

Trial Hearing
Witness: KEN-OTP-P-0247

(Open Session)

ICC-01/09-01/11

1 International Criminal Court
2 Trial Chamber V(a) - Courtroom 1
3 Situation: Republic of Kenya
4 In the case of The Prosecutor v. William Samoei Ruto and
5 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 Tuesday, 17 June 2014
10 (The hearing starts in open session at 9.34 a.m.)
11 THE COURT USHER: All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
15 Court officer, please call the case.
16 THE COURT OFFICER: Thank you, Mr President. Situation in the Republic of
17 Kenya, in the case of The Prosecutor versus William Samoei Ruto and Joshua Arap
18 Sang, ICC-01/09-01/11.
19 And we are in open session, your Honours.
20 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
21 Are there any changes in the appearances?
22 MR STEYNBERG: Good morning, your Honours. Yes, for the Prosecution, we're
23 the same except Mr Garcia and Ms Simms are absent this morning.
24 MR NARANTSETSEG: Good morning, Mr President, your Honours.
25 For the victims we remain the same. Thank you.

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1 MR KIGEN-KATWA: Good morning, your Honours. For Mr Sang the team

2 remains the same. Thank you.

3 MR HOOPER: We are the same other than Dato' Alagenda who is now here.

4 Thank you.

5 PRESIDING JUDGE EBOE-OSUJI: All right. We will continue.

6 WITNESS: KEN-OTP-P-0247 (On former oath)

7 PRESIDING JUDGE EBOE-OSUJI: Witness, welcome back. Thanks for joining us

8 again. Yesterday there was that suggestion that -- whether to have the Defence

9 conduct their cross-examination and then we'll return to documents. We will not

10 proceed in that way. We will proceed in the usual manner.

11 Witness will bear with us and sit there. This is one witness whom I'm sure does not

12 feel uncomfortable in the courtroom and around lawyers, so he can sit and we will

13 proceed as normal. Thank you.

14 THE WITNESS: That's true, Mr President. Thank you.

15 PRESIDING JUDGE EBOE-OSUJI: Ms Zago.

16 MS ZAGO: Thank you, Mr President. Good morning, your Honours.

17 I can inform the Chamber that the Prosecution intends to tender only two other

18 documents through this witness, which are contested. The remaining documents the

19 Prosecution seek to be granted an MFI. And the remaining two documents which

20 are tab 5 and 6, the Prosecution does not intend -- no longer intend to seek them

21 through this witness; therefore, the examination-in-chief might be shorter than

22 expected.

23 PRESIDING JUDGE EBOE-OSUJI: Then you said there are two documents you still

24 want to tender through the witness; is that it?

25 MS ZAGO: Yes.

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1 PRESIDING JUDGE EBOE-OSUJI: All right. Let's get to those then.

2 MS ZAGO: Certainly. The first -- the first document is -- can be found at tab 4 of
3 the OTP bundle. And the ERN number for display to the witness only, given the
4 confidentiality of the information contained therein, and the ERN number is

5 KEN-OTP-0002-0015. As I said, the content is confidential and we would request
6 that the public does not have access to this document on their screens or monitors.

7 Thank you.

8 Your Honours, this is a compilation of contemporaneous situation reports by the
9 Kenya National Security Intelligence Services, the NSIS, so-called NSIS, to cover a
10 period from June 2007 up to February 2008. The reports are collated in one single
11 ledger.

12 PRESIDING JUDGE EBOE-OSUJI: Before we go there, does the Defence contest that
13 characterisation of the report in terms of the source of it?

14 MR HOOPER: Yes.

15 PRESIDING JUDGE EBOE-OSUJI: You --

16 MR HOOPER: No, no, we don't contest.

17 PRESIDING JUDGE EBOE-OSUJI: You don't contest of this --

18 MR HOOPER: Don't contest the nomination, as it were, of what it is and its specific
19 paragraphs that my friend's been good enough to indicate to us yesterday, about a
20 dozen paragraphs out of about 200 that are being sought to be put in.

21 Now, in respect of those paragraphs, can we say we see no reason if they're admitted
22 why they should remain confidential, but how that process is engineered, if the Court
23 were to consider that they shouldn't be confidential, at this stage, is -- I'm not going to
24 suggest.

25 And in respect of the nominated paragraphs, we have no -- for our part, any essential

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1 objection bearing in mind your decision of last week with other NSIS reports where
2 you said that you found them prima facie relevant, it relies on unverified sources or
3 predictions. The probative value may become outweighed by prejudice if relied
4 upon to prove central aspects of the charges such as common plan, systematic nature
5 of attacks or existence of network, but it was all right, you felt, to use it as general
6 background information as to widespread nature of attacks, election campaign
7 activity, and what was being --

8 PRESIDING JUDGE EBOE-OSUJI: But you --

9 MR HOOPER: -- reported at the time.

10 PRESIDING JUDGE EBOE-OSUJI: One second. You may be jumping the gun.

11 MR HOOPER: Yep.

12 PRESIDING JUDGE EBOE-OSUJI: What I wanted to know now from you was
13 whether there is a need to have this witness speak to the document in terms of is this
14 national intelligence security agency report received by the CIPEV or not? You're
15 saying there's no need --

16 MR HOOPER: We've accepted that he's been shown this last week and he's
17 recognised it as material that came before CIPEV.

18 PRESIDING JUDGE EBOE-OSUJI: Good. So that's all I wanted to know from you
19 for now. The Prosecution will later on tell us what they want to do with it.
20 But Mr Kigen-Katwa.

21 MR KIGEN-KATWA: Mr President, we take the same position. We do not contest.
22 We will, however, in terms of production we will have -- we have a few observations
23 to make. Thank you.

24 MS ZAGO: Thank you, your Honour.

25 As was indicated before, this collection of situation reports is organised in reverse

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1 chronological orders, so if your Honours intended to browse this document during
2 the legal arguments, I would advise to commence from the back of the document and
3 come to the front in terms of following chronologically the assemblage of the -- of the
4 documents.

5 The --

6 PRESIDING JUDGE EBOE-OSUJI: Now, is there a need then to still leave the blinds
7 down if the witness is not going to talk about the document, or are you intending to
8 show the witness parts of the document?

9 MS ZAGO: In light of Mr Hooper's comment, we do not intend to show the witness
10 the specific paragraphs. I note that this document was classified by the NSIS as
11 secret and this is the reason why the Prosecution intended to display it only in the
12 courtroom, and also my understanding is that the report was received confidentially
13 during a confidential hearing from CIPEV.

14 PRESIDING JUDGE EBOE-OSUJI: So what you're saying is from time to time you
15 may be taking us to -- you may be pulling up parts of this document on the screen?

16 MS ZAGO: I don't think in light of Mr Hooper's comment that that will be necessary.
17 I was providing further informations on our course of action.

18 PRESIDING JUDGE EBOE-OSUJI: So the blinds behind the witness can go up.
19 You have indicated, I've learnt from Mr Hooper, certain parts of the documents you're
20 interested in. Can you put those parts on the record.

21 MS ZAGO: Certainly, your Honour.

22 Starting from page -- and, again, I'm following a chronological order: Page 0097,
23 paragraph 422; page --

24 MR HOOPER: Sorry. That's not on our list of nominated paragraphs to be relied
25 on. I'd have to look it up.

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1 MS ZAGO: I can return to that paragraph. It is a discrete paragraph. In case there
2 are objections on the other side, we can revisit.

3 MR HOOPER: Well, you've given me the page, but not the paragraph. Could you
4 perhaps indicate the paragraph? Oh, did you give me the paragraph?

5 PRESIDING JUDGE EBOE-OSUJI: 422, she said.

6 MR HOOPER: Thank you very much. I'll just read it. Thank you.

7 PRESIDING JUDGE EBOE-OSUJI: All right. Just give us the paragraphs you're
8 interested in. And if counsel want to make any observation later during their turn,
9 including that you may have indicated additional parts that you had not given to
10 them before, they can do that later.

11 MR HOOPER: We have no objection to that particular paragraph.

12 MS ZAGO: Thank you.

13 The following paragraph is 383 at page 0087; paragraph 349 at page 0075. I should
14 mention that in this page there is under paragraph 349, there is a first bullet point.

15 The paragraph that is attached to that bullet point we intend to rely upon. And in the
16 sixth bullet point on page 0077, it is still under the same paragraph and it's the sixth
17 bullet point from the top at page 0077.

18 Paragraph 341 --

19 PRESIDING JUDGE EBOE-OSUJI: All right. Let's go in a certain order. If you're
20 going to say page first, paragraph later, let's follow that, instead of reversing it all the
21 time. So let's do page first and then paragraph.

22 So what page next? I've got on my notes 0077. What is the next page?

23 MS ZAGO: Next page is 0073.

24 PRESIDING JUDGE EBOE-OSUJI: Okay.

25 MS ZAGO: Paragraph 341.

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- 1 PRESIDING JUDGE EBOE-OSUJI: Right.
- 2 MS ZAGO: Up to the first paragraph at page 0074.
- 3 MS BUISMAN: Excuse me.
- 4 MS ZAGO: Yes.
- 5 MS BUISMAN: I think that's a mistake. You said paragraph 341. In my -- in
- 6 my -- no, it says 0072 to 0073, right?
- 7 PRESIDING JUDGE EBOE-OSUJI: Okay, let's get to that page.
- 8 Ms Zago, do you see the difficulty?
- 9 MS ZAGO: Yes. Thank you for the correction. I appreciate.
- 10 It is page 0072, paragraph 341; page 0073, the first paragraph that starts with the
- 11 words "Trans-Nzoia."
- 12 Page 0071, paragraphs 392 -- 329, sorry, 333, 335 and 336.
- 13 PRESIDING JUDGE EBOE-OSUJI: Now, is there a correction there on the record?
- 14 So is it 392 or 329?
- 15 MS ZAGO: 329.
- 16 PRESIDING JUDGE EBOE-OSUJI: So you were not relying on 392, although I notice
- 17 there is no 292 on this page.
- 18 MS ZAGO: That is correct. Thank you, your Honour.
- 19 Page 0060, paragraph 270; page 0059, paragraph 265; page 0051, paragraph 215; page
- 20 0050, paragraph 209; page 0048, paragraph 192; and, finally, page 0020, paragraph 40.
- 21 And I can advise the Defence that we no longer seek to rely upon page 0087,
- 22 paragraph 384, as it was indicated in our email to the Defence yesterday.
- 23 While the Prosecution seeks to tender this document, rely upon the selected
- 24 paragraphs, we intend to seek the entirety of the document in light of your Honours'
- 25 decision that in order to assess in the proper context the content of the document, the

1 probative value of the document and the information contained therein and all other
2 indicia of reliability that might be found in the report, we tender to seek the report in
3 its entirety, however, to rely upon the selected paragraphs for background purposes.
4 Those paragraphs are related to matters before the Chamber. They deal with the
5 widespread and systematic nature of the attacks, the attacks against civilian
6 population, in particular perceived or actual PNU supporters in the relevant areas,
7 more generally in the Rift Valley. They provide information that, I should add, that
8 is contemporaneous. The reports are dated. And the reports are ostensibly drafted
9 in the ordinary course of business by NSIS agents in the field providing information
10 to their chain of command.

11 PRESIDING JUDGE EBOE-OSUJI: That, of course, is your submission.

12 MS ZAGO: Excuse me?

13 PRESIDING JUDGE EBOE-OSUJI: That can only be your submission that the report
14 was drafted in the ordinary course of business.

15 MS ZAGO: On its face it would appear --

16 PRESIDING JUDGE EBOE-OSUJI: What I mean is that we don't have evidence of
17 that. We have a document for what it says. Yes.

18 MS ZAGO: As indicated previously, this Chamber has already analysed a
19 considerable set of documents that were produced before CIPEV by various
20 intelligence sources including the NSIS. The documents were admitted by
21 your Honours for the specific purpose of providing background information on,
22 again, the widespread nature of the violence, the election campaign activity, and the
23 nature of what was reported at the time.

24 These documents, contrary to other intelligence reports that were admitted, do not
25 comprise opinions or analysis by the authors. They're merely accounts of events

1 during the relevant period. They are dated and have a serial number.

2 As indicated before, the fact that sources are not identified has not prevented the
3 Chamber from accepting similar documents, precisely because the documents are not
4 to be relied upon in a direct manner for central aspects of the case.

5 The documents, or several reports, CIPEV reports, that are included in this collection,
6 do mention the accused, however, the Prosecution has carved out those paragraphs
7 directly mentioning the accused and their alleged involvement. Therefore, we do
8 not intend to rely at all upon those sections.

9 We believe that these documents satisfy the minimum requirement for admission.

10 They are related to the charges. They're prima facie relevant. They have indicia of
11 reliability. And bearing in mind the specific and limited purpose for which this
12 report

13 Is tendered, the prejudice to the Defence, in our submission, is minimal and the
14 documents should be admitted.

15 The admission of the document per se will not prevent the Chamber from exercising
16 its fact-finding functions. The Chamber will be able to evaluate the document at the
17 end of the case against all the other evidence that will have -- be admitted and
18 presented before the Court. Therefore, in terms of weight, that exercise will -- will
19 be -- will be conducted at the end against the rest of the evidence that will be before
20 the Chamber.

21 This concludes our submission on this specific document. Again, the Prosecution
22 seeks to tender it for background purposes. Thank you, your Honours.

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

24 MR KIGEN-KATWA: With your leave, Mr President, I will request my colleague
25 Dr Buisman to proceed.

1 PRESIDING JUDGE EBOE-OSUJI: Ms Buisman.

2 MS BUISMAN: Good morning, Mr President, your Honours. The -- on the basis of
3 your decision and on the basis of what my learned colleague said, with a
4 limited -- limited acceptance or admissibility to the sole purpose of the general
5 background information, we may not object, but I do want to make a few
6 observations.

7 And I'm looking at your own decision, this is again 1353, at paragraph 50, where you
8 refer to --

9 PRESIDING JUDGE EBOE-OSUJI: Now, before you say that, let's, first of all, get
10 clearly on the record what you're saying. Are you saying you are not objecting, but
11 you want to put certain observations on the record?

12 MS BUISMAN: Indeed. I just want to be sure that we are clear on the scope of the
13 admissibility and -- in particular because I heard my learned colleague say we have
14 omitted all references directly relating to the accused, but there's still references to
15 planning and planning goes to common plan.

16 And in paragraph 50 of your decision you refer to the central aspects of the charges
17 such as the existence of a common plan, the systematic nature of attacks or the
18 implication of members of the alleged network. That any of these documents, given
19 that there's no signature, there's no official stamp, we don't know don't know
20 anything about the sources, we do not know if it's hearsay, double hearsay, triple
21 hearsay or, even further, remote hearsay.

22 So on that basis, I mean, if you want, I can go through the paragraphs. Some of them
23 relate -- do not relate to the temporary scope of the -- of the document containing the
24 charges, which is, in our view, not very relevant. And those that do relate to
25 the -- the document containing the charges, yeah, as I said, given that you've already

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1 ruled upon this, in light of your decision, we see little scope to object, but we do want
2 to make sure that when references are made to planning, this solely goes to
3 background information and nobody can be -- it cannot be relied upon to show the
4 existence of a common plan.

5 PRESIDING JUDGE EBOE-OSUJI: Have we already ruled on this particular
6 document?

7 MS BUISMAN: Not this particular document, but very similar documents. The
8 NSIS documents in -- in, for instance, KEN-OTP-0008-0180.

9 PRESIDING JUDGE EBOE-OSUJI: It may be safer for you and your colleagues to
10 assume that the rulings we made were rulings made to the particular documents that
11 we were looking at at the time we made the ruling. If you want to -- of course,
12 you're free to argue that there's some similarities that should apply, but it is not safe
13 to say because we made a ruling in relation to document X, that ruling always
14 necessarily applies to document B, although they may come from the same pool or
15 the same batch.

16 So you -- so the point is you can speak to the Prosecutor's offer that their purpose in
17 tendering this document is for background information only, as I understand them,
18 and they do not intend to implicate the accused persons directly with information
19 seen in this document.

20 Now, later on, of course, they will tell us whether they also -- what they say in
21 reaction to your observation about planning. They will react to that when their turn
22 comes, but the point is speak only in terms of the background and then your concern
23 about incriminating material and not rely on the rulings we've made before as if it
24 automatically applies to this document.

25 MS BUISMAN: Mr President, I appreciate it doesn't automatically apply, but if I

1 may read out your -- your analysis here at paragraph 50, you find the document is
2 prima facie relevant to the questions, but you are mindful of the nature of such
3 intelligence documents. So in general, you make a general observation about
4 intelligence documents which rely on unverified anonymous sources and often
5 contain predictions rather than accounts of events that have actually occurred.
6 And if we look at this document, it's entirely -- the sources are entirely anonymous.
7 We have no idea where this information comes from. And as I said earlier, it could
8 be five times hearsay. We are unaware of the document, so we do think -- though I
9 do appreciate what you're saying, we do think that the same analysis applies.
10 And also as my learned colleague limited herself to general background, I just want to
11 make sure that we're not bringing in evidence about a common plan through the back
12 door, because if that's the situation, then we would object.

13 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper.

14 MR HOOPER: Yes, I can merely echo what Ms Buisman has submitted and adopted.
15 Indeed, in dealing with -- and I think we can speak of a class of document here in
16 these NSIS reports, that it's already been touched upon in respect of paragraph 50 of
17 your decision. And in the Bar table objections to NSIS reports, this Defence raised a
18 document -- I'll give its -- its nomination, but it needn't be called up. It's
19 KEN-OTP-0006-0048, which we submitted is important to a proper understanding
20 and appreciation of NSIS documents because it's the NSIS director,
21 General Gichangi who explains that the security briefs contain unverified intelligence
22 which must be verified by other security agents -- agencies, sorry. Let me start again.
23 He says the briefs contain, quote, "... unverified intelligence which must be verified by
24 other security agencies and subjected to further analysis.", unquote.
25 There's quite a considerable step between this kind of anonymized information from

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1 unknown sources, of course, to evidence. The Prosecution are relying on this
2 material as evidence of proof of the truth of the content, and we'd submit that's a very
3 dangerous thing to do with this kind of material.

4 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, let me stop you there. The -- you
5 said you were adopting Ms Buisman's position. That was your starting point. And
6 her position was that to the extent that the Prosecutor is going to rely only on the
7 parts they have indicated and to rely on those parts only for purposes of background
8 information, that they do not object, say the Sang Defence, but that they do object if
9 inferences of guilt may be drawn from those parts. That is my understanding of
10 their position. Is that your's too?

11 MR HOOPER: It is, with a nuance, which I'll come to in -- in a moment. We've no
12 objection to it being used as background material, but what is undefined is what is
13 background.

14 A particular problem that we have with this material, it's a compilation dated
15 July 2008 and it's compiled as a presentation to CIPEV. And there's -- given the
16 history that you already know about the forces, if I can put it like that, that may be in
17 existence, the interests that may have been seeking to protect themselves, or perhaps
18 prejudice others at that time --

19 PRESIDING JUDGE EBOE-OSUJI: We don't know anything of the sort. We are
20 only operating now -- we have evidence of what you're saying and what the
21 Prosecutor is saying.

22 MR HOOPER: Indeed. But this will probably be developed in the course of the
23 case, but the position is -- but even this is -- is subject to -- to obvious -- an obvious
24 concern and hesitation on the part of us to accept the reliability of these matters, and
25 the fact that it then becomes labelled background still requires great care and

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1 hesitation in approaching this material. So there's the nuance.

2 The Court's accepted NSS -- NSIS reports with considerable limitations imposed on
3 that material. In respect of these -- these particular reports - you'll see, they work, as
4 we know, from back to front - working from front to back in the normal manner in the
5 bundle, you'll see that many of the reports or several of the references that my friend's
6 referred to are way outside the temporal interests of the Court and, as far as
7 background is concerned, they far exceed what would one might thought reasonably
8 was background to this case because it projects way into -- into the future
9 into 2000 -- in February, late January of 2008.

10 But there is particular concern that we'd raise in respect of paragraph 329 onward.

11 And if we turn to page -- to 329 --

12 PRESIDING JUDGE EBOE-OSUJI: What page?

13 MR HOOPER: That's on page 57 of the document, which is 0071 on the ERN.

14 Now, this is a situation report for 4 January 2008. And of particular concern
15 here -- and this extends to the subsequent paragraphs, that's 335, 336, which are the
16 others that have been itemised here.

17 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, so we can cut the process of your
18 submissions short and go to other things, you referred to paragraph 329, did you?

19 MR HOOPER: I'm looking at paragraph (Microphone not activated).

20 PRESIDING JUDGE EBOE-OSUJI: All right. One second. If you look at --

21 MR HOOPER: In other words, the matters that have been --

22 PRESIDING JUDGE EBOE-OSUJI: One second.

23 MR HOOPER: -- identified --

24 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, one second, one second.

25 Paragraph 329, for example, we have the passage saying "allegedly intent". Is it the

1 sort of thing we have in the other things that caused -- that should cause you worry
2 that somebody wrote and said somebody else has allegedly said something?
3 The point is you've made your point that you do not accept this material be used to
4 draw any inference of guilt against your client. I think that should be enough, don't
5 you?

6 MR HOOPER: It goes a little bit further than that. I mean, what is background
7 material? If it's something that directly concerns the substance of the case, the
8 question of network, for example, the question of organisation of militia groups,
9 organisation, that kind of thing, that touches upon the case, that's evidence that we
10 are concerned about.

11 It really comes to this, doesn't it really: If background is material that doesn't
12 impinge on the case is truly background, then we would have no objection to it
13 because it wouldn't directly concern us -- I say "directly concern" us -- concern us.
14 But when you've got this kind of observation at 329, when you've got the kind of
15 thing at 333, when you've got the observation of a Chief Rukia at 335 going around
16 identifying houses, we object. We are -- it is not a question of being happy or
17 unhappy. It is wholly inappropriate.

18 PRESIDING JUDGE EBOE-OSUJI: All right. What passages do you object to?

19 MR HOOPER: Well, I think we can easily deal with that by saying you'll see that
20 those paragraphs all relate to an alleged situation report the 4 January 2008. We
21 don't accept, by the way, these are genuine documents in the sense that they've been
22 honestly compiled. That's at root. And of interest is that in Kenya II, the
23 Prosecution in respect of similar intelligence have said it's unreliable. It's they're
24 wearing different clothes depending which case they're in.
25 But in respect of this, we'd say that it would be wrong for the Prosecution --

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1 PRESIDING JUDGE EBOE-OSUJI: Did you say the Prosecutor in another case said
2 that intelligence reports are unreliable?

3 MR HOOPER: This Prosecutor, OTP, in Kenya II has said that the NSAC reports,
4 which is part of the intelligence community in Kenya, the NSAC, of which NSIS as I
5 understand it forms a part, producing reports that are unreliable, slanted.

6 PRESIDING JUDGE EBOE-OSUJI: All right. Ms Zago, of course, will speak to that
7 when it is her turn.

8 MR HOOPER: Yes. But -- yes, I can give a reference to that if my friend wishes.
9 But coming back to this particular document, 4 January 2008, so we've got specific
10 factual allegations absolutely central to the case, not general background. This is
11 activity at the time. And we say, you know, given the background, the potential
12 background to this material, all the rest of it, the anonymous nature of it, the possible
13 slant, all the rest of it, it would be wrong, procedurally wrong to permit the
14 Prosecution to rely on these as fact.

15 And the same applies for the next report, which is the situation report to the 3
16 January.

17 PRESIDING JUDGE EBOE-OSUJI: What page are you looking at?

18 MR HOOPER: This is the next page. So we're now -- the dates are going
19 backwards. We've moved from the 4 January to the 3 January '08 reports. And
20 what one has there at paragraph 341, and it is paragraph 341, you may recall, is being
21 referred to or relied upon up until the end of the first paragraph at page 59. In other
22 words, just over the top -- to the top of the next page, that first paragraph is the limit
23 of what my friend's relying on there.

24 And what do we have there? We see "Kalenjin youth ... planning to raid/burn
25 houses." Then we've got names of people, "... intend to raid houses."

1 "Speculation... Kikuyu have ferried Mungiki." And then "Some ODM leaders
2 allegedly gave money to Kalenjin youth."

3 This isn't background material. As a prosecutor, if you have this kind of material,
4 you perhaps can use it as a springboard in order to seek out those informants and
5 produce the evidence, but you don't limply in my -- our submission introduce this
6 kind of material, call it background material, and clothe it in that manner and
7 necessarily put the Defence's mind at ease that it might not have some other purpose
8 in being introduced.

9 And if we go on to the next report which is relied on, it is the 2 January, that's page 61
10 of the document at paragraph 349. I'd lost track actually exactly what part of that
11 was being referred to by my friend.

12 349, as you'll see, is -- extends over almost three pages. And some of it clearly relates
13 to areas that we're not concerned with, though, of course, those are areas that may be
14 of interest to you, the Judges, as background material. That's exactly the kind of
15 material that we thought these reports, if they're going to be looked at, might be
16 looked at for what's going on in Nairobi, in Mombasa, and the other
17 contemporaneous outbreaks of violence.

18 But it seems that this Prosecution is looking rather more focusedly on facts concerning
19 Eldoret and Uasin Gishu.

20 And, again, as for the previous two days' of reports, there is concern, an objection in
21 respect of reliance on that other than background. But what is background? So
22 anything in part of that that extends to substantive issues in the case, and it's quite
23 clear they do, shouldn't be relied on in our submission; in other words, if the
24 Prosecution is saying this is background material, then it must be understood that
25 that is all it is and not of the quality that I've just highlighted.

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1 It becomes perhaps less significant as we go further on in time back into November.
2 And so there is no reports here of political meetings or of hate-speeching by Mr Ruto,
3 for example, in political meetings.
4 But it is still of a concern that there's material here that might be pieced together by a
5 prosecutor later to try and indicate network, all the other features that you know are
6 matters that need to be shown evidentially in this case. If that is being used
7 evidentially in that way, then we have a concern with this document. And those are
8 our submissions.

9 PRESIDING JUDGE EBOE-OSUJI: Ms Zago, any one specific question, of course,
10 you may speak to other things that your colleagues have said, but what one -- the
11 number of issues that spring to mind one is planning, are you going to use this
12 material to -- are you planning --

13 MS ZAGO: There is a distinction to be made between common plan and planning of
14 the attacks. In paragraph -- and I understand the -- your Honours' direction that
15 each document should be analysed individually and scrutinised separately from the
16 others, but paragraph 50 --

17 PRESIDING JUDGE EBOE-OSUJI: But there will still be some general principles to
18 keep in mind if -- yes, that is correct. But if certain principles have been indicated,
19 it is also safe for you to keep that in mind, as much as it is safe for the Defence not to
20 assume anything.

21 MS ZAGO: Yes, thank you, your Honour. That was actually indeed the point that
22 in analysing a previous NSIS document from specifically the same period that the
23 problematic paragraphs for my learned friend from the Ruto Defence have indicated,
24 December 2007 and January 2008, that specific document, in the context of analysing
25 that specific document, an NSIS-generated report, the Chamber has clearly spelled

1 out what they consider to be background information. In my understanding there is
2 no ambiguity in the definition that the Chamber has given to background information,
3 including, the Chamber says, for example, the widespread nature of the attacks,
4 election campaign activity and the nature of what was being reported at that time.
5 So if the Prosecution confines itself to rely upon those documents within the
6 circumscribed perimeter established by the Chamber, we don't see the reasons why
7 this specific entries in this specific report should be excluded if we take and we
8 analyse this document in the context of other similar documents produced at the
9 same time by the same intelligence agency.

10 PRESIDING JUDGE EBOE-OSUJI: Ms Buisman is worried about planning.

11 MS ZAGO: We do not intend to rely upon those documents to prove the common
12 plan that is charged in this case. We intend to use this, sections of this report, for the
13 widespread and systematic nature of the attacks and the contextual element of the
14 charges. Therefore, this document, the way in which they are drafted, will be relied in
15 this manner -- or for those purposes.

16 PRESIDING JUDGE EBOE-OSUJI: What about corroboration? Are you going to
17 use the document for corroborative purposes in the sense of one of your witnesses or
18 some of your witnesses testifying to certain events and you now saying: Well, see,
19 the passages we indicated in this document corroborate those stories told by the
20 witnesses from the witness' seat.

21 MS ZAGO: If the Court allows the Prosecution to use this material as corroborating
22 evidence heard from witnesses, the Prosecution will seek to use this material for
23 corroborating purposes.

24 PRESIDING JUDGE EBOE-OSUJI: Is that the same thing as background?

25 MS ZAGO: The intent, the original intention of the Prosecution was not to rely as

1 corroborating. I did not mention it in the -- the main submission; however, if the
2 Chamber allows it, the Prosecution will act accordingly.

3 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper makes the submission that this sort of
4 material is something that would have been better used as springboard material from
5 the basis upon which you go to find those or witnesses who will testify actually to the
6 offence indicated in the document. Now, that raises this question: This material or
7 this sort of material were received by the CIPEV. Is it the case -- this is a question:
8 Is it the case that what CIPEV did was to say some -- we've conducted an inquiry; at
9 the end of it we have come to the conclusion that there is a need for a prosecutorial
10 investigation to be carried on so that people may be prosecuted? Is that my
11 understanding of what CIPEV was about?

12 If that is the case, assuming that is the understanding, correct me if I understood
13 wrongly, but if I was correct in that understanding, is there some circularity then to
14 jackknifing, as it were, to the material that the CIPEV would have looked at to say
15 there's a need for investigation so that there may be criminal investigation and
16 prosecution? That's the second question.

17 MS ZAGO: Your Honour's understanding of the mandate is -- of CIPEV, to my
18 knowledge, is correct. Another witness more appropriately placed to inform
19 your Honours specifically about the mandate is scheduled to appear soon.

20 However -- and it is correct that CIPEV's mandate was to investigate the post-election
21 violence with the aim at establishing the facts and identifying alleged perpetrators for
22 possible judicial proceedings and eventually reparations to victims.

23 However, the material that was put forward to CIPEV, in our submission, is not to be
24 excluded in terms of probative value, not only because material was put forward
25 CIPEV for the specific purposes that CIPEV was -- for which CIPEV was created does

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1 not mean that the material put forward is completely deprived of any value for
2 subsequent judicial proceedings.

3 PRESIDING JUDGE EBOE-OSUJI: Those are my questions. You may complete
4 your submissions in another respect then.

5 MS ZAGO: Subject to verification, I -- with respect to the comment related to the
6 parallel case, in Kenya II, and the comments on the statement by the Prosecution that
7 the NSIS reports were unreliable, I don't have the documents with me at this point,
8 however, my recollection is that those documents presented to -- in the other case
9 were documents that were incomplete and there were sections that were missing.
10 So the compilation itself of the document suggested that the document could not be
11 relied upon. However, the information contained therein in the documents or the
12 relevant sections that were contained in those documents, it doesn't necessarily mean
13 because a document was incomplete that the information that was in the document
14 was not reliable. Therefore, I believe there has to -- a distinction to be made between
15 in the documents that were analysed in the context of Kenya II and in this case
16 It is -- again, it was because the document -- the way in which the document was put
17 together in Kenya II was not satisfying the minimum requirements of indicia of
18 reliability.

19 PRESIDING JUDGE EBOE-OSUJI: You're saying you will need to verify what in fact
20 was the position in the other case?

21 MS ZAGO: I would like to be absolutely certain --

22 PRESIDING JUDGE EBOE-OSUJI: All right.

23 MS ZAGO: -- of the context on this.

24 PRESIDING JUDGE EBOE-OSUJI: Make that verification and then inform us
25 definitively of what the position was. Thank you.

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1 (Trial Chamber confers)

2 PRESIDING JUDGE EBOE-OSUJI: The Chamber will admit this document and
3 purely for background information. We are mindful of the concerns raised by the
4 counsel for the Defence. We also are alert to our own responsibilities and we hope to
5 continue to be assisted by counsel's submission on these things at the right time. The
6 document comes in.

7 THE COURT OFFICER: This document will bear the following number:
8 EVD-T-OTP-00093 and will be registered confidential. It will also be referenced as
9 Prosecution Exhibit Number 93.

10 PRESIDING JUDGE EBOE-OSUJI: Thank you.

11 Your next document, Ms Zago.

12 MS ZAGO: Thank you, your Honour. My next document is ERN number
13 KEN-OTP-0006-1061.

14 PRESIDING JUDGE EBOE-OSUJI: What tab is it?

15 MS ZAGO: Tab 11.

16 PRESIDING JUDGE EBOE-OSUJI: Please proceed.

17 MS ZAGO: The document, in our submission, should not be displayed publicly.
18 This is a roster of outpatients at the Nandi Hills District Hospital, which lists the
19 outpatients by name, age, sex and relevant diagnosis. I should mention that this
20 document was --

21 PRESIDING JUDGE EBOE-OSUJI: Once more, this is a document that is coming in
22 through this witness as material received by the Commission of Inquiry?

23 MS ZAGO: That is correct, your Honour, yes.

24 PRESIDING JUDGE EBOE-OSUJI: And Defence have -- does not contest that?

25 MR HOOPER: Does not contest it, you're correct.

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1 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa?

2 MR KIGEN-KATWA: We take the same position, Mr President.

3 PRESIDING JUDGE EBOE-OSUJI: Please, proceed.

4 MS ZAGO: The blinds then can come up and the document does not need to be
5 displayed. The document, this specific list, was included by the Prosecution in its
6 original Bar table motion. It was rejected by the Chamber and I refer specifically to
7 paragraph 75 of the Chamber's decision because the Chamber could not fully assess
8 the document's relevance or probative value because the Prosecution has uploaded
9 a -- only a redacted version of the document.

10 However, today we intend to -- or -- and we have providing a complete full
11 non-redacted version of this document.

12 PRESIDING JUDGE EBOE-OSUJI: What did we say about it in the Bar table
13 decision?

14 MS ZAGO: I'm reading from paragraph 75 of decision of 10 June, at page 37, which
15 says that KEN -- "Document... KEN-OTP-0006-1061 is indicated by the Prosecution as
16 a list of persons who were treated in Nandi Hills District Hospital. The Chamber
17 notes that only a redacted version of the document... appears to be registered in the
18 case record. This has not been explained by the Prosecution. The Chamber finds
19 that it is unable to fully assess the document's relevance and probative value. For
20 these reasons the Chamber does not admit..." the document.

21 The Prosecution wishes to tender the document, the same document, in its entirety, in
22 non-redacted form and explains that the reason why it was uploaded in the record of
23 the case in redacted form was purely due to a technical oversight of -- on our side.
24 I should also advise the Chamber that a similar document stemming from the same
25 hospital containing a list of patients was admitted by the Chamber and the analysis of

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1 that document admitted and that list is at paragraph 74, the paragraph preceding the
2 analysis of the document that we are analysing now.

3 The witness has explained that the markings of this document at the top right-hand
4 side, which reads Exhibit 62C, refers to a CIPEV document introduced via Witness 62.

5 The document -- similar document, similar list of patients that were admitted by
6 your Honours in that decision, bears the marking 62B, which we argue means that
7 these two documents are stemming from the same witness and arguably from the
8 same source.

9 The information contained in this document is corroborative of information provided
10 by other witnesses before this Court concerning the violence in the district of Nandi
11 Hills during the relevant period. And even if the document is not dated, or does not
12 appear to have a date, its connection to Witness 62, which was a representative of the
13 medical services in the area, is suggestive that the information had been assembled
14 and prepared for the purposes of presenting it before CIPEV and CIPEV had the
15 mandate of collecting information and provide evidence to the commissioner for the
16 purposes of establishing responsibilities in the post-election violence.

17 For all these reasons, we submit that this document should be admitted, has indicia of
18 reliability, its probative value is established and there is minimal prejudice to the
19 Defence. Thank you.

20 MS BUISMAN: Mr President, I have this document here in my hand and I simply
21 cannot see how anyone can rely on this document for -- to make any finding. There's
22 no name of a doctor, there's no explanation of a doctor, there's no identity, there's no
23 ethnic group identified, there's -- we don't know how this list was compiled. We do
24 not know whether these sort of reports were accurately reported at the time. We
25 have no dates. We don't have a reason for -- for the injury. It could be the police.

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1 It could be -- it could be anyone. This -- this simply says nothing. And I -- I admit
2 there's limited prejudicial effect, but do we really want to -- we want to keep a
3 quality --

4 PRESIDING JUDGE EBOE-OSUJI: One second. You say there's limited prejudicial
5 effect. What do you mean?

6 MS BUISMAN: Because in our case we are -- our case is whether or not our client
7 himself is liable and responsible, so in that sense it's not our case we're necessarily
8 contesting this or not.

9 The only issue I have is there needs to be -- first of all, we need to look --

10 PRESIDING JUDGE EBOE-OSUJI: Ms Buisman --

11 MS BUISMAN: -- at the relevance.

12 PRESIDING JUDGE EBOE-OSUJI: One second.

13 MS BUISMAN: And if there's no relevance, then -- then we don't even get to the
14 question of prejudice.

15 PRESIDING JUDGE EBOE-OSUJI: One second. The -- my question is when you
16 say "limited prejudicial effect", do you mean there is no prejudicial effect or there is
17 some prejudicial effect?

18 MS BUISMAN: Of course there's some prejudicial effect.

19 PRESIDING JUDGE EBOE-OSUJI: What is it?

20 MS BUISMAN: This is not introduced for background information; this is -- this is
21 supposed to present a list of -- of names of people who are injured during that
22 time -- during the relevant time. We do not actually know who was responsible for
23 these injuries, which group was responsible for these injuries. So in our view
24 this -- this document demonstrates nothing. There's no relevance.

25 If it intends to corroborate another document, it has no corroborative value. If that

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1 other document has the indicia of reliability, then that document can stand on itself,
2 but this adds nothing. This is -- this adds nothing to you, the Judges, and it adds
3 nothing to the case.

4 PRESIDING JUDGE EBOE-OSUJI: You say there's no relevance. The document
5 says on top of it -- the title is "Post-election Violence Outpatients Nandi Hills District
6 Hospital". And we have a witness who you admit came here and said he worked for
7 CIPEV as a records clerk, as it were, and who said that this was a document received
8 by the CIPEV, and in this document that has the title I've read out it says "Name",
9 "Age", "Sex", "Diagnosis" are the columns we see on top. And you run down on the
10 columns -- on the column for diagnosis, first person indicated number 1 there, "cut
11 wound"; number 2, "trauma left eye"; number 3, "soft tissue injury"; go down to five,
12 "rape case"; 6, "rape case"; number 16, "gunshot" and so on. You tell us there is no
13 relevance.

14 MS BUISMAN: Mr President, what does this prove in -- in respect of the case
15 against Mr Sang? I do not see that. I do not -- as I said, there's no indication of -- of
16 how this list was compiled or who is responsible for these -- these wounds. So on
17 that basis I -- I'm afraid I don't see much relevance.

18 PRESIDING JUDGE EBOE-OSUJI: Thank you.
19 Mr Hooper.

20 MR HOOPER: First of all, I -- we're very aware that the Court has already admitted
21 a number of lists, medical lists, in its decision, and bearing -- but bearing that in mind,
22 my understanding is that this list is produced as background. That -- that was my
23 understanding. It's got certain deficiencies. We don't know who compiled it, from
24 what records it was compiled. It was produced by CIPEV. Witness 62 is a medical
25 officer from Nandi Hills Hospital we learn from -- what, the witness, but we don't

1 know how this list came about, and more significantly, we don't know the temporal
2 period that concerns this list, because you'll bear in mind the temporal period for the
3 Nandi Hills crimes, as it were, is 2 January, limited to 2 January.

4 And your Honour's just done the exercise of going down that final column, the
5 diagnosis, and I can - I see your Honour's point there, but if you go down the names
6 column on these three pages, it's very interesting because the majority of names are in
7 fact -- from my limited knowledge appear to be Kalenjin names, Nande names. As
8 well you can with -- there's even a Ruto here, no -- no relation, but we've got clearly a
9 majority of Kalenjins. So we're left with a document that's -- that may be admitted,
10 but -- but it remains rather suspended in terms of its use.

11 And I bear in mind that, as I recall, the Prosecution have already produced a list of
12 people from Nandi Hills Hospital, which may be in conflict with this, and they're at
13 some point going to have to tell us which list they're relying on if they are. Anyway,
14 those are our observations.

15 PRESIDING JUDGE EBOE-OSUJI: I would imagine that might be something you
16 would like to see.

17 MR HOOPER: Yes.

18 PRESIDING JUDGE EBOE-OSUJI: Conflict in the Prosecution evidence.

19 MR HOOPER: There's an abundance of that already, but I mean the more -- more
20 the better, yes.

21 MS ZAGO: Very briefly, the -- this document we -- we argue that this document
22 should be analysed in connection with the other document that is -- was admitted by
23 the Chamber in the same context.

24 The feature of the documents are almost identical and if one follows the logic of the
25 first document and import it in the second one, which is the one we are looking at

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1 right now, the first column seems to -- the second column titled "OP number" seems
2 to bear a date -- a number and a date, 10/07 -- sorry. The second column, the first
3 patient listed, we can see a number, 38910/07, presumably indicating the year of
4 admission, and if we scroll down to entry number nine, patient number nine, we see a
5 number of the patient, 002/08, presumably indicating the year of admission.

6 PRESIDING JUDGE EBOE-OSUJI: Now you're speculating, are you?

7 MS ZAGO: I'm analysing this document in connection to the other one and inferring
8 that this is reasonably the system adopted to record the admission of the patients.

9 MR HOOPER: Well, just -- just, I hope, helpfully, where does, for example, item 16,
10 where do the numbers jump from 74 to 130? None of the numbers seem to bear any
11 correlation. They're sequential on this list, but they pose their own questions, don't
12 they, the numbering?

13 PRESIDING JUDGE EBOE-OSUJI: Well, I think we've heard enough.

14 (Trial Chamber confers)

15 PRESIDING JUDGE EBOE-OSUJI: The Chamber will admit the document. The
16 document has prima facie relevance to this case. In relation to the probative value,
17 the Chamber will assess that in the context of the other material received in the case.
18 The Defence may, at the appropriate time, challenge the -- any inconsistencies that
19 they see in this document or in this document's relationship with other evidence in
20 the case, but for now the document comes in.

21 THE COURT OFFICER: This document will bear the following number:

22 EVD-T-OTP-00094, and will also be referenced as Prosecution Exhibit Number 94.

23 PRESIDING JUDGE EBOE-OSUJI: Thank you.

24 So Ms Zago, that brings us to the end of your documents, is that it?

25 MS ZAGO: Not quite. We have three more documents we would like to receive an

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1 MFI for.

2 PRESIDING JUDGE EBOE-OSUJI: And what are those?

3 MS ZAGO: And those are document at tab 7, ERN number KEN-OTP-0003-0522,
4 titled "Update on Post-election Violence Deaths". This document was identified by
5 the witness and I -- I don't believe there are any objections to that from my learned
6 friends on the other side.

7 PRESIDING JUDGE EBOE-OSUJI: The document will be marked for identification.

8 THE COURT OFFICER: This document will bear the following number:

9 MFI-T-OTP-00095.

10 MS ZAGO: Thank you.

11 The following number for MFI purposes is number tab 9, and the ERN number is
12 KEN-OTP-0005-9365, entitled "Status Report on IDPs."

13 PRESIDING JUDGE EBOE-OSUJI: The document will be marked for identification.

14 THE COURT OFFICER: This document will bear the following number:

15 MFI-T-OTP-00096.

16 MS ZAGO: The last document for MFI purposes, under tab 10, ERN number
17 KEN-OTP-0006-1045, entitled "Statement by former Uasin Gishu district
18 commissioner before CIPEV". This document, like the previous one, has been
19 recognised by the witness as stemming from CIPEV collection.

20 PRESIDING JUDGE EBOE-OSUJI: The document will be marked for identification.

21 THE COURT OFFICER: The number assigned will be MFI-T-OTP-00097.

22 MS ZAGO: Thank you.

23 I would like to place on the record that the witness was properly given warnings. I
24 failed to advise the Chamber of that at the beginning of my examination. And with
25 that note, I conclude the Prosecution's examination-in-chief of this witness. Thank

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1 you.

2 PRESIDING JUDGE EBOE-OSUJI: You mean the witness was given the Rule 66(3)
3 and 74(1)?

4 MS ZAGO: That is correct, your Honour.

5 PRESIDING JUDGE EBOE-OSUJI: All right. Thank you for putting that on the
6 record.

7 Witness, the -- we've come to the end of the Prosecutor's examination-in-chief of you.

8 We will be taking our morning break, but when we return Defence counsel, either

9 Mr Hooper or Mr Kigen-Katwa, will cross-examine you.

10 We will rise for 30 minutes.

11 THE COURT USHER: All rise.

12 (Recess taken at 11.01 a.m.)

13 (Upon resuming in open session at 11.39 a.m.)

14 THE COURT USHER: All rise.

15 Please be seated.

16 THE COURT OFFICER: We are in open session, your Honours.

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

18 Mr Kigen-Katwa, who is going first?

19 MR STEYNBERG: Your Honours, if I may, before we commence, I'm informed that the next
20 witness is on standby for this afternoon, and I wonder if I might inquire -- well, perhaps I

21 should say that I've been given to understand from my learned friends even if we do finish
22 cross-examination today that they might require some time before we start with Witness 613.

23 And if we could confirm that so the witness might be excused, I would be grateful.

24 PRESIDING JUDGE EBOE-OSUJI: The point being released from standby mode?

25 MR STEYNBERG: Yes, your Honour.

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1 PRESIDING JUDGE EBOE-OSUJI: Okay.

2 MR KHAN: Yes, I'm grateful, Mr President. That is correct. I think cross-examination
3 will be very brief. But we've had previous discussions with the Prosecution and, indeed,
4 there was some discussion to defer this witness until later in the month due to the morass of
5 late disclosure. However, in an effort to move proceedings on, we're content, despite the late
6 disclosure to proceed, but it should start tomorrow. I'm grateful.

7 PRESIDING JUDGE EBOE-OSUJI: I think we've heard enough on that. Let's -- witness may
8 be told not to be on standby --

9 MR STEYNBERG: Thank you, your Honour, I'm most grateful.

10 PRESIDING JUDGE EBOE-OSUJI: -- for today. Thanks.

11 Who is starting first?

12 MR KIGEN-KATWA: I do, Mr President.

13 PRESIDING JUDGE EBOE-OSUJI: All right. How long do you think you might take?

14 MR KIGEN-KATWA: Approximately 15 minutes, Mr President.

15 PRESIDING JUDGE EBOE-OSUJI: All right. Please, proceed.

16 Mr Witness, welcome back. Mr Kigen-Katwa, counsel for Mr Sang, will be the first
17 of the Defence counsel to ask you questions in cross-examination. Thank you.

18 THE WITNESS: Mr President and your Honours, am I still on oath?

19 PRESIDING JUDGE EBOE-OSUJI: Yes, indeed, you're still on oath --

20 THE WITNESS: Thank you.

21 PRESIDING JUDGE EBOE-OSUJI: -- and you also are to keep in mind the advice I gave you
22 the first time you appeared. In reverse order, it's important for you to observe the pauses
23 between the question and your commencement of your answer so as to enable the court
24 interpreters and court reporters to record what you say accurately.

25 I also would remind you to be careful to understand the question being asked of you.

1 Understand it and then think about the answer you want to give and give just that answer
2 and leave it there and wait for the next question, all right? Thank you.

3 MR KIGEN-KATWA: Mr President, for purposes of moving fast, I propose to ask my
4 questions relative to the statement given by the witness, and for that purpose I request that
5 the blind be brought down so that I can give him a copy of his statement and take him directly
6 to the paragraphs that I propose to use.

7 PRESIDING JUDGE EBOE-OSUJI: We can bring down the shade then.

8 QUESTIONED BY MR KIGEN-KATWA:

9 Q. Good morning, Mr Wasilwa.

10 A. Good morning, Mr Katwa.

11 Q. Now, I want to ask you a few questions. The first question relates to whether or not
12 you have a comprehensive list of all the documents that were used in the CIPEV process.

13 And for purposes of that question, I would like you to look at paragraph 35 of your statement.

14 MR KIGEN-KATWA: Mr President, I'm making reference to document
15 KEN-OTP-0073-00150, 0150 being the page.

16 Q. Mr Wasilwa, you will confirm that in fact in that statement you confirmed that there
17 was no complete list of all witness statements, isn't it?

18 A. I do confirm there were no complete list of all witness statements.

19 Q. Now, the next question I want to ask you is that you've also stated at paragraph 46 that
20 there was no chain of custody of the documents, some of which you have made reference to in
21 these proceedings.

22 A. I do confirm.

23 Q. You do confirm that there was no chain of custody?

24 A. Mr Katwa, please repeat the question again.

25 Q. My question is that at paragraph 46, you've indicated that the situation that obtained

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1 and obtains now is that there was no chain of custody of the documents that were used by the
2 CIPEV commission, isn't it?

3 PRESIDING JUDGE EBOE-OSUJI: No, no. Let's read the paragraph 46 into the record,
4 Mr Kigen-Katwa, please.

5 MR KIGEN-KATWA:

6 Q. Mr Witness, at paragraph 46, this is what you said: "Apart from marking exhibits
7 (according to witness and standard numbering) and the tables of exhibits, I do not think there
8 was any other record of the chain of custody of exhibits."

9 PRESIDING JUDGE EBOE-OSUJI: And your question?

10 MR KIGEN-KATWA:

11 Q. My question, Mr Witness, is that that remains the position that to the best of your
12 recollection you do not think there was any other record of chain of custody of exhibits, isn't
13 it?

14 A. Apart from the numbering, there was no other chain apart from the ones
15 provide -- produced in private sessions.

16 Q. Now, in respect to what you referred to, private sessions, I would like to make reference
17 to both paragraph 46 and paragraph -- sorry -- paragraph 47 and paragraph 61 of your
18 statement. And the question I want to ask you, Witness, is that you confirm that in fact you
19 were not involved in the handling of the documents used in the private sessions, isn't it?

20 A. Yes.

21 Q. Now --

22 PRESIDING JUDGE EBOE-OSUJI: But is that all that 47 says, Mr Kigen-Katwa?

23 MR KIGEN-KATWA:

24 Q. Witness, you would confirm that you do not know how the documents, particularly the
25 exhibits, in private session were handled except to the extent to which you were personally

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1 involved, isn't it?

2 A. Yes.

3 Q. Now, I will take you to various paragraphs. At paragraph 48 you confirm that you
4 collected the exhibits that were used in these proceedings, CIPEV proceedings from various
5 places, both at Nairobi and outside of Nairobi, isn't it?

6 A. Yes.

7 Q. You subsequently said that you took those documents to Mombasa for purposes of
8 having the report made.

9 PRESIDING JUDGE EBOE-OSUJI: Where are we referring to now?

10 MR KIGEN-KATWA: Paragraph 61, Mr President.

11 THE WITNESS: Yes.

12 MR KIGEN-KATWA:

13 Q. Witness, at paragraph 61 you say -- or paragraph 63 first -- you say you subsequently
14 submitted a report to the president, isn't it?

15 A. Yes, a report was submitted to the president.

16 Q. Then at paragraph 65 you said that another report was submitted to one Kofi Annan
17 together with some documents, the hand-over having been done at Serena Hotel, isn't it?

18 A. Yes. It is the same report and the documents presented to Mr Kofi Annan as the
19 commission had wound up.

20 Q. Now, at paragraph 66 you say that there was another set of documents that was sent to
21 the AU National Dialogue for Reconciliation office?

22 A. Yes. These were documents that several people had presented to the commission,
23 either reports or history or literature and documents that had remained and there was no
24 other place to be stored. So the AU National Reconciliation Office was the place the
25 documents were taken to.

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1 Q. Now, I want to ask you a couple of questions from that process, from Mombasa to the
2 president to Kofi Annan and then to UN and AU. The first question I want to ask you is did
3 you -- did the office that remained of the CIPEV retain any copies of those documents?

4 A. No.

5 Q. The documents that you handed over to Kofi Annan and to the AU, was there any
6 hand-over document?

7 A. There was no hand-over document.

8 Q. Let me be more specific. Was there a schedule listing the documents that had been
9 handed over to AU?

10 A. There was no -- there was none.

11 Q. And in terms of the documents sent to African Union?

12 MS ZAGO: I apologise to interrupt my learned friend, but I understand the previous
13 question concerned documents that had been handed over to the African Union, and now
14 we're repeating the same question about the African Union documents. So I'm not sure
15 whether the previous --the previous question from my learned friend referred to another
16 entity or we're talking about, in two instances about the African Union.

17 MR KIGEN-KATWA: Sorry. I can see that, Mr President.

18 Q. The question I meant to ask is: Apart from the situation you've described being that
19 there was no hand-over scheduled to AU, was there any hand-over schedule to the
20 documents given to the UN?

21 A. There was none.

22 Q. Now, you said that the report that was given to Kofi Annan is the same report as the one
23 given to the president, isn't it?

24 A. Yes.

25 Q. Now, the documents that were handed over to Kofi Annan through his personal

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1 assistant as explained at paragraph 65, were they also given to the president?

2 A. That one, I'm not sure. That one, I don't know. But we presented a report to the
3 president.

4 Q. Now, from the time of handing over these documents, my recollection is that the report
5 was handed over to the president on the 16 October 2000 and to Kofi Annan on the 18 October
6 2008 -- sorry -- to the president on 16 October 2008 and to Kofi Annan on 18 October 2008.
7 And my question, Mr Witness, is from that time when these documents were given out
8 variously to Kofi Annan and AU together and to UN, have you had custody of these
9 documents?

10 A. Repeat your question again.

11 Q. Between the time you handed over these documents to Kofi Annan, to AU and the UN,
12 have you been having access to these documents?

13 A. No.

14 PRESIDING JUDGE EBOE-OSUJI: So, Mr Kigen-Katwa, I assume that your question, the
15 material proposition in your question was whether or not this witness had continued to have
16 access to documents between the time of hand-over of the documents until now, I take it?

17 MR KIGEN-KATWA: That is true, Mr President.

18 PRESIDING JUDGE EBOE-OSUJI: All right. Not necessarily the date on which the
19 documents were handed over?

20 MR KIGEN-KATWA: Not necessarily, Mr President.

21 PRESIDING JUDGE EBOE-OSUJI: Thank you.

22 MR KIGEN-KATWA:

23 Q. Now, Mr Witness, the general tone of your statement is that your business was from
24 time to time make copies of the documents, give copies to the commissioners, and mark them
25 as exhibits to correspond with the witnesses. That was the general scope of your work, isn't

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1 it?

2 A. Yes.

3 Q. Mr Witness, you were not in a position to say with detail that the same document you
4 saw in the commission being the document you photocopied is the same one that the
5 Prosecution showed you immediately before you came to testify, can you?

6 A. I can be in a position to identify the document that I photocopied or reproduced while at
7 the commission.

8 Q. Lastly, Mr Witness, it was said at that time that there was a certain list of people who
9 had been identified by the commission as being culpable and whose names had been put in
10 an envelope. Are you aware of that proposition?

11 A. I'm not aware. And I would say I don't know even whether my name was also in the
12 envelope.

13 Q. Your point being that you were not aware how it was composed and how it was
14 handled?

15 A. Precisely.

16 Q. And so on the same issue you wouldn't know whether the president was given?

17 A. I wouldn't know.

18 MR KIGEN-KATWA: Mr President, that should be all the questions I had for this witness.

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

20 Mr Hooper.

21 MR HOOPER: No questions. Thank you.

22 Thank you, Mr Witness.

23 PRESIDING JUDGE EBOE-OSUJI: All right. Any re-examination?

24 MS ZAGO: No, your Honours. Thank you.

25 PRESIDING JUDGE EBOE-OSUJI: Witness, that brings us to the end of your testimony.

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1 And I thank you very much for coming to assist us with our work. We wish you a safe
2 return. You are discharged. Thank you.

3 THE WITNESS: I'm grateful to be a witness here. Now I'll go and listen to other witnesses
4 back at home. Thank you very much.

5 PRESIDING JUDGE EBOE-OSUJI: You don't need to depart yet, if you don't mind, if you
6 can sit there for a while.

7 (The witness is excused)

8 PRESIDING JUDGE EBOE-OSUJI: So then that will conclude our matter for today, and we
9 return tomorrow at 9.30.

10 MR STEYNBERG: As the Court pleases.

11 PRESIDING JUDGE EBOE-OSUJI: All right. The Court adjourns until tomorrow.

12 THE COURT USHER: All rise.

13 (The hearing ends in open session at 12.01 p.m.)

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