witness may have said that. I didn't quite catch it.

20 MR OMOFADE: I believe the witness said I remember when I left
21 there he was still speaking.

22 Q. And you've said this was a crowd of tens of thousands of ODM
23 supporters. Did you hear Mr Ruto say anything to the crowd about what he
24 really meant when he used the word "grabbers"?

25 A. No. He never --

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Witness: KEN-OTP-P-0487 (On former oath) (Open Session)
Questioned by Mr Omofade

Page 9

1 MR HOOPER: Again, I'm sorry. Your honour, I hope I'm not being
2 over intrusive. I know the question has been is asked and the witness is
3 about to answer, but these are all matters that my friend dealt with in
4 chief. It's just repetition, going over ground, broken ground largely.
5 If there are questions arising out of anything new that's been said, then
6 this is the appropriate time to raise new issues but -- I'm just
7 repeating myself.

8 MR OMOFADE: Your Honour, this is an issue that arose directly
9 out of cross-examination, the word "grabbers" and the interpretation that
10 was placed on it about by counsel. Therefore the response of the speaker
11 is, we say, pertinent.

12 PRESIDING JUDGE EBOE-OSUJI: Objection overruled. Proceed.

13 MR OMOFADE:

14 Q. And therefore I'm asking you, Mr Witness, when the crowd
15 responded in this way, Kikuyu go back to central, did you hear Mr Ruto
16 make any statement to the crowd clarifying what he meant?

17 A. No.

18 Q. And where is the ancestral home of the Kikuyu?

19 A. Central Province.

20 MR OMOFADE: Mr President, that's all I ask the witness.

21 Q. Thank you, Mr Witness.

22 A. Thank you.

23 PRESIDING JUDGE EBOE-OSUJI: Thank you. That will be it for this
24 witness.

25 Witness, thank you very much for being with us and answering the

1 questions in the manner that you have done. We know you travelled a long
2 way to come here. We appreciate your coming to assist us as best you can
3 in our inquiry. You are now discharged as a witness in the case and we
4 wish you a safe travels back.

5 The blinds will come down. The witness will be escorted out of
6 the courtroom.

7 THE WITNESS: May I say a word?

8 PRESIDING JUDGE EBOE-OSUJI: Yes, please.

9 THE WITNESS: Before I go, it is to me that maybe I offended
10 anybody. When I came here, I offended maybe anybody by my appearance --

11 PRESIDING JUDGE EBOE-OSUJI: No, no, no, okay. You did not
12 offend anybody.

13 THE WITNESS: Yes, so, okay.

14 PRESIDING JUDGE EBOE-OSUJI: Sometimes -- sometimes when lawyers
15 ask questions, witnesses may feel that way, but none of the questions
16 that were asked of you were improper and did not suggest at all that you
17 had offended anyone. So you need not worry about that. Thank you.

18 THE WITNESS: Okay.

19 PRESIDING JUDGE EBOE-OSUJI: The record -- I did not say the
20 questions were improper, I said -- fair enough. It's okay. None of the
21 questions were improper. That's correct.

22 (Closed session at 11 .59 a.m.)

23 (Redacted)

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21 (Redacted)

22 (Open session at 12.01 p.m.)

23 THE COURT OFFICER: (Interpretation) Mr President, we are in
24 public session.

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

1 MR STEYNBERG: Your Honour, if I may just, arising out of what my
2 learned friend say, also indicate there is one small matter I would like
3 to raise. It can -- I'm in the Court's hands as to when we do that. My
4 proposition would be, though, that my learned friend did advise me
5 approximately 20 minutes before we resumed that this application was
6 coming. I know what it's about but I don't know the substance. It is a
7 matter which might require some preparation for a response, so might
8 I suggest that if my learned friend is to make that application before
9 the lunch adjournment that the Prosecution might respond after the lunch
10 adjournment so we can at least have a chance to look over what it is he
11 has to say.

12 We are prepared to deal with the issue of the protective measures
13 for the current witness immediately, though. Thank you, your Honours.

14 PRESIDING JUDGE EBOE-OSUJI: Thank you. You are quite far ahead
15 of us. We do not know what Mr Khan wants to talk about, but do you have
16 any difficulty with him raising it now?

17 MR STEYNBERG: Your Honours --

18 PRESIDING JUDGE EBOE-OSUJI: I know you've indicated that even if
19 he does raise it now, you will not be in a position to respond
20 immediately.

21 MR STEYNBERG: Your Honours, I've no problem with that. He might
22 want to take some time to respond to what I have to raise too, although
23 I've also only recently informed him of that. So it might be that we can
24 each raise our issues and then have some time to consider and in the
25 interim then deal with the issue of the in-court protective measures.

1 MR KHAN: Your Honour, I'm most grateful. I needn't -- I don't
2 require time. My friend was kind enough to alert me just before the
3 session about the matter that he intends to raise. And I can deal with
4 that in fact immediately. So I'm in the Court's hands. I would propose
5 to raise my discrete matter now. The Prosecution can then of course
6 decide with the Court's leave whether or not the matter is one that they
7 can respond to immediately, or if they have difficulties or need to
8 consult with the Prosecutor, there would be no objections if they come
9 back at 2.00 p.m. with their response if the Court is so minded, but it's
10 quite a discrete issue, and I did raise the matter to the extent
11 I thought necessary and available to me before the Court sat.

12 (Trial Chamber confers)

13 PRESIDING JUDGE EBOE-OSUJI: Proceed, Mr Khan. How many minutes
14 did you say?

15 MR KHAN: Your Honour, I think probably ten minutes.

16 PRESIDING JUDGE EBOE-OSUJI: Ten.

17 MR KHAN: Ten minutes, I may be less.

18 PRESIDING JUDGE EBOE-OSUJI: All right.

19 MR KHAN: Your Honour will be aware that before we sat this
20 morning, the president of the court rendered the decision of the Appeals
21 Chamber in the matter of the Prosecution's appeal against the
22 Trial Chamber's decision excusing Mr Ruto from continuous presence at
23 trial. Your Honour, I was informed, and we've read that decision, the
24 decision, as Mr President and your Honours will be aware, upheld the
25 issue of law that was contested that the Trial Chamber do indeed have the
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1 discretion and the lawful authority to wave the attendance of an accused
2 in particular circumstances, and the Appeals Chamber went on to enumerate
3 certain conditions or certain considerations that should inform the
4 Trial Chamber in the exercise of its discretion.

5 Your Honour, very briefly, a pertinent aspect of the decision
6 appears at paragraph 50, which is page 20 of the disposition -- of the
7 decision of the Appeals Chamber, and what the Appeals Chamber held is
8 that the Appeals Chamber considers, and I quote, "that the interests of
9 justice and the psychological well-being of witnesses would not be best
10 served if the trial had to be automatically adjourned in each such
11 instance. A measure of flexibility in the management of proceedings in
12 such circumstances accords with the duty of the Trial Chamber to ensure
13 that a trial is fair and expeditious and is conducted with full respect
14 for the rights of the accused and due regard for the protection of
15 victims and witnesses under Article 64(2) of the Statute and helps to
16 ensure, as mentioned by the United Republic of Tanzania, the Republic of
17 Rwanda, the Republic of Burundi, the State of Eritrea, and the Republic
18 of Uganda, justice in each individual case."

19 Your Honour, the Appeals Chamber in paragraph 2 detailed certain
20 considerations. Now, your Honours, I'll come to that in due course with
21 the Court's leave, but I was informed, it came to my attention on
22 Wednesday, that His Excellency the president of the Republic of Kenya is
23 scheduled on Monday and Tuesday of next week to travel to Rwanda for a
24 tripartite conference with the president of Rwanda, the president of
25 Uganda, and the president of Kenya in attendance to discuss security and
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1 also infrastructure improvements that are necessary for the region.

2 Your Honour, we have previously addressed the Chamber on the
3 constitutional imperative in the Republic of Kenya which disallows the
4 absence of both the president and the deputy president away from the
5 republic at the same time. Your Honour, what I'm asking for, and then
6 I'll come could the considerations of the Appeals Chamber, is that the
7 court excuse the attendance of Mr William Ruto on Monday and Tuesday of
8 next week, that's the period when the president will be out of the
9 country. He will come back, the president, God willing, will re-enter
10 Kenya on Tuesday night. That will allow Mr Ruto to take a flight on
11 Wednesday morning. He would get here on Thursday after court has
12 finished sitting, and so what I would ask is that the order of the
13 Court -- sorry, on, yes, Wednesday night, and so the order of the Court
14 that I would be requesting is that he be excused until Thursday morning.
15 He would come on Thursday morning.

16 Now, your Honours, what the Appeals Chamber held, and there is a
17 six-limb test or six-limb considerations that the Appeals Chamber put
18 forward as relevant to a Trial Chamber in the proper exercise of
19 discretion. Your Honour, the easy one, of course, is 4, that the accused
20 explicitly waives his right to attendance; 5, point five 5, was that the
21 individual be fully represented during any period of absence. That of
22 course is met. Your Honour, the first point is that absence of the
23 accused can take place in exceptional circumstances and it should not
24 become the rule. Your Honour, we say that that would not be violated.
25 Mr Ruto has been continuously present since the commencement of this
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1 case. He has attended all hearings as required by the Trial Chamber, and
2 the period of excusal is extremely limited, and we say it's for
3 exceptional reasons because it will otherwise -- the president of the
4 republic will not be allowed, in effect, to fulfil his constitutional
5 responsibilities to the detriment of the Republic of Kenya as a whole and
6 indeed the region because two other heads of state are involved in this
7 as well.

8 Your Honour, the Appeals Chamber advised that certain alternative
9 measures should have been considered. It doesn't say that there should
10 be no other option. Your Honour, the alternative measures are not
11 available, we say, because the meeting involves heads of state. There is
12 sovereign equality between nations and it does involve the presidents of
13 Rwanda and Tanzania. This is a scheduled meeting. Your Honour, I
14 didn't -- what I was minded to do, and it may have been a mistake on my
15 part, is I became aware of this on Wednesday, and at that point we had
16 some discussions, and I was minded in fact to ask the Court then to
17 adjourn the hearing for Monday and Tuesday, but because I had been given
18 notice that the Appeals Chamber would render a decision today, I decided
19 that that -- such an application may be moot if the appeal had been
20 dismissed in its totality rather than in part. And so, your Honour, I
21 thought the best and most prudent course would have been to wait for the
22 appeals Chamber decision to see whether or not an application was
23 required. And it seems, of course, it was.

24 So Your Honour, I became aware of the president's diary on
25 Wednesday. I didn't make the application. But, your Honours, looking at
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1 the various considerations put forward, we say that the various
2 considerations mitigate -- militate in favour of the excusal. Your
3 Honour, the absence is limited, as factor 3 in paragraph 2 of the Appeals
4 Chamber decision, and it's limited to the period that is strictly
5 necessary. We are not seeking blanket excusal. It is for a defined and
6 limited purpose. It will, once that period ends, if the Court is kind
7 enough to accede to the Defence prayer, Mr William Ruto will come back to
8 court once again.

9 Your Honour, one of the factors that the Appeals Chamber
10 mentioned was that regard could be had -- I'll give you the paragraph in
11 a moment -- to the specific witness, in effect, the subject matter of the
12 proceedings that were then transpiring. Your Honour, the next witnesses
13 are not victim witnesses. The witness that will be heard on Monday and
14 Tuesday is not a victim witness that would violate the original order of
15 the Trial Chamber. It's a witness that we say is not -- it would not
16 occasion any prejudice to any party for the trial to continue in the
17 absence of Mr Ruto.

18 Now, your Honours, the Court, of course, may be -- may have pause
19 for thought and wonder whether or not the trial should be adjourned if
20 you're minded to see some merit in the application put forward.
21 Your honour, that is certainly a possibility but, your Honour, given what
22 I mentioned earlier in paragraph 50, that the Appeals Chamber themselves
23 both in this decision and in terms of Article 68, has regard to the
24 welfare of victims and witnesses, we know that a witness is here in the
25 territory of the Kingdom of the Netherlands. Mr Sang of course is also
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1 here. And notwithstanding the excusal, both Mr Sang and Mr Ruto have a
2 right an expeditious trial, we would say on balance the appropriate
3 course is not to cause disruption. We also know there are ASP issues
4 regarding budgetary constraints on the court. We don't want to waste the
5 court's costs. And so what we are asking for is limited excusal to allow
6 the president of the republic to perform his state responsibilities with
7 other heads of state, that that requires the deputy president's
8 attendance. One the deputy -- once the president is back in the country,
9 Mr Ruto will get a plane and come back to The Hague. Your Honour, I will
10 say that on Wednesday, and it doesn't actually alter the time-frame at
11 all, but it may be relevant to your Honour's exercise of discretion, on
12 Wednesday there is also a security meeting --

13 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, the -- you might want to
14 look at Article 72. The reason I say is, I asked you before we started
15 whether your application is something you want to make in the public,
16 whether you want to make with the shades down. You preferred to make
17 them in public. Look at -- I look at article 72 to see if it may have
18 any bearing when this sort of application is made and in what forum and
19 what you may want to discuss.

20 MR KHAN: I'm grateful.

21 PRESIDING JUDGE EBOE-OSUJI: And the reason I say that is one
22 word you used before I interrupted you goes straight to headline of
23 Article 72. I don't know if it does, but --

24 MR KHAN: No, Mr President, I think -- I'm most grateful for your
25 vigilance and it may be more prudent, in fact, to go for a moment into

1 private session. I won't be very long. But with your leave that
2 probably is the prudent course of conduct and I'm grateful.

3 PRESIDING JUDGE EBOE-OSUJI: Shall we go into private session.

4 (Private session at 12.16 p.m.)

5 (Redacted)

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Page 20 redacted – Private session.

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Page 21 redacted – Private session.

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Page 22 redacted – Private session.

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Page 23 redacted – Private session.

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Page 24 redacted – Private session.

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2 (Redacted)

3 (Open session at 12.28 p.m.)

4 THE COURT OFFICER: (Interpretation) We are in open session, your
5 Honour.

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

7 It has been brought to our attention that the defendant, Mr Ruto,
8 had granted an interview to a news outlet, in of course of which he made
9 comments on the matters pending before the court. This is a matter that
10 had arisen in the past and the Chamber cautioned that Mr Ruto is to
11 refrain from making comments to the press on the case pending before this
12 Chamber. It has happened again, and counsel for Mr Ruto explained that
13 it was a mistake, and he, on behalf of Mr Ruto, apologised without any
14 reservation and he has undertaken, that is Mr Khan, to work out an
15 arrangement by which there would be no further comments on the case
16 pending before this Court, comments by Mr Ruto. For now, the Chamber
17 will accept the apology as well as the undertaking of counsel. The
18 Chamber will not issue any sanction on this occasion, but the Chamber
19 will repeat its earlier warning that Mr Ruto is not to comment on this
20 case pending before the Court.

21 We expect that this warning will be respected, and we expect that
22 the counsel will live up to his undertaking to do all that he can to
23 ensure that this doesn't happen again.

24 That is the ruling of the Chamber.

25 We have 30 minutes to our break time. We should now discuss the

1 question of the witness protection measures.

2 MR STEYNBERG: Thank you, your Honours. My learned friend
3 Mr Garcia will address the Court on any matters relating to this.

4 PRESIDING JUDGE EBOE-OSUJI: All right.

5 Mr Kigen-Katwa, you lost your band, or tab, as the case may be.
6 That's all right. You can address us. We are not as strict as some
7 judges who will say, "We do not see you" without the full regalia intact.

8 MR KIGEN-KATWA: I apologise for that, Mr President.

9 Mr President, on our part, on the issue of protective measures,
10 we have an application that prior to arguing the issues of protective
11 measures as proposed by the Prosecution, we should be given unredacted or
12 a lesser redacted version of the VWU's filing with you, your Honours.
13 The reason why we say this is that we have noticed that some issues
14 raised by the VWU are likely to have mentioned our client very
15 specifically and very directly.

16 The allegations made against our client are issues we would like
17 to comment on in the course of addressing the question of protective
18 measures. We are very particularly concerned, Mr President, if those
19 issues have been communicated to the Chamber, and we have a good
20 explanation for them, and would serve only the prejudice of the Court
21 forming an adverse opinion about our client when we have an explanation
22 for what is alleged. For those reasons, Mr President, we very kindly
23 request that you allow us to respond to the protective measures motion
24 after we have had a lesser redacted if not completely unredacted filing
25 by the VWU. Mr President, may I say that there is no statutory
26

1 provisions as to the question of protective measures, the recommendations
2 by the VWU to you. And we would have -- and there is no precedent
3 either. And we would like that that issue be determined once and for
4 all. The VWU in their filing which was sent to us say that they do not
5 wish to have that material shared with us, and we would -- because it's
6 an issue which will keep recurring, Mr President, we would like it
7 addressed, Mr President.

8 For those reasons, Mr President, we pray that prior to addressing
9 the issue of protective measures and to the extent it is likely that my
10 client has been adversely mentioned, we be given a lesser redacted if not
11 completely unredacted version of what VWU has filed.

12 Lastly, Mr President, may I mention that it is our position that
13 the VWU's concerns are limited to the issues of the witness and victims.
14 The concerns of the accused are not taken on board by the VWU, and it is
15 only yourselves who would accommodate the concerns of the accused, and we
16 are entitled to bear notice of what VWU has said, Mr President. Thank
17 you, Mr President, that's my application.

18 (Trial chamber and Legal Officer confer)

19 MR GARCIA: If I may, your Honours.

20 PRESIDING JUDGE EBOE-OSUJI: Yes, Mr Garcia.

21 MR GARCIA: Just one clarification, and this might be of help to
22 my Defence colleague, is that the Prosecution doesn't intend to speak
23 about Mr Sang in its submissions regarding the in-court protection
24 measures for Witness 268. The only thing, and I'm just going to tell
25 immediately I'm going to say it, is that what the Prosecution is

1 concerned about is that the name of the witness was already disseminated
2 according to certain sources of information in the month of March 2013.

3 If we could go into just private session, your Honours? Thank
4 you.

5 PRESIDING JUDGE EBOE-OSUJI: Let's go into private session.

6 (Public session at 12.37 p.m.)

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Page 30 redacted – Private session.

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Page 31 redacted – Private session.

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Page 32 redacted – Private session.

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Page 33 redacted – Private session.

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Page 34 redacted – Private session.

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Page 35 redacted – Private session.

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Page 36 redacted – Private session.

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Page 37 redacted – Private session.

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Page 38 redacted – Private session.

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Page 39 redacted – Private session.

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Page 41 redacted – Private session.

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Page 42 redacted – Private session.

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22 (Recess taken at 1.07 p.m.)

23 (Upon resuming in open session at 2.07 p.m.)

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

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

1 Mr Kigen-Katwa, you -- it was your turn to address the Chamber. We are
2 in public session. I suppose it should go back into private or can you
3 safely speak to the matter in open session?

4 MR KIGEN-KATWA: I'm okay with addressing it in open session,
5 Mr President.

6 PRESIDING JUDGE EBOE-OSUJI: Prosecution, do you see any
7 difficulty with that?

8 MR GARCIA: Just want to make sure that Mr Kigen-Katwa remains
9 with -- his submissions will remain within what can be said in public
10 session, if need be.

11 PRESIDING JUDGE EBOE-OSUJI: Thank you.

12 Mr Kigen-Katwa, proceed. I take it you're mindful of your
13 obligations. Especially I take it most of your submissions will in any
14 event be a question of -- on the matter of the principle, isn't it?

15 MR KIGEN-KATWA: Yes, Mr President.

16 PRESIDING JUDGE EBOE-OSUJI: Sorry, I've been reminded to adjust
17 the announcement made in the morning. I hope it is not inconvenient. We
18 are bringing back 30 minutes into today's proceedings. We had said
19 before we would be adjourning at 3.00 but we would go until 3.30 unless
20 there is great inconvenience that's been caused, okay. Thank you.
21 Please proceed, Mr Kigen-Katwa.

22 MR KIGEN-KATWA: Mr President, we -- the first -- we would want
23 to have these proceedings conducted in open sessions under the provisions
24 of Article 68 and we very much insist on them. It is our contention that
25 the Prosecution have not demonstrated adequate grounds to justify the
26

1 need to give the type of protection to the next witness as they have
2 asked for. Mr President, the argument that the efforts that surrounded
3 the testimony of the first witness are a reason why the type of
4 protective measures asked for are justified, we submit, Mr President, and
5 your Honours, is wholly speculative, and we submit, your Honours, that
6 the right of Mr Sang to trial in the open should not be taken away on the
7 premises of speculation as propositioned by the Prosecution.

8 Mr President and your Honours, it is our -- it is evident that
9 the issue of the protective measures and more specifically closed session
10 asked for in respect to this witness did not come from the VWU but was
11 actually at the instance of the Prosecution, who say that in the course
12 of their meeting with the witness, this issue spontaneously came up, and
13 we think it's a very significant thing, Mr President and your Honours,
14 that the VWU in the course of arranging to bring the witness to this
15 court and to make other provisions surrounding his stay had not raised
16 that issue until the Prosecution in their own words obtained that
17 spontaneous desire for that closed session, and we think, Mr President,
18 that that's a significant issue that should be taken into account.

19 Mr President, I would ask there are two issues which I would like
20 to raise in closed session, in my submissions, Mr President.

21 PRESIDING JUDGE EBOE-OSUJI: We will go into closed session to do
22 that. But before we do, on the last point you raise, it's not clear to
23 me about the sequence of the meeting between the Prosecution and the
24 witness, as one element of the sequence, and the second one being the
25 meeting of the VWU with the witness, as the other element of the
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1 sequence. It's not clear to me what sequence that comes but it doesn't
2 really matter what sequence is engaged. For me, the question is does
3 it -- if the VWU have made their own professional assessment in acting in
4 good faith, we must presume they are, make their recommendation, does it
5 matter then that the witness may first voice that request during a
6 meeting with the Prosecution? In other words, are we to ignore the
7 assessment of the VWU and their recommendation on that matter?

8 MR KIGEN-KATWA: Mr President, it is our submission that the
9 genuineness of the concern of the witness is an issue to be taken --
10 I mean, if the witness was really concerned for his protective measures,
11 it would be expected that he would give -- he would make that indication
12 at the first opportunity, and that first opportunity includes when they
13 met the VWU for purposes of being brought here.

14 On the other hand, when that idea of the scope of the protective
15 measures comes from the first -- comes for the first time from the
16 Prosecution, and, Mr President, we reluctantly accept that the VWU are
17 acting in good faith, we can make that concession, though I say it
18 reluctantly, but we can't say that about the Prosecution. And so when it
19 comes from the Prosecution, Mr President, we are hesitant to say that
20 there was any good faith around that issue when according to the
21 Prosecution it came up spontaneously in the course of proofing,
22 Mr President. That is the distinction we wanted to make.

23 PRESIDING JUDGE EBOE-OSUJI: We must presume good faith on the
24 part of the Prosecution as well as good faith on the part of the Defence.
25 That is how we operate here. I thought I should rectify that, unless you

1 have specific reason to impugn the good faith of somebody else, we should
2 not presume bad faith.

3 MR KIGEN-KATWA: Mr President, if you say we must, then we must.

4 PRESIDING JUDGE EBOE-OSUJI: Please proceed. You want now to go
5 into private session.

6 MR KIGEN-KATWA: Yes, Mr President.

7 PRESIDING JUDGE EBOE-OSUJI: Then we go into private session.

8 (Private session at 2.14 p.m.)

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Page 49 redacted – Private session.

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Page 50 redacted – Private session.

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Page 51 redacted – Private session.

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Page 52 redacted – Private session.

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Page 53 redacted – Private session.

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Page 55 redacted – Private session.

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Page 56 redacted – Private session.

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Page 57 redacted – Private session.

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Page 58 redacted – Private session.

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Page 59 redacted – Private session.

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Page 60 redacted – Private session.

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Page 61 redacted – Private session.

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Page 62 redacted – Private session.

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4 (Open session at 2.47 p.m.)

5 THE COURT OFFICER: (Interpretation) Mr President, we are in open
6 session.

7 PRESIDING JUDGE EBOE-OSUJI: (Microphone not activated) much.
8 The Chamber will now issue its ruling on the Prosecutor's application for
9 protective measures for Witness 268 during the course of the testimony.

10 The Prosecutor's application, backed up by the recommendation of
11 the Victims and Witnesses Unit, is that the peculiar circumstances of
12 this witness recommends that the testimony of the witness be conducted
13 entirely in private session. The Chamber has heard application --
14 submissions from the parties on the matter, including from the victims'
15 counsel. The Chamber has considered the submissions and the applicable
16 law on the question, and the Chamber's ruling is as follows: The Chamber
17 does not accept that the witness's testimony in its entirety will be
18 conducted in private session, but the Chamber does accept that there are
19 peculiar factors relating to this witness that require protection
20 measures to be ordered. The Chamber will therefore order the usual
21 measures, which would be voice distortion, image distortion, use of
22 pseudonym, and use of private sessions for testimony that have a high
23 likelihood of revealing the identity of the witness.

24 There has been a debate in private session as to limit -- as to
25 the limit of the use of private sessions where need be. The Chamber will

1 now go into private session briefly to make a ruling in that regard.

2 (Public session at 2.51 p.m.)

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23 (Open session at 2.56 p.m.)

24 THE COURT OFFICER: (Interpretation) Mr President, we are in open
25 session.

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

2 Mr Garcia, you may proceed -- Mr Steynberg, I misspoke, you may
3 proceed. Please be mindful of Article 72 in your submission so we are
4 not discussing that sort of thing in the public session.

5 MR STEYNBERG: Thank you, your Honour. I don't think my reply
6 will touch upon any of those issues.

7 Just perhaps for the sake of the gallery who may not know what we
8 are about, I will briefly respond to my learned friend for Mr Ruto's
9 request this morning for the limited excusal of Mr Ruto from attendance
10 next week, Monday to Wednesday, in the light of the ruling of the Appeals
11 Chamber this morning.

12 In the first instance, your Honours, I note that the
13 Prosecution's insistence in upholding what it perceives to be an
14 important if not a fundamental principle of law and interpretation of the
15 Rome Statute has in some quarters been misinterpreted as indifference, if
16 not vindictiveness, against the accused. Which most assuredly is not the
17 case.

18 The Prosecution is accordingly grateful that the Appeals Chamber
19 has vindicated its position in its decision this morning. However, we do
20 also note that the majority of the Appeals Chamber has stressed the
21 importance of maintaining a degree of flexibility in dealing with the
22 issue of the continuous presence of the accused in court.

23 The Prosecution also notes that the accused has to date attended
24 the proceedings faithfully, notwithstanding substantial pressures in his
25 home country.

1 The Prosecution notes the limited nature and duration of the
2 extension which is being sought and the fact that the next two witnesses
3 are already in The Hague and ready to testify, and we have a limited time
4 left in which to deal with these witnesses.

5 The Prosecution also notes that, rightly or wrongly, the Defence
6 may have anticipated a different result to today's hearing which, as my
7 learned friend has already explained, is why he didn't bring this
8 application sooner rather than on the eve of the excusal, as it were.

9 Therefore, your Honours, in these exceptional circumstances, or
10 shall I say on this occasion, and exceptionally, the Prosecution will not
11 oppose the request for excusal. However, your Honours, there are a
12 number of important caveats and reservations I would like to be heard on.
13 And perhaps first it's best to deal with the proper interpretation of the
14 decision. And my learned friend referred to paragraph 50 of the decision
15 of the majority, or in this case, unanimous decision of the Appeals
16 Chamber. No, I beg your pardon, this was the decision of the majority,
17 and he quoted the fact that "the majority considers that the interests of
18 justice and the psychological well-being of witnesses would not be served
19 best if the trial had to be automatically adjourned in each instance."

20 Now, what my learned friend with respect did not or omitted was
21 the previous sentence which we say is very important, and the previous
22 sentence reads: "During the course of prolonged criminal proceedings,
23 unforeseen circumstances may arise necessitating the absence of the
24 accused person on a temporary basis." And I stress the words
25 "unforeseen" and "necessitating."

1 The second observation I have to say in respect to this paragraph
2 is that in the absence of unforeseen circumstances necessitating absence,
3 the alternative to excusal is not necessarily an adjournment but, of
4 course, the continued presence of the accused pursuant to an order by the
5 Court to that effect.

6 So --

7 PRESIDING JUDGE EBOE-OSUJI: Can you take that again?

8 MR STEYNBERG: Your Honours, yes. Perhaps I didn't express that
9 eloquently enough.

10 The quote which my learned friend read out is, and I'll read it
11 then in full:

12 "During the course of prolonged criminal proceedings unforeseen
13 circumstances necessitating absence of the accused person --" sorry, "may
14 arise necessitating absence of the accused person on a temporary basis."

15 I mean, this is the portion which was quoted:

16 "The Appeals Chamber considers that the interests of justice
17 psychological well-being of witnesses would not be served best, would not
18 be best served if the trial had to be automatically adjourned in each
19 such instance."

20 The point I make is simply is that unless the absence is both
21 unforeseen and strictly necessary, the alternative to excusing the
22 accused is not the adjournment of the trial but simply that the trial
23 will continue with the accused present. So there is that important
24 caveat to the excusal. So it's not just a choice between excuse or
25 adjourn, there is a third option. That's basically what I'm trying to
26

1 say.

2 Now --

3 PRESIDING JUDGE EBOE-OSUJI: Isn't what the Appeals Chamber
4 really is saying instead of I know parties will tend to hang on every
5 sentence that looks good to them in a long decision, not too long, 27
6 pages, isn't what the Appeals Chamber really saying is this: That the
7 discretion to permit excusals does, in fact, exist, but that there are,
8 shall I say, a hexagon, six-sided wall, that needs to be observed within
9 which the discretion may be exercised? As long as you're within those
10 walls, you can exercise a discretion, Trial Chamber.

11 MR STEYNBERG: Your Honours, yes, I would agree with that. At
12
13 this stage, I'm simply trying to correct what I submit was perhaps an
14 incomplete statement of what the Appeals Chamber said at paragraph 50.
15 If I may now proceed then to the six-stage test which your Honour has
16 correctly referred to, which appears at paragraph - I beg your pardon - I
17 believe it's paragraph 62, yes, it's paragraph 62 of the majority
18 decision.

19 The concern which the Prosecution have with the instant request
20 goes to the first requirement, and that is that the absence of the
21 accused can only take place in exceptional circumstances, and it is in
22 this regard that the portion I stressed in paragraph 50 is also
23 connected. What is exceptional? We say exceptional circumstances are
24 circumstances which are unforeseen and which necessitate, not make it
25 convenient, not make it on a balance of convenience or something like

1 that, necessitate the absence of the accused, so –

2 PRESIDING JUDGE EBOE-OSUJI: How does the Trial Chamber -- the
3 Appeals Chamber, did they supply guidance on what's exceptional? What do
4 they say about what is exceptional?

5 MR STEYNBERG: Your Honours, they do not, as far as I can see,
6 specifically set out or give examples of what should be exceptional
7 circumstances, if the Court will bear with me one moment. I mean, they
8 make reference to the removal of disruptive accuseds, and they make
9 reference to the fact that other reasonable alternatives must prove
10 inadequate. So there is obviously a measure of discretion which is left
11 to the Trial Chamber to determine what is exceptional. But I am saying,
12 your Honours, that what is exceptional must be -- and one cannot simply
13 discard the rest of the majority's judgement and put whatever meaning one
14 wishes on the word "exceptional." I mean, it does have meanings in the
15 English language which --

16 PRESIDING JUDGE EBOE-OSUJI: What can it mean? That's what we
17 are trying to figure out. If we cannot rely on the discretion of the
18 Trial Chamber to supply it? What would it mean?

19 MR STEYNBERG: Your Honours, the point I'm trying to make is that
20 if one takes guidance from paragraph 50, it refers to two requirements
21 which I think, I submit, are in fact instructive and that is these are
22 matters that are unforeseen and that necessitate the absence. These are
23 certainly not matters that are routine, these are certainly not matters
24 that would arise in the course of one's daily occupation. I would that a

1 good example of an exceptional circumstance would be the one which we
2 unfortunately were seized with on the last occasion, and that was the
3 tragic attack on the west wood -- Westgate mall, I beg your pardon. Now
4 that is obviously something which nobody could have foreseen. It's
5 something which gave rise to a dire and national emergency, and I don't
6 think that any -- had the Appeals Chamber judgement come out before that
7 incident, I think I can safely say that we would not -- we would not have
8 disputed that that was an exceptional circumstance.

9 PRESIDING JUDGE EBOE-OSUJI: So then would your submission then
10 be this: Let us say the -- Mr Ruto, the vice-president, and his
11 principal know that in two years' time, there is an important summit that
12 heads of state must attend but it's in two years. That is foreseen,
13 isn't it? Are you saying that an excusal may not be permitted because it
14 is foreseen, a foreseen event, ahead of time?

15 MR STEYNBERG: Your Honours, perhaps that question may be easily
16 avoided by the simple observation that we won't even get to that stage
17 because there are two other matters that need to be attended to first,
18 firstly, whether the schedule can be adjusted, and whether -- or whether
19 an adjournment would suffice, and those are not the only limits. Those
20 are two matters which the Appeals Chamber specifically raise. So if we
21 know that in two years' time there is an important summit, these are
22 matters that can be taken into account, in my submission, by the Chamber
23 and by the parties in the scheduling of the case if it indeed is for a
24 limited period.

25 What I submit would fall within the realms of exceptional
26

1 circumstances, as I have said, unforeseen emergency sort of circumstances
2 that arise and for which the absence of the accused is necessary, such as a
3 medical emergency is one that comes to mind, the accused has to go in
4 for an urgent operation, that would certainly in my submission fall
5 within these parameters.

6 Now because this is a matter which requires the discretion of the
7 Court and because one cannot legislate for every possible eventuality, I
8 don't think that -- I would not wish to want to speculate on what might
9 and what might not be exceptional circumstances except to say that --

10 PRESIDING JUDGE EBOE-OSUJI: But you raised it, you raised the
11 question, you opened the discussion on what is exceptional and what is
12 not, didn't you?

13 MR STEYNBERG: Yes, your Honour. Perhaps I again didn't phrase
14 that eloquently enough. I mean, we can go on debating and putting
15 hypothetical examples forward and debating whether or not these would or
16 would not be exceptional circumstances, but for the purposes of my
17 submission today, all I would submit is that in the ordinary course and
18 in the future, the Prosecution would not be inclined to accept that an
19 important meeting that the accused might wish to attend or the mere fact
20 that the president wished to travel to this or that summit or meeting,
21 would necessarily constitute an exceptional circumstance, because as we
22 know, and we know this from prior submissions by my learned friend,
23 Mr Khan, that these are not exceptional. He's raised these issues as we
24 have gone along in various filings and in various oral submissions that
25 this is the nature of the accused's work. And ergo, not exceptional.

26

1 Certainly not unforeseen.

2 In the present circumstances --

3 PRESIDING JUDGE EBOE-OSUJI: Did the -- did the Appeals Chamber
4 overrule the Trial Chamber's assessment that important functions of an
5 extraordinary dimension might constitute an exceptional circumstance that
6 warrants excusal? Did they overrule that assessment?

7 MR STEYNBERG: Your Honour, to the extent --

8 PRESIDING JUDGE EBOE-OSUJI: It has to be overruled for you to
9 make the last submissions you made, isn't it the case?

10 MR STEYNBERG: Your Honour, to the extent that those functions --
11 let me get the correct word.

12 PRESIDING JUDGE EBOE-OSUJI: Or did the Appeals Chamber in fact
13 say that the Trial Chamber did not err in making that assessment?

14 MR STEYNBERG: Your Honour my submission would be that to the
15 extent that the effect of applying discretion in that manner would result
16 in the absence of the accused being the rule rather than the exception,
17 yes, my submission is it was over ruled, not in terms but that one cannot
18 accept in advance and as a principle that these will in future excuse
19 attendance on that basis alone. What is very clear from the, in my
20 submission, from the Appeals Chamber's ruling is that the assessment must
21 be on a case-by-case basis and it must be exceptional in nature.

22 Now, your Honours, perhaps this argument is somewhat premature
23 because as I have indicated at the outset of this argument, on this
24 occasion the Prosecution does not oppose the excusal, and if any
25 exceptional circumstances -- well, we say exceptional circumstances are
26

1 required, but my submission is the lack of opposition of the Prosecution
2 in this particular circumstance may provide that exception on which the
3 Chamber might wish to grant it but, of course, your Honours will still
4 have to apply your discretion to the matter.

5 There are one or two other matters of practicality that I should
6 also address. Well, I think I've already made the point that our
7 concession on this occasion should not be read as an undertaking for the
8 future and not as a precedent to the Prosecution's attitude in the future
9 and I think I've made that clear.

10 Then two other matters. Firstly, obviously, the accused would be
11 required to give the necessary waiver in terms of the majority's
12 decision. And thirdly, one possible difficulty that might arise from the
13 accused's absence, which has come to our attention, in relation to the
14 following witness, I note I am in public session so I'll say no more than
15 the following, but my learned friends are in possession of the statement
16 of the witness, and they will be aware that there are references made to
17 a person bearing the name of their client. Now, if the accused is not
18 present in court, and I can't ask questions of the accused identifying
19 who that particular person is, this could lead to certain difficulties.
20 So I wonder whether as part of the waiver that my learned friends will
21 give us could be a stipulation to the effect that the person who is
22 referred to in the statement of this witness is, in fact, the first
23 accused.

24 If the Court will bear with me, please, I think that more or less
25 deals with it.
26

1 MR HOOPER: Yes, I'll be crossing the next witness and I can make
2 that concession. He attended a rally where he saw the accused and that's
3 Mr Ruto.

4 MR STEYNBERG: Thank you, your Honours. Unless there are any
5 further questions from your Honours, those will be my submissions in
6 reply.

7 MR KHAN: I'm grateful, Mr President. Your Honours, the issue is
8 not completely moot because it's always useful to have some clarity, and
9 I do note that the Prosecution have in our submission taken a proper
10 course and not objected but, your Honour, a few observations with your
11 leave. The Prosecution seek to shroud that submission in the terms of
12 exceptionally and without binding them in the future. As one would
13 expect many public Prosecutor's office, we have a right to a certain
14 degree of consistency and we would expect that a principled view to such
15 matters be adopted. Now, your Honours, what it turns upon in our
16 submission is precisely the way your Honour, Mr President, put it, that
17 there are six, your Honour called it a hexagon. There is a --

18 PRESIDING JUDGE EBOE-OSUJI: Will that hexagon --

19 MR KHAN: Six conditions.

20 PRESIDING JUDGE EBOE-OSUJI: Well, I meant six-sided wall.

21 MR KHAN: Yes.

22 PRESIDING JUDGE EBOE-OSUJI: With a Pentagon --

23 MR KHAN: Well, it's --

24 PRESIDING JUDGE EBOE-OSUJI: We know we've been talking about
25 Pentagon --

1 MR KHAN: Well, it's --

2 PRESIDING JUDGE EBOE-OSUJI: (Overlapping speakers).

3 MR KHAN: Your Honour, I was going to say we may get to an
4 octagon before the case is out, so I'll have to revisit my O level
5 mathematics.

6 PRESIDING JUDGE EBOE-OSUJI: Or "sextagon."

7 MR KHAN: But, your Honour, there are these six considerations,
8 and I think the Appeals Chamber were very pointed not to seek to stifle
9 or handcuff or strait-jacket the Trial Chamber in its responsibility to
10 do justice. It is what it says. There needs to be exceptional
11 circumstances. It's for the Trial Chamber to decide what constitutes
12 exceptional circumstances. But contrary to the submissions of my learned
13 friend, it may well be the case that the constitutional responsibilities
14 of Mr Ruto, however you look at it, does amount to exceptional work.
15 Now, your Honours, it's for the Bench to decide on a case-by-case basis.
16 And to that extent --

17 PRESIDING JUDGE EBOE-OSUJI: And without -- I thought I should
18 have made this intervention not on your time but on Mr Steynberg's time
19 but it's never too late to make it so that it is clear. Of course, in his
20 submission he said in the future he would not accept or the Prosecution
21 would not accept something. It isn't for the Prosecution to accept. It
22 is the Chamber that will accept. The Prosecutor's limit is to oppose any
23 request you would make. The Defence. And then the Chamber will make the
24 ruling accepting or not the application. And then we will take it from
25 there. But proceed.

26

1 MR KHAN: I'm grateful, Mr President, and that clarification is
2 much appreciated. Your Honour, I will say for the record the Appeals
3 Chamber was very careful, in our respectful submission, not to overrule
4 the key finding of the Trial Chamber, that the important functions of
5 extraordinary dimensions might constitute exceptional circumstance. So,
6 your Honours, these are matters that the Bench will decide in accordance
7 with your own responsibilities on a case-by-case basis, but it would be
8 wrong and a misreading of law we say to somehow read in an additional
9 element which is not part of the disposition of unforeseen circumstances.
10 That's put in an entirely different context. It's not seeking to be
11 restrictive or defining or to be an element of exceptional circumstance,
12 and if one reads paragraph 50 you'll simply see that the way it's drafted
13 makes that abundantly clear. It's but one example of the need for
14 flexibility.

15 But the fact that the Appeals Chamber both in paragraph 2, and
16 later on when they repeated it in the latter part of the decision, did
17 not inject such a restriction is not unimportant, and I refer of course
18 to paragraph 62. So, your Honours, it seems that the Prosecution have
19 made their submission, not opposing. We have made ours. It's for the
20 Bench to decide. Moving forward, of course we will hope that whatever
21 the Bench decides, the Prosecution will always approach such matters in a
22 principled way, and your Honours we are -- I'm content to -- of course,
23 to leave such matters to the Bench to decide. I'm grateful.

24 MR STEYNBERG: Your Honour may I just clarify that I misspoke
25 when I said will not accept. What I meant was will not concede.

26

1 PRESIDING JUDGE EBOE-OSUJI: Thank you for that clarification.

2 It appears that there is no ruling to be made from the submissions.

3 Basically what's happened is a take on the Appeals Chamber's decision.

4 The important thing is that the Defence has made the request. Let me

5 back up, when I say there is no ruling to be made, I mean it's not

6 contentious, the Prosecution does not oppose the request on this

7 occasion. And so to that extent, yes, the ruling is to that effect.

8 As outlined earlier the Appeals Chamber has clarified the issue

9 as it is their responsibility to do. They have accepted the existence of

10 a discretion. They appear to have been concerned that the way it was

11 exercised gave the impression of carte blanche to the accused, and

12 worried that that should not be the case. That's my interpretation of

13 it.

14 So to that extent, in future, if these sorts of applications will

15 be made, the Chamber will invoke earlier advice to counsel, first of all,

16 consult one another to see if the matter can be resolved. If it cannot

17 be resolved, then you bring it to the Chamber to litigate the question of

18 the Chamber's exercise of the discretion on the matter.

19 MR KHAN: I'm grateful, Mr President, your Honours, and we will

20 act accordingly.

21 MR STEYNBERG: As the Court pleases, your Honour.

22 May I just inquire on the issue of the waiver. Is that a matter

23 which will be done in writing or is that a matter -- because I think it

24 should come from Mr Ruto, obviously, and not merely from counsel.

25 MR KHAN: Your Honour, we've done a waiver previously. It hasn't

1 been rendered void. The waiver is in operation. It's been properly
2 lodged. I can repeat it here and Mr Ruto is here as well if your Honours
3 want confirmation of that.

4 PRESIDING JUDGE EBOE-OSUJI: I think you are safer refreshing it
5 because if you -- although the Appeals Chamber does recognise the
6 discretion, but if you looked at the dispositive, there's a little -- the
7 way they put it, they've overturned the earlier decision, question arises
8 as to whether everything else you did under the umbrella of that earlier
9 decision has now not been up to question.

10 MR KHAN: I'm grateful. Your Honours, in that case I will file
11 it in the usual way by the end of today.

12 PRESIDING JUDGE EBOE-OSUJI: Thank you. Is there anything else
13 before we rise?

14 (Trial Chamber confers)

15 PRESIDING JUDGE EBOE-OSUJI: Again, so we are left in no doubt as
16 what has been done, the ruling is on the basis of the concession between
17 the parties the Chamber grants the request of the Defence.

18 MR KHAN: I'm grateful, your Honour. So the trial will continue
19 as usual on Monday and Mr Ruto will be in attendance on Thursday morning
20 as usual.

21 PRESIDING JUDGE EBOE-OSUJI: Yes, to the extent of your
22 application and the Prosecution conceded or accepted.

23 MR KHAN: And, your Honour, before the end, I don't know if you
24 wish me to raise it now or Monday morning, there was another issue that
25 I wished to raise relating to the next witness, and probably that should.

1 be done in private session, but I'm in your Honour's hands to do it now
2 or do it on Monday morning

3 PRESIDING JUDGE EBOE-OSUJI: It's better to do it on Monday
4 morning.

5 MR KHAN: I'm grateful.

6 PRESIDING JUDGE EBOE-OSUJI: Yes.

7 MR KHAN: Your Honour, could we go into private session with your
8 leave for just one minute?

9 PRESIDING JUDGE EBOE-OSUJI: Private session.

10 (Private session at 3.24 p.m.)

11 (Redacted)

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Page 84 redacted – Private session.

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Page 85 redacted – Private session.

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Page 86 redacted – Private session.

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- 1 (Redacted)
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- 10 (The hearing ends at 3.33 p.m.)