

Trial Hearing
Witness: KEN-OTP-P-0604

(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
5 and Joshua Arap Sang - ICC-01/09-01/11
6 Presiding Judge Chile Eboe-Osuji, Judge Olga Herrera Carbuccion
7 and Judge Robert Fremr
8 Trial Hearing
9 Tuesday, 9 September 2014
10 (The hearing starts in open session at 9.37 a.m.)
11 THE COURT USHER: All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
15 Court officer, please call the case.
16 THE COURT OFFICER: Thank you, Mr President. The situation in the Republic of
17 Kenya, in the case of The Prosecutor against William Samoei Ruto and Joshua Arap
18 Sang, ICC-01/09-01/11.
19 We are in open session.
20 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
21 Appearances?
22 MR STEYNBERG: Good morning, your Honours. For the Prosecution
23 appearances remain the same.
24 MR NARANTSETSEG: Good morning, your Honours. For the victims our
25 appearance remains the same. Thank you.

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1 MR KIGEN-KATWA: Good morning, your Honours. Mr Sang's team remains the
2 same. Mr Sang, whose birthday is today, is present.

3 MR KHAN: Mr President, the Defence team for Mr Ruto remains the same. I do
4 note that he has been excused.

5 PRESIDING JUDGE EBOE-OSUJI: Announcements. On Thursday we will be
6 sharing this courtroom with the Ntaganda case in the -- for their status conference.
7 That means we will not be sitting during the morning hours. We will in the course
8 of today announce a revised schedule for Thursday with the hope of capturing as
9 much as possible lost time. So we will be issuing, or announcing rather, a revised
10 schedule for Thursday in the course of today.

11 We will now render our ruling on the disclosure requests made by -- request made by
12 the Sang Defence and joined in by the Ruto Defence.

13 During the hearing on Monday, 1 September 2014, the Sang Defence complained that
14 they had tried in vain to obtain from the Victims and Witnesses Unit disclosure of the
15 financial assistance that the unit has given to Witness 604.

16 On 3 September 2014, the Sang Defence filed their application for disclosure of
17 assistance and benefits provided by the VWU to not only Witness 604, but also to
18 Witnesses 495, 516 and 524, all of whom have been summonsed to testify before the
19 Chamber by video link. The information requested pertains to all expenses related
20 to protection, accommodation, education, health care, transport and communication
21 assistance given to the witnesses or their dependants. The Sang Defence requests
22 that the disclosure be made directly to them, or to the Chamber.

23 The Sang Defence submits that the requested information is potentially relevant to the
24 credibility of the witness, thus potentially exculpatory - I should say credibility of the
25 witnesses - in that it might explain the witnesses' motivation to co-operate with the

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1 Prosecution.

2 The Ruto Defence fully supports the arguments made by the Sang Defence in their
3 application. Additionally, the Ruto Defence submit that a request is meritorious
4 even as a request for reconsideration of the Chamber's previous decision rendered on
5 28 October 2013 on a similar request for disclosure. According to the Ruto Defence,
6 the situation of the four witnesses concerned in the current request present 'new facts
7 or circumstances' and 'compelling new information' which warrant reconsideration of
8 the earlier ruling.

9 The Prosecution opposes the request, arguing that the Chamber in its oral ruling of
10 28 October 2013 had already addressed the underlying Defence arguments made in
11 the current request.

12 The decision engages a principle of general application also pertaining to other
13 witnesses. Additionally, the Prosecution submit that there is no compelling new
14 information warranting reconsideration because the Sang Defence has not made out a
15 case to the effect that the payments made by the VWU to the witnesses were
16 unreasonable or improper.

17 However the Prosecution suggest that, if there is any doubt about the reasonableness
18 of the payments, the information could be provided to the Chamber to enable the
19 Chamber to assess for itself the potential of the material to be exculpatory.

20 In its submissions the VWU stresses that, as a neutral unit of the Court, it ensures that
21 all allowances and support are provided without regard to the party calling the
22 witness. No consultations are undertaken with any party in the process of
23 determining the assistance that the VWU considers necessary and appropriate for the
24 witness. Further, the VWU submits that it does not in principle share details of
25 expenses at the instance of witnesses as this information could lead to the

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1 identification of the witnesses and reveal the working practices of the unit. The
2 VWU offers, however, that they stand ready to make the information available to the
3 Chamber at the direction of the Chamber.
4 The victims' counsel submits that the quantum of assistance provided to each witness
5 and the reasonableness of the assistance has to be assessed for each witness
6 individually if it is supposed to form part of the witness's credibility assessment.
7 It is recalled that on 20 October 2013 the Chamber gave an oral decision on the
8 request of the Ruto Defence and the Sang Defence for, among other things, disclosure
9 of all costs expended by the VWU for purposes of relocation, maintenance and/or
10 support of Witness 268 within the Witness Protection and Support Programme. The
11 Chamber denied that request for the following reasons, amongst others:
12 "In the Chamber's view, the probative value of granting the request [...] is outweighed
13 by both the considerations of prejudice and efficiency, not only in relation to the
14 witness but also the operations of the Victims and Witnesses Unit and the
15 administration of justice in general. Witnesses who come to testify, it is presumed,
16 will have to have sustenance in their lives, whether it is afforded to them on their own
17 or through the instrumentality of the Victims and Witnesses Unit. It therefore does
18 not afford a prima facie [indicium] of credibility that the Victims and Witnesses Unit
19 has undertaken those reasonable tasks of providing reasonable support and
20 maintenance to a witness rather than the witness doing it themselves."
21 While the ruling was given in relation to information concerning Witness 268, the
22 general principle set out in the ruling is also applicable to other witnesses. The point
23 of principle here is that the VWU is an independent impartial unit, tasked with
24 determining what is reasonable in the expenses required of the Court in the
25 protection of witnesses. The reasonableness of the VWU assessment - especially in

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1 the new socio-economic context of a place to which a witness has been externally
2 relocated - is not undermined by the possibility that particular witnesses (perhaps not
3 every witness) may well view the prospect of such assistance, or its actual delivery, as
4 remarkably impressive given the circumstances of the socio-economic context from
5 which the witness has been relocated. Whether or not any witness is impressed by
6 the assistance, or the prospect of it, in that way remains a matter for legitimate
7 questions by counsel without prejudice to the VWU's assessment as to the
8 reasonableness of the assistance. Of course, the principle applies both to internally
9 relocated witnesses and to externally relocated ones.

10 It may of course be argued, as appears to be the case in the matter of this application,
11 that there is little or no apparent prejudice if all that the VWU is required to do is
12 provide the requested information in the manner of generalized figures of the
13 expenses without their detailed particulars.

14 The Chamber is not impressed by that argument for, to be fit for its intended purpose,
15 the information needs to be appreciated in its full context and that poses a risk to the
16 Witness Protection Programme; a prospect that is not acceptable to the Chamber.

17 And in the absence of the fuller context, the generalised information as to expenses
18 poses the risk of being misleading. That prospect also is not acceptable to the
19 Chamber.

20 For the foregoing reasons and based on the information currently before it, the
21 Chamber rejects the request for disclosure of expenditure by the VWU. That is the
22 ruling.

23 MR STEYNBERG: As the Court pleases.

24 PRESIDING JUDGE EBOE-OSUJI: Witness, welcome back. I see you are there
25 standing -- or, sitting ready for Mr Steynberg to continue. Thank you very much.

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1 And Mr Steynberg will now continue his examination-in-chief.

2 MR STEYNBERG: Thank you, your Honours.

3 WITNESS: KEN-OTP-P-0604 (On former oath)

4 (The witness gives evidence via video link)

5 QUESTIONED BY MR STEYNBERG: (Continuing)

6 Q. Good morning, Mr Witness.

7 A. Good morning.

8 Q. I'd like to continue just examining circumstances surrounding your attesting to
9 the affidavit on 11 August this year and I'd just like to get some background please.

10 Is it correct that you were due to travel to The Hague to testify -- or, travel to The
11 Hague on 2 June this year to testify during an earlier session of this Court?

12 A. No.

13 Q. What are you saying? Were there no arrangements made for you to come to
14 travel to court?

15 A. Yes.

16 Q. Sorry, so there were arrangements made for you to travel to the Court?

17 A. You are talking of 2 June?

18 Q. Let me put it a bit more succinctly. Were there not arrangements made with
19 you, in fact, to travel on 1 June to arrive in a location, I won't mention in public
20 session, for the purposes of handover to VWU to travel to The Hague to testify? Do
21 you remember those arrangements being made?

22 A. No.

23 Q. I put it to you that, in fact, you were due to travel on 1 June and, in fact, as late
24 as 28 May you confirmed that you would be travelling for handover to VWU to come
25 and testify but that you never arrived.

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1 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, can you break it up. You're
2 cross-examining the witness and that is overloaded with --

3 MR STEYNBERG: As the Court pleases.

4 PRESIDING JUDGE EBOE-OSUJI: -- more than one proposition. While you think
5 about breaking up that question, one minute.

6 I understand that, Mr Mutai, you had put in a request to address the Chamber. Is
7 that the case?

8 MR MUTAI (via video link): Yes, Mr President.

9 PRESIDING JUDGE EBOE-OSUJI: At what point were you hoping to do that?

10 MR MUTAI (via video link): Mr President, I was a bit unhappy about the kind of
11 questions my learned friend --

12 PRESIDING JUDGE EBOE-OSUJI: No, no, no. Let's not get into your submission
13 now. I'm saying is this something that can wait a while?

14 MR MUTAI (via video link): Mr President, I am prepared to be guided by the Court,
15 but if it is something that my learned friend does not bring up again I would not -- I
16 will let it rest.

17 PRESIDING JUDGE EBOE-OSUJI: All right. Well, then, in that case, let's proceed
18 and see if at any point you feel a need to come in and submit that let me know.

19 MR MUTAI (via video link): As it pleases the Court, Mr President.

20 PRESIDING JUDGE EBOE-OSUJI: Thank you. For now let's proceed with
21 Mr Steynberg's question.

22 MR STEYNBERG: Thank you, your Honours. I do observe, of course, I'm not sure
23 which areas it is my learned friend has concerns about so I'm unable to be guided
24 without that information, but --

25 PRESIDING JUDGE EBOE-OSUJI: Keep going with your question. He will let us

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1 know.

2 MR STEYNBERG: As the Court pleases.

3 Q. I put it to you, Mr Witness, that in fact arrangements had been made for you to
4 come and travel to The Hague to testify during the June session this year. You
5 dispute that?

6 A. Yes.

7 Q. And, in fact, on 28 May did you not send an SMS to one of the investigators
8 telling him that you would travel to Nairobi on Sunday and arrive at the handover
9 destination the following Monday?

10 A. No, I don't remember.

11 Q. Well, is this something you might have done and you've forgotten, or do you
12 dispute that anything like that ever happened?

13 A. I really don't remember sending an SMS in May.

14 Q. Well, if, as you say, no arrangements had been made for you to travel to The
15 Hague, I presume there's no reason -- would be no reason for you to send such an
16 SMS, would there?

17 A. Yes.

18 Q. I see. Well, I put it to you that despite these arrangements you failed to travel
19 on the -- well, you failed to arrive at the destination on the 2nd and despite many
20 attempts to get ahold of you we couldn't contact you telephonically; isn't that true?

21 A. Yes.

22 Q. That is true?

23 A. Yes, it is true.

24 Q. All right.

25 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, one second. We will go into

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1 private session for a quick minute.

2 (Private session at 9.57 a.m.) * Reclassified as Open session

3 THE COURT OFFICER: We are in private session, Mr President.

4 PRESIDING JUDGE EBOE-OSUJI: Thank you.

5 Mr Steynberg, can you spell it out on the record about the location.

6 MR STEYNBERG: If the Court will bear with me. Your Honours, I would prefer

7 not to for the reason being that the location in question is a handover location used by

8 the VWU. Can I just simply leave it at it's a city (Redacted)

9 PRESIDING JUDGE EBOE-OSUJI: All right. Fair enough. Fair enough. Let's
10 leave it at that.

11 MR STEYNBERG: Just so there's no -- perhaps I can do it in public session.

12 PRESIDING JUDGE EBOE-OSUJI: We're done now with the matter of -- you said it's
13 not appropriate to put the -- to spell it out.

14 MR STEYNBERG: Yes.

15 PRESIDING JUDGE EBOE-OSUJI: I accept that, so we'll leave it at that.

16 MR STEYNBERG: Perhaps, your Honours, I can just put it to the witness in that way
17 while we're in private session.

18 Q. Just so there's no confusion, Mr Witness, the arrangements that I say, I put to
19 you were made was that you would travel to Nairobi, and then from Nairobi to a city
20 (Redacted) for the purposes of handover to VWU on 2 June.

21 Does that ring a bell?

22 A. No.

23 Q. Thank you.

24 MR STEYNBERG: Public session, your Honours.

25 PRESIDING JUDGE EBOE-OSUJI: Back to public session.

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1 (Open session at 9.59 a.m.)

2 THE COURT OFFICER: We are in open session, Mr President.

3 MR STEYNBERG: Thank you, your Honour.

4 Q. When did it first come to your attention that a summons had been issued for
5 you to appear before this Court?

6 A. It was August this year.

7 Q. And how did that come to your attention?

8 A. I read it in the newspaper.

9 Q. Could it perhaps have been some time in July that you found out about this?

10 A. If not July, it is August.

11 Q. And when you found out that the summons had been issued for you, is it
12 correct that you then made contact with the OTP again, with the Prosecution?

13 A. Yes, I made.

14 Q. And if I put to you that on 18 August you sent an SMS to a member of our field
15 office in East Africa it reads -- reading as follows: "Hae", spelled H-A-E, "if

16 it ..." -- well, I'm going to read out what I believe it says and then I'll read the

17 shortened version, but it seems to read, "Hae, wl it be possible for ..." and then you

18 name a member of the OTP staff, "...to cal me. Tel him to do so. Thanks."

19 For the record it's H-A-E, "if it", for "would" is abbreviation to W-L, "possible for" the

20 person "to cal me," C-A-L, "tell him to do so," T-E-L. Do you remember sending such
21 a message?

22 A. Yes.

23 Q. And is it correct that the person you wanted to speak to then called you back
24 and you told him that you saw on the internet that you had been summons; is that
25 right?

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1 A. Yes, I told him I saw in the paper.

2 Q. All right. Well, according to my record it says you told him you saw on the
3 internet, but we'll leave that for the time being. And is it correct then you wanted to
4 know if the decision could be reversed and if you could come and testify voluntarily;
5 is that right?

6 A. Yes.

7 Q. Why did you do that?

8 A. Sorry?

9 Q. Why did you want to come and testify voluntarily again?

10 A. Yeah, because I wanted to come and -- and tell the Court the truth.

11 Q. What truth is that?

12 A. That what I had given in the statement was false.

13 Q. I see. And is it correct that from 18 July throughout the rest of July and into
14 August, arrangements were made by the Prosecution and the VWU in preparation for
15 you to come to testify during this session on 1 September?

16 A. Yes.

17 Q. And is it correct that up until 8 August you had been in contact with members
18 of the Prosecution and the VWU and you hadn't indicated to them any problem about
19 coming to testify?

20 A. Yes.

21 Q. And you hadn't made any mention about the fact that any of the evidence you
22 had given in your statements was false?

23 A. Yes, I had not -- I had not told them.

24 Q. So you just told the Court that you wanted to come and tell this -- this Chamber
25 the truth as of 18 July, but yet when you were due to travel on 10 -- to meet VWU on

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1 10 August in order to travel to The Hague, you didn't arrive. What made you
2 change your mind?

3 A. During that time I -- I had to consult my religious leader, who is a priest, and
4 then I informed him that some times back last year I met a group of investigators
5 whereby I had to give them a wrong -- a false statement. So after my consultation
6 with the religious leader he told me that "It is not good for you to testify which things
7 which are false. It is better you say the truth so that the truth will set you free." So
8 from that time, I didn't see any need now to travel, but just to wait and then I can
9 come and testify in Kenya and tell the Court the truth.

10 Q. So you were planning to come and tell the Court the truth when you contacted
11 the OTP on 18 July; is that right?

12 A. Yes.

13 Q. So how did this consultation with your religious leader change your mind about
14 that?

15 A. After it had been said that the summons have been issued, I didn't see any need
16 of travelling to the -- to the ICC. I saw it was better even to testify here in Kenya,
17 because the same thing I will go and say in the ICC is the same thing I will just say
18 here in Kenya.

19 Q. So it was finding out that the summons was issued that made you change your
20 mind about travelling; is that right?

21 A. Yes. After the summons had been issued, I saw there was no need to travel.

22 Q. But, sir, I don't understand. You told the Chamber that you already knew
23 about a summons being issued for you before you contacted the ICC, the OTP; isn't
24 that right?

25 A. Yes.

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1 Q. And at that stage you intended to travel to The Hague to testify, correct?

2 A. Yes.

3 Q. So what made you then change your mind to stay in Kenya to testify?

4 A. Yes, I said I -- I didn't see -- by that time I never saw any difference testifying in
5 The Hague and testifying here in Kenya, so I found it that I will be comfortable to
6 testify here in Kenya.

7 Q. So was it your consultation with your priest that was the turning point in your
8 deciding not to come to testify?

9 A. No, I just went to him for consultation that what should I do. Then he told me
10 just go and tell the truth in the court, and then it was my own decision that let me
11 testify here in Kenya.

12 Q. And, of course, I don't know if you need to have another look at your affidavit,
13 but there's no mention of any consultation with this -- with your priest in your
14 affidavit, is there? It's the first time we hear of this.

15 A. Because as I had said earlier, my main intention of putting the -- consulting the
16 priest was my personal -- my personal view, and I couldn't put it in the affidavit. In
17 fact I had not even tell my lawyer that I consulted a priest.

18 So my aim to put the affidavit, affidavit was a general document to ensure that I had
19 recanted my statement and I was not willing to -- I was not -- no longer willing to go
20 by what I had said earlier.

21 Q. When did you consult this priest?

22 A. Sometimes in the first week of August.

23 Q. So before 8 August then, when you had last contacted the VWU and the
24 Prosecution and advised them you were going to travel; is that right?

25 A. Sorry?

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1 Q. You confirmed earlier, if I'm not mistaken, that you spoke to members of the
2 OTP and the VWU on 8 August confirming that you would travel to Nairobi on the
3 10th; isn't that right?

4 A. Yes.

5 Q. So now you're saying you spoke to the priest before that in the first week of
6 August?

7 A. Yeah, it was somewhere there in that early -- early -- early August. I cannot
8 remember the exact date.

9 Q. And yet you still at that stage didn't mention to the Prosecution or the VWU
10 that you no longer wished to travel to The Hague?

11 A. Yes, I didn't tell them.

12 Q. Why not?

13 A. I didn't have any reason.

14 Q. Isn't it true, sir, that sometime between 8 August and 11 August, when you
15 attested to your affidavit, somebody contacted you and persuaded you not to come?
16 Isn't that true?

17 A. Sorry? Sorry?

18 Q. Isn't the real reason why you changed your mind between 8 August and
19 11 August is because somebody had persuaded you to do so? What do you say to
20 that?

21 A. No one has ever persuaded me.

22 Q. So what is then the -- what was your motivation to give this recanting affidavit?
23 Was it to do with your conscience? Was it to do with the way you had been treated
24 by the OTP? What was your -- what was your main reason?

25 A. Yes, as I had said, it was from my own conscience.

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1 Q. At paragraph 15 of your affidavit you state "That in any event the Office of the
2 Prosecutor never kept their side of the bargain and failed to provide the luxurious
3 lifestyle ... they had promised." Is that why you changed your mind?

4 A. That is one, but not the major. The major is my inner conscience.

5 Q. I see. So if you had been properly paid according to what you expected, your
6 conscience wouldn't have been a problem; is that what you're saying?

7 A. I don't know now because maybe if I could have gotten, I don't know what
8 could have happened.

9 Q. All right. Now, according to your affidavit, you met with the two Prosecution
10 investigators named in (Redacted) from 6 to 8 July 2013. Was that the first time you
11 met these investigators?

12 A. Yes.

13 Q. And was it on this occasion that they mentioned to you that you should fix the
14 two accused by giving false evidence?

15 A. Sorry?

16 Q. Was it on this occasion that the two investigators you've mentioned asked you
17 to fix the two accused?

18 A. Yes, it was on that occasion.

19 Q. And to give false evidence against them?

20 A. Yes.

21 Q. And was it on this occasion that they promised you money and a luxurious life
22 in return?

23 A. Yes.

24 Q. And it was -- was it on this occasion that they told you the sort of information
25 that they wanted you to include in your statement?

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1 A. I had been already given the sort of information by the lady, so it was just
2 to -- to give them.

3 Q. Yes. Just listen to my question though. As far as these two investigators are
4 concerned or as far as any investigators are concerned, was this the first occasion that
5 they told you the information that they wanted?

6 A. Yes.

7 Q. All right. So can we then agree that according to your affidavit, the first time
8 any Prosecution investigator induced you to give false evidence was when you met
9 these two in (Redacted) on 6 to 8 July?

10 A. Yes.

11 Q. Is that right?

12 A. Yes.

13 Q. Thank you. Now, you've mentioned in some detail yesterday and the details
14 have evolved during the course of your evidence regarding what was in fact told to
15 you by the lady we've been discussing. So let me try and understand this clearly.
16 She told you to mention meetings and rallies at which Mr Ruto or his close friends
17 and allies spoke; is that right?

18 A. Yes.

19 Q. She told you to mention a meeting at Mr Ruto's house where planning of the
20 PEV was undertaken, correct?

21 A. Yes.

22 Q. She told you to mention -- give information relating to violence in Turbo and
23 Eldoret; is that right?

24 A. Yes.

25 Q. You told us that on Thursday. On Friday you told us that in addition, she had

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1 discussed with you a list of the names of persons close to Mr Ruto who you should
2 inject into your story; is that right?

3 A. Yes.

4 Q. She then -- also on Friday you stated that you and her discussed the details
5 about the meeting at Mr Ruto's house where that violence was planned, correct?

6 A. Yes.

7 Q. And the final thing that you told her was that you should implicate Mr Sang as
8 stating things on the radio that might be involved or might lead to -- might have led
9 to violence?

10 PRESIDING JUDGE EBOE-OSUJI: Can you take that question again. Look at it,
11 and is that what you wanted to ask?

12 MR STEYNBERG: Perhaps I should just get the exact script in front of me.

13 MR KHAN: It's just the "her," if it helps, "she told you."

14 MR STEYNBERG:

15 Q. Yes. I'm looking at the editing transcript 131 at page 79, middle of the page.
16 When I asked you why you felt it was necessary to falsely implicate Mr Sang, you
17 answered, "Still when we were discussing with the lady, she said that because
18 Mr Ruto was co-accused with Mr Sang, so it would be good" -- "could be good -- my
19 statement will carry more weight if I included the two in my testimony."

20 Do you remember that? Is that correct?

21 A. Yes.

22 Q. And were there any other parts of your evidence that you discussed with the
23 lady other than what you've told the Chamber already and I've summarised
24 previously? I'm giving you a long time to think, Mr Witness.

25 A. I don't remember it now.

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1 Q. Bear with me, please.

2 How -- how did it come about that you met with the investigators in (Redacted) on the
3 6th? How were the arrangements made?

4 A. Yes, from April last year the lady has been calling me on daily basis asking me if
5 I was prepared to go and meet the investigators. Then sometimes back in June I was
6 called by people later on identified them -- identified themselves that they were
7 investigators from the ICC, and they -- they wanted -- they were telling me that we
8 should meet at (Redacted), and then we arranged with them. They sent me the
9 transport and then I had to travel and meet them.

10 Q. All right. And do you recall that --

11 PRESIDING JUDGE EBOE-OSUJI: One second. Private session.

12 (Private session at 10.19 a.m.) * Reclassified as Open session

13 THE COURT OFFICER: We are in private session, Mr President.

14 PRESIDING JUDGE EBOE-OSUJI: Thank you.

15 Mr Steynberg, you've been mentioning (Redacted) repeatedly in your questions, and
16 the witness has now followed that example. And I've been receiving requests for
17 redaction of (Redacted) out of the record; delayed broadcast that is. You need now to
18 establish that you're talking about a certain meeting of a certain date with the
19 investigators so that we in public session don't need to be mentioning (Redacted) any
20 more.

21 MR STEYNBERG: Thank you, your Honours. It occurred to me after I had started
22 that, even though it is mentioned in the witness's affidavit, it may not be something
23 that the public should -- should know about.

24 PRESIDING JUDGE EBOE-OSUJI: So we will go back to public session, Witness.

25 There is no need to be indicating that the meeting with the two investigators -- you

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1 don't need to tell us it was in (Redacted). Now we've noted that, we don't want the
2 public to be in on that sort of information.

3 Back to the public session.

4 (Open session at 10.21 a.m.)

5 THE COURT OFFICER: We're in open session, Mr President.

6 MR STEYNBERG: Thank you, your Honours.

7 Q. Mr Witness, we were discussing your telephone contacts with the Prosecution
8 prior to your meeting on 6 July 2013. Is it correct that during the course of these
9 conversations you also had certain discussions for instance about your security
10 situation? A number of questions were asked about security; is that right?

11 A. Yes.

12 Q. And what's known as a BSQ - Basic Security Questionnaire - was completed
13 with you telephonically, correct?

14 A. Yes.

15 Q. And is it not also correct that questions were put to you in what's known as a
16 screening to determine whether you in fact had any information which might be
17 relevant to this case? Is that right?

18 A. Yes, some questions were asked.

19 Q. And when you were asked these questions by the investigators, did you give
20 them certain details of events that you had witnessed in 2007 and 2008?

21 A. I don't remember giving them.

22 Q. All right. And would you dispute that the date of this was -- of the telephone
23 call in which the screening was conducted was 27 June 2013? Does that sound about
24 right?

25 A. We never spoke once. We spoke for quite a long time.

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1 Q. Would you dispute that one of those conversations was on 27 June 2013?

2 A. I don't remember the date it is, unless I go and produce my phone call records.

3 Q. All right. If the Prosecution has a record of that date, would you dispute it?

4 A. I can't say anything unless I produce mine.

5 MR KHAN: Mr President, could I make a request please of the Prosecution that,

6 when they are putting questions, it would be very helpful for us if they can refer to

7 which tab they are relying upon for putting the questions? For example, there was

8 reference to BSQ. I haven't got BSQ I think, but it takes a bit of time to find what

9 document and it would help focus our own information.

10 Similarly, questions were put regarding an SMS. I haven't got the SMS to hand. So

11 if my learned friend can refer to the tab, he's obviously got information that is the

12 basis of questions. We should also have that information and I don't think --

13 PRESIDING JUDGE EBOE-OSUJI: That is -- Mr Khan, that is a good observation.

14 Prosecutor, try to do that. I too was wondering -- I did not want to interrupt you in

15 the middle of a question, but I was wondering where the text message was in the tab.

16 Just try and point us to it.

17 MR STEYNBERG: Certainly. Your Honours, the text message is contained in an

18 investigators' report which is at tab 65.

19 PRESIDING JUDGE EBOE-OSUJI: We can move on now --

20 MR STEYNBERG: Yes. Well --

21 PRESIDING JUDGE EBOE-OSUJI: -- but for other questions based on something

22 that is on your bundle try and point us.

23 MR STEYNBERG: As the Court pleases, but your Honours for future readers of the

24 record I may just say that the ERN is KEN-OTP-0138-0501. The basis of my current

25 questioning is to be found -- well, the ERN I'll read out in the meantime is

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1 KEN-OTP-0106-0905. I've just lost my place, but -- tab 34, your Honours.

2 MR KHAN: Your Honour, I think in our binder it's 24, but I'm not sure.

3 Your Honours, I do formally ask for disclosure of the SMS. We've seen the

4 Prosecution in other cases take photographs of SMSs and preserve them. I

5 haven't -- although my learned friend's point is that it's included in the investigators'

6 note, the complete SMS has not been read into the record. I think it should have

7 been, but at the very least, as it is the basis of questions that are put to impugn the

8 credibility of a witness, we say we are entitled to that disclosure and I formally

9 request disclosure of that SMS without delay.

10 MR STEYNBERG: Your Honours, the SMS was sent not to investigators at

11 headquarters. It was sent to a member of the field staff, who recorded it in a note

12 and transmitted the text verbatim to the OTP. We do not have access to the original

13 text message.

14 PRESIDING JUDGE EBOE-OSUJI: That was an important matter that should have

15 been made clear at the time, shouldn't it?

16 MR STEYNBERG: Well perhaps, except if the witness had disputed that he sent

17 such an SMS, but of course he admitted that he did.

18 MR KHAN: Your Honour, that's not correct at all. It's false.

19 PRESIDING JUDGE EBOE-OSUJI: No, no, no. Mr Steynberg, you need to make

20 such distinctions, but now that's on the record that you did not actually have the

21 actual SMS. It was based on a report to you by your field officer.

22 All right, please proceed.

23 MR KIGEN-KATWA: Mr President, with your permission, may we also observe

24 that the BSQ was not disclosed to the Defence.

25 MR STEYNBERG: Your Honours, the BSQ deals with security matters relating to a

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1 witness. It is not -- it is routinely not disclosed for obvious reasons, unless there are
2 any --

3 PRESIDING JUDGE EBOE-OSUJI: But if you're going to ask witnesses questions on
4 the basis of that, you have to disclose it.

5 MR STEYNBERG: Your Honour --

6 PRESIDING JUDGE EBOE-OSUJI: It is one or the other.

7 MR STEYNBERG: Your Honour, if he had asked any questions on the basis of the
8 contents of the BSQ I certainly would have. All that I wanted to establish - and I was
9 leading towards the screening - was whether there'd been various other discussions
10 besides the arrangements of dates. And I was leading to discussions about security
11 issues, I didn't go into anything that the witness said during those discussions, and
12 from there on it was a segue into the issue of the screening note. So the contents of
13 the BSQ, in my respectful submission, are completely irrelevant to the present
14 discussion.

15 MR KHAN: Mr President, can I note that I think there's a matter of principle here.
16 In our respectful submission, if the Prosecution -- they have a choice in conducting
17 the cross and, if they wish to cross-examine in relation to a document, we have a right
18 to disclosure of that document.

19 Your Honour, the Prosecution can't have it both ways. We have a record that in
20 relation to other Prosecution witnesses the BSQ has been disclosed, so they can't now
21 pray in aid a matter of principle that there's something precious and unique and
22 sensitive in a BSQ to the extent that it can't be given to a Defence team bound by a
23 code of conduct.

24 Your Honour, it's been given previously. It was referred to now. It should have
25 been given now as well.

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1 THE INTERPRETER: The interpreters kindly request attention be paid to
2 overlapping speakers.

3 PRESIDING JUDGE EBOE-OSUJI: The Prosecutor has explained what was done
4 with the BSQ. We will see later on if there's a need for more than that.
5 Let's proceed, Mr Steynberg.

6 MR STEYNBERG: Thank you, your Honours.

7 Q. So regardless of the exact date of the screening conducted with the Prosecution,
8 you won't dispute that it was before you met the two investigators who we've been
9 discussing on 6 July; is that correct?

10 A. Yes.

11 MR STEYNBERG: And, your Honours, may I ask we go briefly into private session?
12 I just want to talk about individuals.

13 PRESIDING JUDGE EBOE-OSUJI: Private session.

14 MR STEYNBERG:

15 Q. When you -- just an introductory question. When you --

16 THE COURT OFFICER: Mr Steynberg, please.

17 MR STEYNBERG: Sorry.

18 (Private session at 10.30 a.m.) * Reclassified as Open session

19 THE COURT OFFICER: We're in private session, Mr President.

20 MR STEYNBERG: Thank you. I beg your pardon.

21 Q. When you met with the two investigators on the 6th, you've told the Chamber
22 that was a (Redacted); is that right?

23 A. Yes.

24 Q. And which of the two was it that had requested you to fix the two accused?

25 A. Both of them.

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1 Q. And when you say "both of them", did they speak one after another or were
2 they speaking in unison like a choir? How did that happen?

3 A. It was a kind of discussion. So one could speak, then next could speak.

4 Q. And which of them told you about the type of evidence they wanted you to
5 give?

6 A. Still the same.

7 Q. I see. When you spoke to investigators telephonically and conducted the
8 screening, can you recall who you spoke to on that occasion? Was it the same
9 investigators, or was it perhaps somebody else?

10 A. One of them is the one I met in (Redacted) Then the other one never came to
11 (Redacted)

12 Q. All right. Well, would you confirm then that one of them was in fact (Redacted)?

13 A. Yes.

14 Q. And was the other one a person by the name of (Redacted)?

15 A. Yes.

16 Q. All right. Now, we know from what you told us earlier that the first time you
17 had been told to fix the two accused by anyone from the Prosecution was in the
18 meeting on 6 July, right?

19 A. Yes.

20 Q. So may I presume then that during this telephone screening you weren't told by
21 the investigators to fix anybody?

22 A. They told me that the earlier witnesses, the initial witnesses had -- had
23 withdrawn, so they wanted -- there was a gap and they want -- they specifically
24 wanted people from my place to go and testify.

25 Q. Okay. We're in private session and so your place would be (Redacted); is that

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1 right?

2 A. Yes.

3 Q. All right. I don't -- but to go to my previous question, it's correct that they did
4 not tell you at that time during this telephone screening to fix anybody because you
5 would have told us earlier if that were the case, correct?

6 A. Sorry?

7 Q. Is it correct that during the telephone screening, which I say took place on
8 27 June, nobody told you to fix the accused? Do you understand?

9 A. I say that before -- before that June, that July we had met with the lady and we
10 had discussed and every day -- every day she used to tell me that, "You may be called
11 today or tomorrow."

12 Q. Did you hear my question, sir? Did I ask you about the lady?

13 MR KHAN: Well, your Honours, in fairness the question was "... nobody told you to
14 fix ..." and the witness is answering. I think it's unfair, your Honours. Of course,
15 my learned friend is a very experienced and widely travelled lawyer. It's only fair to
16 a witness to put questions simply, straightforwardly and with specificity, and it's not
17 fair we say to blame the witness if the -- any confusion caused is because of an
18 ambiguous question and the one posed is such an example. My learned friend used
19 the word "nobody" and the witness is talking about the lady. That clarifies. It's not
20 irrelevant.

21 MR STEYNBERG: Your Honours, that is quite incorrect. I will read my question,
22 and it speaks for itself.

23 PRESIDING JUDGE EBOE-OSUJI: Can you ask the question again, please.

24 MR STEYNBERG: I'll repeat it because I believe it's quite clear.

25 Q. Is it correct, and I stress that during the telephone screening which took place on

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1 27 June, I say, nobody told you to fix the accused during that telephone screening; is
2 that correct?

3 A. I had said that I was called several times, so I don't know what we spoke on
4 27 June.

5 Q. But you've told the Chamber earlier that the first time any OTP investigator told
6 you to fix the accused was when you met the two investigators on 6 July, correct?

7 A. Yes, that is when we meet -- we met face-to-face with them.

8 Q. And that is when, as you told the Chamber, you were asked to fix the two
9 accused, correct?

10 A. Yes, when we met there.

11 Q. Does it, therefore, not follow that any in any prior conversations with OTP
12 investigators nobody had told you to fix the accused; do you understand?

13 A. Yes, I get you, but I had said that before they called me, we had -- we had
14 already planned with the lady, and I had said that before -- before I went and met the
15 team in (Redacted), they had said that they really needed witnesses who are going to
16 assist them in filling the gap that had been left by the initial witnesses and they were
17 really pleading that "If you could assist us to give us" any -- "any material or any
18 evidence that can assist us in one way or another to fix the two it will be okay."

19 Q. Sir, are you saying that in the telephone conversation they asked you to give
20 them evidence to fix the two accused? Is that what you're saying?

21 A. Yeah, they were saying that there was a problem with the witnesses and they
22 want somebody who could actually tell them and wear the shoes of the others who
23 had left.

24 Q. Do you appreciate the difference, Mr Witness, between requesting a witness to
25 give evidence that might be needed and requesting a witness to fix the accused?

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1 There's a difference there, isn't there?

2 A. Yeah, there is a difference.

3 Q. So I'm not asking you about the lady. All that I'm interested now is your
4 discussions with the investigators during the telephone screening. Did they or did
5 they not request you to fix the two accused?

6 A. They requested.

7 Q. And why is it, sir, that --

8 PRESIDING JUDGE EBOE-OSUJI: I don't want to break your flow, but do we need
9 to be in private session?

10 MR STEYNBERG: No, your Honours. If I may just direct the witness not to refer to
11 the two investigators in question.

12 PRESIDING JUDGE EBOE-OSUJI: Indeed.

13 MR STEYNBERG:

14 Q. Mr Witness, I will refer to the two investigators involved in the telephone
15 screening, you know who those are, that's investigators (Redacted) You don't
16 need to mention their names. And when I refer to the two investigators in the
17 meeting on the 6th, I'll be referring to (Redacted) Do you understand?

18 A. Yes.

19 MR STEYNBERG: All right. Public session, please, your Honours.

20 PRESIDING JUDGE EBOE-OSUJI: Public session.

21 (Open session at 10.38 a.m.)

22 THE COURT OFFICER: We're in open session, Mr President.

23 MR STEYNBERG:

24 Q. Mr Witness, you've while we were in private session told the Chamber that in
25 fact the two investigators who spoke to you during the telephone screening at that

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1 stage had asked you to give evidence fixing the two accused; you confirm that?

2 A. Yes.

3 Q. My question is: Why is it that a few moments ago when I asked you quite

4 clearly whether the first time you were asked by OTP investigators to fix the two

5 accused was when you met -- met them on the 6th, why did you confirm that if in fact

6 there had been a previous request?

7 A. I didn't get you well. I thought you were talking of me meeting them face to

8 face. I -- I never thought of the -- the telephone conversation.

9 Q. And when you gave your affidavit to Mr Mutai you didn't think of it then either,

10 did you?

11 A. Sorry?

12 Q. When you gave your affidavit at the offices of Mr Mutai, you didn't think about

13 it either that you had been requested on the phone to fix the two accused?

14 A. I never talked of the phone -- phone calls.

15 Q. Why not?

16 A. As I had said earlier that the affidavit was -- was too general to give details of

17 each and every account that took place.

18 Q. General is one thing, Mr Witness, but I put to you that, according to your

19 current version, the affidavit was inaccurate in a number of critical details.

20 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, you will know whether you're

21 now beginning to argue with the witness.

22 MR STEYNBERG: Yes. Well -- all right. Let me move on, your Honours.

23 Q. Now, during this phone screening, do you recall telling the investigators about

24 the harambee in Kaptabee school around 19 November? Did you mention that?

25 A. I don't remember mentioning.

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1 Q. If it's recorded in the notes of the investigators, would you accept that this is
2 something you might have told them about?

3 A. Sorry?

4 Q. If the investigators have made a note of what you told them and that note
5 includes the fact that you believe in November, possibly around the 19th, you "...
6 attended a fundraiser (Harambee) at a school in Kaptabee, near Turbo.", would you
7 accept that that is something you may have told the investigators?

8 A. I said I don't remember telling them.

9 MR KHAN: Mr President, the witness has said that. It can be quite simple. I
10 don't object if my learned friend wishes to show the screening note and ask the
11 witness is that broadly what transpired, there would be no objection from the Defence
12 and then, of course, questions can be put regarding the content.

13 MR STEYNBERG: Thank you, your Honours. If there's no objection from the Sang
14 Defence I'll take my learned friend up on that offer.

15 MR KIGEN-KATWA: We will not object, your Honour.

16 MR STEYNBERG: Mr Court Officer, can you please call up the item

17 KEN-OTP-0106-0965. I understand it's unredacted.

18 PRESIDING JUDGE EBOE-OSUJI: Tab?

19 MR STEYNBERG: According to my list, it's tab 34, your Honours.

20 MR KHAN: Mr President, it's 24, 25, I think of ours, 25 -- 24.

21 THE COURT OFFICER (via video link): The document is being presented --

22 MR STEYNBERG: Sorry, may I just inquire from your Honours. There seems to be
23 a discrepancy in the tabs. I'm not sure if they have been mixed up or if they were
24 incorrectly tabulated. Is it 24 or 34 in your Honours' binder?

25 PRESIDING JUDGE EBOE-OSUJI: At tab 34 of mine there is KEN-OTP-0106-0965.

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1 Is that what we're looking at?

2 MR STEYNBERG: Indeed, that's the correct document, your Honours.

3 MR KHAN: Your Honour, could I just ask at the break, I don't want to delay matters,
4 but we be given tabs that correlate with your Honours and the Prosecution's, so new
5 binders please with the identical tabs so we're not at cross-purposes.

6 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, what do you -- where does
7 yours fall in?

8 MR KIGEN-KATWA: Mine is similar to yours, Mr President.

9 PRESIDING JUDGE EBOE-OSUJI: Tab 34?

10 MR KIGEN-KATWA: Yes, yes.

11 PRESIDING JUDGE EBOE-OSUJI: All right.

12 MR STEYNBERG: Your Honours, we can provide an index. I'm sure my learned
13 friend is capable of rearranging the documents himself.

14 MR KHAN: Your Honour, no. I think this -- we do the courtesy of giving my
15 learned friends for the Prosecution properly paginated bundles. I know it takes
16 some work. But, your Honour, we're about to finish with this witness and start
17 hopefully cross-examination. I'm not asking for too much, with the Prosecution
18 front office and the back office, for somebody to take the trouble to do the service that
19 we provide my learned friends to give a properly paginated bundle. Your Honour, I
20 don't want to waste our time trying to do something that should have been done
21 properly the first time.

22 PRESIDING JUDGE EBOE-OSUJI: I notice that there are a number of people in the
23 team for both the Prosecution and the Ruto Defence. It certainly should be possible
24 for two members of these teams to get together and correlate these tabs.

25 MR STEYNBERG: Yes, your Honours.

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1 PRESIDING JUDGE EBOE-OSUJI: Yes.

2 MR STEYNBERG: I will ask my case manager to sit with the Defence case manager
3 and make sure it's right. I note that everybody else's bundle appears to be correct.

4 PRESIDING JUDGE EBOE-OSUJI: Yes, let's proceed and do that at the break.

5 MR STEYNBERG: Thank you, Mr Court Officer. Is that document up?

6 THE COURT OFFICER (via video link): Yes, I confirm the document is being
7 presented to witness, first page.

8 MR STEYNBERG:

9 Q. Mr Witness, while we've been talking amongst ourselves, have you had an
10 opportunity to read through that document?

11 A. I haven't read.

12 Q. Well, let's take it paragraph by paragraph. The first paragraph reads,
13 "Investigators ..." and two names appear "screened the potential witness." We're in
14 open session, yes, so I'll call it -- the next person, investigator number 1, "... explained
15 the disclosure [procedures] and voluntariness. The potential witness agreed and
16 stated that he was willing to give a statement and to appear in court. He explained
17 that he was in ..." and you give a location "... before and during the 2007/2008 PEV
18 there."

19 And then we get to the harambee. "He believes in November, possibly around the
20 19th, he attended a fundraiser (Harambee) at a school in Kaptabee ..." And I think
21 I can say actually in public "... near Turbo." Ruto spoke at this event, he said that
22 anyone who supported the PNU was mad and should be taken away. Ruto added
23 that if the ODM lost the election[s], they should be prepared to drive the Kikuyu
24 away."

25 Do you now recall mentioning the harambee during the screening?

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1 A. I don't remember.

2 Q. All right. You go on to say in the next paragraph, "In December 2007, he
3 attended an ODM rally in Turbo. Ruto was one of the speakers." Do you
4 remember telling them about that?

5 A. I don't remember.

6 Q. All right. Two paragraphs down, at the bottom of the page, you state, "About
7 a week before voting day, [you] attended a meeting at Ruto's house." Do you
8 remember telling them about that?

9 A. I don't remember.

10 MR STEYNBERG: Mr Court Officer, please call up the next page, 0966.

11 THE COURT OFFICER (via video link): The next page is being presented to the
12 witness.

13 MR STEYNBERG:

14 Q. Mr Witness, I don't want to read out of the first paragraph in open session. It's
15 only two lines. Can you read it to yourself and tell us whether you remember saying
16 that?

17 Did you say that, Mr Witness?

18 A. I don't remember.

19 Q. All right. The next paragraph starts off, "He was in Turbo between
20 30 December 2007 and 2 January 2008. He witnessed Kalenjin youths looting and
21 burning a Kikuyu's house in Turbo." Did you tell them that?

22 A. I don't remember saying that.

23 Q. You then give details of a meeting which you apparently told them was being
24 led by one Benjamin Murey. Do you recall that? Mr Witness, do you recall that?

25 A. No.

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1 Q. You then state, according to this you told them "Around 1 January, a friend
2 warned him to get away as he may be killed" -- if the Court will bear with me.

3 I think I can say this in public -- "that he may be killed (Redacted)
4 (Redacted) Do you remember telling them that?

5 A. No.

6 Q. Further down in that paragraph you tell the investigators that you were in
7 hiding in the nearby town of Kipkaren and various things that you saw whilst in
8 hiding. Do you remember that?

9 A. No.

10 Q. The penultimate paragraph you describe returning to Turbo in mid-January
11 where you and a person who you've mentioned in your evidence in private session
12 were forced to chair -- forced to attend a meeting chaired by one David Rono. Do
13 you remember telling them about that incident?

14 A. No.

15 Q. And finally you mention that you have not given any previous statements.
16 You mention that you have in your possession a leaflet in English which threatens
17 PNU supporters and some notes in your diary. You told them you did not commit
18 any crimes during the PEV. Any of that ring a bell with you?

19 A. No.

20 Q. Incidentally, what became of this pamphlet which you speak about apparently
21 in the screening note and I believe also mentioned in the statement? What happened
22 to that pamphlet?

23 A. I had said that I don't remember.

24 Q. What don't you remember, sir? Don't you remember talking to the
25 investigators about it or don't you remember such a pamphlet?

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1 A. Talking to investigators telling them all this.

2 Q. All right. I'm now asking you about a pamphlet. Did you ever have a
3 pamphlet in your possession threatening PNU supporters?

4 A. No.

5 Q. All right. See, what I'll put to you, sir, and I'll then move on is that the reason
6 why you've been changing your evidence about who and when you were requested
7 to fix Mr Ruto is because your affidavit made at Mr Mutai's office cannot explain the
8 fact that as early as 27 January -- I beg your pardon -- 27 June 2013 you had already
9 given important details of your version to the investigators. Do you understand?

10 A. Sorry?

11 Q. I put to you that the reason why you've been changing your evidence as to
12 when you were told and by whom you were told to fix Mr Ruto is to explain the
13 existence of this report on 27 January, isn't that so?

14 A. I think I have not changed any of my statement.

15 Q. The reason why you've had to implicate the lady in manufacturing evidence is
16 because either you realized or somebody told you that prior to your meeting on 6 July,
17 you had already created a record of your version; isn't that right?

18 A. We have not -- I didn't even discuss with anybody about the lady and about
19 meeting those people. It was from my own because I knew what -- what happened
20 to me.

21 Q. The final proposition I'll put to you in this regard is that if things had happened
22 as you now say they had, that you had been requested to fix the two accused by
23 investigators during your telephone screening and by the lady, that important detail
24 would not have been omitted from your affidavit; isn't that so?

25 A. I think I have said that when I was giving the story to my lawyer, I didn't have

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1 the statement with me and I was just giving an overview of what had happened.

2 Q. And how would the statement --

3 A. When I was -- when I was giving the statement, I never knew it was -- that it
4 was going to be -- to be used against me. I could have kept the records.

5 Q. There's nothing in your statement to the investigators on the 6th that mentions
6 anything about the lady or about being asked to fix the accused; isn't that so? That
7 doesn't --

8 A. In my statement --

9 Q. Yes?

10 A. Is it in my statement or on my affidavit that you are talking about?

11 Q. You mentioned earlier when I challenged you on the fact that the lady is not
12 mentioned in your affidavit as being the person who told you, first told you to fix the
13 accused, all right, your answer was that you didn't have your statement with you
14 when you made the affidavit.

15 A. Yes, I didn't have the statement with me.

16 Q. And how would the statement have helped you to remember that it was the
17 lady who asked you to fix Mr Ruto and not for the first time these two investigators?

18 A. I think I said in that --

19 MR KHAN: Mr President, I'm sorry for interrupting the witness. I apologize.

20 Your Honour, I'll leave it to the Bench, but we've been really going around the
21 houses. The witness has said repeatedly about the role that the lady he says played
22 about being recruited and what was said. And my learned friend, to keep going
23 back to a point where the Bench have more than sufficient evidence to make
24 assessments on that issue, on that particular issue really is -- becomes irrelevant
25 questioning in our respectful submission.

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- 1 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, proceed.
- 2 MR STEYNBERG: Thank you, your Honours. I had I think exhausted that issue.
- 3 If the Chamber will bear with me.
- 4 PRESIDING JUDGE EBOE-OSUJI: Private session.
- 5 (Private session at 10.57 a.m.) * Reclassified as Open session
- 6 THE COURT OFFICER: We're in private session, Mr President.
- 7 PRESIDING JUDGE EBOE-OSUJI: (Redacted)
- 8 (Redacted)
- 9 (Redacted)
- 10 (Redacted)
- 11 (Redacted)
- 12 We will go back to public.
- 13 (Open session at 10.58 a.m.)
- 14 THE COURT OFFICER: We're in open session, Mr President.
- 15 PRESIDING JUDGE EBOE-OSUJI: Thank you. And we will take our morning
- 16 break now and we will come back in 30 minutes.
- 17 Witness, you're still on the witness seat and we will -- you will rejoin us in 30 minutes.
- 18 THE WITNESS: Okay. Thank you.
- 19 PRESIDING JUDGE EBOE-OSUJI: Court will rise.
- 20 THE COURT USHER: All rise.
- 21 (Recess taken at 10.59 a.m.)
- 22 (Upon resuming in open session at 11.37 a.m.)
- 23 THE COURT USHER: All rise.
- 24 Please be seated.
- 25 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.

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1 Welcome back, everyone.

2 Witness, welcome back.

3 THE WITNESS: Thank you.

4 PRESIDING JUDGE EBOE-OSUJI: Before we proceed, two matters. One, the

5 interpreters and court reporters have expressed concern that the pace of the exchange

6 has been more rapid than it should be for their purposes, so let's watch that.

7 Witness, the warning or, rather, the advice we had given to you the first time and

8 repeated often we want to reiterate. Please observe that pause between completion

9 of the question and your commencement of your answer and also remember it's five

10 seconds. Try and observe that. Watch the pace. Do not speak too fast.

11 That goes for Mr Steynberg as well.

12 THE INTERPRETER: Many thanks from the interpreters and court reporters.

13 PRESIDING JUDGE EBOE-OSUJI: The second announcement concerns our

14 schedule for Thursday. As I indicated earlier, we will yield the courtroom for the

15 Ntaganda case inevitably because Judge Fremr is the Presiding Judge in that case so

16 he cannot be in two places at -- in two cases at once. So we will yield the morning of

17 Thursday, and to make up for the lost time we will -- the proposal is to start at 2 p.m.

18 on Thursday for two sessions of two hours with a 30-minute break in-between. That

19 means we will start at 2 and go to 4 p.m., take a break then, return at 4.30 and

20 continue to 6 p.m. There's something wrong with that mathematics, but you've got

21 the point. We start at 2 and stop at 6.

22 That's the -- I take it there is no serious inconvenience to counsel. I see Mr Khan

23 indicates it's fine with him. Mr Kigen-Katwa?

24 MR KIGEN-KATWA: It's fine with us.

25 PRESIDING JUDGE EBOE-OSUJI: All right.

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- 1 Mr Prosecutor?
- 2 MR STEYNBERG: We're available, your Honours.
- 3 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
- 4 And Mr Narantsetseg? Thank you.
- 5 MR NARANTSETSEG: Yes.
- 6 PRESIDING JUDGE EBOE-OSUJI: So that is what we will do on Thursday.
- 7 With those announcements out of the way, Mr Steynberg, please continue with your
- 8 now cross-examination of your witness and you will go until --
- 9 MR STEYNBERG: I hope to finish by the luncheon adjournment, your Honours.
- 10 That is --
- 11 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 12 MR STEYNBERG: -- the plan. Your Honours, perhaps I can just observe that to
- 13 date there have been no interventions from the Rule 74 counsel relating to dealing
- 14 with matters in private session, but I would alert him to the fact that during the
- 15 course of this session I do intend to deal with matters which might touch on the issue
- 16 of self-incrimination. I will -- I will signal it before I pose any such questions.
- 17 PRESIDING JUDGE EBOE-OSUJI: Mr Mutai, that basically put -- Mr Steynberg is
- 18 putting you on notice that there is -- the questioning from now on may touch on
- 19 matters of self-incrimination so you be on alert and that's why you have been retained
- 20 to be on hand for the testimony of the witness.
- 21 In the meantime, I notice that you had indicated earlier that you wished to express
- 22 some concern about the manner in which Mr Steynberg had conducted his
- 23 questioning yesterday and you said that if you saw no need to press that concern, you
- 24 would let matters lie. I take it that has remained the case so far?
- 25 MR MUTAI (via video link): That is so, Mr President.

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1 PRESIDING JUDGE EBOE-OSUJI: All right. Thank you. So we will continue.

2 MR STEYNBERG: Thank you, your Honours.

3 Q. Mr Witness, good afternoon.

4 A. Good afternoon.

5 Q. Now, you've told the Court in some detail over the course of the last three days
6 regarding inducements that had been offered to you for the purposes of fixing the
7 two accused and about discussions that were had about the evidence you should give
8 to the investigators to fix those accused, correct?

9 A. Yes.

10 Q. Besides being requested to give evidence implicating -- or falsely implicating, as
11 you say, the two accused in the post-election violence, have any of the investigators of
12 the OTP requested you to give any other false evidence or false reports?

13 A. I don't remember.

14 Q. Is this not something you would remember if it had happened, Mr Witness, if
15 an investigator had asked you to lie about something else besides what's contained in
16 your first statement?

17 A. You know the contact has been quite for some time, so I may not remember
18 everything that took place.

19 Q. I see. Can you recall having made reports to investigators relating to issues of
20 witness interference, witness tampering?

21 A. Maybe, Prosecutor, you can refresh my mind?

22 Q. All right. I'll come to that, but let me ask you one more introductory question.
23 Besides the investigators whom you say spoke to you at the screening and asked you
24 to fix the accused and besides the investigators who met with you on the 6th and you
25 say asked you to fix the accused, can you recall whether there were any other

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1 investigators or any other persons from the OTP who had induced you to give false
2 evidence?

3 A. I remember meeting some two investigators in the nearby country some times
4 back last year.

5 Q. Yes. And what happened with those two investigators? Anything you need
6 to tell the Court about?

7 A. Yeah, they asked me some questions.

8 Q. Okay. And did you answer those questions truthfully?

9 A. Yeah, some were true. Some were not true.

10 Q. And to the extent that you may have given answers that were not true, why did
11 you do that?

12 A. Yes, prior to -- to me going to meet the two investigators, we were still
13 communicating with my mentor and my mentor I mean the lady who recruited me.
14 So she had some issues. She was telling me that she wasn't happy on the way she
15 was being treated by the -- the OTP and again she was telling me that, "If you want
16 certain measures or certain goods, goodies to be given to you, when you meet the
17 team, you must mention some people whom" -- she gave me the names that those
18 people had been adversely mentioned in interfering with witnesses.

19 MR STEYNBERG: I see. And perhaps before I ask you who those people are, I
20 should ask to go into private session because I'm not sure what the answer might be.

21 PRESIDING JUDGE EBOE-OSUJI: For how long?

22 MR STEYNBERG: Your Honours, for just a couple of questions, but the time is
23 approaching where we might have to go into private session for longer purposes for
24 issues relating to Rule 74.

25 PRESIDING JUDGE EBOE-OSUJI: Private session.

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1 (Private session at 11.49 a.m.) * Reclassified as Open session

2 THE COURT OFFICER: We're in private session, Mr President.

3 MR STEYNBERG:

4 Q. Yes, and who are these people who -- well, firstly we are in private session.

5 You were referring to (Redacted) as your mentor, correct?

6 A. Yes.

7 Q. And who are the people who you say she told you to mention.

8 A. She told me to mention (Redacted), somebody called (Redacted)

9 and another person called --

10 Q. Yes, who was the other person?

11 A. I don't remember this.

12 Q. All right. For the record (Redacted) Is

13 that right?

14 A. (No audible response)

15 Q. Mr Witness, is that spelling correct?

16 A. Yes, it is. Yeah, it is correct.

17 Q. All right. And when you met with the investigators, did you give them

18 information like that?

19 A. Though I don't remember well because I have -- I have not gone through that

20 statement, but I gave them some information according to what we had discussed

21 with the lady.

22 Q. Mr Witness, was this statement not provided to you by the VWU for the

23 purposes of your witness preparation?

24 A. I didn't go through it.

25 Q. So what are you saying, you were provided the statement but you didn't read it,

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1 or you were not provided with the statement?

2 A. I was not provided.

3 MR KHAN: Mr President, could -- could my learned friend help us with which tab
4 is the evidence to which he refers?

5 MR STEYNBERG: Thank you, your Honours. It's at tab 38 and the ERN is

6 KEN-OTP-0017-1019 (sic) and it's R02, lesser redacted version.

7 PRESIDING JUDGE EBOE-OSUJI: Can we not do this in public?

8 MR STEYNBERG: One more question about the identity of the investigators, your
9 Honours, and then we can move back to public.

10 Q. Just for record, the investigators you met, do you confirm that that would be an
11 investigator by the name of (Redacted) and an investigator call (Redacted) do you
12 recall that?

13 A. Yes.

14 Q. And this meeting took place on 13 November 2013; is that correct?

15 A. Yes.

16 MR STEYNBERG: Your Honours, for the moment we can move into public session.

17 PRESIDING JUDGE EBOE-OSUJI: Public session.

18 (Open session at 11.52 a.m.)

19 THE COURT OFFICER: We are in open session, Mr President.

20 PRESIDING JUDGE EBOE-OSUJI: All right. Before you proceed, Mr Steynberg,
21 one second.

22 (Trial Chamber confers)

23 PRESIDING JUDGE EBOE-OSUJI: Witness, can you -- we will have the court officer
24 have you step out for a minute in the anteroom, just for a minute. We want to have
25 some small legal discussion amongst the lawyers and the Judges.

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1 (The witness exits the video-link room)

2 THE COURT OFFICER (via video link): Mr President, the witness has been escorted
3 out of the transmission room.

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

5 Mr Steynberg, this witness was brought to the Court and from the beginning he said
6 that the statement he gave to -- that he gave a statement to the Prosecutor implicating
7 the accused persons, and then he said he subsequently resiled his statement, saying
8 that what -- part of what he said in this statement was true, others not. On the basis
9 of that we have proceeded and the standby counsel had been appointed. What is it
10 about Rule 74 that has become so special in your questioning?

11 MR STEYNBERG: Your Honours, I seek by reference to this statement to
12 demonstrate that the witness during the course of these proceedings has been in
13 contact with persons whom the Prosecution submit -- against whom the Prosecution
14 submits there is evidence of being involved in witness tampering.

15 We submit that this evidence is relevant to determine why his version has suddenly
16 changed, or suddenly changed, has changed between the time he gave his original
17 affidavits and the time he deposed to his -- sorry -- his original statements and the
18 time he deposed to his affidavit in July.

19 It will also be relevant, your Honour, we will submit to the Court's assessment of the
20 credibility of the version given in his latest affidavit versus the evidence given in his
21 original statements should the Chamber ultimately agree that those statements may
22 be admitted.

23 We submit that it is most efficient to allow the Prosecution to examine all of this
24 evidence at the moment, rather than to have to recall the witness at a subsequent date
25 to testify on these issues should the issue of the credibility of his original version

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1 become an issue.

2 But in the main part the Prosecution submits that all of this will be relevant to his
3 credibility. In the course of this, the witness gives evidence of the fact that he was
4 approached by certain of the alleged tamperers and on behalf of those tamperers
5 conveyed messages to another witness being -- are we in open session? Yes -- the
6 lady who has been mentioned earlier, and in the course of this he may have
7 implicated him in -- himself in offences under Article 70.

8 PRESIDING JUDGE EBOE-OSUJI: Was that not covered in the guarantees given the
9 witness earlier, that whatever he said may not be used against him in any -- in any,
10 directly or indirectly, in any subsequent prosecution against him or any such effort
11 with the exception of 70(1)(a) and (b) that pertain to giving the Court false testimony
12 while on the stand.

13 MR STEYNBERG: Your Honours, indeed it was, but the undertaking is an
14 undertaking of the OTP in this Court. And no undertaking that this Prosecution
15 gives can be binding on, for instance, the Kenyan government. So there is a
16 combination of protection offered by Rule 74, and the combination is an undertaking
17 that the Prosecution should not use this evidence to prosecute the witness, but also
18 that the information should not be disclosed publicly, including to other authorities
19 who might wish to use the information.
20 Now, we're in public session at the moment. I don't want to say too much more, but
21 the point is that evidence that might incriminate the witness should be given in
22 private session and should be subsequently placed under seal by the Chamber.

23 PRESIDING JUDGE EBOE-OSUJI: All right. We don't need to have any extended
24 debate on that. We just wanted to know the direction of the Prosecutor's questioning
25 and why he posted that signpost to this part of his questioning.

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1 The witness may be brought back in.

2 MR KHAN: Mr President, I am not going to address the article of -- the issue of 74
3 given your Honour's ruling on the issue. I would say that given my learned friend's
4 various submission, in my respectful submission, and it's a strongly held position,
5 before we get into that there is an ethical obligation on the Prosecution to seek to
6 controvert the initial account of the witness, the initial account of the witness, by
7 objective evidence or otherwise.

8 Your Honour, there has been no attempt by my learned friend despite all these
9 submissions of declaring the witness hostile to even attempt to do that. We are
10 dealing with a by-alley of allegations. And this assertion my learned friend has said
11 now, we are now getting more and more tenuous arguments we say from the
12 Prosecution.

13 Your Honour, that can be put, it can be put at the proper time, but surely there is an
14 obligation first to deal with the veracity of the original account. And the Prosecution
15 who have been investigating this case for four years, surely we say they must have
16 some objective evidence to show that the first account was true and not a pack of lies
17 as the witness says. And that should be done before we go on to this side-show that
18 the Prosecution are trying to put centre stage.

19 Your Honour, there has been no attempt by the Prosecution to do it. We say it's
20 necessary.

21 PRESIDING JUDGE EBOE-OSUJI: Well, Mr Khan, we will not make -- engage in
22 that debate at this time. We believe that it is a matter upon which you can make
23 submissions at the right time.

24 MR KHAN: Your Honour, I am grateful. The only reason I raise it, my learned
25 friend said he had a very smoking gun, and I'm yet to see a whisper of smoke.

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1 PRESIDING JUDGE EBOE-OSUJI: I am sure you will be sitting by waiting for it.

2 MR KHAN: Eagerly.

3 PRESIDING JUDGE EBOE-OSUJI: We will now bring back the witness and
4 continue.

5 (The witness re-enters the video-link room)

6 MR KHAN: And, Mr President, I am grateful to my learned friend. I think a
7 wrong reference was given just for the record. It is in fact, the correct reference I am
8 told by my learned friend is KEN-OTP-0117-1019. My learned friend is Mr Hooper.

9 PRESIDING JUDGE EBOE-OSUJI: That is what we have at tab 38.

10 MR KHAN: Yes.

11 PRESIDING JUDGE EBOE-OSUJI: All right.

12 MR KHAN: On the transcript it was wrong. That was my point.

13 (The witness re-enters the video-link room)

14 THE COURT OFFICER (via video link): Mr President, the witness is back in the
15 transmission room.

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

17 Witness, we just had a little discussion with the lawyers about a procedural matter,
18 and Mr Steynberg will continue his questions of you. Welcome back.

19 Mr Steynberg?

20 MR STEYNBERG: Thank you, your Honours. I just need to find my train of
21 thought again.

22 Q. So, Mr Witness, you told the Chamber that prior to meeting with the OTP
23 investigators or with two OTP investigators in November 2013, you had certain
24 discussions with the lady; is that right?

25 A. Yes.

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1 Q. And the lady told you that if you wanted to get benefits, you had to mention the
2 names of various people who were implicated it seems -- well, just remind me what
3 she told you, because I don't have the exact note in front of me. Why did she tell you
4 to implicate these people?

5 A. She said that the OTP is concerned with those people about witness
6 interference.

7 Q. All right.

8 A. And when you then met with the investigators, you gave them certain reports in
9 which you mentioned these people; is that right?

10 A. Yes, I gave them.

11 Q. And what you told the investigators about these people, where did that
12 information come from? Did you make that up?

13 A. The lady told me that she has been speaking with people who are within the
14 country, and they had given him some information. Of what that information is
15 now, she said that it was very hard for her to relay the message to the Prosecution
16 because she was not allowed to talk or to speak with people who are within the
17 country. So she told me that it was better for you since you are inside the country,
18 when you go there, you just go and say, "I've seen this and this."

19 MR STEYNBERG: So firstly a correction to the record at line 3, it should be "within
20 the country" where the word "indiscernible" appears.

21 Q. Do I understand from that that the details that you told the investigator were
22 relayed to you by the lady?

23 A. Some of them.

24 Q. And the others? What about other details? You say "some of them." Where
25 did the other details come from?

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1 A. Maybe I could request to go over that report just for a while?

2 Q. Certainly I can give you that opportunity.

3 You can't recall as you are sitting there where you might have got other details from
4 that weren't told to you --

5 A. No, I don't --

6 Q. Sorry. That -- I'm not finished -- that weren't told to you by the lady?

7 A. I think my memory should be refreshed so that I see in details what actually I
8 told them and say: This one was from the lady. This one was mine.

9 MR STEYNBERG: If the Court will bear with me for one moment, please?

10 Q. Before I call up that statement, I just want to understand you correctly. Is it
11 your version that basically you and the lady conspired to provide false evidence to
12 the OTP in order to get greater benefits? Is that what you're telling us?

13 A. Sorry. Maybe you can repeat the question? I never got it well.

14 Q. Yes. Is it correct from what you've told the Court that you and the lady - and
15 let me use a simpler word - discussed the fact that you would give false details to the
16 Prosecution in order that the two of you would get more benefits? Is that right?

17 A. Yes.

18 MR STEYNBERG: All right. Mr Court Officer, can I ask you please to call up the
19 document I mentioned earlier, KEN-OTP-0117-1019-R02.

20 THE COURT OFFICER (via video link): The first page of that document is being
21 presented to the witness.

22 MR STEYNBERG:

23 Q. Mr Witness, do you recognize that document?

24 A. Yes.

25 Q. And you confirm it's your name that appears in typed font at the top left and

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1 your signature at the bottom of the page?

2 A. Yes.

3 MR STEYNBERG: And can we call up the last page, please, Mr Court Officer, page
4 1027?

5 THE COURT OFFICER (via video link): Yes.

6 MR STEYNBERG:

7 Q. Do you confirm that's your signature below the witness acknowledgement
8 dated 13 November?

9 A. Yes.

10 Q. And again at the bottom of the page?

11 A. Yes.

12 Q. Does this refresh your memory as to whether this document was in fact shown
13 to you by the VWU during your witness preparation?

14 A. I was not shown. I only read two statements.

15 Q. All right. Because I'll check, but according to my records this -- yes, in fact, my
16 colleague has just confirmed that this witness was provided -- this statement was
17 provided to the VWU for the purpose of your witness preparation. Are you sure
18 you didn't see it?

19 A. No, I only saw two statements. The first -- the one for 6th, 7th and 8th. And
20 the one for 14 July I -- I never read this one.

21 MR KHAN: And, your Honour, can I just for the record state the obvious. The fact
22 that information was given by VWU doesn't mean VWU gave it to a witness or that
23 the witness read it.

24 PRESIDING JUDGE EBOE-OSUJI: You mean the fact that information was given to
25 VWU?

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1 MR KHAN: It does not mean that VWU gave it to the witness, or that the witness
2 read it to the extent that my learned friend is seeking to make a point of it.

3 PRESIDING JUDGE EBOE-OSUJI: Well, let's leave it there.

4 Mr Steynberg, continue.

5 MR STEYNBERG: Yes. Well, your Honours, that is obviously something that can
6 be objectively verified from the VWU members present at the Court, but it places me
7 in a bit of a tricky situation because the witness claims he has not had time to refresh
8 his memory. Either we can do it the tedious way of me reading through the
9 statement and -- in court, or the witness could be given some time to read through his
10 statement to refresh his memory.

11 PRESIDING JUDGE EBOE-OSUJI: All right. This is how many pages of document?
12 Nine or so?

13 MR STEYNBERG: It is nine pages, your Honours.

14 PRESIDING JUDGE EBOE-OSUJI: All right.

15 MR STEYNBERG: It shouldn't take the witness too long.

16 PRESIDING JUDGE EBOE-OSUJI: Do you need the witness to read the entirety of
17 the nine pages for you to ask your question for -- or, is there a discrete part of the
18 document you can point to the witness to see if that refreshes the witness's memory?
19 Perhaps a line or two, or paragraph?

20 MR STEYNBERG: My position is made more difficult by the fact that the witness
21 now has denied the truth of much of this statement and has, again, stated that parts
22 are correct and parts are incorrect.

23 PRESIDING JUDGE EBOE-OSUJI: I thought -- I thought your objection -- your
24 purpose was to refresh the witness's memory.

25 MR STEYNBERG: Yes.

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1 PRESIDING JUDGE EBOE-OSUJI: Does it matter does he have to read the whole
2 thing to have a memory refreshed?

3 MR STEYNBERG: Perhaps not, your Honours. If your Honours are satisfied that
4 that would be fair to the witness to proceed in this matter, then --

5 PRESIDING JUDGE EBOE-OSUJI: We will -- let's give it a try first. If it doesn't
6 work, then we'll see where else we go from there.

7 MR STEYNBERG: Thank you.

8 Mr Court Officer, can I then ask you to call up the third page of this document, that is
9 ERN-1021.

10 THE COURT OFFICER (via video link): The page is being displayed at paragraph
11 10 onwards.

12 MR STEYNBERG: Yes. Your Honours, I am going to have to ask some questions
13 which may be identifying of the lady. May I ask that we go into private session
14 probably for no more than three or four minutes?

15 PRESIDING JUDGE EBOE-OSUJI: Private session.

16 (Private session at 12.12 p.m.) * Reclassified as Open session

17 THE COURT OFFICER: We are in private session, Mr President.

18 MR STEYNBERG: Mr Witness, at paragraph 15, you told the investigators,
19 according to this statement, that "Sometime towards the end of July 2013, [you]
20 received a call from (Redacted) ...", correct?

21 A. Correct.

22 Q. "... and she informed [you] she was in" a certain location which I won't mention
23 other than to say it's outside of Kenya; is that right?

24 A. Yes.

25 Q. (Redacted)

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1 (Redacted)

2 (Redacted)

3 A. Correct.

4 Q. (Redacted)

5 (Redacted)

6 (Redacted)

7 A. Yes.

8 Q. If your purpose, Mr Witness, was to conspire with (Redacted) to get more benefits
9 out of the OTP, why would you tell them something like this which might in fact get
10 (Redacted) into trouble?

11 A. Sorry?

12 Q. Let me ask this question first. Was this something that (Redacted) asked you to tell
13 the investigators?

14 A. No.

15 Q. Why did you decide to tell the investigators this?

16 A. Yeah, during the discussion with the investigators, they decided to ask me more
17 about my relationship with (Redacted), so I decided to tell them what I knew about
18 (Redacted).

19 Q. And what I want to know is why you decided to tell them that? Do you
20 understand?

21 A. Yes, I decide -- yes, I'm getting you.

22 Q. Go ahead.

23 A. I decided to tell -- to tell them because some times back, I don't remember which
24 month, (Redacted) called me telling me that she had told them, the ICC, the
25 witness that -- the Witness Protection Unit that (Redacted)

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1 (Redacted)

2 (Redacted)

3 (Redacted)

4 So I saw that -- I believed that the two investigators knew more about (Redacted), so I
5 didn't find any need to cheat them.

6 Q. You described (Redacted) a few moments ago as your mentor; is that right?

7 A. Yes.

8 Q. And she's the person who was responsible for your -- your ticket to a luxurious
9 life, as you call it; is that right?

10 A. It is right.

11 Q. Why is it then that if that were true you would so easily sell her -- sell her out to
12 the investigators?

13 A. I think I'd said that she called me some times back that the team -- that the team
14 was aware. She told me that it seems somebody had leaked the information that
15 she -- (Redacted)

16 (Redacted) so when I met the

17 team I never saw the need now of hiding what I knew was true about her.

18 Q. (Redacted) didn't ask you to -- to lie for her, as you'd been doing in previous
19 statements?

20 A. Yeah, she had asked me, but I -- for that occasion I never lied on her behalf.

21 Q. I see. You see, I put it to you, Mr Witness, that your story just doesn't add up.
22 That if, in fact, you and (Redacted) were conspiring to get benefits out of the ICC, you
23 would not have given information which would get her into trouble.

24 PRESIDING JUDGE EBOE-OSUJI: Witness, you do not have to answer that question,
25 but it's up to you if you do want to answer it. You don't have to answer it. It is an

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1 argumentative question.

2 MR KHAN: Mr President, the other matter I note it misstates the witness's answer.

3 He said very clearly that the reason he didn't lie on that occasion is he believed the
4 investigators already knew the true story.

5 THE WITNESS: Exactly.

6 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, move on please.

7 MR STEYNBERG: Well, I thank my learned friend for --

8 PRESIDING JUDGE EBOE-OSUJI: Mr Faal, no.

9 MR FAAL: My apologies, Mr President.

10 MR STEYNBERG: Right.

11 Q. You could simply have told the investigators that you didn't know anything
12 about (Redacted), couldn't you?

13 A. I couldn't do that because I had said that I have known (Redacted) for the last eight
14 years.

15 Q. I see. In any event, I put to you for your comment, if you wish, that in fact
16 (Redacted)

17 (Redacted) Do you have any
18 comment on that?

19 A. Sorry?

20 Q. (Redacted)

21 (Redacted)

22 (Redacted)

23 A. Yes.

24 Q. Thank you.

25 MR KHAN: Mr President, I raise the question -- the point my learned friend has

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1 started. I am putting to you that your information here is in fact correct and then of
2 course another part of the question seems to say it's not. So, your Honour, I think
3 the record should be clear and the question should be clear to the witness. Is it being
4 put to him that what he has said that (Redacted)
5 is the assertion that (Redacted) is that correct, but obviously
6 both can't be.

7 MR STEYNBERG: Your Honour, I believe the record is incorrect and that in fact
8 what I said was that the information here is in fact incorrect, but if I did not say that
9 then I misspoke.

10 PRESIDING JUDGE EBOE-OSUJI: We can move on.

11 MR STEYNBERG:

12 Q. Now --

13 PRESIDING JUDGE EBOE-OSUJI: Do we need to remain in private session?

14 MR STEYNBERG: Unfortunately, yes. I believe so, your Honour. The matter I
15 intend to proceed to now is the very matter which I -- I raised earlier as being
16 potentially incriminating, but we'll see what the witness says. It may be that he
17 denies it and then --

18 PRESIDING JUDGE EBOE-OSUJI: All right. Proceed then.

19 MR STEYNBERG:

20 Q. (Redacted)

21 (Redacted)

22 A. (Redacted)

23 Q. (Redacted)

24 (Redacted)

25 A. (Redacted)

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- 1 (Redacted)
- 2 Q. (Redacted)
- 3 (Redacted)
- 4 A. (Redacted)
- 5 (Redacted)
- 6 Q. (Redacted)
- 7 (Redacted)
- 8 Q. (Redacted)
- 9 A. (Redacted)
- 10 Q. (Redacted)
- 11 (Redacted)
- 12 A. (Redacted)
- 13 Q. (Redacted)
- 14 (Redacted)
- 15 A. (Redacted)
- 16 Q. (Redacted)
- 17 (Redacted)
- 18 A. (Redacted)
- 19 (Redacted)
- 20 (Redacted)
- 21 MR STEYNBERG: (Redacted)
- 22 Q. (Redacted)
- 23 (Redacted)
- 24 A. (Redacted)
- 25 Q. (Redacted)

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- 1 (Redacted)
- 2 A. (Redacted)
- 3 Q. (Redacted)
- 4 A. (Redacted)
- 5 Q. (Redacted)
- 6 A. (Redacted)
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- 11 Q. (Redacted)
- 12 A. (Redacted)
- 13 Q. (Redacted)
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- 17 (Redacted)
- 18 Q. (Redacted)
- 19 (Redacted)
- 20 A. (Redacted)
- 21 (Redacted)
- 22 (Redacted)
- 23 Q. (Redacted)
- 24 (Redacted)
- 25 A. (Redacted)

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- 1 (Redacted)
- 2 Q. (Redacted)
- 3 (Redacted)
- 4 A. (Redacted)
- 5 Q. (Redacted)
- 6 A. (Redacted)
- 7 (Redacted)
- 8 Q. (Redacted)
- 9 A. (Redacted)
- 10 Q. (Redacted)
- 11 A. (Redacted)
- 12 Q. (Redacted)
- 13 A. (Redacted)
- 14 Q. (Redacted)
- 15 A. (Redacted)
- 16 Q. (Redacted)
- 17 A. (Redacted)
- 18 Q. (Redacted)
- 19 (Redacted)
- 20 A. (Redacted)
- 21 (Redacted)
- 22 (Redacted)
- 23 Q. (Redacted)
- 24 A. (Redacted)
- 25 MR STEYNBERG: (Redacted)

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- 1 (Redacted)
- 2 THE COURT OFFICER (via video link): (Redacted)
- 3 (Redacted)
- 4 MR STEYNBERG:
- 5 Q. (Redacted)
- 6 (Redacted)
- 7 (Redacted)
- 8 (Redacted)
- 9 (Redacted)
- 10 (Redacted)
- 11 A. (Redacted)
- 12 Q. (Redacted)
- 13 A. (Redacted)
- 14 Q. (Redacted)
- 15 A. (Redacted)
- 16 Q. (Redacted)
- 17 (Redacted)
- 18 (Redacted)
- 19 A. (Redacted)
- 20 Q. (Redacted)
- 21 (Redacted)
- 22 (Redacted)
- 23 A. (Redacted)
- 24 Q. (Redacted)
- 25 (Redacted)

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- 1 A. (Redacted)
- 2 Q. (Redacted)
- 3 MR KHAN: (Redacted)
- 4 (Redacted)
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- 14 (Redacted)
- 15 MR STEYNBERG: (Redacted)
- 16 (Redacted)
- 17 (Redacted)
- 18 (Redacted)
- 19 PRESIDING JUDGE EBOE-OSUJI: (Redacted)
- 20 (Redacted)
- 21 (Redacted)
- 22 MR STEYNBERG:
- 23 Q. (Redacted)
- 24 (Redacted)
- 25 A. (Redacted)

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- 1 (Redacted)
- 2 Q. (Redacted)
- 3 A. (Redacted)
- 4 (Redacted)
- 5 Q. (Redacted)
- 6 (Redacted)
- 7 (Redacted)
- 8 (Redacted)
- 9 (Redacted)
- 10 A. (Redacted)
- 11 Q. (Redacted)
- 12 PRESIDING JUDGE EBOE-OSUJI: (Redacted)
- 13 (Redacted)
- 14 MR STEYNBERG: (Redacted)
- 15 (Redacted)
- 16 (Redacted)
- 17 (Redacted)
- 18 (Redacted)
- 19 PRESIDING JUDGE EBOE-OSUJI: (Redacted)
- 20 (Redacted)
- 21 MR STEYNBERG: (Redacted)
- 22 PRESIDING JUDGE EBOE-OSUJI: (Redacted)
- 23 (Redacted)
- 24 MR STEYNBERG: (Redacted)
- 25 (Redacted)

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- 1 (Redacted)
- 2 PRESIDING JUDGE EBOE-OSUJI: (Redacted)
- 3 MR STEYNBERG: (Redacted)
- 4 PRESIDING JUDGE EBOE-OSUJI: (Redacted)
- 5 MR STEYNBERG: (Redacted)
- 6 Q. (Redacted)
- 7 (Redacted)
- 8 (Redacted)
- 9 A. (Redacted)
- 10 Q. (Redacted)
- 11 A. (Redacted)
- 12 Q. (Redacted)
- 13 (Redacted)
- 14 (Redacted)
- 15 (Redacted)
- 16 (Redacted)
- 17 A. (Redacted)
- 18 (Redacted)
- 19 Q. (Redacted)
- 20 (Redacted)
- 21 A. (Redacted)
- 22 Q. (Redacted)
- 23 (Redacted)
- 24 A. (Redacted)
- 25 (Redacted)

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- 1 (Redacted)
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- 3 (Redacted)
- 4 Q. (Redacted)
- 5 (Redacted)
- 6 (Redacted)
- 7 (Redacted)
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- 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. (Redacted)
- 19 (Redacted)
- 20 Q. (Redacted)
- 21 (Redacted)
- 22 (Redacted)
- 23 A. (Redacted)
- 24 (Redacted)
- 25 (Redacted)

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- 1 Q. (Redacted)
- 2 A. (Redacted)
- 3 Q. (Redacted)
- 4 (Redacted)
- 5 A. (Redacted)
- 6 (Redacted)
- 7 (Redacted)
- 8 MR STEYNBERG: (Redacted)
- 9 (Redacted)
- 10 THE COURT OFFICER (via video link): (Redacted)
- 11 (Redacted)
- 12 MR STEYNBERG:
- 13 Q. (Redacted)
- 14 (Redacted)
- 15 (Redacted)
- 16 A. (Redacted)
- 17 Q. (Redacted)
- 18 (Redacted)
- 19 MR KHAN: (Redacted)
- 20 THE WITNESS: (Redacted)
- 21 MR STEYNBERG:
- 22 Q. (Redacted)
- 23 (Redacted)
- 24 A. (Redacted)
- 25 Q. (Redacted)

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- 1 (Redacted)
- 2 A. (Redacted)
- 3 Q. (Redacted)
- 4 A. (Redacted)
- 5 Q. (Redacted)
- 6 A. (Redacted)
- 7 (Redacted)
- 8 Q. (Redacted)
- 9 (Redacted)
- 10 A. (Redacted)
- 11 Q. (Redacted)
- 12 A. (Redacted)
- 13 Q. (Redacted)
- 14 A. (Redacted)
- 15 Q. (Redacted)
- 16 A. (Redacted)
- 17 Q. (Redacted)
- 18 A. (Redacted)
- 19 Q. (Redacted)
- 20 A. (Redacted)
- 21 (Redacted)
- 22 (Redacted)
- 23 (Redacted)
- 24 Q. (Redacted)
- 25 A. (Redacted)

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- 1 (Redacted)
- 2 Q. (Redacted)
- 3 A. (Redacted)
- 4 Q. (Redacted)
- 5 (Redacted)
- 6 A. (Redacted)
- 7 Q. (Redacted)
- 8 (Redacted)
- 9 (Redacted)
- 10 (Redacted)
- 11 A. (Redacted)
- 12 (Redacted)
- 13 Q. (Redacted)
- 14 A. (Redacted)
- 15 Q. (Redacted)
- 16 (Redacted)
- 17 A. (Redacted)
- 18 MR STEYNBERG: (Redacted)
- 19 Q. (Redacted)
- 20 A. (Redacted)
- 21 (Redacted)
- 22 Q. (Redacted)
- 23 (Redacted)
- 24 A. (Redacted)
- 25 Q. (Redacted)

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- 1 (Redacted)
- 2 A. (Redacted)
- 3 Q. (Redacted)
- 4 (Redacted)
- 5 (Redacted)
- 6 MR STEYNBERG: (Redacted)
- 7 (Redacted)
- 8 (Redacted)
- 9 (Redacted)
- 10 (Redacted)
- 11 PRESIDING JUDGE EBOE-OSUJI: (Redacted)
- 12 (Redacted)
- 13 MR STEYNBERG: (Redacted)
- 14 (Redacted)
- 15 (Redacted)
- 16 (Redacted)
- 17 (Redacted)
- 18 (Redacted)
- 19 Q. (Redacted)
- 20 (Redacted)
- 21 (Redacted)
- 22 A. (Redacted)
- 23 Q. (Redacted)
- 24 (Redacted)
- 25 (Redacted)

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1 A. (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 Q. I put to you that what's now become apparent and crystal clear as a result of
7 your affidavit and recantation is that in fact you have been in contact with persons
8 involved in witness tampering and that is the reason why you have now withdrawn
9 your evidence and not because of any conscience on your part.

10 MR KHAN: Your Honour, for the record --

11 THE WITNESS: Sorry?

12 MR KHAN: -- can we have the persons named that the Prosecution say are involved
13 in witness tampering and the witness then can answer it? It is all ambiguous. My
14 learned friend's put a proposition that this witness has been in contact with people
15 engaged in witness tampering. Let us have names and then let's have the evidence
16 upon which it's based.

17 MR STEYNBERG: Your Honour --

18 MR KHAN: Because the witness's account -- and we can't contort even if you are
19 cross-examining. The witness's account of course it be controverted, I'm not
20 objecting to that, but the witness' account is all of that narrative was part of a plan.
21 Now, if my learned friend has evidence, he can lead. He has got massive licence to
22 lead. He can confront the witness. But we need to have some clarity and we're not
23 getting that at the moment.

24 So, your Honour, I would ask that we be given those details, who are members of that
25 interference scam and then what's the evidence upon which it's based, and then the

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1 witness can respond.

2 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg?

3 MR STEYNBERG: Your Honours, the two persons already mentioned, (Redacted)

4 (Redacted) are the two persons I'm referring to for present purposes who he has

5 admitted he has been in contact with. And the Prosecution has sought to and will

6 seek to place evidence before the Court of the involvement of those people in witness

7 tampering, but that's a matter which I need not necessarily with respect to this

8 witness.

9 PRESIDING JUDGE EBOE-OSUJI: But did you need to put that question to the

10 witness? Isn't that argumentative?

11 MR STEYNBERG: Your Honours, perhaps it is, but in my submission at least the

12 witness should be given an opportunity to comment on it. If I am going to argue this

13 at a later stage, that the witness should not be -- or his latest recantation should not be

14 believed because he has been tampered with, at least he should have the opportunity

15 to comment thereon. I don't intend to enter into a debate about that.

16 PRESIDING JUDGE EBOE-OSUJI: Fair enough. Proceed.

17 MR STEYNBERG:

18 Q. What do you say to that, Mr Witness, my suggestion that the reason why you

19 have recanted your evidence is in fact because you have been in contact with people

20 such as (Redacted) and in fact they have induced you to change your

21 version?

22 A. I believe even by now those people you are referring to don't know that I am the

23 one giving the testimony.

24 MR STEYNBERG: I see. Can I then ask -- move on to the following page of your

25 affidavit, your statement of 13 November. That's page 1024, Mr Court Officer.

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1 PRESIDING JUDGE EBOE-OSUJI: Still in private session?

2 MR STEYNBERG: Yes, your Honours, because I will be referring to other

3 Prosecution witnesses I'm afraid.

4 THE COURT OFFICER (via video link): The requested page is being presented at
5 paragraph 29.

6 MR STEYNBERG: Yes, thank you.

7 Your Honours, the other reason of course is that my reference to persons who the

8 Prosecution alleges are involved in witness tampering is not something that the

9 Prosecution would want to put out in public. There are ongoing investigations and
10 issues related to that.

11 Q. Mr Witness, I direct your attention to paragraph 33 under the heading

12 (Redacted) It is

13 (Redacted) Do you recall telling the investigators about that?

14 A. Yes.

15 Q. About such a conversation?

16 A. I recall telling the story.

17 Q. And what you told the investigator, was it true or untrue?

18 A. It was not true.

19 Q. Why did you tell the investigators this version?

20 A. Yes, I told you that before I went there we spoke with the lady and she told me

21 that she had spoken with one now, that person (Redacted) and that

22 (Redacted) had told him -- her that story that I gave, that version that I gave, to

23 the investigators.

24 Q. So let me understand you clearly. According to your information this

25 conversation did happen, but you were told about it not by (Redacted), but

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(Private Session)

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1 rather by (Redacted)?

2 A. Yes.

3 Q. And (Redacted) in turn had heard it from (Redacted) is that what you're telling
4 the Court?

5 A. Yes.

6 Q. All right. Is this what you told the investigators at paragraph 34, "We ...",
7 you -- well, from 33 you state, "I have ..." -- "Since 2002 I have known ..." -- "I have
8 known as person ...", that should be "a person" I think, "... called (Redacted) Is
9 that true?

10 A. Yes.

11 Q. And did you know him from your hometown?

12 A. Yes, I know him.

13 Q. All right. According to this you met him on (Redacted)
14 (Redacted) is that correct?

15 A. That is the story I gave.

16 Q. So it is not correct?

17 A. It is not correct.

18 Q. Did you tell the investigators, (Redacted)

19 (Redacted) Is that

20 what you told them?

21 A. Yes, I told them.

22 Q. But that was incorrect?

23 A. Yes.

24 Q. Reading on, "... who had originally told him ...(Redacted)... that Ruto's team
25 were willing to come and give him something good if we withdrew." Did you tell

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(Private Session)

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1 them that?

2 A. Yes, I said.

3 Q. (Redacted)

4 (Redacted) That's correct, isn't it?

5 A. Yes.

6 Q. "I have two phone numbers on my phone for (Redacted)" and then you provide
7 the two numbers. That's true as well, isn't it?

8 A. Yes, the numbers are true.

9 Q. And in fact you showed those numbers to the investigators? Do you
10 remember that?

11 A. Yes.

12 Q. You showed them the numbers on your phone and they took pictures of that,
13 correct?

14 A. Correct.

15 Q. (Redacted)

16 (Redacted) I presume you say that's false because you say you didn't meet
17 him; is that right?

18 A. Yes.

19 Q. All right. According to this, at paragraph 35 (Redacted)

20 (Redacted)

21 (Redacted)

22 A. (Redacted)

23 Q. (Redacted)

24 (Redacted)

25 A. Yes.

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1 Q. (Redacted)

2 A. (Redacted)

3 (Redacted)

4 Q. So in your mind were you conveying something which was true, or something
5 which was false? In other words, from your understanding did this event actually
6 happen?

7 A. It is only known to (Redacted) and (Redacted).

8 Q. Yes, but I want to understand clearly what was going on in your mind. When
9 you were told this by (Redacted), did you understand that this was something which
10 really happened or was this something which you and (Redacted) were cooking up?

11 A. (Redacted), as I had said earlier, we have been cooking a lot of materials with her.
12 So I don't know if it was true or false. You cannot judge if it is true or false.

13 Q. Do you know if there's any reason why (Redacted) couldn't simply give this
14 information to the investigators?

15 A. Yes, I had said the reason was that she was not allowed to speak with those
16 people; with the people who were inside the country.

17 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, how much more time do you
18 need?

19 MR STEYNBERG: Your Honours, I am almost finished with this statement, really I
20 won't be more than another couple of minutes, but there is one issue - one further
21 issue - I'd like to traverse. Unfortunately, regarding the refreshing of memory, it's
22 taken rather longer than I would have hoped.

23 PRESIDING JUDGE EBOE-OSUJI: The question is how much more time do you
24 need to finish?

25 MR STEYNBERG: I would estimate between 20 and 30 minutes after the luncheon

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(Open Session)

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1 adjournment.

2 PRESIDING JUDGE EBOE-OSUJI: We will take our lunch-break now and come
3 back at 2.30.

4 THE COURT USHER: All rise.

5 (Recess taken at 1.03 p.m.)

6 (Upon resuming in open session at 2.35 p.m.)

7 THE COURT USHER: All rise.

8 Please be seated.

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

10 Welcome back, parties and participants.

11 On this side of the proceedings, I understand that we have lost our connection with
12 Nairobi with the video link. Our connection to Nairobi is no longer occurring at this
13 moment. The latest we were informed by the Registry -- by the Registry is that
14 they're looking at checking back in about 20 minutes to see if there is some positive
15 development in that regard. So that is what will be -- we should -- we thought this
16 should be on the record anyway.

17 In the meantime, is there any -- Mr Steynberg, when we resume, you said before that
18 you needed 20 minutes or 30, on the outside, to complete.

19 MR STEYNBERG: Your Honours, yes, I certainly hope to stick to that. What I can
20 tell you is that, unfortunately for the members of the audience, I need to go through
21 certain names with the witness of persons I cannot mention in public and I then
22 intend to deal with one or more documents, again, which I can't mention or deal with
23 in public, and for the record these are in the binder from tabs 57 to 64. It's actually
24 four documents. It's -- one is a translation of the other -- or, four of them are
25 translations of the other four. There are certain -- I don't intend to go through them

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1 all, but there are certain isolated parts of them I wish to ask the witness about, and
2 due to the nature of these documents, your Honours, it's not something I can deal
3 with in public session.

4 PRESIDING JUDGE EBOE-OSUJI: To what extent -- I noticed -- I noticed that you
5 haven't used the PIS much and to what extent might it be possible to use the PIS in
6 order to reduce the incidents of excluding the public --

7 MR STEYNBERG: Your Honours --

8 PRESIDING JUDGE EBOE-OSUJI: -- for the proceedings?

9 MR STEYNBERG: -- I have not used the PIS for a variety of reasons. Firstly,
10 because the witness -- the evidence of this witness has not gone according to the
11 normal progression of Prosecution witnesses; secondly, because there are other
12 technical difficulties that we -- we can only show one document at a time to the
13 witness; but the third reason which causes me problems now is that the names I wish
14 to traverse with these witnesses are -- are names of persons of interest to the
15 Prosecution, but not necessarily names of people that are mentioned by him in his
16 statements and, therefore, are contained on the PI -- on the PIS.

17 One thing, your Honours, that we could profitably do to use this time is to deal with
18 the admission of certain documents that the Prosecution has already dealt with. This
19 is a matter I was going to do at the end of the testimony, but since we have 20 minutes
20 to spare, it may be that we could profitably use that time to deal with the admission
21 of certain documents I have already referred to. I'm in the Court's hands.

22 PRESIDING JUDGE EBOE-OSUJI: So you did mean to tender some documents.

23 You remember that our preference is always to do it at the point of reference to those
24 documents --

25 MR STEYNBERG: Yes.

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1 PRESIDING JUDGE EBOE-OSUJI: -- in order to avoid confusion in future.

2 MR STEYNBERG: Yes. I apologise for that, your Honours. As I've said, the
3 progression of this witness's evidence has not gone according to the normal process of
4 leading on a document and then handing it in.

5 PRESIDING JUDGE EBOE-OSUJI: All right. We will then do that.

6 The note passed up to me by the court officer indicates that it seems that the difficulty
7 on the other end of the video link has to do with power supply issues and at the
8 moment again there is no indication when precisely the difficulty might be resolved.
9 Be that as it may, you may proceed with tendering the material to -- you had in mind.

10 MR STEYNBERG: Thank you, your Honours.

11 I intend to first request for the admission of the three affidavits of the witness that
12 have been referred to during the course of this testimony. I can indicate at this stage
13 that the purpose --

14 PRESIDING JUDGE EBOE-OSUJI: Three affidavits?

15 MR STEYNBERG: Yes, your Honours. I will refer to them. There is -- he has
16 identified three affidavits -- sorry, statements. I see the confusion. The three
17 statements of the witness. I will also come to the affidavit.

18 The three statements are KEN-OTP-0109-0019, and that is his first statement to the
19 OTP dated 6 to 8 July 2013. Your Honours, I can indicate that for present purposes,
20 the purpose of the admission of this document is limited to the issue of the credibility
21 of this witness. This is a document which has been referred to extensively during
22 the course of his evidence, and should this matter ever come before a -- an Appeal
23 Court or any other person trying to make sense of this record will not be able to do so
24 without references to that document.

25 At this stage the Prosecution does not request the document be admitted for the truth

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1 of its contents. The Prosecution has, however, signalled that it intends to do so in
2 due course.

3 References have been made to Rule 68. As my learned friend for the Sang Defence
4 points out, Rule 68(2) refers to the admission of documents relating to witnesses who
5 are not before the Court. 68(2)(d) refers to people who have either not testified or
6 having testified, in the past tense, have disavowed material portions of their
7 statement.

8 So upon my reading of Article 68 -- or Rule 68(2) this is something which is normally
9 done after the witness has finished testifying.

10 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, so we do not confuse the issues,
11 you are not now -- we're not now dealing with Rule 68, are we?

12 MR STEYNBERG: Not at all, your Honours. It's simply a question of notice to my
13 learned friends so they're not under any misapprehension that by requesting the
14 admission at this stage only for the purposes of impeachment, that I'm somehow
15 abandoning what I have previously said about the Prosecution's intention to request
16 the admission for the truth of its contents, but for --

17 PRESIDING JUDGE EBOE-OSUJI: All right. Again, let's leave it at that. We now
18 understand why you mentioned Rule 68.

19 MR STEYNBERG: Yes.

20 PRESIDING JUDGE EBOE-OSUJI: All right.

21 MR STEYNBERG: So that is the first statement that the witness was shown and
22 confirmed he made that statement.

23 The second statement was --

24 PRESIDING JUDGE EBOE-OSUJI: And let's take it one at a time.

25 MR STEYNBERG: Yes, as the Court pleases.

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1 PRESIDING JUDGE EBOE-OSUJI: Defence counsel?

2 MR STEYNBERG: Sorry, before -- before Defence counsel stands up, I beg your
3 pardon, for the record it's -- I've read out the ERN number, but it's R01, so it's the
4 redacted version that I request to be admitted.

5 PRESIDING JUDGE EBOE-OSUJI: And that is the document appearing at tab --

6 MR STEYNBERG: Tab 1, your Honours.

7 PRESIDING JUDGE EBOE-OSUJI: Tab 1.

8 Counsel for the Defence? Mr Khan?

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

10 We object for at least a couple of reasons. I'm not going to get into the Rule 68. My
11 learned friend in filings and in other submissions has indicated that that's something
12 that the Prosecution think may be relevant to this case. The Bench has informed
13 them when they were given an opportunity that that was a matter that they
14 wish -- they may wish to have clarification on. And, your Honours, when we started
15 entering a discussion on Rule 68, my learned friend said he wanted to put in
16 submissions at a later stage.

17 So, your Honours, I'm not going to deal with that. Our concerns in reference to the
18 Statute and undertakings given by the ASP have been previously mentioned, that rule
19 is simply inapplicable.

20 Your Honour, the reason we say it's not -- it shouldn't be exhibited is for two reasons:
21 Firstly, my learned friend was given licence to cross-examine the witness, and extracts
22 that he thought were relevant were read into the record and those extracts, those
23 paragraphs of the statement, are already in the record.

24 It's important to note that the witness was not taken through paragraph by paragraph
25 in relation to each and every aspect of the statement. But, your Honour, be that as it

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1 may, regardless of that point, we say it will be sufficient to assist an Appeals Chamber
2 or your Honours, firstly, when you're reviewing the transcript if that statement - and
3 it applies to all of them - are simply marked for identification.
4 Now, your Honour, that would allow the transcript to be understood fully. It's
5 particularly important because when one wades through an exhibit list, I don't want
6 there to be confusion. My learned friend has given an undertaking that the
7 Prosecution is not seeking to exhibit this statement or any of the other three for the
8 truth of their purported contents, but in -- and that's quite right and I think that was
9 the correct position, but, your Honours, in circumstances where a witness has not
10 only resiled from a statement, but said under oath, under pain of punishment that
11 that statement is materially unreliable and is a fiction, a fabrication because the
12 witness wanted to gain a luxurious lifestyle, in my -- in our respectful submission, the
13 Court should be very slow to find that such a statement has sufficient indicia of
14 reliability so as to be given an exhibit number.
15 We say it can be properly dealt with by marking it for identification at this point.
16 That would allow the transcript to be fully understood and the proceedings to be
17 rendered intelligible by --

18 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, that argument you've just made, how
19 far do we take it? Does it go as far as to say that every document that we've
20 admitted on the record is reliable and upon which the Chamber must -- and the
21 Chamber must find accordingly?

22 MR KHAN: Your Honours, of course not, but my understanding at least, and of
23 course I may be wrong, is when a statement is -- when a document is exhibited, the
24 Trial Chamber have a complete discretion. When weighing the evidence, at
25 whatever stage of the proceedings, to determine any fact in issue, the Bench may give

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1 that statement such weight as they think necessary and appropriate, or may
2 completely disregard it as being unreliable.
3 Given that the Prosecution's avowed contention is not to invite the Chamber to accept
4 that evidence for the truth of its contents at this stage, we say the purpose of the
5 Prosecution and the only basis was to render the proceedings intelligible, that is
6 properly met with the normal reservations by marking it for identification. If and
7 when we get to a stage where the Prosecution seek to use any other provision of the
8 Statute, that matter, of course, can be revisited.
9 There is a record, of course, in the proceedings that may provide a basis. The law
10 can be argued and the Bench can dispose of the matter. But given the purpose - the
11 narrow purpose - that my learned friend, when given an opportunity, has
12 adumbrated, we say it should be marked for identification so that when we're looking
13 through the exhibit list at the end of the day - and I've seen Prosecution exhibit
14 lists - it doesn't have an annotation not for the truth of its contents. Given that --
15 PRESIDING JUDGE EBOE-OSUJI: What's --
16 MR KHAN: -- marked for identification is sufficient.
17 PRESIDING JUDGE EBOE-OSUJI: What's your -- the witness has, in terms of
18 reliability, in terms of reliability, that surely depends on the context of the discussion,
19 that discussion of reliability. If it is a document that came out and no one knows
20 where it came from, counsel says, "Well, we don't want that thing on the record
21 because it has not been authenticated," that's one thing, but here we have the witness
22 who says, "Yes, I made that statement, but what I'm saying is that part of that are false
23 and parts are true" and we've gone through the extent of the material that the witness
24 says is false and those he says are true and they were quite extensive. They were
25 quite extensive. Does it not make more sense then to, in light of the extensive nature

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1 of those references, to bring the documents in, knowing what the witness has said
2 about the truth of the content?

3 MR KHAN: Well, your Honour, I take the point and it's well put, if I may say so, but
4 in our respectful submission, the primary evidence that your Honours must consider
5 is the evidence under oath. And the transcript that the court stenographers
6 assiduously prepare is the record that should be the first port of call, and that record
7 will include both the cross-examination of the Prosecution of their witness, as well as
8 attempts by the Prosecution to controvert that account or impugn the credibility of
9 the witness by way of a previous statement.

10 So, your Honour, all that's in the record already. So the only purpose of the -- of the
11 previous inconsistent statement that the witness has recanted and said is a pack of lies,
12 in large part, is to understand the transcript. If that is the limited purpose, we say,
13 for the sake of clarity, it should simply be marked for identification. That way it can
14 be used. It's part of your court record, it can be used to make -- to render the
15 transcript intelligible, but it would avoid any confusion by the Prosecution, or any of
16 us, that it is accepted that it can be admitted for the truth of its contents. And indeed,
17 the Prosecution are not seeking it which, in our respectful submission, militates in
18 favour of marking it for identification. Otherwise, your Honours, why mark
19 anything for identification? The reason you seek to exhibit principally is because we
20 say it is relevant to a fact in issue, and it can be taken for the truth of its contents.

21 The Prosecution are not, so we say marking for identification renders the transcript
22 intelligible and meets the requirements of certainty and clarity that would be
23 welcomed by all parties, I'm sure. Your Honour, those are my submissions on the
24 matter.

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

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1 Mr Kigen-Katwa, quickly.

2 MR KIGEN-KATWA: Your Honours, we take the same position as submitted by the
3 Ruto team. And, your Honour, our understanding of what the Prosecution desire is
4 to make the record complete and for purposes of clarity. We submit, your Honours,
5 that by marking the document for identification, those two criterias are satisfied.
6 Your Honours will recall on our part we very -- we volunteered that the Prosecution
7 can read verbatim what they need from the statement and cross-examine the witness
8 on them so that they -- whatever they are interested in from the initial statement can
9 be brought out.

10 It is our submission that that was done exhaustively and that they attempt now to
11 introduce the statement, especially considering that the statement was not read a
12 hundred percent would be unfair. For those reasons, your Honour, we submit that
13 the statement should be marked for identification.

14 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, the argument is that if the only
15 reason you want to tender material is to make the record intelligible, your learned
16 friends are saying that you can do that by marking the document for identification.
17 Can you address that matter?

18 MR STEYNBERG: Yes. Your Honours, the purpose, as I understand, of marking a
19 document for identification is where a document is shown to a witness, a document
20 which has not yet been properly established the provenance or the authenticity, is
21 shown to a witness for his comment subject to subsequent proof. In other words if I
22 wish to show in cross-examination of a Defence witness a document produced by one
23 of my investigators I can show it to him and then say, "I will call the investigator in
24 rebuttal to prove this document," but -- but for that limited purpose it is marked for
25 identification.

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1 The purpose here is completely different. The witness has already identified the
2 document. He has confirmed that it is a statement he gave to the investigators.
3 He's confirmed his signature on the document. So on the normal requirement of a
4 showing of a proper or a reasonable connection between the witness and the
5 document, my respectful submission is that that requirement has easily been met.
6 My learned friend raises the issue of reliability, that there's no indicia of reliability of
7 the document, but with respect, your Honours, in the present circumstances that's a
8 complete red herring. The reliability of the document is only relevant if the party
9 seeking to tender it wishes to rely on the correctness and the truth of its contents,
10 which we're not seeking to do.
11 I honestly don't understand the basis of the objection. Where my learned friends say
12 I could have read the entire document verbatim - which would have taken us
13 probably a good day of court time - into the record they would have had no objection,
14 but instead because I followed a more, in my submission, efficient technique and only
15 put to the witness those parts which I deemed to be the most necessary to put to him,
16 that therefore the rest of it should fall out.
17 In my respectful submission, the -- the document itself, everything about the
18 document, everything it contains and the juxtaposition of this document versus the
19 affidavit which the witness subsequently attested to is relevant to the issue of whether
20 or not the witness's recantation is credible or not.
21 If this witness's recantation is accepted, let's not beat around the bush, it is very
22 damaging or would be very damaging to the Prosecution case. If this Chamber were
23 to accept for a moment that there was a possibility - a reasonable possibility - that
24 prosecution investigators were supporting perjury, that is something the Prosecution
25 takes very seriously.

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1 But in my respectful submission, taking into account the witness's evidence to
2 date - and I'm not quite finished yet, but the evidence already on record - as well as
3 the documents before the Chamber, this is the only way on which the Chamber can
4 reach an informed decision.

5 And on the point of marking for identification, my understanding of the situation is if
6 a document is simply MFI'd it does not form part of the record. It is therefore
7 not -- or if the matter were to go on appeal, the normal process on appeal is that an
8 Appeal Chamber is bound by the four corners of the record. That is the traditional
9 position and I don't believe it's different here. So unless the documents are admitted
10 as evidence, the Appeals Chamber would not have sight of those.

11 Now, I don't see how there can be any confusion as to the purpose for which it's
12 admitted. My learned friend has said the record is -- the transcript is the record of
13 the case - the authoritative record in the case - and it's there in the transcript.
14 Those are my submissions, your Honours.

15 PRESIDING JUDGE EBOE-OSUJI: Thank you.

16 (Trial Chamber confers)

17 PRESIDING JUDGE EBOE-OSUJI: The objection is overruled. The document will
18 be admitted on to the record. The witness clearly identified the document as a
19 statement that he had made and the Prosecutor made extensive references to aspects
20 of that document, so much so that if there was anything to be done in admitting the
21 document it might have been done already, so at this stage we might as well admit
22 the document. So the document comes in.

23 MR KHAN: I'm grateful.

24 PRESIDING JUDGE EBOE-OSUJI: The document will be marked as the next in the
25 Prosecution exhibits.

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1 THE COURT OFFICER: The document KEN-OTP-0109-0019-R01-Conf will bear the
2 number EVD-T-OTP-00132.

3 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, your next document.

4 MR STEYNBERG: Thank you, your Honours. The next document is one which is
5 connected to the first one, and that is the witness's statement of 14 July 2013 where he
6 handed to the investigators the two diaries. The reference is
7 KEN-OTP-0109-0071-R01.

8 Your Honours, the witness also identified this statement.

9 PRESIDING JUDGE EBOE-OSUJI: Tab, please?

10 MR STEYNBERG: I beg your pardon, tab 21.

11 The document has -- the witness has also identified this document as being an
12 affidavit he attested to to the investigators. He's confirmed his signature.

13 PRESIDING JUDGE EBOE-OSUJI: Do you mean statement?

14 MR STEYNBERG: Statement, I mean. I beg your pardon.

15 PRESIDING JUDGE EBOE-OSUJI: There's a difference between statements and
16 affidavits.

17 MR STEYNBERG: Yes, I'm sorry, your Honour. Where I come from all statements
18 are taken as affidavits, so I'm afraid it's hard to unlearn 25 years of habits.

19 The statement. In connection with that, also the two diaries to which we've referred
20 to. Those are KEN-OTP-0109-0082 and 0157 respectively and they are the following
21 two tabs, 22 and 23.

22 PRESIDING JUDGE EBOE-OSUJI: So the two diaries are -- they come with the
23 statement?

24 MR STEYNBERG: They are in fact --

25 PRESIDING JUDGE EBOE-OSUJI: They're annexes to the statement?

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- 1 MR STEYNBERG: They are Annexes 1 and 2 to the statement.
- 2 PRESIDING JUDGE EBOE-OSUJI: All right.
- 3 MR STEYNBERG: And in fact the statement -- the purpose of the statement is to
- 4 hand over and explain the diaries.
- 5 PRESIDING JUDGE EBOE-OSUJI: Mr Khan?
- 6 MR KHAN: No objections, your Honour.
- 7 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa?
- 8 MR KIGEN-KATWA: We would not object, your Honour. We are not objecting.
- 9 PRESIDING JUDGE EBOE-OSUJI: The documents would be admitted as the next in
- 10 the Prosecution exhibits.
- 11 MR KHAN: Your Honour, in relation to the statements, I think my learned friend's
- 12 undertaking that there's no attempt at the moment -- at the time of exhibiting these
- 13 documents for them to be used for the truth of the contents. That applies in relation
- 14 to all of the statements, so with that undertaking no objection.
- 15 MR STEYNBERG: Yes, that was an omission on my part. I confirm that.
- 16 PRESIDING JUDGE EBOE-OSUJI: That was the understanding and the Prosecutor
- 17 confirms that.
- 18 Court officer, please.
- 19 THE COURT OFFICER: One moment, Mr President. I apologize.
- 20 The document KEN-OTP-0109-0071-R01-Conf will bear the number
- 21 EVD-T-OTP-00133.
- 22 The document KEN-OTP-0109-0082-Conf will bear the number EVD-T-OTP-00134.
- 23 The document KEN-OTP-0109-0057 will bear the number EVD-T-OTP-00135.
- 24 PRESIDING JUDGE EBOE-OSUJI: Is that -- Mr Steynberg, I understand that the
- 25 second diary would be 0157, is that it?

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- 1 MR STEYNBERG: Correct, your Honours. 0109-0157.
- 2 PRESIDING JUDGE EBOE-OSUJI: So that should be the second annexure to the last
3 statement?
- 4 MR STEYNBERG: Yes, your Honour.
- 5 PRESIDING JUDGE EBOE-OSUJI: All right. The record will stand corrected. So
6 it should be -- where we now have "0057" should be "0157."
- 7 MR STEYNBERG: Correct, your Honours. That's at line 22 of page 100 that the
8 correction should be made.
- 9 PRESIDING JUDGE EBOE-OSUJI: Proceed, Mr Steynberg.
- 10 MR STEYNBERG: Thank you.
- 11 The third statement the Prosecution wishes to exhibit is the statement of 13
12 November 2013. It is KEN-OTP-0117-1019-R02. That's a redacted version. It is at
13 tab 38.
- 14 Your Honours, again this is a statement tendered at -- for present purposes only for
15 impeachment, not for the truth of its contents. Again, the witness has identified the
16 document - the statement - confirmed that he signed it and I submit that for the same
17 reasons as the previous two statements this one should also be admitted.
- 18 PRESIDING JUDGE EBOE-OSUJI: Mr Khan?
- 19 MR KHAN: No objections, your Honour.
- 20 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa?
- 21 MR KIGEN-KATWA: Your Honour, we object based on the same grounds we had
22 raised that the important aspects of that statement that had been intended to be
23 contested by the Prosecution have already been read into the record.
- 24 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa's objection is overruled. The
25 document is admitted as the next in the Prosecution exhibits.

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1 THE COURT OFFICER: The document KEN-OTP-0117-1019-R02-Conf will bear the
2 number EVD-T-OTP-00136, and I take this opportunity to correct the record to say
3 that the document KEN-OTP-0109-0157 is the document that will bear the EVD
4 number EVD-T-OTP-00135. Thank you.

5 PRESIDING JUDGE EBOE-OSUJI: Thank you.

6 Mr Steynberg?

7 MR STEYNBERG: Thank you, your Honours. The next document which I would
8 request to be exhibited is the investigators' report at tab 65. The ERN is
9 KEN-OTP-0138-0501. The basis -- R01, I beg your pardon. R01, tab 65. It's an
10 investigators' report dated 18 July 2014, and this is the report dealing with the SMS
11 sent by the witness to the field office as conveyed to the staff.
12 Your Honours, my submission is that the substance of this investigators' report was
13 confirmed by the witness, and I refer to real-time transcript 132 - that's this morning's
14 transcript - page 12, lines 4 to 12, where this issue is dealt with. The witness
15 confirms at lines 11 or 1, after I read the message out, that he remembered sending
16 such a message and, if I understand correctly, confirmed also the subsequent
17 conversation with the OTP member.

18 So on that basis I submit that the document has been sufficiently identified and
19 confirmed by the witness to warrant admission as an exhibit.

20 MR KHAN: Mr President, objection in relation to this. My learned friend, in our
21 respectful submission, the Prosecution cannot circumvent the principal of orality in
22 this manner. We have an investigator's note. The witness denied sending an SMS.
23 We don't know who the OTP representative is. We were told some unknown person
24 in a field office but no record was kept by the Prosecution of that SMS to give it to the
25 Defence and, in the circumstances, the testimony to the witness on that point will

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1 speak for itself, but the Prosecution must be constrained, we say, to the basic rules
2 that evidence must be relevant to a fact in issue and this investigators' report
3 prepared by the named individual should not be exhibited in the present
4 circumstances. So the objection is there.

5 MR KIGEN-KATWA: Your Honours, we equally object on the same grounds but, in
6 addition, your Honour, we observed the document had not been disclosed to the
7 Defence and, secondly, that it meets accurately the criteria that the Prosecution had
8 made out for marking for identification, being that that document is marked for
9 identification for subsequent identification by the party who was involved in its
10 making, and we submit that the investigator who composed the report should be the
11 one to come and identify it and possibly -- and if it can be made at that point, produce
12 it.

13 MR STEYNBERG: Thank you. Your Honours, firstly, the witness did confirm
14 sending the SMS, and I'll read it out because this is the second time my learned friend
15 has said that he didn't. I'm reading from page 12 of the record, I read the -- from line
16 4, I put it to the witness that on 18 August he sent an SMS to a member of the field
17 office, reading as follows. I then read the message out. I asked the witness "Do you
18 remember sending such a message?"

19 And at line 12 he unequivocally says, "Yes."

20 "And is it correct that the person you wanted to speak to then called you back and
21 you told him that you saw on the internet that you had been summonsed; is that
22 right?"

23 "Yes, I told him I saw... " -- it should be, I think, "... in the paper." -- and the paper.

24 MR KHAN: Your Honour, I don't want to interrupt my learned friend unnecessarily,
25 but there is obvious difference. 18 August is what the transcript says and the

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1 document he seeks to exhibit is 18 July.

2 MR STEYNBERG: Your Honours, perhaps that is something I should clear up with
3 the witness first, and it was an error on my part, but clearly he -- the witness has
4 confirmed sending the message and confirmed the contents and the relevant portions
5 of -- of this investigators' report.

6 Now, it is true that the Prosecution could at some stage call an investigator to come
7 and testify to this, but if the Prosecution is constrained to call witnesses to come and
8 testify to each and every item of information put before the Court this case will never
9 end. My friend has repeatedly asserted his client's right to a speedy trial. The
10 Chamber has discretion to admit evidence of this nature, in particular where it is
11 evidence which does not deal with the acts and circumstances of the accused. This is
12 a purely procedural matter, it is a record which is kept in the ordinary course and it is
13 a contemporaneous note of this conversation, and in itself it has indicia of reliability,
14 over and above the fact that the witness has, in my submission, confirmed the
15 contents.

16 (Trial Chamber confers)

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

18 Mr Steynberg, do you want to mark these for identification?

19 MR STEYNBERG: Please, your Honour, I would like to mark it for identification.
20 Just one other issue of clarification. I can confirm that the relevant investigators'
21 report was disclosed to the Defence on 21 August 2014. It is, in fact, one of the
22 documents included in the Regulation 35 request which the Chamber approved
23 recently.

24 PRESIDING JUDGE EBOE-OSUJI: The document will be marked as the next
25 document for identification on the part of the Prosecutor.

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1 THE COURT OFFICER: The document KEN-OTP-0138-0501-R01, confidential, will
2 bear the number MFI-T-OTP-00137.

3 MR STEYNBERG: Your Honour, the -- the last document -- well, no, the second-last
4 document I wish to seek to deal with at the moment is the screening note of 27
5 June 2013. The reference is KEN-OTP-0106-0965. I had intended to ask for the
6 admission of this document on the basis that the witness confirmed that there was
7 such a screening, but --

8 PRESIDING JUDGE EBOE-OSUJI: Tab.

9 MR STEYNBERG: Thirty-four, 3-4.

10 PRESIDING JUDGE EBOE-OSUJI: Yes, proceed.

11 MR STEYNBERG: I -- on the basis that the witness identified it, on the basis that it is
12 again a contemporaneous record, the metadata of this document will show that it was
13 registered on 1 July, that is some six days before the witness gave his first statement,
14 and on the same basis at the previous one, I'd ask for admission. Should the
15 Chamber not wish to admit the document, I ask in the alternative that it be MFied.

16 MR KHAN: Your Honour, objection on both heads, in fact. The record speaks for
17 itself, but certainly it was my recollection that the witness did not, when he went
18 through the -- the screening note with my learned friend, he didn't recall the contents
19 of the screening note at all.

20 Your Honour, in those circumstances, we really -- it can't assist the Chamber much,
21 but I'm a little bit concerned that the Prosecution say that metadata prepared by party
22 to litigation has some evidential value. That's a novel, surprising and weak
23 argument, we say, that the metadata created by party to proceedings somehow
24 renders a document admissible. So I'd say that it shouldn't be exhibited, obviously
25 we say, but even to have it marked for identification in the present

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1 circumstances -- it's not identified, so how on earth can it be marked?

2 MR KIGEN-KATWA: Your Honour, we also object to the production as an exhibit of
3 these screening notes, in part, because it was not made by the witness and the witness
4 did not identify the document, and the Prosecution has the window to have it
5 exhibited through the investigator who composed the report.

6 MR STEYNBERG: Your Honours, firstly, may I make a correction at line -- page 106,
7 line 1, I gave the ERN as 0106-0105, in fact the last four digits should be 0965. May I
8 firstly make that correction.

9 Your Honours, as regards the MFling of the document, it is not a case, as I understand
10 it, that the witness has to identify the document, if the witness were to identify the
11 document normally it would be admitted. The point is to identify the document as a
12 document which has been shown to the witness subject to subsequent proof, if
13 necessary.

14 PRESIDING JUDGE EBOE-OSUJI: Thank you.

15 (Trial Chamber confers)

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

17 MR STEYNBERG: Thank you, your Honours.

18 The final document --

19 PRESIDING JUDGE EBOE-OSUJI: One second.

20 THE COURT OFFICER: The document KEN-OTP-0106-0965 will bear the number
21 MFI-T-OTP-00138. The document is confidential.

22 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg.

23 MR STEYNBERG: Thank you, your Honour.

24 The last document I wish, at this stage, request to be admitted, and I will deal in a
25 moment with the doctor's certificate, but the document I wish to seek to admit at this

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1 stage is the affidavit of the witness dated 11 August 2014. It is at tab 68. And the
2 reference is KEN-OTP-0135-1135. And on the same basis, your Honours, as the other
3 three statements, not for proof of its contents but for the purposes only of
4 impeachment.

5 PRESIDING JUDGE EBOE-OSUJI: Mr Khan.

6 MR KHAN: On that basis, no objection. I'm grateful.

7 PRESIDING JUDGE EBOE-OSUJI: No objection?

8 MR KHAN: Indeed, no objection.

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

10 MR KIGEN-KATWA: We do not oppose, your Honours.

11 PRESIDING JUDGE EBOE-OSUJI: The document comes in as a next in the
12 Prosecution exhibits.

13 THE COURT OFFICER: The document -- sorry, the document KEN-OTP-0135-1135,
14 confidential, will bear the number EVD-T-OTP-00139.

15 MR STEYNBERG: Thank you, your Honours.

16 Finally, I wish to deal with one document, which is not a prosecution exhibit --

17 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, one second. Just so we're clear
18 on the record, it just occurred to me that the ERN number you indicated, which ends
19 with 1135, is in fact the lawyer's letter, under the cover of which the affidavit was
20 communicated. The affidavit itself appearing at ERN -- that ends with 1137, and we
21 also have another document at 1140. The intent, of course, was you spoke to the
22 affidavit that comes in, so that is intent, but do you also wish the accompanying
23 documents including the lawyer's letter to come in as well?

24 MR STEYNBERG: Your Honours, the witness certainly confirmed the last
25 handwritten document at 1140, so, yes, I would certainly ask that that goes in on the

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1 same basis, also not for the proof of its content.

2 Your Honour, I didn't specifically show the witness the covering email, but I believe it
3 is on record that the affidavit -- the recanting affidavit was forwarded to the OTP by
4 this lawyer.

5 PRESIDING JUDGE EBOE-OSUJI: So we are on the same -- we are speaking the
6 same language, this doesn't look to me like an email, it looks like a letter written --

7 MR STEYNBERG: Yes.

8 PRESIDING JUDGE EBOE-OSUJI: -- by Kipsang & Mutai Advocates under the
9 colour of their -- under their letterhead appearing in red, or orange, as the case may
10 be.

11 MR STEYNBERG: Your Honour, I spoke imprecisely. This letter was
12 emailed -- put it this way: The affidavit was emailed to the Prosecution under cover
13 of this letter as an attachment, so this is not the email, but this is the document which
14 we received via email, we disclosed it, as such, to the Defence, and unfortunately it
15 has been registered as one document. So if only one or other is -- is to go in we
16 would have to then re-register it, I understand it, under separate ERNs.

17 Alternatively, if the Chamber is not satisfied that the entire document should go in,
18 which I submit it should, because it goes to the surrounding circumstances, but if not
19 then the Chamber could simply make an order that only certain pages are admitted
20 on to the record.

21 PRESIDING JUDGE EBOE-OSUJI: All right. The point I make is not to express
22 doubt as to whether the sandwiching documents -- the documents sandwiching the
23 affidavit should not come in, it is just to point it out so that we have clarity on the
24 record. And you've now made it clear that you want the three documents to come in.
25 I take it you have no objection, Mr Khan.

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1 MR KHAN: No objection for the -- for the affidavit, the handwritten note and also
2 the first document, the letter from the lawyers. All to be exhibited under the same
3 ERN sequence.

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

5 MR KIGEN-KATWA: We have no objection, your Honours.

6 PRESIDING JUDGE EBOE-OSUJI: All right. So in that case the three documents
7 will come in under the same ID number.

8 Court officer, there is no need for you to re-work your record. Thank you.

9 MR STEYNBERG: Thank you, your Honours.

10 The final document is the doctor's certificate which was produced by Mr Mutai on
11 behalf of the witness and which was sent to the Chamber via the Registry, if I'm not
12 mistaken. This is the doctor's certificate dated 27 August 2014. I did make
13 reference to this medical certificate in the course of my questioning of the witness.
14 He confirmed portions of it relating to his financial situation, for instance. And for
15 the completeness of the record, I submit that this document should also be exhibited,
16 again, not for the truth of its contents but simply as a document which was put to the
17 witness and on which he commented and confirmed -- he confirmed that this was in
18 fact the medical certificate he -- he obtained.

19 PRESIDING JUDGE EBOE-OSUJI: Mr Khan?

20 MR KHAN: No objections, your Honour.

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

22 MR KIGEN-KATWA: We do not object, your Honour.

23 PRESIDING JUDGE EBOE-OSUJI: The document then is admitted as the next in the
24 Prosecution exhibits.

25 THE COURT OFFICER: Mr Steynberg, could you please repeat the ERN number of

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1 that last document.

2 MR STEYNBERG: That is something I omitted to deal with. This document of
3 course does not have an ERN because it was a document which has been submitted
4 via the Registry to the Chamber, so it's not a Prosecution exhibit, so I would request
5 that CMS assign to it an ERN or if -- or is it necessary for the Prosecution to do that?
6 Perhaps I could be guided.

7 THE COURT OFFICER: The Prosecution should attribute an ERN number to the
8 document a posteriori. We will provide you with an EVD number right now.

9 MR STEYNBERG: I'm happy to do that, your Honours, if the Chamber is happy
10 with that -- with that arrangement.

11 Your Honours, my support team has overtaken me. I understand that, in fact, an
12 ERN number has been assigned. So I can provide that immediately.

13 PRESIDING JUDGE EBOE-OSUJI: All right. That solves the problem then.

14 MR STEYNBERG: For the record, the ERN number will be KEN-OTP-0140-0054.
15 Thank you, your Honours. And it's unredacted. I imagine this will be a
16 confidential document.

17 THE COURT OFFICER: The document KEN-OTP-0140-0054, confidential, will bear
18 the number EVD-T-OTP-00140.

19 PRESIDING JUDGE EBOE-OSUJI: Thank you.

20 MR STEYNBERG: Thank you, your Honours. That exhausts the documents which
21 I have referred to already. There may be a few more tomorrow that I have referred
22 to earlier I can't refer to in open session.

23 It would appear that we still do not have a feed. I note the time is approaching half
24 past three. I don't know whether there's really any prospect of resuming the feed
25 before 4 o'clock, but we remain at the Court's disposal.

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1 PRESIDING JUDGE EBOE-OSUJI: (Redacted)

2 (Redacted)

3 (Redacted) hopes of continuing with Nairobi today

4 is next to slim.

5 MR STEYNBERG: Yes. Well, obviously we're in the Court's hands, but in the

6 circumstances perhaps it would be best not to keep everybody waiting around.

7 PRESIDING JUDGE EBOE-OSUJI: All right.

8 (Trial Chamber confers)

9 PRESIDING JUDGE EBOE-OSUJI: All right, it is now 3.30. Ordinarily we rise at 4,

10 so we will have to adjourn for the day now, so we will be losing 30 minutes, but we

11 will make it up tomorrow. We will start at 9 a.m. and not 9.30 as usual.

12 So the Court will adjourn.

13 THE COURT USHER: All rise.

14 (The hearing ends in open session at 3.30 p.m.)

15 RECLASSIFICATION REPORT

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

17 2013, and the instructions in the email dated 8 January 2015, the version of the

18 transcript with its redactions becomes Public.