

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 Monday, 28 October 2013

10 (Upon commencing in open session at 9.35 a.m.)

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

13 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. Court officer,
14 please announce the case.

15 THE COURT OFFICER: (Interpretation) Good morning. Situation in
16 the Republic of Kenya, in the case of The Prosecutor versus William
17 Samoei Ruto and Joshua Arap Sang, case number ICC-01/09-01/11. We are in
18 public session.

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

20 MR STEYNBERG: Good morning, Mr President, your Honours.
21 I appear for the Prosecution this morning, Anton Steynberg, together with
22 Lucio Garcia, Lorenzo Pugliatti, Thomas Franzinger, and Grace Goh, case
23 manager. Thank you.

24 PRESIDING JUDGE EBOE-OSUJI: Defence?

25 MR HOOPER: The Ruto Defence remains the same.

1 MR KIGEN-KATWA: Mr Sang's Defence remains the same,
2 Mr President.

3 MR NARANTSETSEG: Good morning, Mr President, your Honours.
4 Orchlon Narantsetseg for victims. Our case manager will join us in one
5 hour, Ms Carolin Herzig. Thank you.

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

7 MS SCHAUDER: (Interpretation) Good morning, Mr President, Natacha
8 Schauder for the VWU. Thank you.

9 PRESIDING JUDGE EBOE-OSUJI: For the record, Mr Hooper, I take it
10 your client is not in.

11 MR HOOPER: No. It's Hamlet without the prince.

12 PRESIDING JUDGE EBOE-OSUJI: Pardon me?

13 MR HOOPER: Hamlet without the prince.

14 PRESIDING JUDGE EBOE-OSUJI: Ah. And translated: Mr Ruto is not
15 in the courtroom. It's that Hamlet without the prince thing that gets us
16 into trouble, Mr Hooper.

17 All right. On that matter, Mr Khan or Mr Hooper, did you file
18 your waiver?

19 MR KHAN: Your Honour, we did. We did that on Friday.

20 PRESIDING JUDGE EBOE-OSUJI: It's good to know. And one more
21 little matter on it. In the course of the debate last week, we had
22 occasion to look at what paragraph 50 said. I've had another look at it
23 again. Paragraph 50 of the Appeals Chamber judgement is not to be
24 understood as inverting the whole decision on the understanding of
25 unforeseen circumstances. That was not the context in which the Appeals
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1 Chamber made that comment about unforeseen circumstances. The Appeals
2 Chamber was basically giving one instance in which in their view, the
3 majority's view, they did not accept the argument that there was no
4 discretion to permit excusal. They did not mean to say that excusal may
5 only be granted where circumstances were unforeseen. They just gave one
6 instance where they say, well, this is one reason why the argument of
7 lack of discretion is unsustainable. That was the understanding of
8 article -- paragraph 50.

9 And they also did not overrule the test of function where
10 exceptional circumstances rooted in the incidence of function, they did
11 not overrule the test for function as meeting the exceptional
12 circumstance. Their concern was there is discretion but it need not be
13 seen to operate as a general rule. Excusal cannot be a general rule as
14 far as they are concerned, and they communicated that quite clearly in
15 the decision.

16 So, Mr Hooper or Mr Khan, you have a motion you said you want to
17 argue?

18 MR KHAN: Mr President, yes. Before we come to that, just a
19 small matter but for the sake of clarity, the transcript should be
20 corrected at page 2, line 12. It's, of course, Mr Ruto who is not in the
21 courtroom, not Mr Steynberg, so that should be corrected. My learned
22 friend, I'm happy to see, is sitting (* overlapping speaker) --

23 PRESIDING JUDGE EBOE-OSUJI: Yes, Mr Steynberg is very much in
24 the courtroom.

25 MR KHAN: Very much here. I'm very grateful.

1 PRESIDING JUDGE EBOE-OSUJI: It is Mr Ruto that we are talking
2 about who is not in the courtroom today.

3 MR KHAN: I'm grateful. Mr President, we do have an application.
4 It's one, in fact, ordinarily I would say that could be made in public
5 session but I'm alive to the fact that there are certain sensitivities.
6 And so perhaps the more prudent course is to go into private session to
7 make the application so that there can be no blame on the Defence. So,
8 your Honours, perhaps private session to start with.

9 PRESIDING JUDGE EBOE-OSUJI: We go to private session.
10 (Public session at 9.41 a.m.)

11 THE COURT OFFICER: (Interpretation) Mr President, we are in
12 private session.

13 PRESIDING JUDGE EBOE-OSUJI: Thank you. Mr Khan?

14 MR KHAN: I'm grateful, Mr President.

15 One of the important matters in this case for the Defence is to
16 distinguish between witnesses that we say are telling the truth,
17 particularly in relation to crime base witnesses, and a number of
18 witnesses that we say their testimony is not only unreliable but has been
19 effectively, even if unwittingly, induced by certain incentives and
20 benefits that are on offer by becoming Prosecution witnesses. Now, your
21 Honours, the interests of the Defence is quite clear and the -- your
22 Honours have in your decision on intermediaries and benefits at paragraph
23 59 made it very clear that, in the Chamber's view, (Redacted)
24 (Redacted)
25 (Redacted) are prima facie material to the preparation of the Defence case as
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1 they could, amongst other things, go to the credibility of the witness.

2 Now, your Honours, for the reasons which I'll detail, we say we
3 have not been getting what I believe the Judges and we anticipated we
4 would get, which is all the benefits that witnesses had been given by
5 becoming Prosecution witnesses. Now, your Honours it brought into stark
6 relief in relation to this present witness.

7 On 21 October, so not so long ago, we received notification from
8 the Prosecution, purportedly in accordance with your Honours' decision,
9 that Witness 268, the next witness, has been the subject (Redacted)
10 (Redacted) and the entity responsible, the document says, is the OTP pursuant
11 to the Registrar's decision. So here we've got the next witness,
12 (Redacted), and the OTP are responsible. But, your Honours, in the
13 schedule that is actually sent to the Defence, what is clearly disclosed
14 to us is a total of (Redacted). But, your Honour, it's clearly, in our
15 respectful submission, (Redacted)
16 (Redacted). It's not the real issue that we are
17 looking at which is the cost and the benefits (Redacted). Now,
18 your Honours we don't even know what (Redacted) is.

19 There is a certain degree of crossover between the application
20 I'm making now and the matter that your Honours are seized of seeking to
21 strike down the OTP-Registry Protocol on intermediaries. But, your
22 Honours, we don't know what is the -- is it a word of art?
23 (Redacted) Or what is entailed with
24 such (Redacted)? Your Honours, we say we are entitled, for obvious reasons,
25 to the cost (Redacted), the benefits, the (Redacted), the (Redacted)

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1 the (Redacted), the (Redacted)
2 (Redacted), any (Redacted) that have
3 been given, and also matters that have been requested by a witness. Your
4 Honours, we are in the blind. We haven't received this for any of the
5 witnesses so far.

6 Now, your Honours, we say this is a very important matter because
7 I can -- I've prepared some bundles which I can hand up. But, your
8 Honours, let me give you an example. KEN-OTP-0106-427, it's an
9 investigator's report filed on 6 June 2013. And we see in this letter
10 prepared by the Prosecution the real impact and importance that such
11 benefits have on witnesses because here we have a witness that -- who had
12 been given a final notice -- it's the tab -- that had been given a final
13 notice, and the witness, as is apparent in the bundle - and my learned
14 friend will give me the tab reference in a moment - when he was served
15 with the final warning, tab 1, he (Redacted)
16 (Redacted)
17 (Redacted)
18 (Redacted) because of this Prosecution witness. So, your
19 Honour, that's the pressure point, how important benefits are to certain
20 Prosecution witnesses.

21 But, your Honours, if we go to one of the next Prosecution
22 witnesses, Witness 356, which is tab 2, he's one of the next Prosecution
23 witnesses, one of their key witnesses in the case, we see a witness here
24 (Redacted)
25 (Redacted) This is from the
26

1 (Redacted) dated 9 October 2012. So, your Honour, this witness is

2 (Redacted). It shows the importance of financial benefits. But

3 the very last sentence of tab 2: (Redacted)

4 (Redacted)

5 (Redacted)

6 So he's worried about being dropped, why? Obviously it's for the

7 benefits that have accrued. Your Honours, we don't have -- what are

8 those benefits? We don't know the benefits for this witness. Because

9 what's happening effectively is it seems the Prosecution say, well, they

10 are the entity responsible (Redacted), but we don't get what that

11 entails. And the Prosecution, at the last tab, my learned friend has

12 responded and says we should address this to the Victims and Witnesses

13 Unit. I understand and am grateful to see that pursuant to your Honour's

14 order on Friday, the VWU are present here in court. But, your Honours,

15 the bottom line is, in our filing on intermediaries of 14 August in

16 paragraph 2, we said that we submitted and I quote, "That the

17 obligation" --

18 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, you're urged to slow down.

19 MR KHAN: I'm grateful. Your Honours, in paragraph 2 of our

20 filing of 14 August, the Defence, and I quote:

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

1 (Redacted)

2 So, your Honours, in our respectful submission, there are two
3 options and we can't really -- I'm at a loss at least to understand the
4 interrelationship and the consequences in practice of the OTP-VWU
5 Protocol on intermediaries. But if the Prosecution are, as they stated
6 in writing, the entity responsible, we must have a right, we say, to the
7 full list of benefits their witnesses received, (Redacted)
8 (Redacted) and the like. If the Prosecution say, well, we asked for it but the
9 actual signature on the cheque, so to speak, is the VWU and so we can't
10 give you that information. Well, if that's right, then the VWU should be
11 ordered to give us that information as, in fact, the VWU do in other
12 cases, for example, in the Special Court for Sierra Leone.

13 Now, your Honours, the reason it's important is already we have
14 seen with one of the witnesses, (Redacted), and your Honours will remember,
15 I hope, that the witness on the one hand stated that he had received --
16 (Redacted)
17 (Redacted). Well, your Honours, there was no mention of
18 an (Redacted), so again, we are not getting the identity, and even
19 their witnesses are denying it. But critically, the witness said under
20 oath that (Redacted) was paying all these bills, and it was only when
21 I said, well, the Prosecution have told us you've been subject to an
22 (Redacted), that the witness accepted certain benefits had been
23 received.

24 So, your Honours, the Defence surely, we say, have a right, and
25 I think that was the spirit of your Honour's decision, not to shoot in
26

1 the dark but to have proper disclosure on the table regarding the
2 benefits received, and we say we haven't got it. We have a right to it
3 from the Prosecution. And if, for any reason, the Prosecution say they
4 cannot get it, we say they should be ordered to obtain it, and if not,
5 the VWU should be ordered to give it to us. But either way, when you
6 have got witnesses like this that are under the care of the Prosecution,
7 and when we say that the credibility is an issue and these type of
8 benefits that have provoked witnesses (Redacted)
9 (Redacted), have induced witnesses or compelled witnesses of the Prosecution
10 to (Redacted), we want to know more
11 about it so that we can be in a proper position to test the credibility
12 of these witnesses, hopefully to assist the Trial Chamber.

13 Your Honour, the benefits of witness protection and by the OTP
14 are not really a life support system for witnesses that have occasioned,
15 unfortunately, hardship and have lost their jobs and is some kind of life
16 line to economic betterment, and in order to determine whether or not the
17 ICC witness protection scheme and the (Redacted) the Prosecution
18 are being used as such a life line, we need disclosure. And, your
19 Honours, in our respectful submission, that was the spirit of the -- of
20 your Honours' decision on intermediaries.

21 Your Honours, as I said, we were at a loss and still I am at a
22 loss to understand fully the interrelationship between VWU and OTP and
23 the internal dynamics there, but it can't be right - and that's the
24 important point - it can't be right that one entity, the OTP, is the
25 entity responsible and denies or says, We don't give disclosure because
26

1 the actual financing officer is the registry. We must have a right, we
2 say, to that information and that's what we request is given to us in
3 relation to this witness, and in fact, as the e-mail that you have, it
4 should be backdated to all the witnesses so far because we haven't
5 received what we say we are entitled to, and it may well be germane to
6 your Honour's assessment of the credibility and the motivations of these
7 witnesses.

8 Your Honour, the other matter is you'll note that the -- which is
9 a separate request but related. The OTP investigative notes that are on
10 tab 1 and tab 2 have been provided by the Prosecution, but, your Honours,
11 I would also like an order, and I think on the same lines, that any
12 occasions of fraud or false accounting or false or exaggerated claims
13 that have come to the attention of the VWU should also be disclosed to
14 the Defence. Your Honours, there is a clear -- I don't need to know
15 where a witness is, we don't need to know what job a witness is doing,
16 but we do need to know the benefits. But also where a witness has tried
17 it on, so to speak, where a witness has tried to put in false accounts
18 with VWU as they have done with the OTP, we say we are entitled to that
19 disclosure because it may well provide relevant information for your
20 Honours to determine whether or not the witnesses you hear before the
21 Court are telling the truth or otherwise.

22 Your Honours, I will finish by going back to the beginning of
23 this case, and I've said it a number of times but it's really key, in our
24 submission. The witnesses, the core witnesses of the Prosecution in this
25 case were identified before the Court, before any judge of the ICC,
26

1 authorised investigation, and key to that was witnesses before
2 authorisation were put into (Redacted) where benefits
3 were given, so it's all interrelated in a very real and meaningful way.
4 And we need to get to the bottom of it so your Honours can make these
5 determinations. And those witnesses were looked after and taken into the
6 (Redacted) at the express request of the OTP
7 according to the OTP's own disclosure.

8 Your Honours, those are my submissions on this issue and I'd ask
9 that an order be made by the Bench, if you're so minded, requiring that
10 disclosure in the terms requested are given without delay by the OTP or,
11 in the alternative, if for any reason the Bench feel the OTP cannot or
12 should not be required to do it, to the VWU. But we say it goes to the
13 heart of our rights to a fair trial. And, your Honours, that's my
14 application, unless I can assist you further.

15 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, is it your position that
16 your request comes within the legitimate ambit of the decision of 4
17 September 2013, the decision entitled, "Decision on disclosure of
18 information related to Prosecution intermediaries"?

19 MR KHAN: Mr President, yes, because as is clear from that
20 decision, and the spirit behind it, and I read out Article 59, the
21 Chamber was clear. In the Chamber's view, (Redacted)
22 (Redacted)
23 (Redacted) prima facie material to the preparation of the Defence case as they
24 could, amongst other things, go to the credibility of a witness.

25 So, your Honours, the Bench has already made a determination in
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1 paragraph 59 of your decision of 4 September that this material is
2 relevant to the preparation of the Defence and we say that applies with
3 equal vigour whether or not due to internal arrangements, due to internal
4 bilateral arrangements between the registry and the OTP, the formal
5 financing is done at the behest of the VWU or the OTP, it makes no
6 difference to the rights of the Defence we say. And of course, it goes
7 back -- we were not consulted or brought in on the intermediaries --
8 sorry, on the OTP-Registry Intermediaries Protocol which we have very
9 serious concerns about which have been articulated in a separate filing.

10 PRESIDING JUDGE EBOE-OSUJI: Yes, the spirit, of course, but the
11 spirit must have some anchor somewhere. The spirit can't always float in
12 the air always. Here you look at the title that appears, to -- or,
13 rather, paragraph above, paragraph 59, title says, (Redacted)
14 (Redacted)
15 (Redacted) That's one
16 anchor. The other anchor was the title of the decision itself, yet
17 another anchor would be paragraph 35 and 41 of this decision.

18 MR KHAN: Your Honour, I'm grateful. Can I deal with that
19 briefly?

20 PRESIDING JUDGE EBOE-OSUJI: Yes, please.

21 MR KHAN: In paragraph 60, the Chamber was, we say, rightly alive
22 to the concerns of the Defence because here the Bench very clearly
23 distinguishes between intermediary, as in the heading, or any third
24 party. And, your Honour, the reason that distinction was made, we say,
25 was because the Bench wanted to draft -- require broad disclosure on
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1 these issues (Redacted)
2 (Redacted) may well have a very critical
3 effect on the determination of the motivations and credibility of a
4 witness. So, your Honour, we say a third party there will encompass any
5 third party outside the OTP.

6 Now, your Honours, as I've said, I'm still not -- I still do not
7 fully understand how this OTP-Registry Protocol is working because that's
8 a matter of mutual agreement between the Prosecution and the Defence --
9 between the Prosecution and the Registry. But, your Honours, it cannot
10 be right by of some kind of artificial bilateral arrangements to shield
11 effectively certain information and to prevent and to withhold it
12 effectively from the Defence. In this case, the Prosecution is the
13 entity responsible, payments have been made, we don't know what they are,
14 we don't know what (Redacted) mean, and paragraph 60 also makes it
15 very clear that (Redacted). In
16 circumstances where the OTP is the entity responsible, we say that (Redacted)
17 (Redacted), whether it's the VWU or whether it's
18 (Redacted) or, indeed, your Honour, whether it's (Redacted)
19 (Redacted), they are all on behalf of the OTP because
20 they are focused on one imperative. Besides purportedly the protection
21 of witnesses, it's because the Prosecution have identified these
22 individuals as suiting the narrative that they are putting forward to the
23 Court.

24 So, your Honours, we say, both by the express terms as well as by
25 the spirit underlying this decision, disclosure is needed. And, your
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1 Honour, if for any reason the Bench feel that there is a lacuna, we say
2 that the interests of justice, because of Defence submissions or the way
3 things have been put, we say the interests of justice would militate in
4 favour of the Bench stepping in to ensure that we get the disclosure that
5 is relevant. And your Honours, if for any other reason the Bench think
6 that spirit alone is reflected in the decision rather than the express
7 terms that I have referred to, in the paragraphs detailed, I'd ask that a
8 consequential order be given ordering disclosure to the Defence.

9 PRESIDING JUDGE EBOE-OSUJI: So that now is an alternative
10 argument.

11 MR KHAN: Your Honour, indeed. If your Honour is not with me on
12 the first argument that the express wording of the decision and the
13 implication behind it, the spirit behind it, must be adhered to and that
14 a party cannot somehow with legalese or by internal arrangements between
15 another entity of the court shield information from the Defence.

16 PRESIDING JUDGE EBOE-OSUJI: It is still an alternative argument.

17 MR KHAN: Indeed.

18 PRESIDING JUDGE EBOE-OSUJI: By analogy, more or less, that's
19 what you're arguing effectively.

20 MR KHAN: Indeed.

21 PRESIDING JUDGE EBOE-OSUJI: Saying that you stand on Article
22 67(2) as an alternative basis to say, well, even if it doesn't fall under
23 the ambit of the decision of 4 September, you're arguing that under
24 Article 67(2), you are still entitled to the relief you seek regardless
25 of the decision already rendered.

1 MR KHAN: I'm most grateful, your Honour.

2 PRESIDING JUDGE EBOE-OSUJI: Is that what you're arguing?

3 MR KHAN: That's exactly correct. I'm grateful.

4 PRESIDING JUDGE EBOE-OSUJI: Prosecutor?

5 MR STEYNBERG: Thank you, your Honour. May I commence with
6 responding to the applicability of Chamber's decision number -- if I can
7 find it -- 904 of 4 September. Your Honour, obviously, decisions of this
8 Chamber need to be read in context, and the starting point, in my
9 submission, should be to look at the relief that was sought by the party
10 that moved this. I refer to the relief requested, paragraph 39 of
11 decision 855, confidential, filed by my learned friend on 14 August which
12 reads as follows:

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 The Defence themselves defined in this filing what they
19 understood by the term "intermediaries." That definition was amended by
20 the Chamber in the paragraphs to which your Honour has referred,
21 paragraph 35 or paragraph 41 of decision 904.

22 By no stretch of the imagination can that definition be argued to
23 include the VWU, in my submission.

24 The decision went a little further because the application
25 morphed as it went along to include (Redacted). Again in context, the

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1 reason for that was a reference to the OTP-VWU Witness Protection
2 Protocol which provides in certain circumstances that - let me get the
3 right word - I think it's (Redacted) may be used where
4 appropriate to provide assistance. And the argument was, as my learned
5 friend has pointed out to you, that -- that the OTP cannot divorce itself
6 of its disclosure obligations by contracting out to (Redacted), but
7 that is not the case here.

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 So I submit, with respect to my learned friend, there is, quite
20 frankly, no merit in the submission whatsoever that that decision 904
21 includes the VWU.

22 Now, turning to the point which my learned friend has --

23 PRESIDING JUDGE EBOE-OSUJI: And, Mr Steynberg, to be clear, you
24 say that because, amongst other things, Article 35 itself expressly
25 excludes VW unit, isn't it.

1 MR STEYNBERG: Does your Honour mean Article 35 or paragraph 35?

2 PRESIDING JUDGE EBOE-OSUJI: Paragraph 35, sorry.

3 MR STEYNBERG: Indeed, your Honour.

4 PRESIDING JUDGE EBOE-OSUJI: Yes.

5 MR STEYNBERG: Let me just get the right filing, I can check
6 that. Are you referring to paragraph 35 of the decision 904, your
7 Honour?

8 PRESIDING JUDGE EBOE-OSUJI: Yes.

9 MR STEYNBERG: Yes. In terms, it does, your Honour. Thank you.

10 I will return shortly to the alternative argument that the
11 decision should be expanded or that a new decision should be handed down
12 to oblige disclosure of this, but may I first deal with another issue,
13 and that is what is meant by the entity responsible. May I also inquire,
14 since my learned friend has not provided us with a copy of the bundle
15 which was handed up to the Chamber, whether there is a copy of an e-mail
16 dated 23 August by Mr Khan to myself and my response of 24 August?

17 MR KHAN: Yes, I'm sorry, it was an omission. The bundle for my
18 learned friend is here. And I can confirm that his e-mail is also
19 included I think at the last tab and our e-mail that it responded to.

20 MR STEYNBERG: I'm grateful to my learned friend for that
21 clarification. Thank you.

22 Now, as to what was meant by the entity responsible, in my e-mail
23 dated 24 of September I responded to this issue as follows. I'll just
24 read out the first two paragraphs for the record:

25 "I believe that your impression that the Prosecution has not
26

1 fulfilled its disclosure obligations under decision ICC
2 01/09-01/11-904-Conf may arise in part at least from a misunderstanding
3 of the nature of the Prosecution's involvement in the (Redacted)
4 provided to certain witnesses."

5 I'm sorry, I'm being told to slow down. I don't think the
6 interpreters have a copy of this document.

7 "This may in turn result from the ambiguity of the disclosure so
8 I will attempt to clarify.

9 "When the Prosecution informs the Defence that it is the entity
10 responsible for the (Redacted) of a witness, (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 I'm sure my learned friend from the VWU can clarify if there were
22 any employed by the VWU, but I don't believe there have been.

23 (Redacted)

24 (Redacted)

25 (Redacted)

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1 (Redacted)
2 (Redacted)
3 (Redacted)
4 (Redacted)
5 (Redacted)
6 (Redacted)
7 (Redacted)
8 (Redacted)
9 (Redacted)
10 (Redacted)
11 (Redacted)
12 (Redacted)
13 (Redacted)
14 (Redacted)
15 (Redacted)
16 (Redacted)
17 (Redacted)
18 (Redacted)
19 (Redacted)
20 (Redacted)
21 (Redacted)
22 (Redacted)
23 Prosecution will monitor their safety. They will normally have access to
24 (Redacted)
25 (Redacted)
26

1 (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, the persons who fall

22 in the medium category that you just spoke about, (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted), who continues

26

1 (Redacted)

2 (Redacted)

3 MR STEYNBERG: (Redacted)

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted). This is intended to be (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 PRESIDING JUDGE EBOE-OSUJI: But you would know (Redacted)

17 The OTP would know (Redacted)

18 (Redacted)

19 MR STEYNBERG: Yes.

20 PRESIDING JUDGE EBOE-OSUJI: -- (Redacted)

21 MR STEYNBERG: (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 PRESIDING JUDGE EBOE-OSUJI: Mr Khan had raised a question, what

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1 is the difference between (Redacted)
2 (Redacted). Is that what you're trying to do, explain to us, or can you
3 tell us what that is?

4 MR STEYNBERG: (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 PRESIDING JUDGE EBOE-OSUJI: So (Redacted) can indeed apply to
14 (Redacted)

15 MR STEYNBERG: Indeed, your Honour, it can.

16 PRESIDING JUDGE EBOE-OSUJI: Please proceed with your other
17 submission.

18 MR STEYNBERG: (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

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24 (Redacted)

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1 (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 PRESIDING JUDGE EBOE-OSUJI: Okay, (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 MR STEYNBERG: No, your Honour.

15 PRESIDING JUDGE EBOE-OSUJI: (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 MR STEYNBERG: (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

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1 Now, turning to the necessity for the Defence to be provided with
2 this sort of information, the Prosecution can fully understand why
3 payments by the Prosecution to witnesses may be the subject of interest
4 by the Defence, if it may be anticipated that the Prosecution is paying
5 witnesses to induce them to testify. Since we are a party to the
6 proceedings, we obviously have an interest in the outcome, and while we
7 believe we hold ourselves to higher professional standards than that, one
8 can understand why persons on the other side might wish to satisfy
9 themselves as to the nature of those payments.

10 The same can be said, this Court has found, for payments paid by

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 And in my submission, it's that very independence and neutrality which
21 provides the guarantees against payments made by the VWU being used as an
22 inducement to witnesses to testify. (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

26 (Redacted)

1 (Redacted). This is certainly not a

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 PRESIDING JUDGE EBOE-OSUJI: Sorry. Do you mean so unhappy or so
7 happy?

8 MR STEYNBERG: I meant to say "so unhappy." If I said the
9 opposite, then that was a -- I misspoke.

10 PRESIDING JUDGE EBOE-OSUJI: You did say the opposite.

11 MR STEYNBERG: I beg your pardon, your Honour. I certainly
12 haven't received reports of people being deliriously happy at (Redacted)
13 (Redacted).

14 Now, my learned friend has pointed to the credit side of the
15 ledger, as it were, but of course one mustn't forget there is a debit
16 side too. People (Redacted), as I've mentioned, (Redacted)
17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted). So there is a substantial cost which is involved (Redacted)

23 (Redacted) it certainly isn't a gateway to nirvana as may be suggested on
24 the other end of the room.

25 But in this regard, my submission remains that the gatekeeper to

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1 this supposed nirvana remains the VWU and they police this gate jealously
2 and make sure that there is no overabundance of happiness on the other
3 side, I'm led to believe.

4 So in my respectful submission, my learned friends can in
5 cross-examination test with the witness whether any promises were made of
6 a better life, (Redacted), but as far as what they
7 actually receive, my submission is that the VWU should be trusted to make
8 sure that they are not receiving any more than is necessary in the
9 circumstances. And absent any indicia to the contrary, in my respectful
10 submission, (Redacted)
11 (Redacted)
12 (Redacted)

13 PRESIDING JUDGE EBOE-OSUJI: But, Mr Steynberg, the alternative
14 prayer of the Defence is that, regardless of the question whether or not
15 their request comes within the ambit of the decision of 4 September, they
16 are saying that the alternative prayer is still warranted, in their view,
17 on the basis of Article 67(2) of the Statute. Article 67(2), as you
18 know, says, in addition to -- if we can look at it together, maybe that
19 would help us. We all know what it says but I find it helpful always to
20 look at these things repeatedly when dealing with them, the provisions.

21 In addition to any other disclosure provided for in this Statute,
22 the Prosecution shall - and "shall" is one word that we keep debating the
23 meaning of in various contexts in this court - it says the Prosecution --
24 or Prosecutor shall as soon as practicable disclose to the Defence
25 evidence in the Prosecutor's possession or control which he or she
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1 believes shows or tends to show the innocence of the accused or to
2 mitigate the guilt of the accused or which may affect the credibility of
3 Prosecution evidence or which may affect credibility. Doesn't say which
4 necessarily affects the credibility.

5 If that is the case, isn't this an independent source of
6 disclosure quite apart from any decision that the Chamber makes? Of
7 course, the Chamber may make a decision on the basis of this when the
8 matter is litigated. Is this not an independent source of obligation?

9 MR STEYNBERG: Indeed, it is, your Honour, and which is why my
10 learned friend was able to read out the investigator's notes and details
11 which he read out earlier. This is information which was disclosed under
12 this very provision. And where a witness has, for instance, (Redacted)
13 (Redacted), this is something which in the Prosecution view may be used,
14 legitimately used by the Defence to undermine the credibility of that
15 witness and it has been promptly disclosed.

16 PRESIDING JUDGE EBOE-OSUJI: So you are saying you have made the
17 disclosure.

18 MR STEYNBERG: Indeed, your Honour. We say that where there is
19 some indicia that the (Redacted) has been abused by a
20 witness, or if we were, for instance, to come into information that a
21 witness had been promised relocation to a mansion on the beach or
22 something like that, then that is the sort of information which we would
23 deem necessary to disclose under this provision. But the day-to-day
24 maintenance of the witnesses in the ordinary course of business of VWU
25 would, in our submission, not give rise to any disclosure obligation
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1 under 67(2) because, in our submission, it simply does not rebound upon
2 the credibility of the witness.

3 PRESIDING JUDGE EBOE-OSUJI: Any more than it does the fees
4 counsel receive for defending their clients?

5 MR STEYNBERG: Indeed, your Honour.

6 PRESIDING JUDGE EBOE-OSUJI: That's your point.

7 MR STEYNBERG: Indeed, your Honour. Far less so, because the --
8 I suspect the assistance provided to the witness is far more modest, if
9 I may speculate on that issue, but --

10 PRESIDING JUDGE EBOE-OSUJI: The point, really -- I mean on a
11 more serious note, the point is this: If it may affect -- if the point
12 is, the threshold is what may or may not affect credibility, would it
13 then not be up to you to say, well, one could see how this sort of thing
14 may be argued as affecting credibility. But when the matter is raised in
15 real term, in the course of the litigation, you also would have the job
16 or right to point out the other side of the ledger, like you've done in
17 your submission. Shouldn't that have settled it?

18 MR STEYNBERG: I'm afraid I don't think I followed that entirely.

19 PRESIDING JUDGE EBOE-OSUJI: All right. You've argued here that
20 the Defence has looked only on the plus side, plus for them. They, say
21 well, this thing has put the witnesses on some sort of a gravy train, so
22 they are receiving all these (Redacted) and all
23 that, so they have an incentive to remain on the (Redacted) and for them
24 to do that means they have to testify for the Prosecution. But you're
25 saying that is not the end of the story. There is also (Redacted)

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1 (Redacted)
2 (Redacted), and so on and so forth, which counterbalances the plus they see.
3 Shouldn't that be how we proceed? Disclose this material. If the
4 Defence uses it, you point out the other side of the ledger?

5 MR STEYNBERG: Your Honour, I think the -- the starting point is
6 whether or not the material may or may not affect the credibility of the
7 witness. And if you look at Article 67(2), it states that the
8 Prosecution shall disclose as soon as practicable to the Defence evidence
9 in the Prosecution's possession or control which he or she believes shows
10 or tends to show, for instance, may affect the credibility of
11 Prosecution's witness. (Redacted)
12 (Redacted) in
13 their business do not affect or tend to affect the credibility of the
14 Prosecution evidence.

15 The regime does not require the Prosecution to disclose
16 everything so that the Defence can make that request. This is distinct
17 from Article 77 where we are talking about the preparation itself which
18 may on a prima facie basis may be helpful to the preparation of the
19 Defence. And in my understanding that is the way in which this article
20 has been provided.

21 And in cases of doubt, the Chamber shall decide. So in cases of
22 doubt as to whether there is any incentive or anything which may
23 undermine, then that material should be submitted to the Chamber to
24 decide, and I'm sure my learned friends from the VWU would have no
25 objection to doing that.

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1 PRESIDING JUDGE EBOE-OSUJI: So your point then is that you are
2 not to be found to have violated your obligation under 67(2). You formed
3 a judgement and in your judgement these materials are not triggered, so
4 it is for the Chamber now to decide whether or not in the Chamber's view
5 the material may be disclosed. That's your view?

6 MR STEYNBERG: Indeed, your Honour, and my submission, of course,
7 is that that decision should not be made in a vacuum, but if your Honours
8 are minded to, they should consult and have a look at the material first.

9 PRESIDING JUDGE EBOE-OSUJI: Fair enough. Is there anything else
10 you want to submit on that?

11 MR STEYNBERG: If the Court will bear with me for one moment to
12 see whether I've missed anything.

13 (Prosecution counsel confer)

14 MR STEYNBERG: No, your Honour, I think that covers it. Thank
15 you.

16 PRESIDING JUDGE EBOE-OSUJI: All right. Mr Kigen-Katwa?

17 MR KIGEN-KATWA: Mr President, a couple of days ago, our learned
18 friend from the other side said that the proceedings we are engaged in
19 are adversarial. In the same breath, with reference to Article 67, they
20 say -- 67(2), they say they have made their assessment and found that the
21 material we are asking for does not necessarily go to credibility. Your
22 Honours, we submit that that is inconsistent in the sense that to the
23 extent to which in their view this is an adversarial process, it is
24 likely that in exercising that judgement they may not be as objective as
25 would ideally be the case if the intention was to avail to the Court the
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1 full scope of the material that would inform the question of whether or
2 not there is any guilt on the part of our clients.

3 Mr President, it is our submission that what the -- this Chamber
4 said in its decision that the material asked for in the application -- in
5 the decision of 4 September 2013 at paragraph 59, where the Court said
6 that (Redacted)
7 (Redacted) are prima facie material to -- are
8 prima facie material to preparation of the Defence case as they could,
9 amongst other things, go to credibility of the witness. That's one test.

10 The second test was the paragraph immediately above, being this:

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 So then, your Honours, it is not necessary for this disclosure to
15 be based (Redacted). It is --
16 the right to that disclosure, Mr President, is left to us to determine
17 whether it is an issue which goes to the credibility or otherwise. And
18 as, Mr President, you had indicated and observed to the Prosecution, if
19 we were to take advantage of that disclosure and contend that it has
20 influenced the actions of the witness, then the Prosecution have the free
21 hand to indicate on their part how the witness could not have been
22 motivated to take the position they took owing to what was given to them.

23 Mr President, the Prosecution have attempted to argue to you that
24 we should trust the VWU in their judgement and assessment as to the
25 protective measures and the extent that they give. And, your Honours, we
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1 submit that that is not the appropriate criteria, that the issue should
2 not be left to the VWU. For the reason, your Honours, that the VWU --

3 PRESIDING JUDGE EBOE-OSUJI: Counsel, can counsel please try and
4 keep -- maintain silence in the courtroom when others are talking?
5 Please, it's distracting.

6 MR KIGEN-KATWA: Mr President, I'm sorry for that.

7 PRESIDING JUDGE EBOE-OSUJI: It wasn't you. It was not you.

8 MR KIGEN-KATWA: Mr President, I was explaining that -- our
9 submissions, Mr President, is that the argument made by the Prosecution
10 that the issue should be left to the VWU to make the best judgement and
11 that the judgement should not be questioned is something we do not agree
12 with. And our challenge is based on the source of the information that
13 the VWU goes to to make the decision. And the sources of the information
14 is -- the first one is the witness himself who would be asking for so
15 much in terms of protection and measures for his security to testify.
16 And we submit that in the course of making that request, they would go as
17 far as saying that: It is only if this is satisfied that I will
18 cooperate.

19 The second source of information would be the Prosecution
20 themselves in their assessment of the security situation. And, your
21 Honours, we submit that that is exactly where the mischief and the
22 question of credibility would come in, and we would rather be given that
23 information so that we make the judgement or the assessment as to whether
24 or not to challenge the witness on his motivation based on the
25 information as to what he required before he can cooperate and the
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1 (Redacted) that the Prosecution give -- assessed as being
2 necessary, just in case it was more than necessary and was made to
3 attract the cooperation of the witness.

4 For those reasons, Mr President, we submit that it doesn't matter
5 whether the information is in the hands of the Prosecution or in the
6 hands of the VWU. We are entitled to that information for purposes of
7 exercising our option to challenge the integrity of the witness and the
8 motivation they have in testifying.

9 Mr President, lastly I wish to make the observation that
10 thankfully the Prosecution did not anywhere in the course of their
11 submission on this issue say that that disclosure will not assist the
12 Court in the truth -- in the course of looking for the truth in this
13 prosecution, Mr President, but they do not say that there is any
14 prejudice to the interest of this court nor to justice -- to mete out
15 justice in the matter.

16 For all those reasons, Mr President and your Honours, we pray the
17 material be disclosed to us, regardless whether or not it falls within
18 the ambit of the decision of 4 September 2013 or otherwise.

19 PRESIDING JUDGE EBOE-OSUJI: Thank you. Mr Narantsetseg, please.

20 MR NARANTSETSEG: Mr President, your Honours, I haven't received
21 any instructions from Mr Nderitu on this matter so we have no submissions
22 to make. Thank you.

23 PRESIDING JUDGE EBOE-OSUJI: Thank you. Ms Schauder?

24 MS SCHAUDER: (Interpretation) Thank you, Mr President, your
25 Honours, for allowing us to address the Bench on this important matter.

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1 I would like, first of all, to refer the Court to our mandate, that is
2 the mandate of VWU, as mentioned in the submissions of 20 September, ICC
3 -- ICC-01/09-01/11-968 which highlights the desiderata of the authors of
4 the Rome Statute and judges of other Chambers of this court who insisted
5 on the need and importance of conferring to an independent unit a
6 significant amount of the work relating to the protection of witnesses
7 and victims.

8 Our understanding is that this neutrality, as well as internal
9 processes are stacked over several levels, in order to ensure that the
10 amounts of money disbursed by VWU to victims and witnesses are strictly
11 proportionate to the needs of the security relating to any particular
12 individual.

13 Now, regarding what Mr Steynberg said previously, the fundamental
14 difference between providing someone with the (Redacted) as well as
15 the (Redacted) is that, in the first case, the full responsibility
16 of -- over the person lies within the VWU, and any contact between the
17 (Redacted). Therefore, the OTP, for
18 example, will not be aware (Redacted) for the person
19 involved.

20 When it comes to (Redacted), it is possible, both for the OTP
21 to participate if it is in a better position to do so, in this (Redacted)
22 (Redacted)
23 (Redacted)
24 communication between the OTP and the witness will then be restored at
25 that time. (Redacted)
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Page 35 redacted.

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8 (Redacted)

9 (Redacted)

10 PRESIDING JUDGE EBOE-OSUJI: So that's now a practical matter,
11 really, than one of principle, so to speak.

12 MS SCHAUDER: (Interpretation) Well, initially, I talked about the
13 principles but I just want to point out to the Chamber some of the
14 technical problems that we are likely to encounter, and I would like you
15 to bear this in mind when dealing with issues of deadlines and any
16 decisions that you may want to come to.

17 PRESIDING JUDGE EBOE-OSUJI: (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

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1 (Redacted)

2 (Redacted)

3 MS SCHAUDER: (Interpretation) (Redacted)

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

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18 (Redacted)

19 (Redacted)

20 PRESIDING JUDGE EBOE-OSUJI: That would be your preference.

21 MS SCHAUDER: (Interpretation) Yes, indeed.

22 PRESIDING JUDGE EBOE-OSUJI: All right. Is there anything else
23 you want to add?

24 MS SCHAUDER: (Interpretation) Not at this juncture, Mr President,
25 but we are ready to field any questions you may raise regarding our
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1 finances. Thank you.

2 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. Mr Khan, one
3 minute.

4 MR KHAN: Mr President, the scope and ambit of Article 67(2) has
5 already been defined in favour of the relief requested by the Trial
6 Chamber in paragraph 59 of the decision in which the Trial Chamber has
7 (Redacted)
8 (Redacted). So that issue has been
9 done.

10 Your Honour, I would ask the Chamber to be alive to the
11 distinction that must be drawn between the request for disclosure and any
12 inference that may be made from that. So issues regarding internal
13 regulation in the OTP or in the Registry, VWU, or whether or not the
14 expenses are proportionate are really matters for a later stage. That
15 would be putting, we'd say, the proverbial cart before the horse. The
16 issue now is simply disclosure of information in relation to a witness
17 that the Prosecution state in writing that they are the entity
18 responsible for.

19 Your Honour, it goes back to the intermediary filing which was
20 sought to strike down the protocol and, of course, the VWU and we were
21 very supportive of what the Appeals Chamber held out as their role, which
22 was the independent neutral organ, but for the reasons detailed in that
23 previous filing, we say that the OTP-Registry Protocol has carved a
24 massive dent in that independence because your Honours will see in the
25 protocol itself, if I can have it -- just bear with me one moment. Oh,

26

1 it's here.

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 (Redacted). So, your Honour, there has been a massive change in what

7 the Appeals Chamber held in Katanga on (Redacted) and we've,

8 in writing, said we are rather confused. We thought that the term

9 (Redacted) was, to put it bluntly, a rather clever wheeze to

10 sidestep the prohibition (Redacted). My learned friend has said today

11 in court that (Redacted) can indeed apply to (Redacted). So

12 really it's a matter of degree rather than spirit. And no judge so far

13 of the ICC has determined whether or not that protocol is consistent with

14 the spirit of the Appeals Chamber, and that's the matter the Court will

15 decide in due course.

16 But, your Honours, going to the other issues that have been

17 raised, we say what possible danger can there be in giving the Defence

18 information, and the Defence will hopefully make responsible choices

19 whether to raise that as an issue with the witness if we feel it relevant

20 or not to use it. But whether or not (Redacted)

21 (Redacted) all the other benefits have impacted on a

22 witness's willingness to testify and tell a certain narrative is a matter

23 ultimately that the Chamber will decide, but the simple muted information

24 regarding costings will not possibly, we say, by any stretch of the

25 imagination imperil a witness. We are not interested in specifics

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1 regarding (Redacted). At most what one

2 could say is that a witness (Redacted)

3 (Redacted)

4 (Redacted)

5 (Redacted), but that is not enough to put in peril a particular witness.

6 And, your Honours, the cost and the benefits received, we say there has

7 been no persuasive reason put forward by the Prosecution or, indeed, by

8 my learned friend for the VWU that would militate against the submissions

9 put forward.

10 Your Honour, oversight is a tremendously good thing and the

11 Registrar, of course, has certain delegated functions, but when it comes

12 to the trial, of course, the Trial Chamber is sovereign.

13 PRESIDING JUDGE EBOE-OSUJI: We know that. We know that. The

14 point now is that you are saying that, at a minimum, you're happy to

15 receive the costs summary of -- associated with each witness.

16 MR KHAN: Yes, and broken down in this manner: (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

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1 (Redacted). So, your
2 Honour, it's in those three broad categories that we asked for disclosure
3 and we say that it can't -- it can be done in a way in which the rights
4 of the Defence are properly secured without jeopardising witnesses at
5 all.

6 PRESIDING JUDGE EBOE-OSUJI: All right. We need to leave it
7 there. It's almost 11.00 when we take our morning break.

8 MR KHAN: I'm most grateful.

9 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, you have the right of
10 reply.

11 MR STEYNBERG: Your Honour, may I just say I have no objection to
12 the third category. Indeed, those sort of matters we have already always
13 disclosed to the Defence, if there has been any hint of fraud or
14 witnesses trying it on. I imagine that my learned friends in the VWU
15 would have already alerted us had there been such incidents and we would
16 have passed them on. But if there are any additional ones, then I have
17 no objection. If the VWU has no disclosure obligations, as it says, not
18 being a party, they can pass that information to us and we can disclose
19 it in the ordinary course.

20 PRESIDING JUDGE EBOE-OSUJI: Are you also -- what about the
21 matter of just the costs summary itemised?

22 MR STEYNBERG: My reservation is this, your Honours. My learned
23 friend has said he has (Redacted)
24 I question the utility, your Honour, (Redacted)
25 (Redacted) If
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1 that person (Redacted)
2 (Redacted)
3 (Redacted). If the person, on the other hand, had been
4 (Redacted), as my learned friend points out(Redacted)
5 (Redacted)
6 (Redacted). So how is that information in the absence of the context
7 going to provide anything to the Defence?

8 My submission is -- the object is to determine whether the
9 payments are reasonable. My submission is that is already catered for by
10 the various layers of review and independent oversight that the VWU bring
11 to bear on this, and in the absence of knowing where the witness is --
12 it's really -- it's, in my submission, more aimed at keeping the
13 Prosecution occupied on accounting for dollars and cents than it is for
14 any utility of the information which is going to be received at the other
15 end. Those are my submissions. Thank you.

16 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. We've heard
17 submissions on this matter. We are going to take our morning break. One
18 second, please.

19 (Trial Chamber confers)

20 PRESIDING JUDGE EBOE-OSUJI: The witness will be brought to court
21 for 11.30. We will proceed with the testimony of this witness, whether
22 or not the Chamber is able to render an oral decision at 11.30. The
23 witness's testimony will proceed in any event. So we hope we are able to
24 render a decision by 11.30, but if not, we will still go ahead with the
25 testimony. The Chamber will now rise.

1 (Recess taken at 11.01 a.m.)

2 (Upon resuming in open session at 11.38 a.m.)

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

5 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. The Chamber
6 will deliver its ruling on the motion argued earlier this morning.

7 The Defence made a request for disclosure of, first, all costs
8 expended by the Victims and Witnesses Unit for purposes of relocation,
9 maintenance and/or support of Witness 268 within the witness protection
10 and support programme. That is the first limb of the Defence request.

11 The second limb of their request is the disclosure of any
12 evidence tending to show fraud or other acts of illegality on the part of
13 the witness that bears a direct connection to his maintenance and support
14 within the witness protection and support programme.

15 The legal bases of the Defence request are, alternatively, the
16 Chamber's decision of 4 September 2013 entitled, "Decision on disclosure
17 of information related to Prosecution intermediaries" or, alternatively,
18 Article 67(2), which requires the Prosecutor to disclose information
19 which may affect the credibility of Prosecution evidence.

20 The rational basis for the request, of course, is that the
21 request may affect the credibility of the witness.

22 The OTP does not oppose the second limb of the request but they
23 do oppose the first limb of the request so, too, as we understand it,
24 does the VWU. The reason for opposing the request is that the VWU is an
25 independent unit tasked with making independent judgements on what is
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1 appropriate, in terms of costs to be expended on witnesses' sustenance or
2 maintenance, witnesses that are within their care, and as such, all
3 efforts are made to ensure that those costs are reasonable and not
4 inordinate.

5 The Chamber grants the request, in part only, and only as regards
6 the second limb of the request. The Chamber denies the request in all
7 other respects, in particular as regards the first limb of the request.
8 In the Chamber's view, the probative value of granting the request in the
9 first limb is outweighed by both the considerations of prejudice and
10 efficiency, not only in relation to the witness but also the operations
11 of the Victims and Witnesses Unit and the administration of justice in
12 general.

13 Witnesses who come to testify, it is presumed, will have to have
14 sustenance in their lives, whether it is afforded to them on their own or
15 through the instrumentality of the Victims and Witnesses Unit. It
16 therefore does not afford a prima facie indicia of credibility that the
17 Victims and Witnesses Unit has undertaken those reasonable tasks of
18 providing reasonable support and maintenance to a witness rather than the
19 witness doing it themselves.

20 That is the ruling of the Chamber.

21 MR STEYNBERG: As the Court pleases, your Honours. I know that
22 your Honour is anxious to get started with the next witness and
23 I understand he is ready to come. If I may just raise one matter and
24 perhaps your Honours can give us an answer in due course, and that's
25 simply relating to the conduct of proceedings. Now, we've lost some time

1 this morning, more time on Friday and again this afternoon, the result
2 being that, in the assessment of the Prosecution at least, it is unlikely
3 that we will be able to finish both of the witnesses who are presently in
4 The Hague by the end of the week as planned.

5 So my first request is for an indication as to whether or not, if
6 we do not finish that witness, if we will be able to continue into the
7 next week to finish that witness before we break.

8 The second one, which I imagine your Honours will not be able to
9 give an answer as readily, relates to the conduct of proceedings
10 thereafter. I did raise this issue a few days ago, your Honours, but in
11 the interim, I note that the Defence in the Kenya II case have filed a
12 request for an adjournment of that matter. Now, obviously we cannot
13 prejudge what will happen with that request, but if your Honours would be
14 predisposed to guide the parties as to what would happen should that
15 request be granted so that the necessary plans can be put in place to
16 secure witnesses. As your Honours know, there is approximately a
17 two-week lag time to get witnesses who are based in Africa or overseas to
18 the court to testify, so there is some considerable logistical issues
19 that will need to be addressed.

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

21 MR KHAN: Mr President, two matters with your leave. The first,
22 if the court officer, with your permission, can give me some assistance,
23 the microphone and audio system on this table is not working in the
24 middle and my side so I can't hear the translation, so if somebody could
25 come and fix one of these two devices, I'd be most grateful.

26

1 Your Honours, when it comes to the schedule next week, of course
2 we are in the Court's hands, but we have been guided by the court
3 schedule at the moment and we have -- various team members have other
4 commitments that have been planned because we had been led to believe the
5 session would end on 1 November. Your Honours, from what I understand my
6 learned friend, Mr Hooper, QC, and my learned friend, Mr Kigen-Katwa, as
7 well as the Prosecution, no doubt, could speak to it. We anticipate this
8 witness will take the bulk of this week and it may well be, in those
9 circumstances, the more prudent course would be to release the witness to
10 come back later because, of course, there is option of starting maybe on
11 Friday sometime a bit of examination-in-chief, but on balance, my own
12 personal view and my own submission would be, where possible, it's always
13 preferable to keep examination-in-chief and cross-examination together
14 unless it's absolutely unavoidable. So my submission would be the
15 witness could be returned and no need to keep the witness unnecessarily
16 in The Hague until the current witness is finished.

17 PRESIDING JUDGE EBOE-OSUJI: Your point is that beyond 1
18 November, you have other commitments you've made in the meantime that may
19 not allow you to continue beyond that.

20 MR KHAN: Yes. Your Honour, of course, we will endeavour to
21 accommodate and comply with whatever directions of the Court, but we have
22 planned certain, amongst both teams, I think I can speak for both teams
23 here, certain discrete investigative activity and other activity as well
24 that would put us in hardship.

25 Your Honour, in relation to the second aspect and the court
26

1 calendar, your Honour, that's a matter that the Court will decide in due
2 course, but for my part, and on behalf of Mr Ruto, the Court have been
3 well informed about our preparedness to start this case and the need, our
4 original request, based upon the judgement of all counsel involved, that
5 we needed until November. Now, your Honours, complying with the Court's
6 order as we have, we factored in that during certain breaks, various very
7 necessary investigative activity would be carried out, and so, actually,
8 we need those court adjournments to do essential jobs that actually
9 should have been done before trial started but haven't. So, your Honour,
10 I'd ask that to be borne in mind. It's not a question of simply, of
11 course, filling the slots because something may or may not happen during
12 the case --

13 PRESIDING JUDGE EBOE-OSUJI: Well, why don't we not -- let's
14 proceed this way. The Prosecutor has raised this matter and put it on
15 the table and he did not require a ruling immediately.

16 MR KHAN: I'm grateful.

17 PRESIDING JUDGE EBOE-OSUJI: Why don't we, as it were, put it on
18 the bring-up matter so that we can later on bring up that matter.

19 MR KHAN: So be it.

20 PRESIDING JUDGE EBOE-OSUJI: Especially in light of the
21 application I understand that has been made in the companion case for an
22 adjournment.

23 MR KHAN: Indeed.

24 PRESIDING JUDGE EBOE-OSUJI: So if that is resolved either way,
25 we may have to take up what happens with our own case in here.

1 MR KHAN: I'm grateful and we will be so guided.

2 PRESIDING JUDGE EBOE-OSUJI: Why don't we do that and then
3 proceed with calling this witness. And, yes, we have lost some time
4 discussing necessary procedural issues that we need to take care of.

5 MR KIGEN-KATWA: Mr President, I just wanted to be sure that you
6 will hear me before any decision is made on that issue of extending the
7 time.

8 PRESIDING JUDGE EBOE-OSUJI: We are not making any decision --

9 MR KIGEN KATWA: (Overlapping speakers) --

10 PRESIDING JUDGE EBOE-OSUJI: -- that's what I'm saying.

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

12 PRESIDING JUDGE EBOE-OSUJI: Can we bring in the witness now,
13 blinds down and the witness called in, please?

14 (Closed session at 11.52 a.m.)

15 THE COURT OFFICER: (Interpretation) We are in closed session and
16 the witness will --

17 MR HOOPER: Your Honour, while the witness is being brought in,
18 I've just received the protected information on the witness together with
19 a CV and personal information. And I'd be grateful if my friend,
20 Mr Garcia, doesn't lead on the issues of work experience and any
21 political memberships. If we hear of those aspects from the witness, I'd
22 be grateful. Thank you.

23 MR GARCIA: I understand, your Honours, that the CV and the list
24 of work experience was already sent to the Defence, and the comment that
25 we got back was that it was accepted and there would be no problem with
26

1 that and that possibly the reliability of the information that might have
2 come from Kigen-Katwa -- Mr Kigen-Katwa's Defence counsel.

3 MR KIGEN-KATWA: Mr President, we responded to that CV and said
4 we do not wish to have that evidence led and we reserve our right to
5 challenge the truth of the content, but otherwise, we do not wish to have
6 it belaboured in the course of the trial.

7 PRESIDING JUDGE EBOE-OSUJI: So you do not wish to have the
8 evidence -- leading questions asked on the CV?

9 MR KIGEN-KATWA: They can lead, Mr President.

10 PRESIDING JUDGE EBOE-OSUJI: So what's the concern now,
11 Mr Hooper? Where are we?

12 MR HOOPER: We certainly didn't indicate to the contrary to what
13 I've just said, and that is that as far as work experience and political
14 memberships are concerned, we would -- I'd invite my friend to -- well,
15 we just want to hear from the witness himself.

16 PRESIDING JUDGE EBOE-OSUJI: To ask the questions.

17 MR HOOPER: He can ask the questions, yes --

18 PRESIDING JUDGE EBOE-OSUJI: All right.

19 MR HOOPER: -- we will hear from the witness. It won't take very
20 long. It's not as if it's a great shortening of time one way or the
21 other, but we would rather hear directly rather than just accept what is
22 written here.

23 PRESIDING JUDGE EBOE-OSUJI: All right. We have not seen the PIS
24 in question, the CV.

25 MR GARCIA: A copy was given, actually, during the break. I'm
26

1 not sure. I think Mr Rojas has one.

2 PRESIDING JUDGE EBOE-OSUJI: So we understand it, what you're
3 saying, Mr Hooper, is that bullet -- the first and second bullet points
4 you are prepared to accept without any questions being asked?

5 MR HOOPER: Yes.

6 PRESIDING JUDGE EBOE-OSUJI: But the third and fourth bullet
7 points, you want counsel to ask questions on those? In the ordinary
8 course.

9 MR HOOPER: Yes, he can ask questions, even quasi-leading
10 questions in respect to that. But we would like to hear the information
11 more fully from the witness in the course of his descriptions. Thank
12 you.

13 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. Can the
14 witness be sworn, please?

15 (The witness enters the courtroom)

16 PRESIDING JUDGE EBOE-OSUJI: In private session.

17 (Open session at 11.55 a.m.)

18 PRESIDING JUDGE EBOE-OSUJI: Sorry.

19 THE COURT OFFICER: (Interpretation) We are in public session,
20 your Honour.

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

22 Witness, welcome to the courtroom, and thank you for joining us.
23 Your oath will now be administered to you.

24 Court officer, can you kindly administer the oath or the
25 declaration.

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1 THE WITNESS: I solemnly declare that I will speak the truth, the
2 whole truth, and nothing but the truth.

3 WITNESS: KEN-OTP-P-0268

4 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. The -- what
5 you just declared is, in a nutshell, all that we require of you for your
6 period of stay with us in this case. Just to speak the truth, the whole
7 truth and nothing but the truth.

8 If you do that, you would have helped us a lot in our work. And
9 doing that requires the simple matter of really listening closely to the
10 questions the lawyers would ask you while you're in court. The
11 Prosecutor will begin asking you the questions, and after they are done,
12 the Defence lawyers for Mr Ruto and possibly also Mr Sang will have the
13 right to ask you questions also. As they do that, just listen carefully,
14 make sure you understand the questions they are asking, and after you've
15 understood each question, then you do your best to answer it truthfully
16 to the best of your ability.

17 What we require of you, what we are more interested in or most
18 interested in, is what you witnessed yourself first-hand, what you saw
19 yourself, what you heard, what you smelled, essentially firsthand
20 experience from you is what we are interested in. Try not to guess at
21 answers. Try not to draw inferences, if you can avoid it. Inferences as
22 in, there is one fact and another fact and then you come to your own mind
23 that because there is one fact and a second fact, it necessarily means
24 that a third fact also is the case. Try not to do that. It is the
25 lawyers who will do that at the end of the day. Just concentrate on what
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1 you saw and experienced or heard.

2 Try not to guess also. If you do not understand the question,
3 tell them you do not understand the question. If you do not have an
4 answer, tell them you do not have an answer or you don't know the answer
5 to that question. That's all right too. Try not to guess, if you can
6 avoid it.

7 There is another matter that's very practical and that is the
8 matter of we want to make sure that your trip here is worth it so that
9 what you are telling the Court is actually heard correctly and recorded
10 properly. That requires you to pay attention to the work of the
11 interpreters up there and the court reporters. They will help to
12 interpret what you say into different languages of the court and also to
13 record your answers for the transcript. You need to assist them in doing
14 that work by speaking slowly, not too slowly, but don't speak too fast.
15 Also, speak in chunks of information and not to give continuous flow of
16 information that may take up to ten sentences continuously. Speak
17 deliberately, stop so that they can digest what you're saying and capture
18 it properly and record it.

19 There is something we call the gap rule. The gap rule also
20 assists in making sure that your answer is captured correctly. That is a
21 gap that must be observed between the speaker asking you the question,
22 between when he finishes asking the question and when you start answering
23 it. There is a little gap that needs to be observed. We call it the
24 five-seconds rule. It also helps interpreters and court reporters to do
25 their work. If you observe all these things, you would have assisted us
26

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1 a lot in our work. And again, I thank you for coming to give us what you
2 know.

3 THE WITNESS: You're most welcome, your Honour.

4 PRESIDING JUDGE EBOE-OSUJI: Thank you.

5 MR GARCIA: Your Honours, just before we do start, just a matter
6 of procedure. There is a question of bundles that the Prosecution had
7 prepared for this witness which contained the annexes of the statement of
8 the witness, the witness's statements and other prior statements as well.
9 Before we started today's hearing, Defence counsel, Mr Hooper, indicated
10 that he strongly objected to a lot of these documents being in the bundle
11 that was going to be provided to the Chamber. Obviously, the Prosecution
12 has no problem with removing the documents that are deemed problematic by
13 Mr Hooper, but obviously we would like the Chamber's guidance on this
14 matter because the fundamental reason why the Prosecution inserted these
15 documents is so that the Chamber could possibly refer to them, ease of
16 usage during the examination or cross-examination of the witness. So
17 I leave that obviously in the hands of the Chamber. If need be, I can --
18 we have the bundles right here. We have recuperated them. We can
19 also -- we can either provide the Chamber with an amended one, with
20 simply the annexes of the witness, or one with all the documents,
21 depending on what the Chamber requests.

22 PRESIDING JUDGE EBOE-OSUJI: The matter would be -- the
23 objection, Mr Hooper, would be as to statements you said?

24 MR HOOPER: Well, essentially what I objected to were documents
25 which in the normal course of events would not be admissible in chief,
26

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1 and when I raised that with my friend, he said he'd put them in,
2 I thought over-kindly, because they might be documents I would want to
3 refer to. But of course, if I want to refer to documents, I'll put them
4 in my own bundle and provide that to the Judges in due course. So I'd
5 submit that this is the better and more appropriate position.

6 PRESIDING JUDGE EBOE-OSUJI: But the bundles are not evidence.
7 They are just a handy package of information that may be useful. They
8 are not being admitted. I can assure you that in previous instances, I
9 have not looked at witness statements before coming here, but in the
10 course of the arguments or the witness testimony when the questions are
11 raised as to what they said, then we look at them at that time. That's
12 how I've done it.

13 MR HOOPER: Well, I've raised no objection to the statement going
14 in because we learned last week that that was the position, that your
15 Honour has access to it and refers to them, so I didn't object to that.
16 I objected to other documents which, so far as I can see, would not be
17 properly admissible in the course of an examination-in-chief of a
18 witness, one's own witness, and I felt it was quite inappropriate that
19 those documents would be put in at this stage.

20 If in the course of the trial those documents become relevant,
21 they will, I would anticipate, become relevant only in cross-examination,
22 in which case your Honours will be provided with them. But I don't think
23 this is an opportunity for the Prosecution to pack its bundle with all
24 manner of statements, and so I suggested there was a line to be drawn and
25 I hope that's an appropriate one.
26

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1 So the position is it at the moment that what your Honour has
2 here is a bundle that contains the witness's statement to the
3 Prosecution, the fundamental statement, and it includes the exhibits and
4 it includes some other matters which, in the normal course of events,
5 I do anticipate my friend seeks to introduce. May I say that in respect
6 of certainly one of those items there will be an objection in respect of
7 its admissibility, but it's still in the bundle.

8 (Trial Chamber confers)

9 PRESIDING JUDGE EBOE-OSUJI: Well, we will -- Prosecutor can hand
10 up the bundles. What we will do is -- Mr Hooper has already flagged his
11 concerns. At the appropriate time where the Prosecutor makes a move to
12 tender any of these documents, we will hear the objections at that time.

13 MR KIGEN-KATWA: Mr President, on that issue, may I indicate that
14 I didn't get access to the document.

15 PRESIDING JUDGE EBOE-OSUJI: You did not?

16 MR KIGEN-KATWA: I had not been given. And so I reserve my right
17 to object at the appropriate time.

18 PRESIDING JUDGE EBOE-OSUJI: All right. Definitely.

19 MR KIGEN-KATWA: Thank you.

20 PRESIDING JUDGE EBOE-OSUJI: All right --

21 MR GARCIA: Your Honours, given the --

22 PRESIDING JUDGE EBOE-OSUJI: Let's get going on this witness's
23 testimony.

24 MR GARCIA: I can perhaps start immediately with the witness.

25 But given the objections by Mr Hooper, we had already removed some of the
26

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1 documents. I understand that we have approximately 55 minutes of
2 testimony today and most probably we will only be getting to one of the
3 documents. So for Defence counsel, we will provide the full version
4 after today's session. I understand that the Chamber has --

5 PRESIDING JUDGE EBOE-OSUJI: Are you saying -- are you saying
6 that we have the full version?

7 MR GARCIA: Yes, your Honour, from what I understand, I'm looking
8 at it right now and I see that that is the full version, yes.

9 PRESIDING JUDGE EBOE-OSUJI: All right.

10 MR GARCIA: I just want to make sure with Mr Rojas if -- whether
11 these documents have tabs A and tabs F on them -- in them still
12 incorporated.

13 PRESIDING JUDGE EBOE-OSUJI: There is nothing in tab A and there
14 is nothing in tab F of my own bundle.

15 MR GARCIA: What we can do, your Honour, is we'll supplement and
16 add those after today's hearing. That's not a problem.

17 PRESIDING JUDGE EBOE-OSUJI: Okay. Please proceed.

18 MR GARCIA: I'd like request that we go into private session,
19 your Honour.

20 PRESIDING JUDGE EBOE-OSUJI: For how long?

21 MR GARCIA: For the first part it should take ten to 15 minutes,
22 your Honour.

23 PRESIDING JUDGE EBOE-OSUJI: All right. Private session.

24 (Private session at 12.08 p.m.)

25 THE COURT OFFICER: (Interpretation) We are in private session,

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1 your Honour.

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

4 QUESTIONED BY MR GARCIA:

5 Q. Good morning, Mr Witness.

6 A. Good morning, your Honour.

7 Q. Now, Mr Witness, my name is Lucio Garcia and I will be asking you
8 questions on behalf of the Prosecution today. I understand that we've
9 already had the occasion of meeting in the past.

10 The first question I'd like to ask you is if you could please
11 state your name for the record?

12 A. My name is (Redacted).

13 Q. And I correct in stating, Mr Witness, that you are of (Redacted)
14 ethnicity?

15 A. Yes, your Honour.

16 Q. Now, Mr Witness, I'm not -- if you'll see before you, I think
17 that you have a document, a PIS document.

18 A. Yes, your Honour.

19 Q. Mr Witness, I'd like to draw your attention to the last page of
20 that document. It says: CV, personal information for P0268. Do you see
21 that page?

22 A. I see it, your Honour.

23 Q. Now, do you see the information that's under personal background?
24 Have you had a chance to just read that information?

25 A. I see it, your Honour. Personal background, born on (Redacted)

26

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1 (Redacted)

2 Q. That's fine, Mr Witness. Would you be able to just confirm for
3 me that the information as to the date that you were born and the fact
4 that you are (Redacted); is that correct?

5 A. It is correct, your Honour.

6 Q. Now, just below that, there is a section titled, "Education."
7 Could you tell me if the -- tell the Court if that information is correct
8 as well?

9 A. Yes, your Honour, it's correct. I attended several primary
10 schools and went to (Redacted), completed a diploma at (Redacted)
11 (Redacted).

12 Q. Now, Mr Witness, in regards to your work experience, am I correct
13 in stating that you worked as a (Redacted)
14 (Redacted) from (Redacted)

15 A. Yes, your Honour.

16 Q. Am I also correct in stating that you began practising
17 (Redacted) in the year 2002?

18 A. Yes, your Honour.

19 Q. Am I also correct in stating that you have worked as an
20 (Redacted)
21 (Redacted) from (Redacted)

22 A. Yes, your Honour, that's correct.

23 Q. Now it also says here that (Redacted)
24 (Redacted); is that correct?

25 A. Yes, your Honour.

26

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1 Q. Is it also correct to state that you've previously worked as a

2 (Redacted)

3 (Redacted)

4 A. That is correct, your Honour.

5 Q. Also, is it also correct to state that you have currently a

6 (Redacted)

7 (Redacted)

8 A. That is correct, your Honour.

9 Q. Now it also says here under the title (Redacted) that you've

10 had (Redacted) and that between (Redacted)

11 (Redacted), you were an (Redacted); is that

12 correct?

13 A. That is correct, your Honour.

14 Q. Is it correct as well, Mr Witness, that currently you're a member

15 of (Redacted) but that you have not participated in any

16 of its activities?

17 A. Yeah, that's correct, your Honour.

18 Q. Mr Witness, am I also correct in stating that you're a member of

19 (Redacted)

20 A. Yes, your Honour.

21 Q. Thank you for those -- that information, Mr Witness. In a couple

22 of seconds I'm going to be asking the Court to go into public session,

23 and obviously you have before you the document that I showed you during

24 the preparation session, and on this document there are names and there

25 are numbers that correspond to this name. There are also list of places

26

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1 with numbers that correspond to them and list of organisations with
2 numbers that correspond to them. So what I'd ask, Mr Witness, is that
3 when we do go into public session and you feel that you need to refer to
4 any of these people or these places or organisations, that you do so by
5 referring to the number, the corresponding number on your list.

6 PRESIDING JUDGE EBOE-OSUJI: Do you understand?

7 THE WITNESS: Yes, your Honour.

8 PRESIDING JUDGE EBOE-OSUJI: So we will -- are you now requesting
9 to go into open session?

10 MR GARCIA: Indeed, Your Honour, I would ask that we go into
11 public session.

12 PRESIDING JUDGE EBOE-OSUJI: Witness, we will go into public
13 session and we had occasion to discuss the needs to protect you while you
14 were testifying and the Chamber made the order that you will testify --
15 part of your testimony will be in the public session, but when that is
16 happening, we want to be sure that information concerning you is not
17 inadvertently indicated to the public. Counsel will know how to phrase
18 their questions so as to avoid that difficulty, but you also need to
19 assist in the effort.

20 Try to -- first of all, let the question strictly guide your
21 answer. Try, if you can avoid it, to not give more by way of an answer
22 than the question requires, so that if a question requires you to say
23 "yes" or "no," just simply say "yes" or "no." Leave it to the lawyer to
24 ask you the follow-up question that will get you to say more and that way
25 it's easier to avoid accidental slipups on your part, so that you may
26

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1 start adding something else that the lawyer has not asked you and, in
2 that process, you may end up giving more information that may indicate
3 who you are.

4 It's not just about mentioning names of people or where you've
5 been in particular. It could also be a matter of you relating
6 information that is very unique, that only one or two people observed
7 together with you, and nobody else, so if you start telling that story in
8 public, those people who were with you will know, ah, that's him now
9 testifying because he would have been the only one who knows about this.
10 That sort of information we don't want to give in public session. We
11 will do that in the private session, all right?

12 Now, there is a button next to you, you see it between you and
13 me, there is a button that's now lit up green, you see that? Can you
14 look beyond your microphone, there is a light that's showing -- yes,
15 that. When it's green it means we are in private session, it's safe for
16 you to speak freely. But when we are in public session, it will light up
17 red. When it's lit up red it means we are in public session so be
18 careful what you say. All right?

19 THE WITNESS: All right, your Honour.

20 PRESIDING JUDGE EBOE-OSUJI: Thank you. We will now go into
21 public session.

22 (Open session at 12.17 p.m.)

23 THE COURT OFFICER: (Interpretation) We are in public session,
24 your Honour.

25 PRESIDING JUDGE EBOE-OSUJI: Thank you.

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1 MR GARCIA:

2 Q. Now, Mr Witness, I'd like for us to start with this whole issue
3 of the 2005 referendum in Kenya and I'd have some questions to ask you on
4 that subject. Now, could you please tell the Court who was president of
5 Kenya at the time of the 2005 referendum?

6 A. It was honourable Mwai Kibaki, your Honour.

7 Q. Can you also tell the Court, Mr Witness, of what party he was
8 representing?

9 A. He was in NARC (* Realtime transcript read in error "ACF")
10 coalition.

11 Q. Now, just for the record, is that NARC, the acronym of the party?

12 A. National Alliance Rainbow Coalition.

13 MR GARCIA: So just for the record, your Honours, line 14 should
14 be corrected. It's not ACF coalition but NARC.

15 Q. Mr Witness, can you please tell us what was the atmosphere like
16 in Kenya at that point during the referendum?

17 A. The country went into a referendum, and after referendum the
18 country was very divided.

19 Q. Now, when you're saying that the country was very divided, can
20 you tell us if the ethnic groups were divided?

21 A. Very much division between Kikuyus and the rest of Kenyan tribes.

22 Q. Can you tell us briefly what was at issue during the 2005
23 referendum?

24 A. Driving issues during the referendum was power, jostling for
25 power, and number 2, there was a land issue at stake also.

26

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1 Q. Now, were there different movements or parties that were
2 confronted during this 2005 referendum?

3 A. Correct. There were those who were against the proposed
4 constitution then, and they were represented by orange symbol, and there
5 were those who were for the proposed constitution, and they were
6 represented by banana symbol.

7 Q. Can you tell the Court, Mr Witness, what politicians were part of
8 the orange movement and those that were part of the banana?

9 A. Your Honour, Kibaki was in banana team. Orange team, we had
10 Raila leading it, we had Ruto, honourable Ruto, we had Uhuru, we had --
11 and others.

12 Q. Now, Mr Witness, just to be clear, when you say "Mr Raila," is
13 that Raila Odinga?

14 A. Yes, your Honour.

15 Q. And when you're speaking about Mr Uhuru, is that Mr Uhuru
16 Kenyatta?

17 A. Yes, your Honour.

18 Q. And when you spoke about Mr Ruto, this is Mr William Ruto; is
19 that correct?

20 A. Yes, your Honour.

21 Q. Now, you mentioned before that it was a jostling for power and
22 there was also the land issues. Can you just elaborate for us on this
23 whole question of land and how it was related to the 2005 referendum?

24 A. The draft constitution had proposed some policies on land, and it
25 happened so that politician, as they went around, they talked on this
26

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1 issue of land. And orange team particularly happened to have rallied
2 people against it in the sense that land was going to be taken away from
3 the masses if, indeed, they support the draft constitution.

4 Q. Thank you for that, Mr Witness. On this whole question of land,
5 you said that land was going --

6 MR HOOPER: Can I just interrupt for just a moment? Of course,
7 it's always of interest to know an individual's viewpoint, but there has
8 been no basis here laid for any expertise or the like in respect of this
9 witness. And I'm wondering, in those circumstances, what particular
10 relevance this has.

11 MR GARCIA: Your Honour, I'm not quite sure I understand that
12 objection because the witness was there at the relevant time period and
13 is here to explain what he observed, what he saw, and how he understood
14 the referendum and that's quite relevant because it is with a certain
15 knowledge of what happened in the referendum that we get to understand
16 what happened afterwards in 2007 during the elections. So he's speaking
17 in his own capacity and we've never presented him as an expert, and
18 obviously that will go to the weight of his testimony in the end. And
19 second point, as my learned colleague will see, is that there are other
20 relevant matters that he does speak about as well that are coming up in
21 his testimony at paragraph 17, so it's a lead-up to that. I hope that
22 answers my colleague's objections.

23 PRESIDING JUDGE EBOE-OSUJI: The objection is overruled but keep
24 it -- do not spend too much time on this. Let's find a way to cut around
25 it quickly and get to the other points that the witness will need to
26

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1 testify to as well.

2 MR GARCIA: I'm grateful, your Honour.

3 Q. Now, Mr Witness, when you -- when you gave your answer
4 previously, you spoke about the land issues and the masses. Can you just
5 elaborate on that? What ethnic groups were going to be affected by this
6 land issue of the referendum?

7 A. As I stated, your Honour, the battle of the constitution was
8 between Kikuyus against other tribes, seemingly, and it so happened that
9 land issues is more pronounced when it comes to tribes in the Rift Valley
10 and tribes at the Coast Province of Kenya.

11 Q. And when you're saying that the land issue was more pronounced
12 for tribes in the Rift Valley, which tribes are you referring to?

13 A. I'm referring to Kalenjins in the Rift Valley and the coastal
14 tribes, of course, I -- there are many coastal tribes, I don't have -- I
15 don't know them.

16 Q. I understand, Mr Witness. Could you just give me an
17 additional -- I just have one additional question on this. How did the
18 Kalenjin tribes view this proposed referendum or constitutional draft?

19 A. The Kalenjins bought into the idea of land, that if indeed we
20 support it --

21 MR KIGEN-KATWA: Mr President?

22 PRESIDING JUDGE EBOE-OSUJI: Mr Katwa?

23 MR KIGEN-KATWA: Yes, Mr President, I would like to raise an
24 objection to that question. That is seeking an opinion, Mr President,
25 which I thought is contrary to the injunction you gave right at the
26

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1 outset by telling the witness to testify on what he knows rather than his
2 own deductions on issues. Mr President, we would object to that.

3 PRESIDING JUDGE EBOE-OSUJI: The objection is overruled. If we
4 are talking about opinion evidence, any witness can give it. It's a
5 matter of degree.

6 MR GARCIA:

7 Q. I'm sorry, Mr Witness, I think that you were cut off when you
8 were going to respond. My question was: How did the Kalenjins view this
9 land issue?

10 A. Land issue is dear to Kalenjins and it happens -- it happened so
11 that politicians have been exploiting it every now and then during
12 elections. Kalenjins love their land and they cannot allow the idea to
13 the extent that somebody else is going to take over it.

14 Q. Just if we just come back on that, Mr Witness, and I'm sorry for
15 that, but you started out your answer by saying, "Land issues," and you
16 also said, "Kalenjins, that it happens -- it happened so that politicians
17 have been exploiting it every now and then during elections."

18 What is it about the land issues that you're relating to the
19 Kalenjins?

20 A. Kalenjins have a history of dearly protecting their lands, and
21 politicians tend to exploit that issue during any other elections,
22 probably to their advantage.

23 Q. And how is it that they exploit that to their advantage,
24 politicians?

25 A. It so happened, I don't know it so happened, every other
26

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1 election, particularly an election that pits major tribes, land issue has
2 to crop up. It has been happening -- it didn't happen only during 2005.
3 It has been happening ever since every other election.

4 Q. What exactly would politicians say?

5 A. Politicians who were looking for votes would come up with an
6 issue of land in the sense that if you support them, the land will be
7 taken away. So we need (* indiscernible) to protect our land.

8 Q. And just to be clear on that matter, when you're saying "if you
9 support them," what ethnic group are you referring to?

10 A. Every other election, and particularly during this referendum
11 time, Kikuyus haven't settled in many places in Kenya. Kikuyus living
12 among the Kalenjins were the one to suffer (* Realtime transcript read in
13 error "serve") if in case land issue is exploited by politicians in the
14 Rift Valley.

15 Q. Just to be clear, you said Kikuyus living among the Kalenjins
16 were the one who serve," and we don't have that on record, "if in case
17 land issues is exploited by politicians ..." What were you saying there?

18 PRESIDING JUDGE EBOE-OSUJI: I think I heard him say "suffer."
19 Did you say "serve" or did you say "suffer"?

20 THE WITNESS: Suffer.

21 MR GARCIA: Most grateful, your Honour.

22 Q. Mr Witness, just so that we understand better what you're trying
23 to say, were there any Kikuyus in the Rift Valley?

24 A. Yeah, yes, your Honour. During referendum time they were there,
25 they have been there.

26

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1 Q. How were they regarded by the Kalenjins?

2 A. When there is no election, communities tend to live peacefully
3 but during any election period, particularly election that puts Kikuyus
4 and other -- and Kalenjins on different sides, there is likelihood
5 Kikuyus are going to be threatened to leave Rift Valley if they don't
6 vote (* Realtime transcript read in error "fought") the way leaders from
7 Rift Valley would like.

8 Q. Just so that we -- that we are clear, line 65, 6, and just
9 correct me if I'm wrong but you say that they "are going to be threatened
10 to leave Rift Valley if they don't have" -- it says here "fought." Is it
11 fought or vote? Which one is it?

12 A. Vote, vote.

13 Q. Thank you for that clarification?

14 PRESIDING JUDGE EBOE-OSUJI: Also on the previous page, line 8,
15 the missing word there, I believe, is "us." And line 18 wasn't the
16 witness. It was me.

17 MR GARCIA: Grateful, your Honour.

18 Q. Mr Witness, let's just come back now to the 2005 referendum.
19 What were the Kalenjins fearing at that point during the 2005 referendum?

20 A. There are many issues that Kalenjins had in mind. Apart from
21 land it so happened that when Kibaki took over, there was the talk of --
22 there was a talk in the sense that Kalenjins lost jobs, lost government
23 jobs. That was also another major issue. And during referendum, they
24 wanted to settle scores with the government of Kibaki, in the sense that
25 the government purged many Kalenjins who were occupying senior position
26

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1 in the government jobs.

2 Q. Just for the -- for clarification again, Mr Witness, you said,
3 "in the sense that the government budged," this is what I have on the
4 record, "many Kalenjins." Is that the word you used, "budged"?

5 PRESIDING JUDGE EBOE-OSUJI: Purged, purged. Witness, don't be
6 discouraged. This happens when there is a new witness sitting on the
7 stand. The court reporters would need to get used to how the person
8 pronounced things. It happens to me.

9 THE WITNESS: Yes, your Honour.

10 PRESIDING JUDGE EBOE-OSUJI: It might interest you to note. The
11 witness said "purged."

12 MR GARCIA: Most grateful, your Honour.

13 Q. Mr Witness, when you are mentioning this land issue and the
14 Kalenjin fears, what -- who were they fearing was going to take away
15 their land, what ethnic group?

16 A. Kikuyus basically.

17 Q. Why?

18 A. The reason is political.

19 Q. Can you just explain to that a little bit more to us?

20 A. Since it happens every other time when we have election, other
21 than the election of 2002, which was a bit different, to me it's a
22 political ploy to -- to have an issue that people fear. It's a political
23 way of bringing people together over an issue they fear most, and that is
24 losing land.

25 Q. You spoke about the politicians' role. Can you tell us about

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1 what type of language was being used by politicians during the 2005
2 referendum?

3 A. Kenyan politician has a tradition of using hate speech during
4 elections. During this referendum, you -- you could hear words such as
5 "madoadoa." You could hear words such as "kwe-kwe," referring to
6 communities who live among -- among community -- a community that they
7 don't want them.

8 MR GARCIA: Your Honours, if we could go into private session,
9 five to ten minutes, please?

10 PRESIDING JUDGE EBOE-OSUJI: Private session.
11 (Private session at 12.38 p.m.)

12 THE COURT OFFICER: (Interpretation) We are in private session,
13 your Honour.

14 PRESIDING JUDGE EBOE-OSUJI: Thank you.

15 MR GARCIA:

16 Q. Now, Mr Witness, before I do ask you additional questions on
17 this, you mentioned having heard words such as "madoadoa" and "kwe-kwe."
18 This is 67, 3. Can you spell to us kwe-kwe for us?

19 A. Kwe-kwe, k-w-e-k-w-e. It is a Swahili word.

20 Q. And as for "madoadoa," can you tell us what language that word
21 is?

22 A. "Madoadoa" is a Swahili word, madoadoa.

23 Q. Thank you, Mr Witness. Did you attend any rallies during the
24 2005 referendum?

25 MR HOOPER: Just before that's answered, I'm -- I appreciate my
26

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1 friend has the conduct of his examination and he obviously knows his
2 footfall, but is it necessary at this moment for us to be in private
3 rather than public session? The spelling of the words? Clearly a matter
4 that could have been in public. Attendance at rallies, in itself, a
5 matter that could be in public.

6 MR GARCIA: Your Honours, this is not -- it's not a scientific
7 procedure. It's obvious that in certain cases I'm going to be erring on
8 the side of caution in light of the circumstances. I'll say no more on
9 that point, but there are different rallies at which the witness attended
10 and it's obvious that I don't want anybody to try and be able to identify
11 him on the basis of the rallies at which he attended. And so that being
12 the case, I think that we should err on the side of caution. There are
13 other subjects -- I'm not going to spend much time on this subject.
14 There are other subjects that I will be leading in public session, so
15 this will ensure and assure Defence counsel. But for these type of
16 matters, I think that the risk is very grave, and there are people who
17 are sitting in the public gallery and redactions are useless in that
18 case. So in -- that is why I'm leading this in private session.

19 PRESIDING JUDGE EBOE-OSUJI: Mr Garcia, I do not know what you
20 make of the evidence we've seen so far, those videos of -- and photos of
21 rallies where you have teeming population in attendance. Is it not
22 possible to elicit evidence of attendance of rallies without eliciting
23 what precisely the witness -- any role, if any, he might have played at
24 the rally, that then makes his evidence unique in that regard?

25 MR GARCIA: Indeed, your Honour, it's possible, but if I may,
26

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1 I would just like to ask a simple two questions in regards to how many
2 people were present at these rallies and then we can go into a public
3 session, and I'll frame my questions in a general way so as to be able to
4 lead that in public.

5 PRESIDING JUDGE EBOE-OSUJI: Fair enough.

6 MR GARCIA:

7 Q. Now, Mr Witness, the question that I asked you before, before
8 there was an objection, was whether you had attended any rallies during
9 the 2005 referendum.

10 A. Your Honour, I remember I attended a rally in Nandi Hills.
11 I also attended a rally in Kapsabet.

12 Q. Can you tell us, Mr Witness, how many people were at these
13 rallies, the ones of Nandi Hill and Kapsabet, approximately?

14 A. During 2005 referendum, generally, orange rallies were well
15 attended, thousands and thousands of people.

16 Q. So I take it these were two orange rallies that you attended?

17 A. Those are two different places, your Honour, two rallies.

18 Q. Two orange rallies?

19 MR GARCIA: Your Honour, we can go into public and I will frame
20 general questions on the matter.

21 PRESIDING JUDGE EBOE-OSUJI: But would you be asking him
22 questions about what he was doing at the rally or what he observed?

23 MR GARCIA: Simply what he observed, what he heard.

24 PRESIDING JUDGE EBOE-OSUJI: Fair enough. Open session.

25 (Open session at 12.44 p.m.)

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1 THE COURT OFFICER: (Interpretation) We are in public session,
2 your Honour.

3 PRESIDING JUDGE EBOE-OSUJI: Please proceed.

4 MR GARCIA:

5 Q. Now, Mr Witness, you mentioned the words madoadoa and kwe-kwe,
6 Swahili words. Did you hear these words during any rally, during the
7 2005 referendum?

8 A. It's been long but it was -- it's likely that I heard them during
9 referendum.

10 Q. I just wanted to make sure for the record, did you hear this type
11 of word during the rallies, the one in Nandi Hills and Kapsabet?

12 A. Yes, your Honour.

13 Q. Now, can you please just explain to the Court madoadoa, first of
14 all? What does that term mean?

15 A. Simply I would explain it as blemish, a blemish. Let me give an
16 example. If I have a white shirt and there are some spots, those are
17 blemishes on a white shirt. So madoadoa in this context as used by
18 politicians means we've got a community that has other communities inside
19 it, and those other communities are madoadoa. When a Kalenjin uses it,
20 it means -- it could mean among the Kalenjins we've got other tribes, and
21 these other tribes could be Kikuyu, could be a Luo or could be a Luhya.
22 But in the context of 2005, it meant the other party who didn't belong to
23 orange grouping.

24 Q. Just to be clear for the record, Mr -- okay. Now I see it's been
25 corrected. Mr Witness, the term "madoadoa," you say it means blemish and
26

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1 it was used for the other tribes. You mentioned Kikuyus. Were there
2 other people who were also covered by this or targeted by this term?

3 A. Your Honour, during referendum, Kikuyu happened to have been the
4 opposite side. They were in banana. So basically when a Kalenjin use it
5 during that time it means Kikuyus.

6 Q. And what exactly is the significance of that? What do you do
7 with blemishes?

8 A. If your shirt has a blemish, what do you do with it? You wash
9 it. And, you know, that is it, your Honour.

10 Q. I understand that you wash a blemish, but when it translates into
11 Kikuyus, how did that translate? What would you do to Kikuyus? What was
12 the idea behind that?

13 A. Probably you displace them.

14 Q. And you would displace them from where?

15 A. From occupying the Kalenjin land.

16 Q. And what is the Kalenjin land?

17 A. Kalenjins live in Rift Valley, and Rift Valley is deemed their
18 land.

19 Q. Now, you stated that this term would have been used at orange
20 rallies. What politicians, what was the ethnicity of the politicians at
21 these orange rallies that you attended?

22 A. Orange, most orange rallies had Luos, had Luhyas, Kalenjins, of
23 course, and tribes from Coast Province and other small tribes. But
24 again, we had an exception. We had Uhuru Kenyatta, and we had Kamotho
25 and we had Nyagah, who belonged to Kikuyu tribes.

26

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1 Q. Now, Mr Witness, just to be clear, my question is regarding these
2 rallies that you would have been at in Kapsabet and Nandi Hills. Who
3 were the politicians who were making -- who were using the word
4 "madoadoa"?

5 A. It was local politicians. And when I say "local politicians,"
6 I mean the Kalenjins.

7 Q. Do you remember the names of these local politicians that would
8 have been using this term?

9 A. I don't remember.

10 Q. Could you tell us what politicians were attending these rallies?

11 A. They were basically politician who were supporting orange, who
12 were supporting -- who were against the constitution, draft constitution.

13 Q. I'd like you to take your time but do you remember which
14 politicians were there? I understand that they are people who were
15 supporting the orange but which ones, do you remember the names of these
16 politicians?

17 A. Correct. I remember in Nandi Hills, Raila was there during
18 referendum rally that I attended. Ruto was there. Musalia Mudavadi.
19 That's the matter I can remember.

20 Q. We are speaking about Nandi Hills from what I understand or --

21 A. Nandi Hills and Kapsabet.

22 Q. Now, you've mentioned the name of Musalia Mudavadi. Can you tell
23 us who he is, who this person is?

24 A. Musalia Mudavadi is a prominent politician from Western Province,
25 comes from the Luhya community. He was once the vice-president of Kenya

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1 during Moi's tenure.

2 Q. Now, Mr Witness, you also mentioned the term "kwe-kwe." Can you
3 explain to us what that means?

4 A. Kwe-kwe means weeds.

5 Q. And can you explain to us what did it mean in that context,
6 weeds, when a politician would use that during the 2005 referendum?

7 A. Your Honour, weeds is what grows among the crops. So
8 practically, your Honour, weeds get weeded so that the right crops can
9 grow properly.

10 (Trial Chamber and court officer confer)

11 PRESIDING JUDGE EBOE-OSUJI: We have five minutes to lunch break
12 and actually the end of our proceedings for the day. We will go into
13 private session for the rest of the five minutes, and when we come back
14 tomorrow, the -- there is a request I understand you need to make on the
15 record. But we will do that first thing tomorrow morning. But for now,
16 we go into private session for remaining five minutes.

17 MR GARCIA: That's fine.

18 (Private session at 12.55 p.m.)

19 THE COURT OFFICER: (Interpretation) We are in private session,
20 your Honour.

21 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. And
22 Prosecutor, for that request you have to provide solid basis for it, in
23 terms of somebody who will speak to it from the evidential point of view.
24 We'll need to hear that person. It is not a request to be made or
25 granted just anecdotally, on the basis of anecdotal or supposition.

26

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1 MR GARCIA: I understand, your Honour.

2 PRESIDING JUDGE EBOE-OSUJI: Please continue.

3 MR GARCIA:

4 Q. Now, Mr Witness, you just explained to us that there were -- your
5 answer was:

6 "Weeds is what grows amongst the crops. So weeds get weeded so
7 that the right crops can grow properly?"

8 What ethnic group is the right crop, Mr Witness?

9 A. In the context of referendum, the tribes that were support --
10 were against the constitution draft were the right crops. The tribe that
11 was for the constitution draft was a weed.

12 Q. So just so we can be clear on the record, the ones, the tribe
13 that were against the constitution were -- you're speaking basically
14 about the Kalenjin tribe; is that correct?

15 A. Basically about the Kalenjin tribes, Luos, Luhyas and other
16 tribes. Basically, your Honour, the tribe that was for the constitution
17 tribe -- constitution draft was the Kikuyu.

18 Q. And you also said that the weeds get weeded out. What do you
19 mean by that? How does that relate to the Kikuyus?

20 A. During that time the Kikuyus were the weeds in that -- as used in
21 that context and what means is that they needed to be sent back to their
22 lands, or, rather, they needed to be weeded out of lands in Rift Valley,
23 Nyanza, and perhaps Western Province.

24 Q. And where exactly -- I understand that it relates to them being
25 weeded out, the Kikuyu, but where exactly would they be sent to? What is
26

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1 their land?

2 A. In this context, their land is in Central Kenya, but that is not
3 the law, your Honour.

4 Q. Just to be clear, Mr Witness, did you say that that is not the
5 lot or law?

6 A. That's not the law. Kikuyus' original home land is in Central
7 Kenya. That is Mount Kenya.

8 Q. Now, Mr Witness, are you able to recall which politicians
9 specifically used the words "madoadoa" or "kwe-kwe" during those rallies
10 that you attended?

11 A. I can't --

12 MR HOOPER: Two matters that arise. First of all, we are still
13 in private and not public; and secondly, he's been asked and answered
14 that question previously.

15 MR GARCIA: Your Honours, if I may I don't think that -- I'm
16 quite sure actually that that specific question has not been posed to the
17 witness. Perhaps Defence counsel can point out exactly what transcript,
18 the number and the reference.

19 MR HOOPER: Page 72. It was words, it was local politicians who
20 used the word "madoadoa." I don't remember who.

21 MR GARCIA: The question extends also to the term "kwe-kwe," your
22 Honour, both terms.

23 PRESIDING JUDGE EBOE-OSUJI: So your contention is that when you
24 asked the question at line 2 at page 72, you had limited the question to
25 only one of the two terminologies? Because, clearly, there is your
26

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1 question there at line 2: Do you remember the names of those --

2 MR GARCIA: Exactly --

3 PRESIDING JUDGE EBOE-OSUJI: -- politicians that would have been
4 using this term?" The witness's answer: "I don't remember."

5 MR GARCIA: Exactly, but the term "kwe-kwe" hasn't been put in
6 the question to the witness. I can reformulate and pose a more specific
7 question. I'm in the Court's hands.

8 PRESIDING JUDGE EBOE-OSUJI: All right. Why don't you
9 reformulate as regards kwe-kwe, if kwe-kwe was not the point you were
10 addressing before.

11 MR GARCIA:

12 Q. Mr Witness you've used the words "madoadoa" and kwe-kwe. Do you
13 remember for the term "kwe-kwe," specifically what politicians would have
14 used that during the rallies, if you can remember?

15 A. I can't remember, your Honour, but generally it was used by
16 politicians in the orange side.

17 PRESIDING JUDGE EBOE-OSUJI: Did you say you cannot remember?

18 THE WITNESS: Yeah, I cannot remember.

19 PRESIDING JUDGE EBOE-OSUJI: All right.

20 MR GARCIA: I'm looking at your time, your Honours. I'll keep my
21 additional questions for tomorrow.

22 PRESIDING JUDGE EBOE-OSUJI: You can keep your questions and take
23 them up tomorrow. We will let the witness off the witness stand, and
24 then we will -- before we rise, address the little matter that I spoke
25 about earlier in cryptic terms, as it were. The blinds will come down

1 and the witness will be escorted.

2 (Closed session at 1.02 p.m.)

3 THE COURT OFFICER: (Interpretation) Mr President, we are in
4 closed session and the witness will be taken out of the courtroom.

5 PRESIDING JUDGE EBOE-OSUJI: Witness, you will be escorted out of
6 the courtroom. The Court is adjourning today a little earlier than
7 normal. Ordinarily we would have just risen for lunch and come back at
8 2.30, but we will not be doing that today. So we will see you tomorrow
9 morning. You are still under oath. Please do not discuss your testimony
10 overnight or while you are outside the courtroom until you are discharged
11 from the witness stand. Okay?

12 THE WITNESS: Yes, your Honour.

13 PRESIDING JUDGE EBOE-OSUJI: Thank you.

14 (The witness stands down)

15 MR HOOPER: Your Honours, one matter as the witness makes his way
16 out, it needn't at all detain him, and that's the question of estimate.
17 My friend has probably got a sense of the pace now with this witness and
18 I'm wondering with that -- with that advantage, whether he's in a
19 position to indicate to the Court how long he estimates he will be in his
20 examination-in-chief.

21 PRESIDING JUDGE EBOE-OSUJI: Can you attend to that first and I
22 will raise my own.

23 MR GARCIA: Your Honours, it's always a bit difficult, a little
24 bit complicated at this point. I'm trying to go as efficiently as
25 possible, and if I can lead on certain topics it might help me. I would
26

1 say, if tomorrow we do have three sessions, I would say four sessions in
2 all would be probably sufficient for me to finish the testimony of this
3 witness in chief. Also depends on the objections that the Defence will
4 have to certain topics.

5 PRESIDING JUDGE EBOE-OSUJI: So by four sessions you mean you
6 will end when, as being more precise? If -- in the normal flow of
7 traffic.

8 MR GARCIA: I would say, your Honours, Wednesday before lunch.
9 This is what I'm hoping to do.

10 PRESIDING JUDGE EBOE-OSUJI: Okay.

11 MR GARCIA: One other matter, your Honour, if I may. It's just
12 this whole question actually that was raised by the Prosecution regarding
13 (Redacted)

14 PRESIDING JUDGE EBOE-OSUJI: That was a matter I said for us to
15 discuss. I was speaking about it in cryptic terms at the time in order
16 not to upset the witness unnecessarily until we figure out exactly what
17 it is we are talking about.

18 MR GARCIA: I'm great grateful for that, your Honours. (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted). I'm not sure. I'm in the Court's hands

26

1 (Redacted) how that can be done. But it shouldn't be, in our
2 opinion, because this is quite serious, (Redacted)
3 (Redacted), of course, we can clarify maybe with
4 the technical units (Redacted)
5 (Redacted)
6 (Redacted)
7 (Redacted)
8 (Redacted). And I think we have to be extremely careful in that regard.

9 MR HOOPER: Obviously I hear what my friend says and I'm just
10 surprised he has so many staff that (Redacted)
11 (Redacted), but if there is a concern, can I just ask
12 this: (Redacted)
13 (Redacted)
14 (Redacted)
15 (Redacted)
16 (Redacted)
17 (Redacted)
18 (Redacted)
19 (Redacted)

20 PRESIDING JUDGE EBOE-OSUJI: Is there not the possibility of
21 (Redacted)
22 (Redacted) Can that not be done?

23 THE COURT OFFICER: With your leave, Mr President, I will speak
24 in English now, and I can assure you that (Redacted)
25 (Redacted) being used for all trials before this court.

26

1 This afternoon we will make some tests, some lineup tests, in order to
2 test (Redacted), and we may provide a report to the Chamber.

3 But I can assure you that (Redacted)
4 (Redacted) because this issue has
5 been raised by the Prosecution and any report will be given to the
6 Chamber and parties and participants if available. The problem --

7 PRESIDING JUDGE EBOE-OSUJI: The concern of the Prosecution is
8 not (Redacted)
9 (Redacted)
10 (Redacted)
11 (Redacted)
12 Something like that.

13 THE COURT OFFICER: With the reserve that technicians may have on
14 this issue, I understand there is only a possibility (Redacted)
15 (Redacted)
16 (Redacted) Of course, this is with the reserve I am not a
17 technician myself. I understand that is the issue and I will explore on
18 the possibilities (Redacted)
19 But as far as I know, by experience of working here, there is only a
20 (Redacted)
21 (Redacted)
22 (Redacted)
23 (Redacted). And in any
24 case, tests will be conducted this afternoon and a report can be made
25 available to all those concerned.

26

1 MR HOOPER: (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 PRESIDING JUDGE EBOE-OSUJI: Mr Garcia?

8 MR GARCIA: Your Honours, obviously we will wait to see exactly

9 what the conclusions are from the technical staff, but there is still

10 (Redacted)

11 (Redacted)

12 (Redacted). I'm in the hands of the

13 technical staff if something can be done in that regard, either not

14 (Redacted)

15 (Redacted)

16 PRESIDING JUDGE EBOE-OSUJI: All right.

17 MR KIGEN-KATWA: Mr President, I wanted to indicate the same

18 thing Mr Hooper said (Redacted). It was the

19 (Redacted)

20 (Redacted). That should be an indicator (Redacted)

21 (Redacted). Secondly, Mr President, we are relying on

22 the representatives of the Prosecution (Redacted)

23 (Redacted)

24 (Redacted). We would also be interested in making our input into that and

25 (Redacted)

26

1 (Redacted), Mr President.

2 PRESIDING JUDGE EBOE-OSUJI: Well, you're not really objecting.

3 What -- we all want an effective (Redacted). You're not

4 saying no if there is some concern arising. Why don't we consult?

5 (Trial Chamber confers)

6 PRESIDING JUDGE EBOE-OSUJI: All right. Out of an abundance of

7 caution, the Chamber will order -- the Chamber orders that the (Redacted)

8 (Redacted) and then we will

9 take the matter up tomorrow. Court will now rise.

10 MR GARCIA: Grateful, your Honour.

11 (The hearing ends in closed session at 1.13 p.m.)

12 RECLASSIFICATION REPORT

13 Pursuant to Trial Chamber V(a) 's Decision, ICC-01/09-01/11-981, dated 24 September

14 2013, and the instructions in the email dated 17 January 2014, the version of the

15 transcript with its redactions becomes Public.

16