

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 International Criminal Court
2 Trial Chamber V(a) - Courtroom 1
3 Situation: Republic of Kenya
4 In the case of the Prosecutor v. William Samoei Ruto and Joshua Arap
5 Sang - ICC-01/09-01/11
6 Presiding Judge Chile Eboe-Osuji, Judge Olga Herrera Carbuccion and Judge Robert
7 Fremr
8 Trial Hearing
9 Thursday, 27 February 2014
10 (The hearing starts in open session at 9.39 a.m.)
11 THE COURT USHER: All right.
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 announce the case.
16 THE COURT OFFICER: (Interpretation) Thank you. 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. We are in open session, your Honour.
19 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
20 Appearances seem to be the same?
21 MR PUGLIATTI: The same, Mr President.
22 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
23 Mr Nderitu?
24 MR NDERITU: The same on our side, Mr President.
25 PRESIDING JUDGE EBOE-OSUJI: Thank you.

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1 Mr Kigen-Katwa?

2 MR KIGEN-KATWA: Mr President, today for Mr Sang is myself, Katwa-Kigen, Joel
3 Bosek and Honor Lanham. May I also indicate that my client, Mr Sang, is present.

4 PRESIDING JUDGE EBOE-OSUJI: Thank you.

5 Mr Khan?

6 MR KHAN: Good morning, Mr President, your Honours. The appearances
7 remain the same.

8 PRESIDING JUDGE EBOE-OSUJI: Thank you.

9 Private session, please.

10 *(Private session at 9.40 a.m.) (Reclassified as Open session)

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

12 PRESIDING JUDGE EBOE-OSUJI: Thank you.

13 There is something, the Chamber, we thought we should mention. Upon
14 completion of the questions from this side of the Prosecution and the victims'
15 counsel, and upon apparently receiving the bundle of materials from the Ruto
16 Defence, the Prosecution signalled some concern about the matter of (Redacted)
17 (Redacted). And we indicated a need for
18 caution at the time. Of course, when we gave that indication for caution, we had
19 not reviewed the materials at the time. I certainly hadn't reviewed it. That's not to
20 say that caution is no longer necessary.

21 But now having had a chance to flip through some of the materials, we want to make
22 sure that the Ruto Defence understands that they can ask questions about (Redacted)
23 (Redacted). We don't want you to feel any chill from the Bench that you may not
24 ask a question or questions about (Redacted).

25 If it is the case that indeed the witness (Redacted)

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1 (Redacted)

2 (Redacted) if that is the

3 case, of course.

4 MR KHAN: Mr President, your Honours, I'm most grateful. And as the witness

5 isn't here, of course, (Redacted)

6 (Redacted)

7 (Redacted)

8 PRESIDING JUDGE EBOE-OSUJI: Well, we don't know what you intend to pursue.

9 MR KHAN: Yes.

10 PRESIDING JUDGE EBOE-OSUJI: But we're simply saying that --

11 MR KHAN: I'm grateful.

12 PRESIDING JUDGE EBOE-OSUJI: Okay.

13 One more thing, and this we feel a need to put on record. It is a distinct impression

14 we have formed, and we thought we should let you know that, the Defence for Ruto,

15 it appears to us that you've had no difficulty investigating this case. It looks like

16 you've been able to conduct your investigations. For what it's worth, we thought

17 we should let you know that that is the impression we have of your ability to

18 investigate. If you think it is overstated or our appreciation of your ability, you are

19 please free to indicate that, but we thought we should let you know that's an

20 impression we have.

21 MR KHAN: I'm grateful, Mr President. I will say it now as we're in private

22 session, previously we had made an application that the investigator in charge with

23 the conduct of this matter for the Prosecution be called to the stand, and the

24 Prosecution had previously indicated they had no difficulties with that, and they

25 agreed. Your Honours at that time said it was premature, and we'd need to show a

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1 legitimate forensic interest, a relevance to that inquiry. It's our case, and so there is
2 no misunderstanding, the inquiries that the Defence have made are those that any
3 reasonable lawyer could have made acting for the Prosecution or for the Defence.
4 So, your Honours, I don't want it to be -- I don't want us to give the impression that
5 there is any advantage. It's simply we've tried our best working day and night to
6 do the investigations that we consider necessary to allow your Honours to make a
7 true and accurate decision.

8 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, it's not a criticism.

9 MR KHAN: No, of course not.

10 PRESIDING JUDGE EBOE-OSUJI: I'm only observing that I would say that you
11 must be the envy, you and your team, of a lot of lawyers who have practised
12 criminal law in your ability to investigate. That's all.

13 MR KHAN: I'm grateful, your Honour. And as we're in closed session I will say
14 I'm massively indebted of course to my team, which worked tirelessly, and it's their
15 efforts that allow us to hopefully get to the bottom of this, of some of these matters.
16 And I'm grateful.

17 PRESIDING JUDGE EBOE-OSUJI: All right. We'll leave it at that and continue
18 with the business of the day. We will bring down the blinds and invite the witness
19 to the courtroom.

20 MR KHAN: And, your Honour, I'm going to with your leave deal with some of the
21 documents I showed yesterday. I can do that in the presence of the witness or now.
22 I'm in the Court's hands.

23 PRESIDING JUDGE EBOE-OSUJI: Why don't we just bring the witness in and then
24 we can do it.

25 MR KHAN: Indeed.

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1 *(Closed session at 9.45 a.m.) (Reclassified as Open session)

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

3 (The witness enters the courtroom)

4 PRESIDING JUDGE EBOE-OSUJI: Witness, welcome back to the court. Mr Khan
5 will continue asking you questions this morning.

6 Mr Khan, do we go back to public session?

7 MR KHAN: Your Honours, we can go back into public to deal with the exhibits.

8 PRESIDING JUDGE EBOE-OSUJI: All right.

9 MR KHAN: I'm grateful.

10 PRESIDING JUDGE EBOE-OSUJI: Public session then, court officer.

11 (Open session at 9.46 a.m.)

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

13 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, please proceed.

14 MR KHAN: I'm grateful. Mr President, with your leave, I will seek to exhibit --
15 seek the Court's leave to exhibit five documents that were shown yesterday and
16 eight documents I will seek to mark for identification.

17 Your Honours, the first is at tab 83. It's KEN-D09-0030-0144. It's a photograph of
18 Nandi Hills field as recognised by the witness. And, your Honour, I'd ask that that
19 be given an exhibit number.

20 PRESIDING JUDGE EBOE-OSUJI: Prosecution?

21 MR PUGLIATTI: The witness recognised that photo, so no objection.

22 PRESIDING JUDGE EBOE-OSUJI: Accepted as an exhibit for the Ruto Defence.

23 MR KHAN: Your Honours, I'm grateful.

24 The second is at tab 114, KEN-D09-0030-0265. It's a photograph of Kapchorwa. It
25 shows some trees and a bit of a goal post, and the witness said he recognised the

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1 trees. Your Honours, given that it was recognised, I'd ask that it be given an exhibit
2 number.

3 PRESIDING JUDGE EBOE-OSUJI: Prosecution?

4 MR PUGLIATTI: Again, no objection to that.

5 PRESIDING JUDGE EBOE-OSUJI: Accepted as a Ruto Defence exhibit.

6 MR KHAN: I'm much obliged.

7 Your Honours, the third is at tab 115, KEN-D09-0030-0266. That's a head-on
8 photograph of one of the goal posts, and behind it storehouses which appear to
9 contain wood. Your Honour, that was recognised by the witness and I'd ask that it
10 be given an exhibit number.

11 PRESIDING JUDGE EBOE-OSUJI: Prosecution?

12 MR PUGLIATTI: No objection.

13 PRESIDING JUDGE EBOE-OSUJI: Accepted as an exhibit for the Ruto Defence.

14 MR KHAN: I'm obliged.

15 Your Honour, the fourth is at tab 89, KEN-D09-0030-0166. It's a photograph of an
16 individual that the witness recognised, and on that basis I'd ask that it be given an
17 exhibit number.

18 PRESIDING JUDGE EBOE-OSUJI: Prosecution?

19 MR PUGLIATTI: No objection.

20 MR KHAN: Thank you, your Honour.

21 PRESIDING JUDGE EBOE-OSUJI: Accepted as a Ruto exhibit.

22 MR KHAN: I'm grateful. That one is confidential. It should be marked
23 confidential.

24 Your Honour, the fifth is at tab 90, KEN-D09-0030-0167, a photograph of another
25 individual. The witness at first had difficulties recognising the person. Finally he

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1 accepted he knew the person and accepted his name. On that basis I'd ask that it be
2 given an exhibit number.

3 PRESIDING JUDGE EBOE-OSUJI: Prosecution?

4 MR PUGLIATTI: No objection to that photograph either.

5 PRESIDING JUDGE EBOE-OSUJI: Accepted as the next in the Ruto exhibits and
6 also confidential, I take it, Mr Khan?

7 MR KHAN: I would be grateful.

8 Your Honour, the next batch the Defence for Mr Ruto would seek to mark for
9 identification, the first appears at tab 104, KEN-D09-0030-0176. It's a Daily Nation
10 news article for the 20 December 2007 entitled "Tight Schedule For Raila As He
11 Hunts For Votes." Your Honour, it was put to the witness, and on that basis I
12 would ask it be marked for identification.

13 PRESIDING JUDGE EBOE-OSUJI: Marked for identification.

14 MR KHAN: Your Honour, the second -- and I'm grateful. The second is at tab 54,
15 KEN-OTP-0103-3147. It's a Standard newspaper article of the 7 December 2007
16 about President Kibaki being in Western Province and the deputy -- and William
17 Ruto and Honourable Musalia Mudavadi being in the Rift Valley. It was put to the
18 witness, and on that basis I would ask that it be marked for identification.

19 PRESIDING JUDGE EBOE-OSUJI: Marked for identification.

20 MR KHAN: Your Honour, the third, it appears at tab 53, but it's the video in fact.
21 It's KEN-D09-0030-0055. Your Honour, in fact, it's my submission this should be
22 exhibited. At first the witness stated he didn't see, he didn't recognise Nandi Hills
23 stadium in the video. Then later on after seeing it two or three times he said he
24 recognised that that video showed that Nandi Hills stadium. Your Honour, I'd ask
25 that that be given an exhibit number as the witness stated that he could recognise the

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1 Nandi Hills stadium in it. Your Honour, the answer includes page 73, lines 2 to 20
2 of the transcript. On that basis I ask that that be exhibited, and it could be public.
3 PRESIDING JUDGE EBOE-OSUJI: The video, you said?
4 MR KHAN: Please.
5 PRESIDING JUDGE EBOE-OSUJI: Prosecution?
6 MR KHAN: And the transcript, please.
7 MR PUGLIATTI: Your Honour, the Prosecution is going to object to the exhibiting
8 of that item, because in our submission it's not as clear as my learned friend has put
9 forward that the witness recognised the location. He has certainly confirmed
10 unequivocally that he didn't attend this event. And in our submission his
11 recognition of the locale is tempered by a certain uncertainty as to where it was, and
12 he referred to the possibility of it also being potentially in Kisumu.
13 For open source materials such as this, media articles or news reports, a witness
14 needs to have recognised that specific item that was broadcast or published and
15 have read it or consumed it or at a minimum, failing that, be sufficiently familiar
16 with the contents of that so as to talk with certainty as to what that item is dealing
17 with and the topics canvassed within it when put to him. And we say that when
18 asked to confirm the contents, the witness stated very clearly that this is not the rally
19 he attended. On that basis, we'd object.
20 MR KHAN: Mr President, if I may briefly? The witness was shown photographs.
21 Originally your Honour will remember that the witness said, "I've seen Nandi Hills
22 stadium." We went through all the photographs that were put to him and he
23 couldn't recognise Nandi Hills stadium. I then went again to the video and, as he
24 said, he recognised Nandi Hills stadium on that video.
25 Now, your Honour, the witness did not volunteer that that was Kisumu. That came

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1 from the Defence. We put it to the witness. It didn't -- it wasn't volunteered from
2 the witness. It was used to controvert the witness.

3 Your Honour, issues of weight can be decided later, but the transcript discloses that
4 after seeing the video at least twice, maybe more, but at least twice, the witness
5 stated that that video contained Nandi Hills stadium.

6 Your Honour, on that basis I'd ask that it be given an exhibit number.

7 PRESIDING JUDGE EBOE-OSUJI: Yes, Mr Pugliatti?

8 MR PUGLIATTI: If it wasn't clear in my earlier submissions, we don't object to this
9 being MFI'd.

10 PRESIDING JUDGE EBOE-OSUJI: From my own recollection of the evidence, there
11 certainly was some equivocation as to the video. Yes, in the end the Defence did
12 say it was Kisumu, but I seem to recall that at the very beginning, the first time that
13 video was played, the witness did say something about it possibly being in Kisumu.
14 But then in-between all of that, the witness had also said he had seen certain
15 buildings. So there was equivocation, but one second.

16 (Trial Chamber confers)

17 PRESIDING JUDGE EBOE-OSUJI: The Chamber will admit it as an exhibit in light
18 of the discussion that was conducted on it. And again, in light of the equivocation,
19 it is certainly something that will require closer consideration at the appropriate
20 time, deliberation or submissions from both sides.

21 MR PUGLIATTI: As the Court pleases.

22 PRESIDING JUDGE EBOE-OSUJI: Yes.

23 MR KHAN: I'm most grateful to the Bench. And, your Honours, that can be
24 public. And the accompanying transcript, because it was also read out, is

25 KEN-D09-0030-0056, your Honour, I think that can be marked for identification.

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1 PRESIDING JUDGE EBOE-OSUJI: It will be marked for identification then.

2 MR KHAN: I'm obliged. Your Honour, the next is at tab 83, KEN-D09-0030-0146.

3 It's the photograph with the large antennae in the background. The witness didn't
4 recognise the field. And I'd ask that as it was put to him it be given an MFI number,
5 tab 83.

6 PRESIDING JUDGE EBOE-OSUJI: Tab 83? We already treated tab 83 and
7 admitted it.

8 MR KHAN: I'm grateful.

9 PRESIDING JUDGE EBOE-OSUJI: We're talking about different things now.

10 MR KHAN: No, your Honour. Under tab 83, there is a series of photographs.
11 And I didn't put all the photographs to the witness, because some are very, very
12 similar as you will see. So to save time, I selected different views of the same field.

13 PRESIDING JUDGE EBOE-OSUJI: 146, you say, your exhibit, the document
14 number 146?

15 MR KHAN: Please.

16 PRESIDING JUDGE EBOE-OSUJI: Yes, all right, identification. It will be marked
17 for identification.

18 MR KHAN: Your Honour, just three more. At tab 86, KEN-D09-0030-0158 is a
19 Daily Nation news report dated the Monday, 17 December 2007. And it refers to
20 the Honourable Raila Odinga, Najib Balala being at Nandi Hills the previous day.
21 Your Honour, I'd ask that that be marked for identification.

22 PRESIDING JUDGE EBOE-OSUJI: That will be marked for identification.

23 MR KHAN: Your Honour, the next is at tab 112, KEN-D09-0030-0263. It's a
24 photograph of Kapchorwa. The witness didn't recognise the photograph. I'd ask
25 that it be marked for identification.

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1 PRESIDING JUDGE EBOE-OSUJI: It will be marked for identification.

2 MR KHAN: Your Honour, the last is at tab 107, KEN-D09-0030-0211. That's the
3 guest book for the Kapchorwa tea estate. And it includes the signature and at least
4 one place on 20 December of Henry Kosgey. I'd ask that the book be marked for
5 identification.

6 PRESIDING JUDGE EBOE-OSUJI: It will be marked for identification.

7 MR KHAN: I'm much obliged.

8 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, just so there is no misunderstanding
9 down the line as regards the newspaper article reports that have been marked for
10 identification, the fact of marking them for identification of course does not indicate
11 any promise that upon calling anybody down the line, the witness, that those
12 materials will be then automatically converted into evidence. There may well be a
13 debate to be had at the appropriate time whether those would be classed as records
14 that need to be admitted as evidence or may be admitted as evidence or whether
15 some debate about them being a previous consistent statement of somebody else.
16 Again, it's a debate, a discussion to be had at the time. And hopefully when, if we
17 do get to that point, counsel on both sides will have researched the question and
18 make appropriate submissions then.

19 MR KHAN: I'm most grateful. That indication is helpful.

20 THE COURT OFFICER: (Interpretation) Document KEN-D09-0030-0144, public,
21 will be given the number EVD-T-D09-00150.

22 Document number KEN-D09-0030-0265, public, will be given the number
23 EVD-T-D09-00151.

24 Document KEN-D09-0030-0266, public document, will be marked as
25 EVD-T-D09-00152.

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- 1 Document KEN-D09-0030-0166, confidential, will be given the number EVD-T-D –
2 rather, EVD-T-D09-00153.
- 3 Document KEN-D09-0030-0167, confidential, will be given the number
4 EVD-T-D09-00154.
- 5 Document KEN-D09-0030-0176, public, will be identified as MFI-T-D09-00155.
- 6 Document KEN-OTP-0103-3147, public, will be marked as MFI-T-D09-00156.
- 7 Video KEN-D09-0030-0055, public, will be marked as EVD-T-D09-00157.
- 8 The transcript of video -- of the video, KEN-D09-0030-0056, public, will be marked as
9 MFI-T-D09-00158.
- 10 Document KEN-D09-0030-0146, public, will be numbered as MFI-T-D09-00159.
- 11 Document KEN-D09-0030-0158, public, will be given the number MFI-T-D09-00160.
- 12 Document KEN-D09-0030-0263, public, will be marked as MFI-T-D09-00161.
- 13 And, finally, document KEN-D09-0030-0211, public, will be given the number
14 MFI-T-D09-00162.
- 15 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
- 16 Mr Khan, please proceed.
- 17 MR KHAN: I'm most grateful.
- 18 WITNESS: KEN-OTP-P-0409 (On former oath)
- 19 (The witness speaks Swahili)
- 20 QUESTIONED BY MR KHAN: (Continuing)
- 21 Q. Mr Witness, we finished up yesterday evening talking about the Kapchorwa
22 rally that you say you attended. It's right, isn't it, that Honourable Henry Kosgey
23 got to that rally in the evening about 6 p.m. That's the time, if you were there at all,
24 that's the time you would have seen him; is that right?
- 25 A. I did not say in the evening.

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1 Q. Had you heard anything about the Honourable Henry Kosgey having come
2 from other rallies that he had participated in earlier that day?

3 A. No, I never heard any such thing.

4 Q. Now, Witness, you've testified that the last rally that you attended was in
5 Meteitei in December 2007; is that right?

6 A. Yes, that is correct.

7 Q. And did you say that was a few days or a few weeks before the elections?

8 A. That is what I said.

9 Q. Was it a few days before the elections or a few weeks before the elections, sir?

10 A. A few weeks.

11 Q. But certainly it didn't take place in June 2007, did it?

12 A. That is correct.

13 Q. Are you aware that Mr William Ruto did go to Meteitei with Henry Kosgey,
14 but it was in June 2007 before the election campaign had even started?

15 A. That is not correct.

16 Q. You're familiar with Meteitei, sir; is that right?

17 A. Yes.

18 Q. One has to travel on a very bad road to get to Meteitei; is that right? It's a
19 mud road?

20 A. Yes, that is correct.

21 Q. And it's quite a drive, isn't it, from the tarmac road, once one leaves the
22 tarmac road, one has to drive for about half an hour at least, maybe 40 minutes to get
23 to Meteitei on the mud road; is that right?

24 A. Yes, that is correct.

25 Q. There is not much at Meteitei, is there, except some shops, maybe 10/12 shops,

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1 maybe less than that? There is not much there in Meteitei except the shops; is that
2 right?

3 A. Yes.

4 Q. Not many people live at Meteitei in that location; is that right? It's mostly
5 shops?

6 A. Yes, that is correct.

7 Q. And, in fact, the road is so bad one has to even straddle a stream before one
8 goes up the hill to the shops of Meteitei, there is a stream, and a vehicle has to go
9 through the water; is that right?

10 A. That is incorrect.

11 MR KHAN: Your Honour, if we could turn to tab 39.

12 Q. Witness, I'd like you to identify a portion of the road at KEN-D09-0030-0041.
13 And if that could please be displayed on the screen? These are all public
14 documents. Witness, can you see that road, the mud track, the mud road? Can
15 you see that?

16 A. Yes, I can see it.

17 Q. And that's the mud track that leads to Meteitei; is that right?

18 A. Yes.

19 Q. If one wants to go to Meteitei, this is the only road one can travel on, is that
20 right, by car?

21 A. Yes, that is correct.

22 Q. I'm grateful.

23 MR KHAN: At tab 40, your Honours, KEN-D09-0030-0042 there is another
24 photograph that I'd like to look at, Witness.

25 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, what are the highlands? It looks like

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1 a mountain range in the background there. Do we know?

2 MR KHAN: Your Honour, I don't want to give a firm answer. I understand it's the
3 Tajasisi area, but I'm not sure to be honest with you. Your Honour, all of that area,
4 in fact, was an apartheid area of colonialism, which was called the White Highlands.
5 The whole area was a white-only area. And the Kenyans, the original population
6 were not allowed in without passes. Very terrible.

7 Q. Witness, can you see that photograph, sir?

8 A. Yes, I can see it.

9 Q. This is the road just going up to Meteitei; is that right? This shop is in
10 Meteitei; is that right?

11 A. Yes.

12 MR KHAN: Perhaps just one more at tab 43, KEN-D09-0030-0045, if that could be
13 put up please, I'd be very grateful.

14 Q. Witness, this shows the main portion, the main shopping centre of Meteitei; is
15 that right?

16 A. Yes, that is correct.

17 Q. And you see from the photographs, but also from your own knowledge of the
18 area, it is really farmland, isn't it, around? There is not many housing. It's
19 scattered dwelling houses on vast areas of arable land; is that right?

20 A. Yes, that is correct.

21 Q. There was massive public interest, massive reporting of the 2007 presidential
22 election campaign in Kenya; is that right?

23 A. Yes, that is correct.

24 Q. And like football, everybody had a team. People were supporting PNU.
25 People were supporting ODM and ODM-K. Everybody had their own party that

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1 they were gunning for, that they were supporting; is that right?

2 A. Yes, that is correct.

3 Q. And they were very keen to know how their leading politicians were doing in
4 that election campaign; is that right?

5 A. Yes.

6 Q. And the politicians, of course, for their part wanted their message to saturate
7 as deeply as possible throughout Kenya; is that right?

8 A. Yes.

9 Q. And, Witness, I'm putting it to you that the reason there is no video,
10 newspaper report, blog report, nothing about a rally in December 2007 attended by
11 Pentagon member William Ruto or Henry Kosgey is because they were not there; is
12 that right?

13 MR PUGLIATTI: Mr President, before the witness answers that, we will make an
14 objection to that, because it does call for a degree of speculation from the witness.
15 The proposition can be put, but the first half of the question is highly speculative.

16 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, can you rephrase?

17 MR KHAN: Yes, your Honour.

18 Q. Are you aware, Witness, that there was -- that there is no newspaper report,
19 Internet report, or TV report of William Ruto attending a rally in Meteitei during the
20 final election period, December 2007? Are you aware of that?

21 A. I know that he attended.

22 Q. Are you aware that there is no mention of such a rally in any of the reports,
23 the Waki report or the Kenyan Human Rights report? Are you aware of that, or
24 you do not know?

25 A. I am not in a position to know.

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1 Q. And, Witness, I'm putting it to you that the reason there is no reporting is that
2 you're making up completely attending such a rally in December 2007. Do you
3 agree with that?

4 A. I do not agree with you.

5 MR KHAN: Your Honour, can we go into private session for a moment?

6 PRESIDING JUDGE EBOE-OSUJI: For how long?

7 MR KHAN: Two minutes, please.

8 PRESIDING JUDGE EBOE-OSUJI: Private session.

9 *(Private session at 10.22 a.m.) (Reclassified as Open session)

10 THE COURT OFFICER: (Interpretation) Mr President, we're in private session.

11 MR KHAN:

12 Q. Witness, you said you attended that rally with some friends of yours
13 including (Redacted). Do you remember saying that?

14 A. Yes, I do remember.

15 Q. They never attended Meteitei with you -- or, sorry, let me put it differently.
16 They never went to Meteitei in December 2007 at all, isn't that right? They never
17 went to a rally in Meteitei in December 2007?

18 A. I do not agree with you.

19 Q. Well, they definitely didn't go with you. Do you agree with that?

20 A. That is not true.

21 Q. You spoke for the first time in fact in testimony when you were asked
22 questions by my friends for the Prosecution that you also went with a Luhya
23 gentleman, (Redacted). Do you remember saying that?

24 A. Yes, I do remember.

25 Q. When did you last speak to (Redacted)?

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- 1 A. In 2007.
- 2 Q. And that was the last time you spoke to him, correct?
- 3 A. Yes.
- 4 Q. And you said he lived in (Redacted); is that right?
- 5 A. Yes.
- 6 Q. Is it correct in fact he was the neighbour of (Redacted)?
- 7 A. What was the name again?
- 8 Q. (Redacted). Is he the neighbour of (Redacted)?
- 9 A. I do not know (Redacted), but there is another person known as (Redacted)
- 10 whom I know who lived a little further on.
- 11 Q. Close to (Redacted); is that right?
- 12 A. I do not know.
- 13 Q. (Redacted), if I give you a name, will it help you, your
- 14 recollection? The father's name was (Redacted); is that right? (Redacted)
- 15 (Redacted)?
- 16 A. I do not know that name. You see, (Redacted) father's name was (Redacted).
- 17 Q. Now, you gave a name of (Redacted) as the mother, (Redacted). Was the
- 18 mother's name in fact (Redacted), but
- 19 she was known as (Redacted)? Is that actually the mother? I'm sorry, she's from the
- 20 (Redacted). I'm grateful. Her name (Redacted).
- 21 A. Yes.
- 22 Q. That's the mother of (Redacted), correct?
- 23 A. We used to call her (Redacted).
- 24 Q. Mr Witness, (Redacted) that lived at (Redacted) died unfortunately (Redacted)
- 25 (Redacted). Are you aware of that?

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1 A. I do not know.

2 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, can you make the question more
3 precise? Do we have the year?

4 MR KHAN: Your Honour, unfortunately we don't have the years, except that it
5 was he died (Redacted)
6 (Redacted)

7 Your Honour, I can move on.

8 Q. Witness, you never went to the Meteitei rally with (Redacted), did you?

9 A. That is not true. That is not correct.

10 Q. And that's perhaps one of the reasons why you never mentioned the name
11 (Redacted) in your victim's application or in screening with the Prosecution or in
12 your statement. The first time you mention this Luhya friend of yours, (Redacted),
13 was when you were sitting where you are today; isn't that right?

14 A. That is not correct.

15 MR KHAN: Your Honour, we can go public with your leave.

16 PRESIDING JUDGE EBOE-OSUJI: Public session.

17 (Open session at 10.31 a.m.)

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

19 MR KHAN:

20 Q. Now, Witness, you've testified that you heard Mr Ruto and also Mr Kosgey
21 saying that they didn't want two types of clothing. Do you remember testifying to
22 that?

23 A. Yes, I said that.

24 MR KHAN: Your Honour, I'll ask to play a video, KEN-D09-0030-0052. And it's at
25 tab 50, the transcript, which is KEN-D09-0030-0053.

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1 PRESIDING JUDGE EBOE-OSUJI: Is this a video that's already in evidence? If it
2 is, it will always be helpful if you indicate that.

3 MR KHAN: Your Honour, it's not in evidence, this particular video as yet. And
4 it's public, please.

5 THE COURT OFFICER: (Interpretation) Is that confidential?

6 MR KHAN: Both public, please.

7 (Viewing of the video excerpt KEN-D09-0030-0052)

8 MR KHAN:

9 Q. Witness, did you attend that rally?

10 A. No.

11 MR KHAN: Your Honours, I'll read the transcript which is KEN-D09-0030-0054.

12 It's the transcript of the video we've just seen.

13 The news reporter starts: "Raila Odinga in his element entered into Moi stadium in

14 Kisumu City. A large crowd of ODM supporters had filled the stadium since

15 morning to receive their leader and his Pentagon group. Raila Odinga, who had

16 done tours in North Rift all day, when he stood on the platform did not hesitate to

17 say that his government would be responsible for Kenyans, but first it will return

18 home John Githongo ...", G-I-T-H-O-N-G-O, "... the former secretary for ethics who

19 exposed the Anglo-Leasing saga prior to fleeing to England on exile."

20 Raila Odinga then speaks and he says this: "Mr Githongo lives in exile in England

21 and he is Kenyan. When we take power next month, Mr Githongo will come back

22 home."

23 The news reporter then says: "Raila explained that his government would not

24 discriminate. Raila explained that his government would not discriminate against

25 any community."

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1 And then he says this: "Our brothers ..." -- sorry, Raila Odinga says this: "Our
2 brothers, the Kikuyu - our brothers, the Kikuyu - that our ODM government will
3 involve all Kikuyus in it. No Kikuyu will be discriminated against by the
4 government of Raila Odinga."
5 The news reporter then says: "His ...", square brackets, "... [nominee] for
6 vice-president, Musalia Mudavadi, when he took the platform pointed out that the
7 ODM government would not want to have any spots ...", brackets, "... (madoadoa)
8 while he asked for the votes to vote for ODM candidates in the style of voting
9 known as three-piece."
10 Musalia Mudavadi then speaks and it's put into the broadcast: "We want Raila to
11 be president and he must have a stable government."
12 The news reporter says: "And William Ruto on his part pointed out that the time
13 Kenyans had been waiting for many years had now come."
14 And Mr William Ruto says this: "Kibaki's group is made up of people who have a
15 hangover about yesterday and the old good days. Agwambo's team believes a new
16 Kenya is possible and that is why we have a passion for the future."
17 The news reporter ends by saying: "Raila Odinga has returned to the town of
18 Kisumu two years after the name ODM was began in the same venue. Rashid
19 Ronald, NTV Kisumu."
20 You heard that, Witness?
21 MR NDERITU: Mr President, your Honours, just for the record, one or two things
22 regarding the interpretation. At line 17 - page 25, line 17 - where my learned
23 colleague, Mr Khan, talked about Musalia Mudavadi, that was not entered into
24 interpretation.
25 And then also at line 3 of page 26, where Mr Khan talked about Raila Odinga having

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1 "... returned to the town of Kisumu two years after the name ODM was began ...",

2 the interpretation said "three years."

3 MR KHAN: I'm grateful, Mr President. Perhaps I could just read again those two
4 extracts?

5 THE INTERPRETER: Message from the interpreters: Could counsel please speak
6 slowly.

7 MR KHAN: Yes, it's my fault, I realise.

8 Your Honour, with your leave if I can just read again slowly those two extracts.

9 Q. Witness -- although it was said in a language the witness understands, but
10 Witness --

11 PRESIDING JUDGE EBOE-OSUJI: So if it was said in a language the witness --

12 MR KHAN: And I think the transcript we can take my learned friend's clarification
13 for the record.

14 PRESIDING JUDGE EBOE-OSUJI: Yes, yes.

15 MR KHAN: I'm grateful.

16 Q. Witness, you heard on that video or you saw in that video Musalia Mudavadi;
17 is that right?

18 A. I saw him on the video.

19 Q. And he's a member of your -- he's a member of the Luhya community; is that
20 right?

21 A. That's right.

22 Q. And the word that William Ruto says "Agwambo," Agwambo is the
23 affectionate name for Honourable Raila Odinga; is that right?

24 A. That's right.

25 MR KHAN: Yes, I'm grateful. Witness, I'd like you to now look at another video

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1 and then I'll put some questions.

2 Your Honour, it appears at tab 74 and it's video KEN-D09-0021-0041. And the bit I
3 want played, please, with the assistance of the court officer, with her kind assistance,
4 is -- well, your Honour I'm advised by Ms Alagendra, and I always follow that
5 advice, we can perhaps play the whole thing? It's short.

6 PRESIDING JUDGE EBOE-OSUJI: Before you do -- before you do that, can you put
7 your questions to the witness regarding the video we've already seen? If you have
8 questions for him on it it doesn't stop you later on also if you need to put a global
9 question after seeing another video, but let's -- so the witness has this particular
10 evidence on his mind, can you ask him a question about this video we've seen?

11 MR KHAN: Your Honour, I will. My preference was to hammer home the point
12 that -- of my question is to play both extracts and immediately ask questions that
13 relate to both. I thought that was the best way to do it, to put the Defence point
14 forward and to give the witness a chance to clarify his understanding of certain
15 words.

16 PRESIDING JUDGE EBOE-OSUJI: All right.

17 MR KHAN: And, your Honour, the next video is already in evidence. It's exhibit
18 of the Defence -- Ruto Defence exhibit 62, the next video.

19 So, your Honours, I'm in the Court's hands. My preference is to play both, but if
20 you would -- I thought that would be the better way of presenting the Defence case.

21 PRESIDING JUDGE EBOE-OSUJI: To do what?

22 MR KHAN: To play the second video and then ask questions.

23 PRESIDING JUDGE EBOE-OSUJI: If you think that that's not too awkward or
24 unwieldy for the witness, then go ahead. My worry is that we don't want this thing
25 to get a little unwieldy at the end of the other video.

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1 MR KHAN: Well, your Honour, I'll ask one question in that case and move
2 forward.

3 Q. Witness, you heard the news report. Is it correct that politicians in fact of all
4 parties, but particularly the ODM, were very keen on the electorate voting uniformly
5 for all the candidates that were standing, so for the president, for parliamentary
6 elections and for councillor elections; is that right? That was one of the key interests
7 of the campaign?

8 A. Yes, that's true.

9 Q. And that style of voting in fact was called "voting in a three-piece suit;" is that
10 right? So one part of the suit is the presidential elections, one part of the suit would
11 be the parliamentary elections and the other part of the suit would be the council
12 elections. That's what is meant by the three-piece suit. Do you agree with that?

13 A. (No interpretation)

14 THE INTERPRETER: Message from the Swahili booth: Could the witness be
15 asked to repeat his answer?

16 MR KHAN:

17 Q. Witness, could you be so kind as to repeat your last answer?

18 A. Repeat the question again.

19 Q. Yes. Witness, my question was that the style of voting that the politicians
20 wanted the electorate to carry out was called "voting in a three-piece suit;" is that
21 right?

22 A. That's right.

23 Q. One part of the clothing of that suit would be the presidential elections; is that
24 right?

25 A. That's right.

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1 Q. One part of the clothing of that would be the parliamentary elections; is that
2 right?

3 A. Well, myself, I was more interested in the presidential election.

4 Q. Yes, I understand that, Witness, but you accept that the other piece of the
5 clothing - of the suit - was the parliamentary elections; is that right?

6 A. Exactly.

7 Q. Yes, I'm grateful. And the final piece of the clothing of that suit would be the
8 elections for the councillor that were being cast on 27 December 2007; is that right?

9 A. That's right.

10 MR KHAN: Yes, I'm grateful.

11 Your Honour, I would then with your leave seek to go to the video I mentioned and
12 it's -- I gave the reference previously. It's already an exhibit, I think it was exhibit
13 63, but I've got the full ERN number if necessary. Should I repeat it? So -- 62. So
14 if that could be played I would be grateful, and your Honours the transcript is at tab
15 74.

16 PRESIDING JUDGE EBOE-OSUJI: I do not want to prevent you playing it, but is it
17 to the same point? If it is, then consider whether you really need to play the video,
18 especially if it is long.

19 MR KHAN: Your Honour, it's actually two minutes in total, but --

20 PRESIDING JUDGE EBOE-OSUJI: Even so, if you shave off two minutes here and
21 there --

22 MR KHAN: Your Honour, in that case I'd ask to play ten seconds. I would ask to
23 play then from 1 hour 32 seconds to 1 hour -- sorry, from 1 minute and 32 seconds to
24 1 minute and 44 seconds please. And, your Honour, the transcript reference is
25 KEN-D09-0021-0044.

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1 (Viewing of the video excerpt KEN-D09-0021-0041)

2 MR KHAN:

3 Q. Witness, did you hear those words of the -- did you hear those words?

4 A. Yes, I heard it on the video.

5 Q. And the --

6 A. I just heard it now.

7 Q. And the speaker was the Honourable Raila Odinga; is that right?

8 A. That's right.

9 Q. The presidential candidate for the ODM in 2007, correct?

10 A. That's right.

11 Q. The person you voted for, sir?

12 A. That's right.

13 Q. And he says -- and let me read it into the transcript. He says at 1 minute and
14 32 seconds to 1 minute and 44 seconds, "Orange below, orange in the middle and
15 orange on the top, yes? Three-piece suit. We do not want spots." You heard that,
16 didn't you, Witness?

17 A. Now I understand what was said in the video. At first I didn't see that
18 because I wasn't at that rally.

19 Q. And that's the suit that the politicians - ODM politicians - are talking about.
20 An Orange clean sweep in the 2007 elections; isn't that right?

21 A. That's right.

22 Q. And now you've seen that, the reference to different pieces of clothing that
23 you've spoken about in evidence, is it in fact the case that the different pieces of
24 clothing were part of this suit?

25 A. That's not so.

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1 MR KHAN: Your Honour, I'll move on.

2 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, in your interpretation of what Mr
3 Odinga was saying in the video, you used the word "spot." Was that the word he
4 used in the video?

5 MR KHAN: Your Honour, I'm grateful for that. It's clear from the video that's in
6 evidence that the word he used was "madoadoa." He used the word "madoadoa"
7 and the translation is "spots," and we say of course the context is clear. That's what
8 I was putting to the witness. I'm grateful for that.

9 PRESIDING JUDGE EBOE-OSUJI: Would you be interested in finding out from the
10 witness what he said he now understands?

11 MR KHAN: I'm grateful.

12 Q. Witness, what did you -- what do you understand by the words of the
13 Honourable Raila Odinga, "Orange below, orange in the middle, orange on top, yes?
14 Three-piece suit. We do not want spots"? What's your understanding of the
15 phrase of Mr Ruto and his use -- sorry, the words of Honourable Raila Odinga and
16 his use of the word "madoadoa"?

17 A. He was asking us to vote for the ODM party.

18 PRESIDING JUDGE EBOE-OSUJI: In what way?

19 THE WITNESS: (Interpretation) He was asking us not to be divided, and we were
20 supposed to vote all together for the same party.

21 PRESIDING JUDGE EBOE-OSUJI: So Mr Khan's -- Mr Khan's video says that Mr
22 Odinga was saying, "Do not vote madoadoa." Was that what you heard Mr Odinga
23 say in the video?

24 THE WITNESS: (Interpretation) Yes, I heard that.

25 PRESIDING JUDGE EBOE-OSUJI: What do you understood he meant when he

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1 said, "Do not vote madoadoa"?

2 THE WITNESS: (Interpretation) Well, he meant this: We shouldn't vote for other
3 political parties.

4 PRESIDING JUDGE EBOE-OSUJI: Mr Khan also said that in the video Mr Odinga
5 said, "Vote for orange on top, orange in the middle and orange below." Did you
6 hear that that's what Mr Odinga said in the video?

7 THE WITNESS: (Interpretation) Yes, that's what I heard.

8 PRESIDING JUDGE EBOE-OSUJI: And what was your understanding, or what is
9 your understanding, of what Mr Odinga might have meant when he said, "Orange
10 on top, orange in the middle and orange below"?

11 THE WITNESS: (Interpretation) He meant this: We were supposed to vote for
12 the lowest ranking positions, for the positions as members of parliament and for the
13 position of president.

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

16 MR KHAN: I'm grateful.

17 Q. Witness, you first -- do you remember submitting a victim -- a victim
18 application form to the ICC on 18 June 2011? Do you remember that?

19 A. (No audible response)

20 MR KHAN: Your Honour, I'm referring to tab 56.

21 PRESIDING JUDGE EBOE-OSUJI: We're in public session, Mr Khan.

22 MR KHAN: Indeed.

23 Q. Witness, do you remember submitting an application form to the ICC Victim
24 and Witness Unit in June 2011?

25 A. I no longer recall the date, but I agree, yes, I did file an application.

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1 MR KHAN: Your Honour, I would ask to be shown confidentially on the screen,
2 not for outside broadcast, the last page of that victim application. The opening page
3 is KEN-OTP-0107-0218 and the page I want shown to the witness is at 0225. It's the
4 page with his signature, if that could be put on the screen confidentially please?

5 Q. Witness, do you recognise your signature on that page?

6 A. Yes.

7 MR KHAN: It can be taken off the screen.

8 Q. Witness, that signature was attached - was appended - to your victim
9 application form that you submitted to the Victim and Witness Unit of the ICC; is
10 that right?

11 A. Yes, that is correct.

12 MR KHAN: Your Honour, I notice the time. It may be a convenient time to break.
13 I'm grateful.

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

15 Witness, we will be taking our morning break now and we'll be resuming at 11.30, so
16 the court officer will escort you from the courtroom once the blinds are down.

17 *(Closed session at 11.02 a.m.) (Reclassified as Open session)

18 THE COURT OFFICER: (Interpretation) Mr President, we're in closed session.

19 (The witness stands down)

20 PRESIDING JUDGE EBOE-OSUJI: Court will rise.

21 THE COURT OFFICER: All rise.

22 (Recess taken at 11.05 a.m.)

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

24 THE COURT USHER: All rise.

25 Please be seated.

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1 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. And, Witness, welcome
2 back.

3 Mr Khan, how much time are you expecting to spend with the witness? Ordinarily,
4 I would have asked you this anyway, but there's something else that has arisen
5 relating to the next witness. Apparently there's some pending procedural issue to
6 be attended to. You know what I'm talking about? The matter of redaction or no
7 redaction --

8 MR KHAN: Yes, your Honour --

9 PRESIDING JUDGE EBOE-OSUJI: -- non-redaction of certain disclosure material.
10 Now, if we went in the ordinary course and do it by written submissions, it will take
11 away more time, so our preference would be to take oral submissions on that issue,
12 and we would like to do it today in good time. So you will need to organise your
13 cross-examination so that you finish in time to allow us time to take in the oral
14 submissions.

15 MR KHAN: Your Honour, I'll proceed accordingly, mindful of that issue to be dealt
16 with today. And, your Honour, we can go into -- we are in public session. We can
17 continue in public session.

18 PRESIDING JUDGE EBOE-OSUJI: In public session. What I'm saying is --

19 MR KHAN: Would half-an-hour at the end of the day be enough?

20 PRESIDING JUDGE EBOE-OSUJI: That may not be enough. Mr Pugliatti, who
21 will be taking the next witness? Mr Steynberg, I take it?

22 MR PUGLIATTI: Mr Steynberg is not present for this session, but he'll be back in
23 Court for the last session ready to address the Bench on the issue that your Honour
24 is referring to. The next witness will be taken by our colleague, Ms Lara Renton.

25 PRESIDING JUDGE EBOE-OSUJI: All right. But at any rate, it will be safe,

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1 Mr Khan, if we could try and put aside one hour at the end of the day to deal with
2 that issue.

3 MR KHAN: Your Honour, I will do that. I wonder if it's also possible just to have
4 a little bit of leeway if the lunch break could be shortened by half an hour so we have
5 an hour's lunch break. In any event I'll try to be mindful, but I'd rather not rush at
6 the end if I -- if I don't manage to finish.

7 PRESIDING JUDGE EBOE-OSUJI: All right. We will then keep in mind your
8 request for a shortened lunch hour.

9 MR KHAN: I'm grateful.

10 PRESIDING JUDGE EBOE-OSUJI: All right. Please proceed.

11 MR KHAN:

12 Q. Witness, before you submitted your form to the Victim and Witness Unit of
13 the ICC, you had not made any complaint to any of the authorities in Kenya; is that
14 right?

15 A. (Microphone not activated)

16 Q. And, Witness, if you could be so kind as to repeat your answer.

17 A. No, I did not make any complaint.

18 Q. So to be clear, you didn't go to the police and make any allegations about your
19 loss or your suffering then in 2007?

20 A. I did so. I went somewhere to do that.

21 Q. You went to a police station and reported matters, did you?

22 MR PUGLIATTI: Mr President, I apologise for interrupting. Our concern is that
23 perhaps out of caution this could be done privately.

24 MR KHAN: Your Honour, I'll come back to that issue and we can stay in public
25 with your leave.

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1 Q. Witness, the Waki Commission in Kenya received massive coverage; is that
2 right?

3 A. No.

4 PRESIDING JUDGE EBOE-OSUJI: Mr Nderitu?

5 MR NDERITU: Yes, thank you, Mr President, your Honours. There is a specific
6 reference --

7 THE WITNESS: (Interpretation) I didn't find that --

8 MR NDERITU: -- to the Waki Commission which did not come out in the
9 interpretation.

10 THE INTERPRETER: Overlapping speakers.

11 MR KHAN:

12 Q. Witness, you've heard of the Waki Commission that investigated or tried to
13 investigate the causes of the post-election violence in 2007; is that right?

14 A. When I heard about that, I went and I registered.

15 Q. You didn't give any statement to the Waki Commission, did you?

16 A. That's right.

17 Q. You didn't go to any of the very -- you didn't go to the Kenya National
18 Commission for Human Rights, did you, to complain?

19 A. At one point I met with officers from the Kenyan --

20 THE INTERPRETER: Overlapping speakers.

21 MR KHAN:

22 Q. I think -- don't give names, Mr Witness, but if you're just going to speak about
23 an organisation it may be their Honours will allow you to answer.

24 MR PUGLIATTI: With respect, we submit that even the details of such meetings
25 should be conducted privately.

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1 MR KHAN: Your Honour, I'm not asking for specifics. Let me put it differently.

2 Q. Witness, did you ever give a statement to the Kenya National Commission for
3 Human Rights, yes or no?

4 A. No.

5 Q. And so, Witness, the first time you made a formal complaint, so to speak, was
6 in 2011 -- middle of 2011 when you filed papers with the Victim and Witness Unit of
7 this Court; is that right?

8 A. Yes.

9 Q. And about six months before you did that, on 15 December 2010, you would
10 have heard with great publicity that the former Prosecutor of the ICC had named his
11 so-called Ocampo Six. You heard that, didn't you, in Kenya?

12 A. I had heard some talk about that.

13 Q. And specifically you heard that the former Prosecutor made public his
14 application for a summons against Mr William Ruto, the Honourable Henry Kosgey
15 and Mr Joshua Sang? You heard about that, didn't you?

16 A. Yes, I heard about that.

17 Q. Did you hear that there was --

18 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, before you continue please.

19 Witness, the one point of counsel's question or questions in that regard is that you
20 heard all that six months before you made a complaint to the ICC victims unit or
21 before you completed your victim's application, you heard about Ocampo's case
22 against Mr Sang and Mr Ruto, six months before your victim's application; is that the
23 case?

24 THE WITNESS: (Interpretation) I can't remember the dates, but I did hear about
25 that, yes.

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1 PRESIDING JUDGE EBOE-OSUJI: If you can't -- if you can't remember the date,
2 did you hear about the case Mr Ocampo brought against Mr Ruto and Mr Sang?
3 Did you hear about that case before you made your victim's application?

4 THE WITNESS: (Interpretation) Yes, I had heard about that.

5 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, proceed, please.

6 MR KHAN:

7 Q. And, Mr Witness, you also heard that there was the possibility of getting
8 money; isn't that right?

9 A. No, that's not so.

10 Q. You wanted money? You wanted money as a result of your evidence, didn't
11 you?

12 A. No.

13 Q. Were you told that if Mr William Ruto was convicted by this Court, you
14 would stand the -- to receive reparations, you would stand to receive money? Did
15 you know that or not?

16 A. No, I didn't know that.

17 MR KHAN: Your Honour, I refer the Bench to question 34 of the victim application
18 signed and submitted by the witness.

19 Q. And, Witness, let me read what question 33, 34 say. You were asked
20 whether the victim would like -- like to apply for reparations and it's ticked "yes".
21 And then the next question, "If yes, what would the victim want?" And you've
22 submitted a form of saying one word, "Finances." That's what you wanted, isn't it,
23 Witness? You wanted money?

24 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, the question needs to be fair, though.
25 In what context would that have occurred, first of all? When did he hear about the

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1 possibility of reparation? And also is the idea of reparation such a dirty word or a
2 dirty idea for a witness or a victim, somebody who say they were a victim of the
3 PEV?

4 MR KHAN: Your Honour, I don't want to make submissions at the moment. Of
5 course reparations are not a dirty word if they flow from truthful testimony, but if
6 that's the objective of testimony to receive money and it results in untruthful
7 testimony, it's a perversion of the course of justice.

8 Q. Witness, perhaps I can put it --

9 PRESIDING JUDGE EBOE-OSUJI: And it is the latter proposition we're interested
10 in, isn't it, for purposes of your exercise, that the testimony was untruthful? And
11 that's what we need to demonstrate.

12 MR KHAN: Indeed, I'm grateful.

13 Q. Witness, when you signed this form, when you completed this form, you
14 stated that if Mr William Ruto, Henry -- Honourable Henry Kosgey and Mr Joshua
15 Sang were convicted, you would want something to be done. Do you remember
16 saying that?

17 MR PUGLIATTI: Mr President, before the witness answers that, could I ask my
18 learned friend to point out to the Court where in the application form the witness is
19 said to have said that if Mr Ruto, Mr Kosgey and Mr Sang were convicted, that he
20 would seek those reparations. I'm interested in that quote.

21 MR KHAN: Your Honour, I'll -- it flows from your Honour's question about what
22 is reparations, and it's a matter that I don't need to tutor my learned friend in that
23 reparations under the clear language of the Statute only come if there's a conviction.
24 But, your Honour, I can put the question differently.

25 PRESIDING JUDGE EBOE-OSUJI: Mr Pugliatti's worry was that your question said

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1 "you stated". You're putting it as if it's something the witness stated.

2 MR KHAN:

3 Q. Witness, you were asked if you would like to apply for reparations; isn't that
4 right?

5 A. No, that's not so.

6 Q. You were asked if you wanted something to be done as compensation for
7 what you say you had suffered; is that not right?

8 A. No.

9 Q. And you said very clearly after you ticked the box "yes", you said what you
10 wanted was finances. Is that not true?

11 A. No.

12 Q. And when you were asked at question 35, KEN-OTP-0107-0223, when you
13 were asked if reparations are ordered, who does the victim want the benefit to go to,
14 you said you wanted the benefits to go to you, didn't you?

15 A. No, that's not so.

16 Q. You didn't tick the box that said the reparations -- the benefits should go to
17 the -- to your family. You're very clear. You want the money to go to you, that's
18 right, is it not? I'm looking at the form, Witness. Is that right or not?

19 A. No, that's not so.

20 Q. And, Witness, when you were asked at question 29, KEN-OTP-0107-0222, you
21 were asked who do you believe was responsible for the events that took place, you
22 said Henry Kosgey, didn't you?

23 A. Could you please repeat your question?

24 Q. You were asked this question at question 29 of the form you signed and
25 submitted, Witness, "Who does the victim believe is responsible for the event or

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1 events? If possible, explain why the victim believes this." Do you remember being
2 asked that question in the form? Do you remember giving an answer to that
3 question?

4 A. I do not remember.

5 Q. And, Witness, the Judges and the Prosecution have this form. It wasn't
6 created by us. And your answer is this, you said Henry Kosgey. You believed
7 Henry Kosgey to be responsible. Do you remember saying that?

8 A. I do not remember having said that.

9 Q. And you explained why you believed it, and you said in a rally he asked the
10 residents to pluck out the non-residents. Do you remember saying that in your
11 form?

12 A. Yes, that is what I said.

13 Q. Yes. And the point is this, Witness, that you make no mention at all of
14 Mr William Ruto, do you?

15 A. Of course I mentioned that.

16 MR PUGLIATTI: Mr President, I'm always loathed to interject in the course of
17 questioning from a colleague, but perhaps it would assist everyone in the court if it
18 was clarified with the witness whether he filled out the form himself, whether he
19 had assistance or not.

20 And I understand he's confirmed it's his signature, but the manner in which
21 questions are put where it's said that he said this or he said that, perhaps the witness
22 could -- if he was able to clarify that or if questions were asked in a way once that's
23 been clarified, it might result in answers that are clearer for all concerned.

24 MR KHAN: Your Honour, I think my learned friend's predisposition to be loathed
25 to interrupt is borne from experience and is well placed, because particularly when

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1 one is a Prosecutor, as my learned friend is, we are trying to look at the interests of
2 justice, and sometimes interjections can alert a witness to certain lines. Your
3 Honour, I'm not finished with this topic and I'd ask that I be allowed to continue.
4 This document of course comes through -- there's a legal representative of the
5 victims here. It comes not from the Defence, but through official ICC channels. It's
6 been submitted from the witness.

7 Your Honour, I can take the witness to the actual document, but given what was
8 announced at the beginning of his testimony, for the first time after all this time, I
9 don't think that will serve much of a purpose.

10 So in my respectful submission, I should be able to continue with this exercise.

11 Your Honours at the end of the day will assign what, if any, weight to the points I'm
12 endeavouring to make.

13 Your Honour, I will be dealing with those matters --

14 PRESIDING JUDGE EBOE-OSUJI: This is not one of those clear-cut issues or
15 straight-out objections that are correct or not. Mr Pugliatti is, in a sense, urging you
16 to be mindful of fairness in the sense of, if there's an underlying current about the
17 completion of the document that need to be kept in mind, for you to do so. I did
18 not want to assert myself in the matter, but keep that in mind.

19 MR KHAN: Your Honour, I will and I will be coming to that. My caution to my
20 learned friend was not that he wasn't entitled to object, but it would be sufficient in
21 those circumstances to simply say the circumstances under which the statement
22 were submitted may be explored. But if one goes further, sometimes it's rather
23 unhelpful or rather helpful to the witness when it shouldn't be.

24 Your Honours, I will be dealing with those matters.

25 PRESIDING JUDGE EBOE-OSUJI: Yes, yes, except that the -- I think Mr Pugliatti's

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1 concern was perhaps the way the question has been asked on the matter so did not
2 indicate that those circumstances might have been taken into account, but now that
3 we have addressed the matter, proceed.

4 MR KHAN: I'm most grateful.

5 Q. Mr Witness, the first time you mentioned the name Mr William Ruto is when
6 the case against Henry Kosgey had been thrown out by Judges of this Court; isn't
7 that right?

8 A. No, that is not correct.

9 Q. And, Witness, are you aware that the name William Ruto does not appear in
10 your victim application form at all? Are you aware of that?

11 A. No, I'm not aware of that.

12 Q. Now, Witness, also along with your victim application form was a short
13 statement that you made. Do you remember submitting that with your victim
14 application form? It's a manuscript, rather long, one, two, three -- three and a
15 half -- three and a quarter pages of manuscript handwriting in which you give
16 details about what you've suffered. Do you remember that?

17 A. Yes, I remember that.

18 Q. And I want to ask you some questions about that, and the first one is --

19 MR KHAN: In fact the first one may have to be in private for just perhaps one
20 minute or two minutes. Your Honours, I'm not going to cover all the aspects of the
21 statement. There's a lot of issues I could take. I'll try to focus on just a couple.

22 Your Honours, the first one in private, please.

23 PRESIDING JUDGE EBOE-OSUJI: Private session then.

24 *(Private session at 12.08 p.m.) (Reclassified as Open session)

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

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1 MR KHAN:

2 Q. Witness, I'm reading from the first manuscript page that was added or -- to
3 your -- attached to your victim application. And you say this -- and you're speaking
4 about (Redacted). We are in private session. You say this: "On looking
5 back I saw my house on fire. We stayed at the school till morning, went to (Redacted)
6 to report (Redacted). He said he has sent out the police. Nothing else he can do.
7 He proceeded to Songhor police..." -- and then above the words inserted "Nandi
8 district station" -- "...and reported and came with the police."

9 Now, Witness, do you remember saying that you went to Songhor police station in
10 Nandi district?

11 THE INTERPRETER: From the Swahili booth, can the witness be asked to repeat
12 his answer?

13 MR KHAN:

14 Q. Witness, could you please repeat that answer? Thank you.

15 A. I said that I went to the Songhor police station.

16 Q. And you also then reported what had happened regarding your house on fire;
17 is that right?

18 A. No. I did not file a report on that.

19 MR KHAN: Your Honour, we could go back into public session with your leave.

20 PRESIDING JUDGE EBOE-OSUJI: Public session.

21 (Open session at 12.11 p.m.)

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

23 MR KHAN:

24 Q. And, Witness, on the second page of that handwritten document that's added
25 to your victim application, and it's the third paragraph, you say this, "ODM

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1 chairman of the area Aramoi ..." A-R-A-M-O-I "... also said they didn't hear that the
2 minister, Kosgey Henry, had earlier visited the area on a rally and asked the
3 residents why they were allowing the grass to grow in the house ..." brackets " ...in
4 Kalenjin language. The chairman echoed his words in the same language and
5 asked them to go back to their native land."

6 Do you remember giving that answer when you were submitting your victim
7 application form?

8 A. I did not quite understand your question.

9 Q. Do you remember being interviewed by the Prosecution in 2012? It was over
10 three days, I believe. Towards the end of 2012 do you remember being
11 interviewed?

12 A. Yes, I was interviewed.

13 Q. And the investigators showed you your victim application, the handwritten
14 document I've been discussing, didn't they?

15 A. Yes. They showed me what was written, but I do not know whether that
16 corresponds to what you are reading.

17 Q. Witness, the Prosecution are here and the legal representative of the victims
18 are here. It's the same document.

19 MR KHAN: Shall I put it -- in fact, your Honours, it can go confidentially perhaps
20 on the -- on the screen. I've got no objections if that's the case. And the
21 document -- the first page I think may suffice, KEN-OTP --

22 PRESIDING JUDGE EBOE-OSUJI: For what purpose though?

23 MR KHAN: Your Honour, just if he wants to -- if it will assist him recognising it's
24 the same document he was shown by the Prosecution in 2012, for that purpose.

25 PRESIDING JUDGE EBOE-OSUJI: Could we not just hand him -- well, if it is on the

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1 screen, somebody can show it to him. It may also be more effective to hand him a
2 paper copy of it to see if he recognises it.

3 MR KHAN: Yes, we can do that, your Honour.

4 PRESIDING JUDGE EBOE-OSUJI: They would not have shown him a screen at the
5 time.

6 MR KHAN: Your Honour, I think we don't have a clean copy. Oh, my learned
7 friend does. Thank you to Mr Bosek, as always, and Mr Sang and Mr Katwa-Kigen.
8 Witness -- and for the court record, the witness has been handed the handwritten
9 portion of the victim application form from page 0226, KEN-OTP-0107-0226 until the
10 end of that document.

11 Q. Witness, that's the document you were shown when you met the Prosecution
12 towards the end of 2012; is that right?

13 A. I do not believe that this is the document, because the document that I had
14 was a form.

15 Q. Okay. Witness, let me give you the full time and then you can -- we'll go
16 through the pages together. And, your Honour, with your leave we'll hand up the
17 whole of the documents received by way of Prosecution disclosure, the relevant part
18 of the application, KEN-OTP-0107-0218 until the end of that form -- handwritten
19 form which is at 0229.

20 Q. Witness, please feel at ease and you can turn perhaps -- well, look at the first
21 page. That's a form, is it not? Please, Witness, do you want to answer something?

22 PRESIDING JUDGE EBOE-OSUJI: Yes, Witness?

23 THE WITNESS: (Interpretation) On the day that I compiled this file, this form, I
24 told them that I could neither read nor write. It is for that reason that I cannot
25 confirm whether these are the forms or not. There was somebody who assisted me

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1 with this process.

2 PRESIDING JUDGE EBOE-OSUJI: But does this form or a copy of it look generally
3 like what you were shown at the time? We've noted what you've said about your
4 ability to read or write, but are you able to recognise the looks of the form generally?

5 THE WITNESS: (Interpretation) Yes, I remember.

6 MR KHAN:

7 Q. And you were asked questions by the Prosecution regarding what you stated
8 in the handwritten application form, were you not?

9 A. Yes.

10 MR KHAN: Your Honour, I'm happy to hand up to the Bench, because we didn't
11 provide it before. It's the statement. If your Honours need it, I can hand it up.

12 PRESIDING JUDGE EBOE-OSUJI: If you're going to use it, yes, we will.

13 MR KHAN: I'm grateful.

14 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, as regards this form, the victim's
15 application form, I've been looking for the authority of freedom of applicants to
16 append extra pages. Usually on a form, some forms will tell you you are not
17 allowed to append any extra and others would in some cases say if the form's space
18 allowed is not sufficient, applicants may append extra sheets. Do we have
19 something like that, any indication in the form itself?

20 MR KHAN: No, your Honours. It's a common practice and it may be useful
21 guidance to the VWU to include that provision and have subsequent pages in future,
22 but the normal practice is, in many cases anyway, when we see such material that's
23 processed given to us by the Prosecution is that there are appendices and they're
24 just, well, attached and we get them that way.

25 Q. Witness --

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1 PRESIDING JUDGE EBOE-OSUJI: It's not a criticism, by the way.

2 MR KHAN: Of course.

3 PRESIDING JUDGE EBOE-OSUJI: I'm trying to see whether what's put in the --

4 MR KHAN: Indeed.

5 PRESIDING JUDGE EBOE-OSUJI: -- extra sheets of paper might be responsive to a
6 specific information indicated in the main form. That is the reasons I'm looking for,
7 any source for, but we can move on.

8 MR KHAN:

9 Q. And, Witness, I'm referring to the statement you signed with the Prosecution
10 at the end of -- (Redacted), and I'm going to read for the record
11 paragraph 121 of that statement, which is KEN-OTP-0080-0364.

12 PRESIDING JUDGE EBOE-OSUJI: We are in open session.

13 MR KHAN: Yes.

14 PRESIDING JUDGE EBOE-OSUJI: Do the interpreters have this form -- sorry, the
15 statement?

16 MR KHAN: Your Honours, they don't.

17 PRESIDING JUDGE EBOE-OSUJI: It's always helpful to give interpreters what
18 we're going to use in court so they can eyeball it as well and, if possible, ahead of
19 time to allow them time to familiarise themselves with what they may have to work
20 with.

21 MR KHAN: Indeed. And I had a very fruitful discussion with the court
22 officer -- with the legal officer of Chambers and it's been agreed in future certain
23 modalities that may assist the interpreters, but your Honour it's one
24 line literally -- or no, two lines.

25 Q. Witness, you said this in relation to the handwritten statement that you

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1 submitted in November 2011 in relation to what Aramoi said. You say this:

2 "Aramoi was not the ODM chairman. I think the name is Daniel Arap Moi, who is
3 the former president of Kenya. He was not contesting at the time." Do you
4 remember saying that?

5 A. No, I do not remember having said that.

6 Q. Witness, I'm reading from the statement taken not by us but by the
7 Prosecution that you signed. Let me just read it one more time. You are being
8 asked to clarify something that is in the handwritten statement that you gave in
9 November 2011 where you mention ODM chairman of the area Aramoi and you
10 clarify -- in relation to that paragraph you say this, "Aramoi was not the ODM
11 chairman. I think the name is Daniel Arap Moi, who is the former president of
12 Kenya. He was not contesting at the time."

13 Does that refresh your memory that you discussed Daniel Arap Moi when you were
14 interviewed (Redacted) by the Prosecution of this Court?

15 A. No, I do not remember.

16 PRESIDING JUDGE EBOE-OSUJI: All right. The record needs to also reflect that
17 so we get the spellings right. They don't have the material we're looking at. The
18 first indication of Aramoi is not Arap Moi. In fact, it's A-R-A-M-O-I.

19 MR KHAN: Indeed, that's correct.

20 PRESIDING JUDGE EBOE-OSUJI: All right. So, Witness, what the lawyer is
21 saying is this: He's asking you whether you remember that when you were meeting
22 with the Prosecution, whether there was any discussion where you corrected
23 something that was said in the victim's application form, something that was written
24 there, and what was written there was "Aramoi". And then you corrected that, no,
25 you were thinking of Daniel Arap Moi instead of Aramoi.

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1 Do you remember having that sort of discussion with the Prosecution lawyers when
2 you met with them a long time ago and whether you had to make any correction
3 about Aramoi and Arap Moi?

4 THE WITNESS: (Interpretation) No.

5 MR KHAN:

6 Q. Witness, the reason you're trying to forget the name Arap Moi is because you
7 know it's ludicrous to say that Arap Moi was repeating - was echoing - what Henry
8 Kosgey said. You know that's ridiculous, don't you?

9 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, is that the only inference to be drawn
10 from that?

11 MR KHAN: Let me move on. We can argue these in closing submissions.

12 Q. Witness, you never mentioned William Ruto at all until there was no chance
13 of you being involved in the case against Henry Kosgey because there was no Henry
14 Kosgey charge before the ICC; isn't that right?

15 A. No, that is not true.

16 Q. You know that former president Arap Moi was supporting the PNU in 2007.
17 You came to realise that, didn't you?

18 A. No, I was not aware of that.

19 Q. And when you were screened, when you were interviewed by the
20 Prosecution - and, your Honour, it's tab 57, KEN-OTP-0086-0189 - again towards the
21 latter part of 2012 -- do you remember speaking to the Prosecution for the first time
22 in 2012? Do you remember that?

23 MR KHAN: Your Honour, I'm happy to give the dates if it doesn't cause my friends
24 difficulties, but perhaps it's better not to.

25 Q. Witness, do you remember that? You spoke for about two-and-a-half hours.

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1 A. I can't remember how many hours I spoke for.

2 Q. Yes, but you remember speaking to them, don't you?

3 A. Yes.

4 Q. And you said, and it's page 0190, that at the Nandi Hills stadium it was
5 Mr William Ruto that spoke first and it was Henry Kosgey that was supporting him,
6 didn't you?

7 A. That's not so.

8 Q. And it wasn't an accidental slip, because in relation to the Kapchorwa rally,
9 again, you say it was Mr Kosgey that was supporting what Ruto was saying, didn't
10 you?

11 A. I didn't say that.

12 Q. And you've changed things around when you gave your statement and
13 decided suddenly you'll say that it was William Ruto speaking last and Mr Kosgey
14 that was speaking first. So you changed your story, didn't you, Witness?

15 A. I haven't changed my story.

16 Q. And in this Prosecution document, the victim application, you said it was
17 Arap Moi that was repeating the words of Henry Kosgey. You did not say it was
18 William Ruto repeating those words, didn't you?

19 A. That's not so.

20 Q. And in the screening in relation to the third rally, you say that -- you told the
21 Prosecution investigators that Mr Ruto -- all Mr Ruto said was, "Do the job that
22 we've asked you to do." That's the sum total of the words that you attribute to
23 Mr Ruto when you spoke to the investigators of the OTP for the first time; is that not
24 right?

25 A. That's right.

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1 Q. Yes. And in fact, when you give your statement to the Prosecution -
2 and, your Honours, it's the statement that I've referred to previously, the final
3 statement, KEN-OTP-0080-0346 at page 0355 at paragraph 64 - all you say -- all you
4 attribute to Mr Ruto is, "He wanted us to do the job he had not already told us to do.
5 I did not think he meant just vote." That's all you said, isn't it, in your statement?

6 A. That's right.

7 Q. Nothing about weeds, trees, chasing people away, nothing about that in
8 relation to the Meteitei rally; isn't that the case?

9 A. I haven't understood the question.

10 MR KHAN: Well, your Honour, I'm trying to deal with a certain block. I can
11 move on with the Court's leave.

12 Q. Witness, you're not working at the moment, are you?

13 A. That's right.

14 Q. Who's paying for your housing? Let me just put it differently. You're
15 receiving money from the ICC for your housing; is that right?

16 A. That's not so.

17 Q. Have the ICC Victim and Witness Unit arranged for your housing in any
18 way?

19 A. I am getting some assistance --

20 Q. Yes.

21 A. -- from the ICC.

22 Q. Yes, I'm grateful for that. This assistance, is it in financial -- do you receive
23 finances or do you get other kinds of assistance?

24 A. I said that I'm not getting any aid.

25 Q. Are you getting any support from the Victim and Witness Unit of the ICC?

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1 A. No.

2 Q. Are you getting any assistance for your children's schooling from the Victim
3 and Witness Unit of the ICC?

4 A. I am not receiving any kind of aid.

5 Q. So no financial aid, no support, whether it's food, accommodation, housing,
6 health, medical, anything at all you're not receiving from the Victim and Witness
7 Unit of the ICC?

8 A. I am not getting any aid from them.

9 Q. I'm going to ask you a question, Witness, but don't give me a name if there is
10 a name to give. Are you receiving any assistance from any other person on behalf
11 of the ICC?

12 A. No one is giving me any aid.

13 Q. And just one question on that topic. Are you receiving any support,
14 assistance, help from any organisation?

15 A. No organisation is giving me any assistance.

16 MR KHAN: Your Honour, could we go into private session please?

17 PRESIDING JUDGE EBOE-OSUJI: Private session.

18 *(Private session at 12.40 p.m.) (Reclassified as Open session)

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

20 MR KHAN:

21 Q. Witness, how did you come into contact with the Prosecution of this Court?

22 A. (Redacted)

23 (Redacted)

24 Q. (Redacted)?

25 A. (Redacted)

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1 Q. What is the name of that organisation or association?

2 A. (Redacted)

3 Q. What is the name of the representative within that organisation or
4 association?

5 A. I can't give the name of the representative of that organisation.

6 Q. Why not?

7 A. For reasons of safety, his safety.

8 Q. (Redacted)

9 A. I would like to ask whether if you could allow me -- I would like to ask the
10 Judges whether they will allow me to give that person's name.

11 PRESIDING JUDGE EBOE-OSUJI: For now, Witness, Mr Khan has asked you
12 whether it is (Redacted)

13 MR KHAN: (Redacted). Not -- not (Redacted) as in the transcript. (Redacted)
14 (Redacted)

15 PRESIDING JUDGE EBOE-OSUJI: Would that be (Redacted)?

16 MR KHAN: Indeed.

17 PRESIDING JUDGE EBOE-OSUJI: Mr Khan has asked you whether the name is
18 (Redacted). You can answer the question.

19 THE WITNESS: (Interpretation) Yes, I was asking whether I was allowed to.

20 PRESIDING JUDGE EBOE-OSUJI: Yes, yes, but you --

21 THE WITNESS: (Interpretation) I can't give a name just because someone asks me
22 for a name.

23 PRESIDING JUDGE EBOE-OSUJI: That's a good policy to have, but on this
24 occasion the Judges say yes, you can answer the question. And again, you are
25 saying that the name is (Redacted) is that it?

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- 1 THE WITNESS: (Interpretation) Yes, that's his name.
- 2 PRESIDING JUDGE EBOE-OSUJI: Thank you very much, Witness.
- 3 MR KHAN:
- 4 Q. And, Witness, do you know --
- 5 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, be careful of follow-up about (Redacted)
- 6 (Redacted).
- 7 MR KHAN: Yes.
- 8 Q. Are you aware -- well, let me go back a step. (Redacted)
- 9 (Redacted)?
- 10 A. (Redacted)
- 11 Q. (Redacted)
- 12 (Redacted)?
- 13 A. (Redacted)
- 14 Q. (Redacted)
- 15 A. (Redacted)
- 16 Q. (Redacted)
- 17 (Redacted)
- 18 A. That's not true.
- 19 Q. (Redacted)
- 20 A. (Redacted)
- 21 Q. (Redacted)
- 22 (Redacted)
- 23 A. That's not so.
- 24 Q. (Redacted)
- 25 (Redacted)

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- 1 A. That is not true.
- 2 Q. When was the last time you spoke to (Redacted)?
- 3 A. I don't remember because it was a long time ago.
- 4 Q. How long ago?
- 5 A. It was a long time ago.
- 6 Q. Five years ago?
- 7 A. About one year.
- 8 THE INTERPRETER: Overlapping speakers.
- 9 MR KHAN: I apologise.
- 10 Q. He's a good friend of yours, is he?
- 11 A. (Redacted).
- 12 Q. Very good friends with him, are you?
- 13 A. (Redacted)
- 14 Q. (Redacted)
- 15 A. It's difficult for me to answer that question.
- 16 Q. (Redacted)
- 17 A. (Redacted) but I don't remember the
- 18 particular period of time.
- 19 Q. Did you used to send him money via M-Pesa?
- 20 A. Personally I never sent him any money. (Redacted)
- 21 (Redacted)
- 22 Q. Did you send him money via M-Pesa, yes or no?
- 23 A. It's possible.
- 24 Q. Did he send you money via M-Pesa?
- 25 A. No.

Trial Hearing
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1 Q. So he never sent you money via M-Pesa, correct?

2 A. Yes.

3 Q. (Redacted)?

4 A. That's not so.

5 Q. The OPT -- the OTP told you that -- did the OTP tell you that (Redacted)

6 could assist you if you were in any difficulties? Did they ever say that on any

7 occasion?

8 A. I was never told that.

9 Q. Were you ever told by (Redacted) that he would look after you or assist you
10 at the request of the Prosecution?

11 A. He never said that to me.

12 Q. Did he ever give you support or assistance?

13 A. He never gave me assistance.

14 Q. (Redacted)

15 (Redacted)?

16 A. (Redacted)

17 Q. (Redacted)?

18 A. (Redacted).

19 Q. Yes. How did he help you? In what way did he help?

20 A. (Redacted).

21 Q. And were you ever told (Redacted) or thereabouts that the Prosecution, the
22 Prosecution had asked you -- do you remember the Prosecution asked you (Redacted)
23 (Redacted)? Do you remember that?

24 A. I don't think so.

25 Q. Okay. I'll move on. Witness, in your victim application form you mention

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1 that the person that could be contacted is -- question 22 of the form. The person that
2 could be contacted by the ICC is the -- was (Redacted)
3 (Redacted). Do you remember giving that information?

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

5 MR KHAN:

6 Q. That's correct, is it, Witness? You were assisted by (Redacted)
7 (Redacted) in making your application to the Victim and Witness Unit; is
8 that right?

9 A. No organisation helped me.

10 Q. Are you aware that (Redacted)

11 (Redacted)

12 (Redacted)? Are you aware of that?

13 A. I don't know.

14 Q. You've met (Redacted), have you not?

15 A. I don't know whether I've met that person.

16 Q. Are you aware that (Redacted) has been part of efforts to mobilise
17 witnesses to give false evidence against Mr Ruto before this Court? Are you aware
18 of that?

19 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, okay. You have to ask another
20 question. Does the witness, to begin with, know who (Redacted) is?

21 MR KHAN:

22 Q. Witness, have you heard the name (Redacted)?

23 A. I've never heard that name.

24 MR KHAN: Your Honour, I think that's 1 o'clock.

25 PRESIDING JUDGE EBOE-OSUJI: Yes. How are we doing?

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1 MR KHAN: Your Honour, I will -- 100 per cent I can confirm that I will need a
2 shorter lunch break. More than that, it's difficult to say. I know the Court wants
3 more than half an hour. I will endeavour to go through the additional matters I
4 planned for the -- of course for the whole day trying to be shorter, but that was my
5 safety zone. But I am sensitive to the fact there's this additional new matter that we
6 wish to deal with before we rise today.

7 So, your Honours, if the Court would indulge me and agree, with the assistance of
8 the interpreters and all the court staff, that we could have on this occasion a shorter
9 lunch break, I will endeavour to finish within the time. I'll do my best.

10 PRESIDING JUDGE EBOE-OSUJI: All right. We will rise and we will be returning
11 to court at 2 o'clock, so that takes care of your request for a shortened lunch break.

12 MR KHAN: I'm most grateful. And, your Honours, hopefully if we start sharp at
13 2 I will try my best to --

14 PRESIDING JUDGE EBOE-OSUJI: Yes.

15 MR KHAN: I'm grateful.

16 PRESIDING JUDGE EBOE-OSUJI: All right. The Court will rise.

17 Witness, we're now going to rise for lunch and you will be brought back at 2 o'clock
18 to continue your cross-examination. Thank you.

19 Please, blinds down.

20 *(Closed session at 1.02 p.m.) (Reclassified as Open session)

21 THE COURT OFFICER: (Interpretation) We are in closed session, Mr President.

22 (The witness stands down)

23 PRESIDING JUDGE EBOE-OSUJI: Court will rise.

24 THE COURT OFFICER: All rise.

25 (Recess taken at 1.03 p.m.)

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1 (Upon resuming in open session at 2.06 p.m.)

2 THE COURT USHER: All rise.

3 Please be seated.

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

5 Counsel, we thought we would take the submissions now. Are you ready? On the
6 matter we thought we should take in the end, we're moving it up. If you're ready
7 for the submissions, we can do it now. So do it quickly, see if we can do ruling on it
8 and then proceed.

9 Mr Steynberg, who is arguing? Is that you?

10 MR STEYNBERG: That will be me, your Honour, yes.

11 PRESIDING JUDGE EBOE-OSUJI: Do we do it in open or closed session or private
12 rather?

13 MR STEYNBERG: Your Honour, since this relates to a filing which has been filed as
14 confidential, in fact, ex parte and then confidential, I suggest private please.

15 PRESIDING JUDGE EBOE-OSUJI: Private session then.

16 *(Private session at 2.07 p.m.) (Reclassified as Open session)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

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1 MR KHAN: Your Honour, it was a good job I was not on my feet. I'm grateful.

2 (The witness enters the courtroom)

3 PRESIDING JUDGE EBOE-OSUJI: Witness, welcome back. Mr Khan will continue
4 asking you questions.

5 Mr Khan, public or closed?

6 MR KHAN: Still in private session for a few minutes, please.

7 PRESIDING JUDGE EBOE-OSUJI: Private session then. Let's go to private session
8 mode.

9 *(Private session at 2.45 p.m.) (Reclassified as Open session)

10 THE COURT OFFICER: (Interpretation) We're in private session, Mr President.

11 PRESIDING JUDGE EBOE-OSUJI: Thank you.

12 Mr Khan, please proceed.

13 MR KHAN: I'm grateful, Mr President, your Honours.

14 Q. Witness, we're in private session, and I wanted to ask you a few questions,
15 well, one question actually regarding (Redacted) that you spoke – (Redacted)
16 (Redacted) that we spoke about before lunch. Have you discussed your testimony
17 with (Redacted)?

18 A. Never.

19 Q. Does he know that you are an ICC witness, a Prosecution witness?

20 A. No, he does not.

21 Q. Do you know if (Redacted) is involved with the ICC Prosecution in any way
22 at all, or do you not know?

23 A. I do not know.

24 MR KHAN: Your Honour, I'll move on. I would just read into the record so it can
25 be cross-referenced later, it's not a tab, but it's a Prosecution document that formed

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1 the basis of some questions regarding (Redacted), and it's

2 KEN-OTP-0123-0043. And, your Honour, we can move to another subject.

3 Your Honour, you don't have that in the tab. It's some other disclosure that was the
4 foundations of my questions, but I just wanted it in the transcript because later on it
5 may be useful to find where certain things are put.

6 PRESIDING JUDGE EBOE-OSUJI: Would you also make available copies of that to
7 us?

8 MR KHAN: We'll do that, your Honour.

9 PRESIDING JUDGE EBOE-OSUJI: Yes.

10 MR KHAN:

11 Q. Witness, we're still in private session. Your ID card number -- you have an
12 ID card, don't you, for Kenya?

13 A. Yes, I do.

14 Q. And the number is (Redacted); is that right?

15 A. Please kindly repeat the number.

16 Q. I'll do so slowly, your identification card number is (Redacted); isn't that right?

17 A. Yes, that is correct.

18 Q. And you have a telephone, don't you?

19 A. Yes, I do have a telephone.

20 Q. At the very least, Witness, until last year, well, from 2007 to last year, your cell
21 phone number was (Redacted); isn't that right?

22 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, you might want to take that again.

23 MR KHAN: Yes, indeed. I'm grateful.

24 Q. Witness, your phone number is (Redacted); isn't that correct?

25 A. Yes, that is correct.

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1 Q. And, Witness, it's also correct, is it not, that you had that phone in 2007?

2 A. I do not know whether I owned it from that year, but what I can say is that
3 the telephone number is indeed my number.

4 Q. And you've had the phone number for quite some time, haven't you, for some
5 years?

6 A. Yes.

7 Q. Yes, I'm grateful. Casting your mind back to the post-election violence of
8 2007, that's the phone number you were using. That's correct, isn't it?

9 A. I do not know whether this was the number I used at that time.

10 Q. If I put it to you that that's the phone number you were using in December
11 2007, would you be able to agree with me or not?

12 PRESIDING JUDGE EBOE-OSUJI: He already said he does not know, Mr Khan.

13 MR KHAN:

14 Q. Witness, you bought that -- well, let me move on.

15 MR KHAN: Your Honours, we'll go into public session.

16 PRESIDING JUDGE EBOE-OSUJI: Public session.

17 (Open session at 2.53 p.m.)

18 THE COURT OFFICER: (Interpretation) We're in public session, Mr President.

19 PRESIDING JUDGE EBOE-OSUJI: Witness, we're back to public session now.

20 Again, remember the red light is on.

21 MR KHAN:

22 Q. Witness, you said in private session that you had a phone number, you had a
23 cell phone. That's correct, is it not?

24 A. What I said is that the number belongs to me.

25 Q. And you had a phone that worked that number; is that right?

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1 A. Yes.

2 Q. Are you aware, Mr Witness, that with modern technology, it is possible to
3 know the area from which a telephone call is made? Are you aware of that?

4 A. No, I do not know.

5 MR KHAN: Your Honour, if we could go to private session, please.

6 PRESIDING JUDGE EBOE-OSUJI: Private session.

7 *(Private session at 2.56 p.m.) (Reclassified as Open session)

8 THE COURT OFFICER: (Interpretation) Mr President, we're in private session.

9 MR KHAN: And, your Honour, I'm going to ask just a few questions raised in tab
10 60 of the bundle, which starts at KEN-D09-0030-0080.

11 Q. Witness, do you know (Redacted)?

12 MR KHAN: And, your Honour, for your Honours records, her name appears at
13 page 5 and page 8 of the document before you, the telephone records.

14 Q. Do you know (Redacted), Witness?

15 A. I know her.

16 Q. (Redacted)?

17 A. (Redacted).

18 Q. She has sent you money via M-Pesa (Redacted). Do you remember
19 that?

20 A. She sent me some money, but I cannot be specific as to when she did.

21 Q. And, Witness, just briefly, I'm not going to ask detailed questions out of time,
22 but you know (Redacted)? You
23 know (Redacted)?

24 A. Yes, I know him.

25 Q. You've received money from him via M-Pesa, haven't you?

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1 A. Yes, I agree with you.

2 Q. Who is he?

3 A. I do not know what he does, but I know him.

4 Q. Why was he sending you money?

5 A. He sent me money because he was my friend.

6 Q. And now we've spoken -- we're still in private session -- we've spoken about

7 (Redacted). You've also received money from him, haven't you?

8 A. (No audible response)

9 MR KHAN: And, your Honour, just for the record I refer to page 2, 11, 14, 16, 20, 21
10 of the document.

11 Q. You received money from (Redacted), haven't you?

12 A. (Redacted).

13 THE INTERPRETER: (Redacted), the interpreter corrects.

14 MR KHAN: Your Honour, we can go back to public session with your leave.

15 PRESIDING JUDGE EBOE-OSUJI: Public session.

16 (Open session at 3.00 p.m.)

17 THE COURT OFFICER: (Interpretation) We're in public session, Mr President.

18 MR KHAN:

19 Q. Witness, I want you to cast your mind back to the day of the elections of the
20 27 December 2007.

21 MR KHAN: Your Honours, I'm referring under tab 59 to page KEN-D09-0030-0070.

22 Q. And, Witness, at three-minutes-past-5 in the morning on that day, you made a
23 telephone call from North Nyanza, didn't you?

24 A. No, I do not know what I called.

25 Q. Yes. But you remember making a phone call early in the morning, 5 o'clock

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1 on the day of the elections of 2007 from North Nyanza. You remember that, don't
2 you, Witness? Three-minutes-past-5 and 46 seconds in the morning to be precise.

3 A. No, I do not remember.

4 Q. Well, let me go later on in the day of the 27th. At 8 p.m. on 27 December,
5 20.00 hours and 44 seconds, you made a phone call for 49 seconds, just 49 seconds in
6 duration, and you made it again from the North Nyanza part of Kenya. Does that
7 help refresh your memory?

8 A. No, I do not remember.

9 Q. And the next day, well, on 29 December 2007, again, you were in North
10 Nyanza, weren't you, at 7.21 p.m.? That's where you were, wasn't it, Witness?

11 A. No, I do not agree with you.

12 MR KHAN: Your Honour, if we can go to public session with your leave -- yes, I
13 apologise.

14 Q. Witness, before you answer my next series of questions, I want to ask you, are
15 you aware about the importance of speaking the truth?

16 A. Yes, I understand that.

17 Q. Are you aware that whilst mistakes can happen, it is a criminal offence to
18 deliberately give false evidence in these proceedings? Are you aware of that?

19 MR PUGLIATTI: I'm objecting. These warnings have been duly given and the
20 witness is on proper notice, and we submit that such warnings on the floor of the
21 courtroom are not appropriate when the witness has been given that warning and
22 has acknowledged it.

23 PRESIDING JUDGE EBOE-OSUJI: Objection sustained.

24 MR KHAN: Your Honour, am I allowed to respond?

25 PRESIDING JUDGE EBOE-OSUJI: I already ruled, Mr Khan. Please move on.

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1 MR KHAN:

2 Q. Witness, contrary to your testimony to this Court, you were not in the North
3 Rift region in 2007 at all, were you?

4 A. I was in Nandi.

5 Q. Witness, are you aware that there is an independent election commission in
6 Kenya? Are you aware of that? IEBC, Independent Electoral and Boundaries
7 Commission. Are you aware of that?

8 A. Yes, I'm aware of it.

9 Q. Are you aware that after the post-election violence in Kenya, in fact, the
10 government set up the Kriegler Commission, which reviewed voting in quite some
11 detail? Are you aware of that?

12 A. Yes, I know that that commission existed.

13 Q. You are aware, are you not, that one has to apply and register to vote in
14 Kenya? That's right, isn't it?

15 A. Yes, I knew that.

16 Q. And when you go to the voting station, the election officials will check your
17 identity card against the registered voters for that area; isn't that right?

18 A. I knew that.

19 Q. So you accept that there was a document in existence in 2007 before you cast
20 your vote that was cross-checked with your identification card to make sure that you
21 were registered to vote in a certain area. You agree with me, don't you?

22 A. I agree with you, but I have some reservations about that.

23 Q. Are you aware that those records, those electoral list of registered voters are
24 archived in Kenya? Do you know about that or not? If you don't know, say so.

25 A. Yes, I'm aware of that, but I also know that changes are made to those records.

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1 Q. Yes. And in fact, Mr Witness, it's correct, is it not, that you registered to vote
2 in Kisumu Town West, so Kisumu West in 1997. That's where you registered to
3 vote. 1997, you were registered to vote in Kisumu West; isn't that right?

4 PRESIDING JUDGE EBOE-OSUJI: Witness, we're in open session, but you want to
5 say something?

6 THE WITNESS: (Interpretation) Your Honour, I would like to say something, but
7 in closed session.

8 PRESIDING JUDGE EBOE-OSUJI: Private session then.

9 *(Private session at 3.10 p.m.) (Reclassified as Open session)

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

11 PRESIDING JUDGE EBOE-OSUJI: Yes, Witness, please.

12 THE WITNESS: (Interpretation) I deny what he is saying through his questions,
13 and that is because in Kenya when someone votes his vote is allocated to somebody
14 else. It is possible to vote and then people will make changes and your vote can be
15 taken to where they want to take it, so I do not agree with the statement made by
16 counsel.

17 PRESIDING JUDGE EBOE-OSUJI: Okay. Witness, we've noted that information
18 you've given us. The lawyer's question now is that you were registered to vote in
19 Kisumu West in 1997. What is your answer? Are you saying "Yes, that's correct,"
20 or "No, that is not correct"? Can you answer?

21 THE INTERPRETER: "Ndiyo," says the Swahili interpreter.

22 THE WITNESS: (Interpretation) That is why I gave the reasons that I denied. In
23 that process they can change your details and change the polling station.
24 Personally I did not vote in Kisumu.

25 PRESIDING JUDGE EBOE-OSUJI: The question is about registration, whether you

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1 had registered as a voter in Kisumu West in 1997. What is your answer to that?

2 THE WITNESS: (Interpretation) No.

3 PRESIDING JUDGE EBOE-OSUJI: All right. We've noted that answer. We will
4 go back to public session.

5 MR KHAN: Your Honour, just one question with your leave?

6 PRESIDING JUDGE EBOE-OSUJI: In private?

7 MR KHAN: Please, just one question.

8 PRESIDING JUDGE EBOE-OSUJI: All right. We'll remain in private then.

9 MR KHAN: And, your Honour, the question is based upon the document at tab
10 124.

11 Q. Witness, you've already described the fact that before casting a vote, one's ID
12 card has to be cross-referenced with a list, register of voters. You were not
13 registered to vote in (Redacted) in 2007, were you?

14 A. No, that is not true.

15 Q. And, in fact, your father didn't vote --

16 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, can you clarify that? When you say
17 "And, in fact ...", what did he say "No" to? Are you accepting that he is denying
18 your proposition?

19 MR KHAN:

20 Q. Witness, you were not registered to vote in (Redacted) in 2007,
21 isn't that the truth?

22 A. I said no.

23 Q. And your father --

24 PRESIDING JUDGE EBOE-OSUJI: Wait. Mr Khan, the form of your questions,
25 you're inverting things, inverting propositions.

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- 1 MR KHAN: Okay, I'll do it from your form.
- 2 PRESIDING JUDGE EBOE-OSUJI: Yes, keep it in a straight line.
- 3 MR KHAN:
- 4 Q. Witness, were you registered to vote at (Redacted) in 2007?
- 5 A. Yes, everyone had to vote where they were registered. In my particular case
- 6 it was at (Redacted).
- 7 Q. Your father was not registered to vote in (Redacted), was he?
- 8 A. I do not know where he registered.
- 9 Q. Do you know if your father voted in 2007?
- 10 A. I cannot tell you whether he voted or not.
- 11 Q. You were in fact registered --
- 12 MR KHAN: Well, your Honours, we can go public I think for that.
- 13 PRESIDING JUDGE EBOE-OSUJI: Will there be an identifying question you're
- 14 about to ask, Mr Khan?
- 15 MR KHAN: Well, your Honour, it would be if the witness accepted it, but he says
- 16 it's a pack of nonsense. So in my submission it can be led in public.
- 17 PRESIDING JUDGE EBOE-OSUJI: We'll go to public session then.
- 18 (Open session at 3.17 p.m.)
- 19 MR KHAN:
- 20 Q. Witness, in 2007, in fact --
- 21 MR KHAN: Oh, sorry.
- 22 THE COURT OFFICER: (Interpretation) We are in open session, Mr President.
- 23 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, proceed.
- 24 MR KHAN:
- 25 Q. (Redacted)

Trial Hearing
Witness: KEN-OTP-P-0409

(Private Session)

ICC-01/09-01/11

1 (Redacted)

2 A. (Redacted)

3 Q. (Redacted)

4 A. (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 PRESIDING JUDGE EBOE-OSUJI: Private session. Private session.

10 MR KHAN: Well, your Honour, I'm not going to go further. There is thousands of
11 voters if they turn out.

12 PRESIDING JUDGE EBOE-OSUJI: One second. Private session, please.

13 *(Private session at 3.19 p.m.) (Reclassified as Open session)

14 THE COURT OFFICER: (Interpretation) We're in private session, your Honour.

15 PRESIDING JUDGE EBOE-OSUJI: Mr Pugliatti, let's not flag that sort of thing in
16 public when it happens and we draw sharp attention to it. It might compound the
17 problem.

18 MR PUGLIATTI: I'm grateful.

19 MR KHAN: Your Honour, I was going to leave the topic, but as we're in private
20 session --

21 Q. Witness, one question. Your friend (Redacted), are you aware
22 in 2007 he was also voting in the (Redacted)? Are you aware of that, in
23 2007, that (Redacted)?

24 A. I do not know, because that location is far away.

25 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, we can move on now?

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Witness: KEN-OTP-P-0409

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1 MR KHAN: Yes, we can.

2 PRESIDING JUDGE EBOE-OSUJI: Public or private?

3 MR KHAN: Public, please.

4 PRESIDING JUDGE EBOE-OSUJI: Public session.

5 (Open session at 3.21 p.m.)

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

7 MR KHAN:

8 Q. Witness, are you aware that somebody's life or two people's lives are at stake
9 in these criminal proceedings? Are you aware of that?

10 A. No, I'm not aware of that.

11 Q. You're not aware that Mr William Ruto and Mr Sang are charged with
12 criminal offences before this Court? You're aware of that, aren't you?

13 A. Yes, I know that.

14 Q. And you know that the charges faced by them are exceptionally serious?
15 You know that, don't you?

16 A. Yes, I know that.

17 Q. And that's why the president of this Court and others have reminded you of
18 the importance of speaking the truth?

19 A. Yes.

20 MR KHAN: Your Honour, I would ask to go into private session please.

21 PRESIDING JUDGE EBOE-OSUJI: Private. Private session.

22 *(Private session at 3.23 p.m.) (Reclassified as Open session)

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

24 MR KHAN:

25 Q. Witness, I'm going to ask you some -- I'm going to ask you some questions

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1 regarding (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 A. Yes.

6 Q. (Redacted)

7 (Redacted)

8 I do not know where you got that information from. (Redacted)

9 (Redacted)

10 Q. (Redacted)

11 PRESIDING JUDGE EBOE-OSUJI: It might be a cultural issue. There are some

12 cultures where that don't like (Redacted). I don't know if that

13 is what is happening here.

14 MR KHAN: Your Honour, I'll move on.

15 Q. (Redacted)

16 (Redacted)?

17 A. (No interpretation)

18 MR KHAN: I think the answer was "Yes." Could we have an interpretation,

19 please?

20 Q. Could you repeat your answer, Witness?

21 A. Yes.

22 Q. (Redacted)

23 (Redacted)

24 (Redacted)?

25 A. (Redacted)

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1 Q. It will just be that one question, (Redacted)

2 (Redacted)

3 A. I believe I already answered that question. I don't want to go into details
4 about (Redacted).

5 PRESIDING JUDGE EBOE-OSUJI: Witness, there are some -- we understand that
6 you may not want to answer certain questions, but there may be questions that it is
7 proper for the lawyers to ask you. As I reminded you before, the Judges are here to
8 make sure that lawyers do not abuse you through their questions. When we think
9 that that is happening we will intervene, but in this case we will ask you to answer
10 the question.

11 What was the question again? If you remember the last time I stopped the lawyer
12 from asking you (Redacted), but this time around I'll
13 ask you to answer the question about (Redacted).

14 MR KHAN:

15 Q. Witness, it's just the one question. I'm not going to delve more.
16 Your -- (Redacted)?

17 A. In relation to that question I have just said that I don't want to dwell on it, and
18 this is very important. I have a reason for that.

19 PRESIDING JUDGE EBOE-OSUJI: Can you tell us what the reason is why you
20 don't want to answer this particular question?

21 THE WITNESS: (Interpretation) I can speak with my lawyer, the one representing
22 me.

23 PRESIDING JUDGE EBOE-OSUJI: Witness, I want you to tell the Judges why you
24 have difficulty with this particular question. Can you tell us that?

25 THE WITNESS: (Interpretation) (Redacted)

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(Private Session)

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1 (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, is this question critical to the Defence
7 of your client, that particular question (Redacted)?

8 MR KHAN: Your Honour, critical may be overstating it, but it's relevant to
9 credibility. But it's also relevant to the assessment of any Defence evidence that
10 comes later, that the witness is required to accept or deny the proposition that's put.
11 I don't want to have to seek requests (Redacted).

12 So, your Honour, it's a very simple question. It's one that he can easily answer if
13 he's -- if he desires to do so and I'd ask that he be required to answer. Your Honour,
14 if he doesn't answer, of course, I'll move on. If he nonetheless insists, the Bench can
15 decide how to proceed after that.

16 Your Honour, it's a very innocuous question to be honest with you in my respectful
17 submission.

18 PRESIDING JUDGE EBOE-OSUJI: Yes, of course, to people who are not in the
19 middle of an issue, some things might not seem as serious as it is for people who are
20 involved in it. (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 MR KHAN:

25 Q. (Redacted)

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1 (Redacted)

2 (Redacted)?

3 MR PUGLIATTI: We're objecting to that language. The proposition can be put.

4 The commentary that follows the proposition we say is unnecessary.

5 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, just put the factual matter and let's

6 avoid the conclusions. You can make the conclusions to us when you make your

7 argument.

8 Mr Nderitu?

9 MR NDERITU: Yes, thank you, Mr President, your Honours. I think just before

10 we rise, I will be asking for some time in connection with the matter at hand.

11 PRESIDING JUDGE EBOE-OSUJI: In the presence or absence of the witness?

12 MR NDERITU: Ex parte.

13 PRESIDING JUDGE EBOE-OSUJI: Okay. Ex parte?

14 MR NDERITU: Yes, ex parte the Defence.

15 PRESIDING JUDGE EBOE-OSUJI: You mean private session?

16 MR NDERITU: No, your Honour, I do not mean a private session. What I mean is

17 that I have some information which may be -- which I would want to share with the

18 Trial Chamber.

19 PRESIDING JUDGE EBOE-OSUJI: And you do not want the Defence to be party to

20 that information?

21 MR NDERITU: Not in the first instance, unless the Chamber otherwise orders.

22 Thank you.

23 PRESIDING JUDGE EBOE-OSUJI: All right. We will direct you to submit that in

24 writing.

25 MR NDERITU: Thank you.

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1 PRESIDING JUDGE EBOE-OSUJI: Thank you.

2 Mr Khan?

3 MR KHAN: Your Honour, there's perhaps disclosure issues that can arise and in
4 other cases VWU -- Counsel for the Legal Representative of the Victims have been
5 required to give disclosure, but your Honours are we still -- is the Bench still minded
6 that we finish today, or can we go over 'til tomorrow for an hour or so?

7 PRESIDING JUDGE EBOE-OSUJI: We would like to finish today. That's the point.

8 MR KHAN: Well, your Honour, we'll do our best. It may be that I may be
9 compelled to make an application later.

10 Q. Witness --

11 PRESIDING JUDGE EBOE-OSUJI: We're still in private, you know?

12 MR KHAN: Yes, indeed. Indeed.

13 PRESIDING JUDGE EBOE-OSUJI: Okay.

14 MR KHAN:

15 Q. (Redacted)

16 (Redacted)?

17 A. No, that is not true.

18 Q. (Redacted)

19 (Redacted)?

20 MR NDERITU: Mr President, your Honours, I rise again. Yes, just to make an
21 objection to this in view of the fact that this would be privileged communication
22 between advocate and client. Thank you.

23 MR KHAN: Your Honour, privilege is -- firstly is owned by the client, not by the
24 lawyer. Secondly, your Honour, I'm not sure that's a direct relationship in the
25 present case, because there's a Common Legal Representative of the Victims. So,

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1 your Honour, as a matter of law the principle is misplaced in the current context, but

2 your Honours I'm aware of the time. Perhaps I should just move on.

3 PRESIDING JUDGE EBOE-OSUJI: I was going to ask you about that, whether you

4 have other areas to cover.

5 MR KHAN: Yes, there are.

6 Q. Witness, well, let's go straight to it. If you could put tab 28 -- your Honours,

7 I'd ask you to look at tab 28. And if that could be put to the screen,

8 KEN-D09-0030-0029, and it should be also confidential. We are in closed session, I

9 know. If that could be done.

10 Witness, that photograph shows (Redacted); is that right?

11 A. Yes.

12 MR KHAN: Your Honour, I'll go next to tab 35, which is KEN-D09-0030-0037.

13 PRESIDING JUDGE EBOE-OSUJI: (Redacted)?

14 MR KHAN: (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 So if the next screen -- document could be put, KEN-D09-0030-0037, I'd be grateful.

21 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, I must return to that matter. What

22 you're telling us is that you believe as counsel in the case that it is reasonably likely -

23 reasonably likely - that you may be calling (Redacted) as a witness?

24 MR KHAN: Your Honour, I can say more even than that, but yes.

25 PRESIDING JUDGE EBOE-OSUJI: Okay, okay. Sure.

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1 MR KHAN: If we have a Defence case.

2 Q. Witness, you're looking at another photograph of four people. The person
3 on the left in (Redacted); is that right?

4 A. What I have said already is that I am not going to dwell on these family
5 matters for a particular reason, which I mentioned.

6 Q. And, Witness, I want to put the question that I'm entitled to put. (Redacted)
7 (Redacted)

8 (Redacted)

9 A. (Redacted).

10 Q. (Redacted)

11 (Redacted)?

12 A. Yes, (Redacted).

13 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, again reasonable likelihood of you
14 calling all these people as witnesses for the Defence, if we get to the Defence case?

15 MR KHAN: Your Honour, I don't say too much with the witness here, because
16 obviously one has responsibilities to putative witnesses, but your Honours the
17 answer is yes.

18 PRESIDING JUDGE EBOE-OSUJI: Yes. The Chamber also has responsibility to
19 make sure that the proceedings are conducted responsibly and that's why I asked
20 that.

21 MR KHAN: Yes. Your Honour, I don't --

22 PRESIDING JUDGE EBOE-OSUJI: If you are saying that there is reasonable
23 likelihood that all these people may be called, reasonable likelihood, not probability
24 or possibility, that these people --

25 MR KHAN: Your Honour --

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1 PRESIDING JUDGE EBOE-OSUJI: -- all these people will be called as Defence

2 witnesses I will leave it at that, but I want to be sure --

3 MR KHAN: Your Honour --

4 PRESIDING JUDGE EBOE-OSUJI: -- why we're doing this.

5 MR KHAN: Your Honour, I don't want any of these individuals to be threatened,

6 but, (Redacted)

7 (Redacted). And we've got, we say, to the bottom of

8 his account, and they are all -- the witnesses, we have a number of witnesses that are

9 willing to give evidence for the Defence that would be relevant, directly relevant to

10 the veracity of this witness's account. Your Honours, we ourselves made an ex

11 parte to go into more detail than that.

12 PRESIDING JUDGE EBOE-OSUJI: We will be going into more details about that,

13 but I'm asking you the question, and that is something we are very serious about.

14 MR KHAN: Your Honour, it is. And indeed certain threats have been received by

15 them, indeed, because of their anticipated utility to the Defence of Mr Ruto. And,

16 your Honours, I can give more information in an ex parte session if necessary.

17 Your Honours, with your leave, I'd seek to go to tab 5, which is KEN-D09-0030-006,

18 if I may, and if that could be put on the screen?

19 THE COURT OFFICER: (Interpretation) Mr Khan, would you please kindly

20 repeat the ERN number?

21 MR KHAN: Yes, of course. KEN-D09-0030-0006, please.

22 Q. (Redacted)

23 (Redacted)?

24 A. (Redacted).

25 Q. (Redacted)

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(Private Session)

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1 (Redacted)?

2 A. I cannot see very clearly.

3 Q. Let me try another photograph in that case.

4 MR KHAN: And, your Honours, I'd ask to go to tab 4 and ask for

5 KEN-D09-0030-004, in fact, under tab 3, if that photograph can be put. (Redacted)

6 (Redacted). So if that could be shown to the witness. Triple zero 4 at the end,

7 0030-0004.

8 Q. That's a closer photograph of (Redacted)

9 (Redacted)?

10 A. I cannot see her clearly.

11 Q. Or do you not want to see her, Witness? It's a close-up.

12 A. Yes, by looking at her face, she is the one.

13 PRESIDING JUDGE EBOE-OSUJI: Now, the record will reflect that the court officer

14 had switched the screens and the witness in looking at the new screen was able to

15 recognise the image.

16 MR KHAN: Your Honour, could we clarify? Was the picture not on the screen on

17 this side? Your Honour, the court officer is indicating it was on the screen that the

18 witness was looking at, so I think the accurate reflection, it was there, and the

19 witness answered when I put it to him, in my respectful submission, "... or do you

20 not want to see?"

21 Q. Witness --

22 MR PUGLIATTI: The record should also reflect that it was also enlarged, the photo

23 was zoomed in on as well, and the court officer is indicating that that also took place.

24 PRESIDING JUDGE EBOE-OSUJI: All right. Let's not --

25 MR KHAN: No, we'll move on.

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- 1 PRESIDING JUDGE EBOE-OSUJI: -- quibble about this. Let's move on.
- 2 MR KHAN: We'll move on. Indeed it was afterwards, but we'll move on.
- 3 Q. (Redacted)
- 4 (Redacted)?
- 5 A. (Redacted).
- 6 Q. (Redacted)
- 7 (Redacted)?
- 8 A. (Redacted).
- 9 Q. (Redacted)?
- 10 MR PUGLIATTI: (Redacted).
- 11 MR KHAN: Well, your Honour, my learned friend should have a look at the
- 12 statement and the evidence that he's disclosed, but your Honour I'll move on. It's
- 13 there, the Prosecution's own evidence.
- 14 Q. (Redacted)
- 15 (Redacted)?
- 16 A. (Redacted).
- 17 Q. (Redacted)
- 18 (Redacted)?
- 19 A. I do not know.
- 20 Q. (Redacted)
- 21 (Redacted) --
- 22 PRESIDING JUDGE EBOE-OSUJI: Okay. The question is disallowed. Move on.
- 23 Another question.
- 24 MR KHAN:
- 25 Q. (Redacted)

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Witness: KEN-OTP-P-0409

(Private Session)

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1 (Redacted)?

2 PRESIDING JUDGE EBOE-OSUJI: Why is that question relevant?

3 MR KHAN: Your Honour, it will be relevant. I can give an answer now, because

4 the witness says (Redacted), but I don't want to

5 constantly alert the witness before my questions about relevance. It's clearly part of

6 his evidence that I'm entitled to confront.

7 PRESIDING JUDGE EBOE-OSUJI: One second.

8 MR KHAN: Your Honour, I can move on. Let me just move on.

9 (Trial Chamber confers)

10 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, at 4 o'clock the tape will run out on

11 the dot. What we will do is this: We will continue tomorrow.

12 MR KHAN: I'm most grateful.

13 PRESIDING JUDGE EBOE-OSUJI: We will excuse the witness now and then bring

14 him back tomorrow, but in the remaining period we would like to have a word.

15 Thanks.

16 MR KHAN: I'm grateful.

17 PRESIDING JUDGE EBOE-OSUJI: The blinds will come down and the witness will

18 be excused.

19 Witness, we will excuse you for the day. You will join us again tomorrow.

20 *(Closed session at 3.56 p.m.) (Reclassified as Open session)

21 THE COURT OFFICER: (Interpretation) We're in closed session, Mr President.

22 (Trial Chamber confers)

23 (The witness stands down)

24 PRESIDING JUDGE EBOE-OSUJI: We will remain in closed session.

25 Mr Khan, you probably will have detected the discomfort on the Bench. (Redacted)

Trial Hearing
Witness: KEN-OTP-P-0409

(Closed Session)

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1 (Redacted)

2 (Redacted)?

3 MR KHAN: Witness -- your Honours, it's clearly relevant in our submission. The
4 witness has given an account to the Prosecution that in December 2007, (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 So, your Honours, it's relevant to identify individuals lest -- we've seen it in the past

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 So, your Honours, it's clearly material for us to shore up our interests to provide

19 effective representation to Mr Ruto, to make sure that there is no ambiguity

20 regarding who the people are, because they may become actors so to speak, they

21 may become witnesses in these proceedings later on.

22 So, your Honour, that's one important factor why it's relevant to put the questions.

23 Your Honour, the second issue regarding (Redacted), to use the expression it's a cock

24 and bull story he's been telling this Court. (Redacted)

25 (Redacted)

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1 (Redacted)

2 (Redacted).

3 So, your Honours, it's all relevant, because at the end -- and I'm very happy, I'll say it
4 in fact publicly. At the end of this, I'm going to invite the Prosecution to commence
5 Article 70 investigations. And I'm content, I'm happy to share my investigations
6 with them and to co-operate, because this is an important matter.

7 We've been shouting from the rooftops so to speak. We've been trying in the most
8 emphatic terms to ask the Prosecution to consider for a possibility that they've got it
9 wrong and to consider as a possibility that witnesses are coming here to deceive.

10 And they talk about reasonable prospects, reasonable basis. One wonders from the
11 Defence bar what one has to do to trigger the Prosecution into action when it comes
12 to their witnesses. It seems that they're trigger happy when it comes to witnesses or
13 excusing the nonattendance of their witnesses which we say are triggered by our
14 constant and emphatic submissions that all witnesses should be safe to come here,
15 tell the truth, whether it's for Mr Ruto or against Mr Ruto.

16 But this Court shall not today or at any time countenance witnesses who think they
17 can pull the wool over the eyes of international Judges, international Prosecutors
18 and foreign lawyers for the Defence.

19 And, your Honours, we say we have a public duty as well as a legal duty to do what
20 we are doing, and we will. We're very happy to share that with the Prosecution.

21 We hope, however late in the day they decide to investigate with equal diligence the
22 allegations that we've put forward in relation to this witness, (Redacted), in
23 relation to so many others.

24 Your Honour, we have a list of about 300 witnesses --

25 PRESIDING JUDGE EBOE-OSUJI: See, the worry there is when you say -- if you

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1 harken back to the witnesses you have cross-examined so far, it seems to be a part
2 that generally speaking when witnesses are on the stand, (Redacted)
3 (Redacted), it
4 comes to a point where one asks are you saying that all those people you may be
5 calling reasonably as Defence witnesses?
6 What we're trying to avoid is a situation where it becomes some sort of
7 psychological warfare on a witness on the stand to say we know you, (Redacted)
8 (Redacted). When that question gets engaged, the other
9 question that follows it reasonably is how come you're able to do all of that? Again,
10 I make no conclusions, but these are things that are provoked by the manner in
11 which this is being done.
12 MR KHAN: Your Honour, we've had an unfortunate experience from the Defence
13 perspective, albeit from the Defence perspective in which -- and I'll speak with more
14 confidence perhaps in relation to, for example, the Muthaura case, it being
15 confirmed in circumstances where we thought it wouldn't be.
16 PRESIDING JUDGE EBOE-OSUJI: Let's forget the Muthaura case. Let's speak
17 about --
18 MR KHAN: Yes. So --
19 PRESIDING JUDGE EBOE-OSUJI: -- what's happening here.
20 MR KHAN: So, your Honour, the duty of counsel, of course, is to provide to the
21 best of our abilities proper representation. Now, your Honours, we will -- in the
22 event we have to put on a Defence case, we hope we don't, but in the event we do,
23 we'll submit a witness list. Now, we will cull the 300 or so witnesses we currently
24 have into those that we say are most important.
25 But, your Honour, ultimately the Bench will decide what margin is given to the

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1 Defence. But I will say that it's going to be a long witness list, because the
2 Prosecution have not cast their net very wide. They've got a witness, they've heard
3 an account from the witness, and they've put the witness forward. And they
4 haven't done the basic minimum of speaking to (Redacted)
5 (Redacted) to ascertain if the account is true.
6 They were desperate for a story or an account that, as I said in opening, ticked the
7 IDAC box. And, your Honour, that's why the Defence have had to do so much and
8 investigate so far and so deeply, because the Prosecution have not. And that ties
9 back to the earlier submission that I will be requiring with the leave of the Court the
10 chief of investigations of the OTP to answer how it came about that this case
11 engaging important individuals, Mr Sang and all the rest, has come to trial.
12 PRESIDING JUDGE EBOE-OSUJI: I'm not trying to cut you off, because I want --
13 MR KHAN: Yes, I'm grateful.
14 PRESIDING JUDGE EBOE-OSUJI: Because we're out of time on the tape.
15 Prosecution, if you have anything to say on that, you cannot say it today because
16 there is no time. You can tomorrow morning for a brief moment.
17 MR PUGLIATTI: Duly noted, Mr President.
18 PRESIDING JUDGE EBOE-OSUJI: All right. We will rise and reconvene
19 tomorrow.
20 (The hearing ends in closed session at 4.04 p.m.)*(Reclassified as open session)
21 RECLASSIFICATION REPORT
22 Pursuant Trial Chamber V(a) 's Decision, ICC-01/09-01/11-981, dated 24 September
23 2013, and the instructions in the email dated 14 August 2014, the version of the
24 transcript with its redactions becomes Public.