

Trial Hearing
Witness: KEN-OTP-P-0495

(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 Friday, 5 September 2014
10 (The hearing starts in open session at 9.10 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.
17 Situation in the Republic of Kenya, in the case of The Prosecutor versus
18 William Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11.
19 We are in open session.
20 PRESIDING JUDGE EBOE-OSUJI: Thank you.
21 Mr Steynberg?
22 MR STEYNBERG: Yes, good morning, your Honours. This morning the
23 Prosecution is -- well, there's one change. Melissa Simms is in the place of
24 Alice Zago.
25 PRESIDING JUDGE EBOE-OSUJI: Thank you.

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1 MR NARANTSETSEG: Good morning, Mr President. Our team remains the same.

2 Thank you.

3 MR KIGEN-KATWA: Good morning, your Honours. Mr Sang's team remains the

4 same.

5 PRESIDING JUDGE EBOE-OSUJI: Thank you.

6 MR KHAN: Mr President, your Honours, good morning. The Defence team for

7 Mr Ruto, who is in court, remains the same.

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

9 For the purposes of our procedure this morning, there is another witness. One of the

10 second summonsed witnesses has appeared and we will need to go into private

11 session to discuss procedural matters relating to that witness. We will now go into

12 private session.

13 *(Private session at 9.12 a.m.) Reclassified as Open session

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

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

16 Nairobi, you are with us?

17 THE COURT OFFICER (via video link): Yes, Mr President. We hear you loud and

18 clear and we see you very well.

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

20 Witness 495, welcome.

21 THE WITNESS (via video link): (Inaudible).

22 PRESIDING JUDGE EBOE-OSUJI: I did not hear that. Are you able to speak a little

23 louder so I can hear you?

24 THE WITNESS (via video link): Yes, I am the Witness 495.

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

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- 1 your name on the record?
- 2 THE WITNESS (via video link): (Inaudible).
- 3 PRESIDING JUDGE EBOE-OSUJI: You're coming in very, very faint. Can you
- 4 speak louder?
- 5 THE WITNESS (via video link): My name is (Redacted). My name is
- 6 (Redacted).
- 7 PRESIDING JUDGE EBOE-OSUJI: (Redacted)?
- 8 THE WITNESS (via video link): Yes.
- 9 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 10 THE WITNESS (via video link): Yes, your Honour.
- 11 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. Welcome to the Court.
- 12 And you're appearing before us today -- while you are in Nairobi, you're appearing
- 13 before us via video link because you have been summonsed by the Court to appear.
- 14 The summons served upon you was on the basis of a decision of the Chamber
- 15 requiring your appearance to give testimony. The Chamber appreciates you
- 16 respecting this summons and we will tell you that you will continue to be bound by
- 17 this summons until the Chamber has discharged you. That means you're still bound
- 18 to appear until we have said, "All right, you have done your job. You're now free to
- 19 go. This summons no longer binds you." Do you understand?
- 20 THE WITNESS (via video link): Yes, your Honour, I understand.
- 21 PRESIDING JUDGE EBOE-OSUJI: We will not be commencing your testimony
- 22 today for a number of reasons. One of those is there was another witness ahead of
- 23 you, or there is another witness ahead of you, and we are still in the middle of that
- 24 witness's testimony and so we cannot do the two at the same time.
- 25 But there is also another important reason why we will not be starting your testimony

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1 today and that is because the Court -- the section of the Court called the Victims and
2 Witnesses Unit -- they are not part of the Prosecution and they are not part of the
3 Defence. They are a central, neutral office in the Court that helps witnesses who are
4 appearing to make life easier for them, ask them questions about what their needs are
5 and how those needs can be accommodated, medically and otherwise, and also go
6 through some processes with these witnesses to make the process of testifying less
7 stressful to witnesses.

8 We call the unit Victims and Witnesses Unit and they will normally undergo or
9 undertake their job of meeting with witnesses and doing what they need to do with
10 witnesses before they testify.

11 We understand that that has not been done with you and they will need to do those
12 things with you, so it is important that they do that and before we start the testimony.

13 So that's another important reason why we cannot start your -- why we should not
14 start your testimony immediately. So over the next few days the Victims and
15 Witnesses Unit will need to do that work. Do you understand?

16 THE WITNESS (via video link): Yes, your Honour, I understand.

17 PRESIDING JUDGE EBOE-OSUJI: Thank you.

18 Now, there may be a matter of having a lawyer be on hand with you, or for you,
19 while you testify in this case. Do you understand that?

20 THE WITNESS (via video link): Sorry, repeat it, your Honour. (Inaudible)

21 PRESIDING JUDGE EBOE-OSUJI: I'm saying that there may be a need for a lawyer
22 to be assigned to you so that a lawyer that can be on hand over there with you while
23 you are testifying for us. I understand you've also given a thought to the matter; is
24 that the case?

25 THE WITNESS (via video link): Your Honour, my interest was that -- to have my

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1 own lawyer representing me.

2 PRESIDING JUDGE EBOE-OSUJI: You want to have your own lawyer represent
3 you?

4 THE WITNESS (via video link): Yes, your Honour.

5 PRESIDING JUDGE EBOE-OSUJI: All right. Do you have any particular lawyer in
6 mind?

7 THE WITNESS (via video link): Your Honour, the time I was served and the time I
8 am in court is too short for me to look for that lawyer and I request time so that I can
9 look for one.

10 PRESIDING JUDGE EBOE-OSUJI: You know that the Court has a lawyer,
11 I understand, standing by for you, already assigned to you. Do you understand that?
12 Have you been told that?

13 THE WITNESS (via video link): I have been told that, but I requested to have my
14 own lawyer.

15 PRESIDING JUDGE EBOE-OSUJI: Why is that?

16 THE WITNESS (via video link): A lawyer whom I can communicate with him in
17 either language of Swahili or even Kalenjin if possible.

18 PRESIDING JUDGE EBOE-OSUJI: I see. You want a lawyer that -- with whom you
19 can speak in Swahili and possibly Kalenjin if need be?

20 THE WITNESS (via video link): Yes.

21 PRESIDING JUDGE EBOE-OSUJI: All right. There is a process we have in court,
22 there is a list of lawyers who are created by the Registry of the Court, the relevant
23 department, the people who deal with lawyers, and on that list we make it a matter of
24 procedure, so far, to appoint people who will appear before the Court on the basis of
25 that list, so it is important that anybody you are thinking of will have to be on that list.

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1 Do you know what I'm talking about?

2 THE WITNESS (via video link): I have understood, your Honour.

3 PRESIDING JUDGE EBOE-OSUJI: Yes. Mr Felipe will also explain that to you later.

4 One thing -- so whoever -- since we're not starting your testimony immediately and

5 you want somebody else than the lawyer standing by for you already appointed, you

6 want somebody else to represent you, whoever you are thinking of, make sure you

7 bring to their attention that it is important that they are on the list, the ICC list of

8 lawyers. That is important. And it is also important that when we want to start

9 your testimony, that there is no delay because this has not been done because the

10 person has not been on the list of lawyers. So you make sure that they assure you

11 that they're either on the list already or that they will promptly put their

12 names -- apply to the Court, they will know -- should know how to do it so that

13 they're on the list and we're ready to go once we need you to start your testimony.

14 Do you understand?

15 THE WITNESS (via video link): I understand, your Honour.

16 PRESIDING JUDGE EBOE-OSUJI: All right. And part of why that needs to be

17 done quite quickly is because whoever is assigned to you as your counsel will be

18 asking for certain material to be given to them, like statements you may have made,

19 and so the sooner the person is on the list and assigned, the sooner they can have the

20 access to those materials. We don't want a situation where they are appointed too

21 late and we -- we want you to start testimony and the lawyers start saying, "Well, I

22 just received this thing, the statement, so we need an adjournment." We don't want

23 that. Do you understand?

24 THE WITNESS (via video link): I understand, your Honour.

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

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1 Now, as I told you earlier, you continue to be bound over, meaning you continue to
2 be bound by the summonses until you are discharged, and the VWU will do that
3 familiarisation process with you. As soon as they finish that familiarisation process,
4 they will let us know, and then we will schedule a date you will be appearing before
5 the Court. We are -- that is likely to be next week, as soon as that. We're hoping
6 that that is the case, so please continue to be on standby, okay?

7 THE WITNESS (via video link): Yes, your Honour. I still have some two requests.

8 PRESIDING JUDGE EBOE-OSUJI: Yes, please, what are those?

9 THE WITNESS (via video link): When I am asking about time is that I would also
10 need to have the documents to testify on so that I can go through and at the same time
11 have time to give instructions to my lawyer about the issue because this case -- about
12 a case that is in the Chamber.

13 PRESIDING JUDGE EBOE-OSUJI: How much --

14 THE WITNESS (via video link): And also -- and also I am -- in my family, in fact, I
15 left them without even telling them how -- how long am I going to be in Nairobi, so I
16 would also request time so that I can prepare and look for even some money for the
17 lawyer who is going to assist me.

18 PRESIDING JUDGE EBOE-OSUJI: Now, how much time are you looking at, you're
19 asking for?

20 THE WITNESS (via video link): At least three weeks.

21 PRESIDING JUDGE EBOE-OSUJI: At least three weeks. That's too --

22 THE WITNESS (via video link): Yes.

23 PRESIDING JUDGE EBOE-OSUJI: -- much time.

24 THE WITNESS (via video link): Yes, your Honour.

25 PRESIDING JUDGE EBOE-OSUJI: Yes, that's a lot -- that's too much. What you

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- 1 can do for now is immediately, as soon as -- one second.
- 2 All right, the suggestion I make to you is when you deal with the VWU, who would
- 3 take over as soon as we let you out of the courtroom today, work out with them a
- 4 programme of meetings that will allow them to do their work of familiarising you.
- 5 The time -- that timetable will also enable you to explore what sort of lawyer you
- 6 want of your own to represent you. Try and do that quickly so that the time is
- 7 minimised when we want you, we don't spend a lot time -- now you indicated that
- 8 the -- you want access to your documents and familiarisation -- and know what you
- 9 have said before. That is part of what VWU would normally do in what they need to
- 10 do with you, they would be taking you through your statements. So that's one thing
- 11 that we can already, you know, put you at ease with to the extent we can do so.
- 12 All right, but just go about quickly looking at the lawyer you want to appoint as soon
- 13 as we're done today, okay?
- 14 THE INTERPRETER: A brief message from the interpreters: Would it be possible
- 15 to do something with the sound because it is very poor quality? Thank you.
- 16 PRESIDING JUDGE EBOE-OSUJI: If you do not -- if you're not -- if you don't have
- 17 your own lawyer set up and whom we can appoint of your own choice, we will have
- 18 to -- you will have to make do with the lawyer that the Court will assign to you and
- 19 we will not be waiting for three weeks to start your testimony. Okay?
- 20 THE WITNESS (via video link): Yes.
- 21 MR STEYNBERG: Your Honours, if I may, I believe the interpreters were speaking
- 22 at the same time as your Honour was speaking. I'm not sure whether -- whether the
- 23 witness would have got everything you said.
- 24 PRESIDING JUDGE EBOE-OSUJI: Thank you very much for reminding me also the
- 25 need to pause.

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1 Witness, what I'm saying is this: You need to go about getting -- that lawyer you
2 have in mind, you need to go about doing that very quickly and making sure that all
3 is clear for their appointments. That means that they are on the list of counsel who
4 can practise before the Court.

5 If by the time we need you to start your testimony you have not yet got this person
6 we have in mind and that they are ready to proceed within a reasonable time, we will
7 have to proceed with you with the lawyer that the Court would appoint to represent
8 you, we will appoint our own lawyer who would be representing you, but these
9 lawyers are very professional so they will be representing you with your own interest
10 in mind, as they are required to do.

11 So it's in your interest to quickly go and get this other lawyer you have in mind; do
12 you understand?

13 THE WITNESS (via video link): I understand you, my -- your Honour.

14 PRESIDING JUDGE EBOE-OSUJI: Thank you.

15 Is there anything else, counsel here, that we need to turn our minds to?

16 MR STEYNBERG: Your Honour, yes, if I may make four observations. The first is
17 that I note that the witness has indicated that finances for the lawyer may be a
18 problem. He mentioned earlier that he might require time to get the necessary
19 money to brief a lawyer. May I request that the Chamber inform him that the duty
20 counsel who will be made available will be paid for by the Court so will be available
21 to him free of charge.

22 May I also suggest that the witness be informed that if there is any problem
23 communicating with the lawyer who is appointed by the Registry, interpretation
24 facilities may be made available by the Registry to assist in that communication.

25 Thirdly, may I request that the Chamber indicate to the witness the limit of the

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1 representation that that lawyer will be entitled to provide him before this Court,
2 which I presume will be limited to protection against self-incrimination under Rule 74.
3 So there's no necessity to prepare a criminal defence here. It's a very, very limited
4 mandate which one would hope the lawyer would be able to prepare himself for
5 in -- in a short time.

6 And, finally, may I ask that the witness be advised that the normal process for
7 witnesses is that preparation is conducted by the Prosecution, which we stand ready
8 to do should he agree to do so, but of course he's under no obligation to consult with
9 the Prosecution if he does not wish to do so.

10 Thank you, your Honours.

11 MR KHAN: Mr President, your Honours, any lawyer that is assigned by CSS to
12 provide representation to the witness will be paid for provided the indigency
13 requirements are made out. So whether or not it's the duty counsel or lawyer of
14 one's choice, the legal aid provisions do not discriminate and those legal fees would
15 be covered provided that CSS satisfy themselves that the witness concerned is
16 indigent and does not have sufficient means to pay himself.
17 Your Honours, the witness, of course -- I think your Honour touched upon it
18 that -- by saying that a lawyer should be contacted promptly, but as it may be helpful
19 to advise the witness that CSS are able to process matters quite quickly, and so the
20 quicker he identifies a lawyer and that lawyer fills in the proper forms, the quicker
21 the lawyer can be on the list of counsel, if the lawyer is not already on the list, and the
22 quicker the assignment can be made. I'm grateful.

23 MR KIGEN-KATWA: I have nothing to say, your Honours.

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

25 Witness, you've heard the discussion between the lawyers. Did you hear all that?

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1 THE WITNESS (via video link): Yes, your Honour, I've heard.

2 PRESIDING JUDGE EBOE-OSUJI: All right. Now, they are generally correct in

3 what they have said, both of them, and the -- as you heard the two lawyers, the

4 Prosecutor and the Defence lawyer for Mr Ruto, have said that it may be the case, it

5 may be the case that the Court will pay for the lawyer that is assigned to you, that

6 lawyer you're thinking of hiring yourself, it may be the case that the Court will pay

7 for his/her services if you are too poor, according to the Court's own standard, to pay

8 for a lawyer yourself. There is an assessment that the Counsel Support Section of the

9 Court does to see who is given legal aid; that is so the Court pays for their lawyer.

10 And the Prosecutor is also right that, if we have to proceed with the case by assigning

11 the Court's own lawyer to you, the matter of language should not be too difficult

12 because the Court has facilities to do translation and interpretation.

13 And it is also the case that often when witnesses want to come to court, they rightly

14 worry that they want to speak in a language that everyone can understand. They

15 want to speak in a -- sorry, they want to speak in a language they feel comfortable,

16 knowing that they've expressed themselves as they would like to, but it's also the case

17 that in that much care -- and this is more difficult with people who are able to speak

18 more than one language, be it English or French as the Court's languages are, and

19 another language like Kiswahili or something else. Then there's that worry where,

20 "I can speak all these languages, but I'm more comfortable in one than the other."

21 It is often the case that people can underestimate their own ability to communicate

22 clearly in that language they think they do not speak comfortably in. That often

23 happens, so you need to keep that in mind. Your ability to speak and be understood

24 very clearly in English may just be enough -- more than enough for what the Court

25 needs and more than enough for what any lawyer who the Court assigns to you

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1 needs. So keep that in mind.

2 The Prosecutor mentioned that any lawyer that's assigned to you is not being
3 assigned to you as if you are an accused person in a court -- if you are the accused
4 person being prosecuted in this case. He's right in that regard, but still the -- if there
5 is any concern that what you say may be used against you later, it is something -- it is
6 for that reason that we're assigning a lawyer to you.

7 But we need not worry about that now for you, it is a discussion we will have with
8 any lawyer who is assigned to you, but you only need to know that you're not hiring
9 a lawyer to come and defend you as if you're one of the accused persons we are now
10 prosecuting this minute in this case. That's not what's going on -- whom we are
11 trying, rather.

12 Another matter the Prosecutor mentioned, which I should also repeat, is that
13 normally when witnesses come to testify, in addition to the meetings they would have
14 with the VWU, the familiarisation process, the lawyer who invited the witness to
15 come and testify in court - in this case the Prosecution is the one who wants you to
16 come - they are entitled to meet with you and also to help you prepare for your
17 testimony so it is also less stressful for you. That is the purpose.

18 So it is an invitation they're extending to you, but it is for you also to decide whether
19 you want to meet with them. If you think that such a meeting will cause you more
20 stress than less, then you think about it whether you want to meet with them. It's
21 entirely up to you, all right?

22 THE WITNESS (via video link): Yes. Yes, your Honour.

23 PRESIDING JUDGE EBOE-OSUJI: All right. I think that will be it for this witness.

24 Now, thank you again for coming today. We will now let you go for now, so that all
25 those processes I talked about can begin with the Victims and Witnesses Unit and also

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1 to enable you to look for that lawyer who you will promptly tell to apply to be on the
2 list of counsel if they're not on it already. Thank you.
3 THE WITNESS (via video link): Thank you, your Honour.
4 PRESIDING JUDGE EBOE-OSUJI: Yes, Mr Felipe. You may escort the witness out.
5 How long will it take you to bring back 604?
6 THE COURT OFFICER (via video link): (Inaudible)
7 PRESIDING JUDGE EBOE-OSUJI: Sorry, Mr Felipe?
8 THE COURT OFFICER (via video link): Yes, Mr President.
9 PRESIDING JUDGE EBOE-OSUJI: Do not bring 604 in yet. We are still discussing
10 the application made by the Prosecutor. So it is enough for you just to escort 495 out
11 of the court -- out of the location.
12 THE COURT OFFICER (via video link): Okay. I will escort him out, Mr President.
13 (The witness exits the video-link room)
14 PRESIDING JUDGE EBOE-OSUJI: We will go back to open session.
15 (Open session at 9.38 a.m.)
16 THE COURT OFFICER: We are in open session, Mr President.
17 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
18 We adjourned yesterday with the arguments being made on the Prosecutor's
19 application to have Witness 604 declared a hostile witness at their instance.
20 Ms Buisman was about to address the Court on the matter.
21 Ms Buisman?
22 MR STEYNBERG: Your Honours, perhaps before Ms Buisman rises, we were sent a
23 schedule yesterday saying that we would break after this witness and recommence at
24 10 o'clock, so we don't have the right team in court at the moment. Well, there'll
25 only be one change, but I don't know whether your Honour's planning to change that

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1 schedule. It was sent from CMS at 16.29, saying that the second session would be
2 from 10 to 11.30.

3 PRESIDING JUDGE EBOE-OSUJI: I see that. I see that.

4 All right. I was wondering whether it was necessary to proceed, but I understand it
5 is necessary because of technical matters that need to be attended to in Nairobi. So
6 we will adjourn now and come back at 10.

7 THE COURT USHER: All rise.

8 (Recess taken at 9.40 a.m.)

9 (Upon resuming in open session at 10.07 a.m.)

10 THE COURT USHER: All rise.

11 Please be seated.

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

13 Ms Buisman.

14 MR KHAN: Mr President, before my learned friend rises, can I just ask, raise one
15 short matter so the Bench can consider it? Your Honour, I'd like some clarification
16 from the Bench. Mr Ruto has been here all this week and I wanted clarification, is he
17 required to be here on Monday, which would -- or is he released at the end of today?
18 Of course he had planned official duties back in Kenya so that he was here this week
19 in compliance with the Court order. Of course we'd very much like it for him to go
20 back and resume those duties, and that's why I raise the application now, or I raise
21 this issue for guidance from the Bench. Is he released at the end of today? He has
22 been here five days. Or do you require him to be here over the weekend and then, of
23 course, on Monday?
24 That will, of course, cause inconvenience in relation to official duties that have
25 already been scheduled back home.

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1 PRESIDING JUDGE EBOE-OSUJI: We will get back to you on that during the course
2 of the day.

3 MR KHAN: I'm most grateful.

4 PRESIDING JUDGE EBOE-OSUJI: Ms Buisman.

5 MS BUISMAN: Thank you, Mr President. Good morning. I actually have a few
6 authorities to hand out. I won't dwell on them, but I thought for a matter of
7 clarification. So if you could?

8 (Pause in proceedings)

9 MS BUISMAN: Yesterday we spoke about -- well, first of all, let me state our
10 position clearly. We share all the observations already made by the Ruto Defence on
11 this.

12 At best this application is premature, but first and foremost we think it should be
13 rejected. The general position is, as we have discussed yesterday, that a party may
14 not discredit his own witness and they should not call a witness for the simple reason
15 to put him down. And just to give a reference for that that has already been
16 discussed yesterday, one of them that I just gave out is the Limaj case, 1 February
17 2005, at page 2736, lines 12 and 13, which is the general position set out.

18 And importantly, at lines --

19 PRESIDING JUDGE EBOE-OSUJI: Sorry, one second. Which document are we
20 referring to now?

21 MS BUISMAN: This is the case of Limaj, ICTY, 1 February 2005, at page 2736.

22 PRESIDING JUDGE EBOE-OSUJI: 2736. Proceed.

23 MS BUISMAN: So at lines 12 and 13, the general position is set out that, as I just said,
24 that parties should not call a witness just to discredit a witness. And lines 17 and 18
25 importantly, as my learned colleague yesterday already stated, there is a material

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1 distinction between an unfavourable witness and an adverse one. So it doesn't -- it's
2 not sufficient for someone to give unfavourable answers. It must be an adverse
3 witness and that must be shown as is stated at line 20.
4 Yesterday we heard this from Mr Khan and he cited the Katanga case --
5 PRESIDING JUDGE EBOE-OSUJI: But let me stop you there, is adverse the same
6 thing as hostile?
7 MS BUISMAN: In legal terms, yes.
8 PRESIDING JUDGE EBOE-OSUJI: Is it? All right. Continue.
9 MS BUISMAN: You can be -- there's a limited extent to which a witness can adverse.
10 That doesn't necessarily qualify him as hostile, if that's what you mean. But in this
11 particular situation where a witness at least must adverse to the party in order to
12 qualify as hostile. It's a minimum criteria.
13 And what does that mean? It means, as Mr Khan pointed out yesterday, that
14 someone is not desirous of telling the truth. And again I just refer to the references
15 in Limaj at page 2736, line 24 up to 2737, '37, line 1, and that's also repeated at 2738,
16 lines 3 to 7. And then there's also another reference at page 2143. I don't want to go
17 too much into details in that.
18 But the most important thing is, and this is also cited yesterday in the Lubanga
19 decision cited by my colleague, this is page 89 of the transcripts, there must be a
20 wholesale change of account, and there is no such thing in this case. It doesn't
21 sufficient -- it is not sufficient that someone is somewhat evasive and doesn't give the
22 exact answers that the Prosecution or the party calling the witness wants to hear. It
23 also doesn't -- it is not sufficient that someone departs from his statement. It has to be
24 a very fundamental change of account.
25 And in this particular situation we are dealing with two statements that he's given,

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1 one that is favourable to the Prosecution and another one that is recanting. And the
2 Prosecution has made -- has taken the position that the first one is the accurate one
3 and the second one is not, so that there is already that as a starting ground, is if the
4 witness sticks to his second statement, does that make him -- does that make him
5 someone who departs from a statement he made earlier?
6 And let me emphasise because in Katanga, this is also one of the -- I just handed it out
7 as well, and this was also referred to yesterday. The case was somewhat -- well, it
8 was actually much different in the sense that we dealt with a witness who was giving
9 a lot of information, a lot of information that he wasn't giving in court, and in fact it
10 went way further than what we've seen here. He didn't go into any of the details
11 about the presence of civilians, child soldiers, existence of ammunition and supply,
12 and yet the Chamber came to the conclusion that this was not a hostile witness and
13 they said, and this is at lines 3 to 10 in your -- this is page 20 of your -- also your
14 handout, I mean, that -- this is what they say, "Minimising previous declarations or
15 statements with regard to previous subjects or answers, none of this is sufficient, or
16 answers that are not as complete."
17 So that's, as far as we are concerned, the standard, and but we are so far from any of
18 this, Mr President, because we're dealing with someone who has not been evasive at
19 all, has been answering all your questions. And there's only been one time when he
20 said, "I'm reserving my right not to incriminate myself.", but when you gave the
21 explanation you did, he was very perfectly happy to answer the question.
22 So we haven't seen a witness who's been evasive. We have not seen a witness who
23 was not willing to answer any questions. And contrary to what the Prosecution
24 asserted, we were talking about demeanour, they said demeanour is not that
25 important.

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1 Well, again I have a reference for that in the Limaj case that, in fact, demeanour is
2 important. And in this particular case he had a perfect -- he had a demeanour of
3 someone who is telling the truth, who was giving answers as he knew them well.
4 And so we -- we see no -- there's absolutely no evidence of either an adverse or a
5 hostile witness, so we are very far.
6 In addition, the Prosecution hasn't explored any of the areas they could have explored.
7 They -- the witness said, "Some of it I told them earlier was true and some of it was
8 not true." Until now we haven't heard what was true and what is not true because
9 they didn't actually ask any follow-up questions.
10 So on -- in addition, we know that the Prosecution said, "This witness is adverse to us
11 as a party because he stopped co-operating and he is here under -- he is only here
12 because he was compelled to turn up." It's true that he was ordered to turn up, but
13 he did and there was no suggestion -- there's been no suggestion yet that he's facing
14 penalties if he doesn't, so he did come by his own volition. It's very important.
15 And it's also true that he has given -- as I said, he's given lots of answers and he hasn't
16 been exonerating any of us. He's giving his statement and I think at this statement
17 we should just carry on listening to what he has to say.

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

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1 (Redacted)

2 PRESIDING JUDGE EBOE-OSUJI: (Redacted).

3 MR STEYNBERG: Thank you, your Honours.

4 Your Honours, listening to my learned friend's argument, I wondered at times
5 whether we were sitting in the same courtroom.

6 This witness has departed fundamentally from the version that he's given to the
7 Prosecution, and if the Court will bear with me, I will demonstrate that, if I can find
8 the piece of paper.

9 In the first instance, we know he has deposed to an affidavit, which is confirmed
10 before this Court under oath. So, yes, it may be that I haven't taken him through that
11 affidavit. He's confirmed it, we have the contents before it and we can simply read it
12 and on the basis of that, draw conclusions on whether or not he has departed.

13 And I refer your Honours to paragraph 8 of that - and it's in the last tab of
14 your Honours' bundle - where he recants the following four topics: (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 PRESIDING JUDGE EBOE-OSUJI: Wait, wait, wait. Before we proceed, first of all,
21 the point now being engaged in and what is the basic purpose of declaration of
22 hostility or adversity is that it boils down to this where the calling party, host counsel,
23 if you like, has a witness on the stand and the host counsel already had previous
24 statement of a witness on hand, and the witness takes the stand and gives evidence
25 that is inconsistent with the previous statement and the host counsel says, "Well, we

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1 now have a difference between what has been deposed to on the stand under oath
2 before the Court and a previous statement."

3 Isn't that the fundamental point? Has that really happened? Can we say -- can you
4 say that that has happened merely because the witness has sworn an affidavit, yet
5 another previous inconsistency? Or do we need first to get to a certain area of
6 interest to the testimony of the witness -- of interest to the party calling the witness,
7 see what the witness says, if what the witness says is inconsistent, the party say,
8 "There is testimony, that testimony is inconsistent with the previous statement so I
9 need to explore that"?

10 Isn't that the bottom line in all of this? Has that happened?

11 MR STEYNBERG: Your Honours, in the Prosecution's submission, yes, it has
12 happened, and I will demonstrate that shortly.

13 But before I go off the point of the statement, the fact that he has confirmed -- sorry,
14 the affidavit, the fact that he has confirmed that affidavit, in my submission, is
15 sufficient. It is not necessary for him to confirm -- to have read out each and every
16 paragraph. He said -- he made that statement three weeks ago, he knows what's in it,
17 he confirms it. That statement recants material portions of his original statement,
18 but it goes further than that.

19 PRESIDING JUDGE EBOE-OSUJI: But he also says on the stand when questioned,
20 the witness did say, "In my previous -- in the affidavit some things I said in it were
21 false and some things true."

22 MR STEYNBERG: Yes.

23 PRESIDING JUDGE EBOE-OSUJI: If I'm wrong, correct me. Also said the same
24 thing about the previous statement, that "Some things in the previous statement are
25 false, some things I said in the previous statement are true."

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1 MR STEYNBERG: Your Honours --

2 PRESIDING JUDGE EBOE-OSUJI: If that is -- if that is the case, is there no necessity,
3 even an obligation to say, okay, let's now -- not everything you say in a statement
4 might be of interest to the Court, so it may well be that what you have in mind as true
5 or false may not be of interest, but there are some things of interest, let's go to those
6 areas. I'm interested in this, you elicit the -- you ask the question in area of critical
7 interest to you --

8 MR STEYNBERG: Yes.

9 PRESIDING JUDGE EBOE-OSUJI: -- and see what answer you receive and all that,
10 afterwards you say, "Now, well, it's not -- I've tried other means and there was no
11 way of getting the witness to the initial statement or what was said in the statement
12 so I have no choice but to do this."

13 MR STEYNBERG: Your Honours, one -- firstly, one observation: I do not recall the
14 witness at any time saying that anything in his affidavit was untrue.

15 PRESIDING JUDGE EBOE-OSUJI: Maybe --

16 MR STEYNBERG: He did say that in his original statement there were things that
17 were true and untrue, but the affidavit he confirmed. He said he remembered what
18 was in it and he confirmed it. That's my recollection. As for the -- as for the
19 previous statement, your Honours --

20 MR FAAL: Mr President, perhaps we should not just gloss over this. We seem to
21 have different understandings of what the witness may have said. Perhaps we could
22 be guided by counsel on which parts of the transcript did he say that he confirms that
23 everything he said in his affidavit was true. I do not seem to have that recollection
24 and perhaps we could be guided to the transcript where he said everything contained
25 in there is true.

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1 My recollection is he remembered that, yes, he made this affidavit, he confirmed that
2 that is the affidavit he made, and I could not recall him going further than that with
3 regards to the affidavit. Thank you.

4 And, Mr President, perhaps we recall counsel was confusing the affidavit and the
5 statement constantly. Even the fact that you had to prod him about that fact, that
6 confusion remained. Thank you.

7 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg.

8 MR STEYNBERG: Your Honours, may I firstly observe, I'm a bit at a loss as to who
9 my opponent is in this matter. At one moment Mr Faal jumps up, the next moment
10 Mr Khan jumps up. I do recall your Honours saying at the beginning of the case that
11 the counsel who is taking the witness should be the one who attends to the argument.
12 This seems to be causing my colleagues some amusement on the other side, but I'm
13 sure they would be less amused if Mr Garcia and Ms Zago started jumping up in turn
14 to reply to their submissions.

15 My understanding is if lead counsel wishes to make a submission on a subject and he
16 is not leading the witness, he should at least have the courtesy of asking the leave of
17 the Court to make such submissions. But we can look at that topic, but I would
18 prefer not to interrupt the substance of my argument. If I may, I'll come back to that.

19 Turning then to his original statement, it is true, your Honours, that I haven't taken
20 him through it paragraph by paragraph, I intend to do so, I intend to do so, but my
21 submission is what is already on record makes it abundantly clear that he has resiled
22 from critical and material portions of his original statement.

23 He testified, your Honours, that he had never attended any PNU or ODM rallies in
24 the period leading up to the elections.

25 PRESIDING JUDGE EBOE-OSUJI: We are in open session, you know, and

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1 remember we are not to -- be careful what you say.

2 MR STEYNBERG: Yes. Very well. I think that this I can -- well, I won't -- I won't
3 quote it then because he does refer to his capacity, but page 54, line 9 of the edited
4 transcript, lines 9 to 16 is where he said that.

5 Now, if one turns to his original statement, from paragraphs 45 to 63, he details rallies
6 and meetings that he attended. That's already 20 paragraphs nearly of his statement,
7 just in that one statement. He was asked whether he'd ever heard Mr Ruto speaking
8 publicly during the campaign period. He said no, never heard that. At least three
9 occasions in his statement, paragraphs 35 to 44, paragraphs 45 to 63, paragraphs 95 to
10 96, 29 paragraphs denied. And the reference is for the record, page 56, line 2 to 5,
11 43 -- page 43, line 4. I asked him pertinently whether he heard Mr Ruto speak on
12 any other occasion, was ever present when Mr Ruto spoke. He said no.

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 PRESIDING JUDGE EBOE-OSUJI: (Redacted)

20 MR STEYNBERG: He was asked when he inserted certain dates in his diary and he
21 said that he had done it in 2013.

22 In his second statement to the Prosecution, dated 14 July, he said that he'd made those
23 entries a few weeks after the violence had ceased. That's paragraph 37 of the second
24 statement.

25 He was asked about Mr Ruto's influence. He was very evasive and vague about it,

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1 yet in his statement he spends nine paragraphs talking about the great influence that
2 Mr Ruto had in the Kalenjin community and giving a number of specific examples of
3 Mr Ruto's influence in backing political candidates for various posts, arranging jobs
4 and the like.
5 And then when questioned about the events of 31 December, he was asked whether
6 he recognised any persons amongst the armed attackers and he said, no, he didn't
7 remember, yet in his statement - in his first statement - at paragraph 116 he named a
8 number of people, who I won't name in public session, who are relevant to the
9 Prosecution case as being present amongst that group of attackers. In total,
10 something like 80 paragraphs of his statement he's already denied.
11 Now, I haven't cross-examined him on it, your Honours, and I am aware that in some
12 jurisdictions there is an intermediate step which may be taken, but is not necessarily
13 taken, which is to request the Chamber to -- for permission to cross-examine or ask
14 closed questions on a previous inconsistent statement, and after that the application
15 to declare hostile is made and, if granted, the Prosecution is then permitted to
16 cross-examine at large on issues extraneous to the statements; other issues that might
17 be relevant to the truth or veracity of his version.
18 Your Honours, I chose not to take that step because in my view far from being
19 premature, it is crystal clear what is going on with this witness and anybody in this
20 courtroom who hasn't -- is not wearing blinkers should be able to see what is going on
21 with this witness, in my respectful submission. And I'm quite happy to go through
22 that intermediate step if the Chamber feels it's necessary, but I submit, your Honours,
23 that we are well past that point.
24 PRESIDING JUDGE EBOE-OSUJI: You've listed a number of areas so that
25 you -- something that wasn't done when you first spoke. Are there any other areas

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1 of interest, beyond those areas you've already identified, as of interest to you that the
2 witness answered questions that are inconsistent with what he said in the statement?
3 MR STEYNBERG: Your Honours, I -- I don't have to hand any further examples
4 other than those mentioned in the affidavit --
5 PRESIDING JUDGE EBOE-OSUJI: No, no, no, I'm talking about looking forward.
6 MR STEYNBERG: Yes, your Honours, there are -- there are other areas, such as
7 what became of this witness after the election. There are certainly further areas.
8 In regards to the statement there are various extraneous issues, that have been the
9 subject of the recent Regulation 35 request to add additional material to the
10 Prosecution's list of evidence, with which the Prosecution would like to confront this
11 witness and which we say will explain his sudden change of heart at the last -- the last
12 moment.
13 Your Honours, my learned friend -- my learned friends have said this witness has not
14 provided any exculpatory evidence. Well, I must observe that the Defence's
15 definition of exculpatory evidence seems to change depending on the circumstance.
16 When it comes to the disclosure of evidence, all manners of evidence are alleged to be
17 potentially exculpatory.
18 This witness has claimed before the Court that members of the Prosecution are
19 engaged, at least in his case, in deliberately falsifying evidence against the two
20 accused. If that is not exculpatory, I'd be grateful that my learned friends could
21 place that on record that they don't -- do not regard that as being exculpatory.
22 Secondly, he has for the first time in this court -- he has for the first time in this court
23 alleged that he was put up to this by another Prosecution witness, whose name is not
24 on record yet but his name does appear in his affidavit as the person who introduced
25 him to the Prosecution. Again, the concept of exculpatory evidence includes

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1 evidence which will hurt the credibility of a Prosecution witness.

2 And if that is not enough, at paragraph 18 of his affidavit he said the following, "To
3 the best of my knowledge, Messrs William Samoei Ruto and Joshua Arap Sang were
4 not involved in post-election violence in any capacity whatsoever."

5 PRESIDING JUDGE EBOE-OSUJI: Has he said that in his testimony before the
6 Court?

7 MR STEYNBERG: Not yet, your Honours.

8 PRESIDING JUDGE EBOE-OSUJI: All right.

9 MR STEYNBERG: But he has confirmed, I say - we will check that - his affidavit that
10 he signed before Mr Mutai.

11 Your Honours, the Katanga argument, the Katanga jurisprudence, does not assist my
12 learned friends. We've gone far beyond a witness who's simply evasive and not
13 forthcoming with the answers that the Prosecution might expect him to bring. He is
14 a witness who has positively and explicitly recanted his earlier evidence.

15 And again if I may return to the Lubanga decision, which I submit is far more on
16 point in this matter, I read previously at paragraph 19 and I do actually have copies
17 for the Chamber. If you would like copies, your Honours, I can hand them up?

18 PRESIDING JUDGE EBOE-OSUJI: We have found it in the meantime.

19 MR STEYNBERG: Thank you, your Honours.

20 Reading then from paragraph 20, which follows on from the extract I read
21 yesterday -- and this is for the record Decision 2201-Red in the Lubanga case Trial
22 Chamber:

23 "Whilst it is instructive to review the approach taken by other courts and tribunals to
24 the problem presented by witnesses who substantially alter testimony ..." -- "... alter
25 their testimony, or who seek to change their written testimony, it is important that the

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1 Chamber does not create unnecessary 'rules of evidence' which may prove in the long
2 term to be unhelpfully inflexible or artificial. Nonetheless, under the rule applied in
3 other jurisdiction that a witness must have demonstrated hostility to the party calling
4 him or her before that party can impeach the witness's credit or contradict him via
5 other evidence, there can be no doubt that Witness 15 has shown 'hostility' towards or
6 is adverse to the Prosecution. The change in his account is fundamental, since he has
7 seemingly resiled from some of the central elements of his first witness statement."
8 That fact, according to the Bench in the Trial Chamber in Lubanga, was sufficient for a
9 finding of hostility. No additional demeanour elements, or adverse animus, was
10 required where we have that fact. I am aware that in certain common law
11 jurisdictions they do look further, but in certain they do not.

12 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, the Lubanga precedent you've
13 start -- you've now invoked may have certain circumstances in it that we have not yet
14 seen here and that is perhaps what counsel on the opposite side are saying. If you
15 look at paragraph 3, for example, of the Lubanga -- paragraph 3, paragraph 4,
16 paragraph 12, paragraph 16, isn't that a situation where more or less the Prosecution
17 is being forced to proceed with the testimony of a witness as their witness of the
18 situation? As I understood what happened, the witness at some point was excused
19 for the Prosecutor to meet with the witness again and take further statements, or a
20 statement, and after that the Prosecutor said, "In light of what we've now learned
21 from this witness, we no longer want to continue with this witness. Effectively, we
22 want to withdraw the witness."

23 That then created the interesting legal scenario in the purely common law courtroom
24 where you would have, "All right, what happens to this witness?" If the Defence
25 called the witness that the Prosecutor no longer wanted to call, the Defence would be

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1 put in the position of asking the witness neutral questions because it is -- the witness
2 is the witness for the Defence and that entitles the Prosecutor then to cross-examine
3 the witness.

4 So that created that conundrum, and the Prosecutor said in Lubanga, "No, we don't
5 want to call this witness any more," and the Defence are saying, "No, you must call
6 the witness, or if you, the Prosecution, no longer want the witness, the Chamber
7 should call the witness." And then the Prosecutor said, "Well, if that happens, we
8 are entitled to cross-examine the witness, if the witness is recalled, either because we
9 were forced to recall this witness or because the Chamber has recalled the witness."

10 Do you see what I'm getting at?

11 MR STEYNBERG: Your Honours, I see what you're getting at, but my --

12 PRESIDING JUDGE EBOE-OSUJI: And then we then see -- I mean, of course you
13 would tell me that, "Well, the Chamber also says that this material -- ultimately that
14 the Prosecutor no longer wanted to call the witness," but the materiality of the matter
15 may well be that the Prosecutor is being told, "Well, you have to call this witness.
16 You have to continue with this witness," and then the compromise situation might
17 have arisen where, "Well, in that case, since it's not fair to have the -- compel the
18 Prosecutor to call a witness they no longer want to call, we can give the Prosecutor
19 leeway to cross-examine."

20 Do you think that is a fair assessment of that jurisprudence?

21 MR STEYNBERG: Your Honours, I take your Honour's point and obviously it goes
22 without saying that every case is different and must be considered on its merits, but
23 the only material difference I would submit is that in the Lubanga case the witness
24 recanted after he was in the witness box, at a stage where the Prosecution is as
25 I understand it not then free to decide whether or not to continue with the witness.

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1 I know the Prosecution argued otherwise, but the Court found against. The
2 Chamber found against him in that case.

3 So the question then should be: Does it make a difference whether the witness has
4 recanted before or after he gives his evidence? Now, your Honours, that is a
5 question which has already been argued before your Honours. It was argued during
6 the course of the summons litigation and, if I understand your Honours' ruling
7 correctly, it was rejected.

8 PRESIDING JUDGE EBOE-OSUJI: That take you have now given of the Lubanga
9 just now -- and I'm not suggesting at all that it is an unreasonable take on that
10 jurisprudence, but does it really help you in the sense that the Defence are arguing
11 that you knew quite well that this witness would be hostile? If we accepted that that
12 is where this thing is going, is it right for you to drag the witness in for purposes of
13 then saying, "All right, we knew you would not want to come. So we're getting you
14 here and, as soon as you come into the witness stand, we'll declare you hostile and
15 cross-examine you." That's the question the Defence are raising for you to answer.

16 MR STEYNBERG: Yes. And, your Honours, in my submission it's the same
17 question that they raised on the last occasion and the same question your Honours
18 argued.

19 And if I may refer your Honours to paragraph 187 of your Honours' decision on the
20 witness summons, it is decision number 1274-Corr2, second corrected version,
21 starting at page 100 -- paragraph 186:

22 "The Chamber notes the Defence's argument that potentially hostile ..." -- "... that the
23 potential hostility of eight witnesses limits the value of their anticipated testimonies
24 and the submissions made in support of Witness 15 ..." -- "... of the Witness 15 fitness
25 request," I beg your pardon.

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1 The important part is the following:

2 "The Chamber is not persuaded by these arguments."

3 At 187:

4 "Regarding the potential hostility of the eight witnesses, until any witness has been
5 given an opportunity to take the stand, take the oath and take questions in

6 examination-in-chief it would be speculative to declare the witness hostile. Even
7 then, there is no known wisdom that hostile witnesses are incapable of testifying to
8 the truth under oath," and your Honours carry on.

9 The witness deposed to his affidavit less than three weeks ago after indicating to the
10 Prosecution that he was prepared to come and testify voluntarily. He was en route
11 to meet the VWU to come to The Hague to testify involuntarily. Over the course of
12 two days there is this sudden change of heart. There is history to this as well, which
13 the Prosecution will seek to go through with the witness which may shed some light
14 on his sudden change of heart.

15 But the point is the Prosecution is not to know in advance whether the witness made
16 this affidavit under some sort of duress and whether or not he would stick to this
17 version in his affidavit under oath, or whether indeed he would, as we say, come
18 clean and tell the Court what happened and why he changed his version.

19 But there is another purpose, as well: Your Honours, the issue of Rule 68 has been
20 raised pertinently by the Prosecution. And there are preliminary steps which must
21 be taken before a witness's statement can be admitted under Rule 68.

22 Firstly, the Prosecution needs to exhaust all reasonable measures to get the witness to
23 court. If those fail, then the Prosecution has -- and the Prosecution can establish
24 improper interference, the Prosecution has met the requirements.

25 If the witness comes to court, it then needs to be established whether or not the

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1 witness's false evidence is materially influenced by improper influence; threats,
2 bribery, et cetera.

3 So there are procedural reasons why the Prosecution is entitled to do this, and it is not
4 fair, we say, to the Prosecution to say that just because you had warning that the
5 witness may not answer favourably you are then precluded from taking these
6 necessary steps which you might require.

7 PRESIDING JUDGE EBOE-OSUJI: I don't think that is the point really. The point is
8 not that you may not compel a witness to come to court. The point is a witness that
9 has not yet taken the stand and started testifying, it may be premature to start ruling
10 that they're coming to lie, or not lie, or they will be hostile. They may well come
11 when they take the stand, prove useful or not, but there is the preliminary step of
12 saying, okay, these are the areas I want to converse with this witness. You go
13 through those and then, once it is clear that there is no getting anything useful out of
14 the witness, compared to what he had deposed to in the past, then we come to the
15 point of potential hostile witnesses.

16 It becomes then the question of, all right, move from beyond the point of being a
17 potential to being a really, a really hostile witness on the stand. That is the issue.

18 MR STEYNBERG: Well, your Honours, my observation on that issue is that the
19 issue is the same whether or not the witness has indicated previously that he resiles
20 from his earlier statement or whether he does so on the stand. You still need to
21 establish that the witness is not willing to give material portions of his testimony.
22 But it would be a very inefficient way of dealing with the matter, in my respectful
23 submission, to require the Prosecution to lead -- to take the witness's evidence in the
24 normal manner of evidence in-chief through each and every issue before being
25 permitted to go back and then cross-examine him on it.

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1 My submission, your Honours, is that once it becomes clear that the witness has
2 deviated and recanted on material portions, it doesn't have to be every material
3 portion, material portions of his affidavit, the reasons why he was called to testify, it
4 is far more efficient to at that stage, provided the Chamber is satisfied of that, declare
5 the witness hostile and then allow the rest of the issues to be dealt with more swiftly
6 and expeditiously.

7 PRESIDING JUDGE EBOE-OSUJI: Shouldn't that -- that probably should have been
8 your starting point by saying, look, there are some areas of this testimony so far, and
9 here they are, where the witness has said something that are inconsistent with what
10 the witness said in the -- in his statement. And you've done that now in your reply,
11 and you laid out. And you argue is it then necessary to wait until you've exhausted
12 all of it, or is it enough for us to proceed from here?

13 But beyond that, there is another question the counsel on the opposite side have
14 engaged, and that question arose from your signalling what you intend ultimately to
15 do, or may do, and that is make a Rule 68 application. And Mr Khan raised the
16 matter, and although Ms Buisman didn't specifically address it, she adopted
17 everything Mr Khan had said, and the point is can you really do a 68 application on
18 this witness?

19 The Chamber thinks it is important for you -- for us to deal with this now so you
20 know what you may or may not do with this witness, and that may guide, out of
21 fairness to you, how you ask your questions and what you seek to do.

22 The question is: Can you at the end of the process say, "Your Honours, in light of
23 what the witness has said and in light of what you think of the witness, that we
24 should think of the witness, you would want to apply, make a Rule 68 application."

25 MR STEYNBERG: Your Honours, the Prosecution submits that provided the

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1 requirements of Rule 68 are met, that should be permissible. However, given the
2 burden which -- which Rule 68(2)(d) places on the Prosecution to establish that in this
3 case the witness's failure to testify, in accordance with material portions of his prior
4 statement, was materially affected by improper interference. The Prosecution would
5 in all likelihood not make that application at this stage. It may well be necessary to
6 provide the Chamber with ancillary evidence to support that finding.

7 PRESIDING JUDGE EBOE-OSUJI: There are just -- there are two things so we can
8 move quickly to it. The first issue is intrinsic to Rule 68 itself, what it says, what it is,
9 what it contemplates, but before we even get to that there is the matter Mr Khan
10 directly engaged yesterday. He says -- he made it a matter of travaux of Rule 68,
11 that States Parties had indicated that Rule 68 should not apply to ongoing cases.
12 I think it is more than travaux as such. The resolution adopting Rule 68 says in
13 paragraph 2, I don't know if you have that, the resolution, but I can read it.

14 MR STEYNBERG: I don't have that before me.

15 PRESIDING JUDGE EBOE-OSUJI: All right. Let me read it.

16 Paragraph 2 of ICC-ASP/12/res7, paragraph 2, says: "Further decides that the
17 following shall replace Rule 68 of the Rules of Procedure and Evidence,
18 emphasising ..." and indeed the word "emphasising" is emphasised "... emphasising
19 Article 51(4) of the Rome Statute, according to which amendments to the Rules of
20 Procedure and Evidence shall not be applied retroactively to the detriment of the
21 person who is being investigated or prosecuted with understanding that the Rule as
22 amended is without prejudice to Article 67," and so on and so forth.

23 But here the adopting resolution explicitly says -- it emphasises that paragraph
24 51 -- Article 51(4). Let's look at what it says.

25 Article 51(4) says, "The Rules of Procedure and Evidence, amendments thereto and

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1 any provisional Rule shall be consistent with this Statute. Amendments to the Rules
2 of Procedure and Evidence as well as provisional rules shall not be applied
3 retroactively to the detriment of the person who is being investigated, or prosecuted,
4 or who has been convicted.", unquote.

5 MR STEYNBERG: Thank you, your Honours. Yes, the Prosecution is well aware of
6 that provision. The first document of the ASP which you read out does nothing
7 more, in my respectful submission, than direct the reader to 51(4).
8 Now, perhaps a full argument of this point may, in my respectful submission, be
9 beyond the scope of this hearing because it is something which parties might want to
10 give a full written argument on, but my submission is that, as it stands, Article 51(4)
11 presents absolutely no bar to the Chamber applying Rule 68 in this case.

12 What Article 51(4) does not say is that an amendment to the rules may not be applied
13 to an ongoing case, which is what my learned friend suggested when he
14 rose -- argued on the matter the other day. What it says is it may not be applied
15 retroactively to the detriment of the accused person.

16 Now, there are two parts to that argument: One is it may not be applied
17 retroactively and, secondly, if it is applied retroactively, it may not be to the detriment
18 of the accused. Both of those -- it is a combined prohibition, as it were.

19 The Prosecution's submission is that the Chamber is not engaged in any form of
20 retroactive application of this rule. And the important point to remember is that,
21 your Honours, this is not a penal statute. It is a procedural rule.

22 Now, the rules or the general principles of legality say that penal statutes may not be
23 applied retroactively. The rationale behind that is that people should be aware at the
24 time that they commit or perform certain actions that they might be punished for
25 those actions, and it would be unfair to subsequently decide that it may be a crime to

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1 step on the cracks, and if someone steps in the cracks then tomorrow he's prosecuted.

2 But this is a simple procedural matter.

3 PRESIDING JUDGE EBOE-OSUJI: I want to understand you and your interpretation

4 of "retroactive." You say there are two things, first, what is meant by "retroactive."

5 Before we do that, let me make this very clear. The reason why I raise this matter

6 now, you say it may be beyond the scope of this application, it is up to you really, in a

7 way, because the sense in which it may be in your interest for a determination to be

8 made so you know where you stand. You don't want to be in a position where a

9 decision is made on 604, and then when we get to rule -- your application on the rule,

10 on whether you can use his statement under 68, and that decision may not been in

11 your favour and then you complained that, "Well, had I known, I might have

12 organised myself differently."

13 That's why it may be fair to you to have this out of the way so you know where you

14 stand on 68. Don't you think?

15 MR STEYNBERG: Yes, certainly, your Honours, that would be helpful. Of course,

16 it would have been far more helpful if I'd had notice of this issue, but it happens that I

17 have given it some thought and I may certainly address some preliminary remarks on

18 this question. If we limit it to the question at the moment of any bar to the

19 application of Rule 68, I think I can address that point at least. So --

20 PRESIDING JUDGE EBOE-OSUJI: With that clarification -- remember now is a

21 clarification along the way to one question I was going to ask you, and then you say

22 retroactive, that the provision 51(4) says amendment "... may not be applied

23 retroactively to the detriment of the person who is being investigated, or who is being

24 prosecuted, or has been ..." -- and you say that what? Sorry.

25 MR STEYNBERG: Your Honours, what it doesn't say is the provision may not be

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1 applied to a person who is being investigated, who is being prosecuted. It may not
2 be applied retroactively to the detriment of such a person, so it is the issue of
3 retroactivity and the fact that it's being applied to the detriment with which I take
4 issue. Obviously I don't take issue that -- that we are looking at a person who is
5 being prosecuted or persons who are being prosecuted.

6 PRESIDING JUDGE EBOE-OSUJI: And what is the -- first of all, the first part of it,
7 before we come back to the second limb of your observation, who is being prosecuted
8 or investigated, what is your interpretation of retroactive in the context of adoption of
9 a rule or an amendment in the middle of an ongoing case?

10 MR STEYNBERG: Your Honour, if for instance a rule were brought in dealing,
11 perhaps, with -- under, say, Article 71, which made certain conduct that an accused
12 might have done an offence for which he might be punishable, that might be a
13 retroactive application, but here we're dealing with a procedural matter, it's a matter
14 of -- it's a matter related to the Court's determination of the admissibility of the
15 evidence.

16 The rule is in place. The rule is in place. It's been in place since November last year.
17 The Prosecution are seeking to use -- to rely on that rule now, nine months -- ten
18 months after the rule is put in place. The Prosecution says this is not retroactive
19 application, we are looking at present facts, facts many of which didn't even arise at
20 the time the rule was changed.

21 Secondly, this is not -- well, that's the first, on the issue of retroactivity.

22 With respect to procedural regulations and rules, the Prosecution's submission is that
23 provided the regulation or procedure is in place at the time either party -- not just the
24 Prosecution, either party, the Defence can rely on this rule to, at the time the party
25 wishes to rely on it, that does not amount to a retroactive application.

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1 If for instance the Chamber had ruled -- had rendered its final decision on the case, or
2 let's say at the end of the Prosecution case the Defence brought a no case to answer
3 motion and the Chamber upheld it, if at that stage the Prosecution then said, "But
4 wait, I have more statements I want to hand in," that might be said to be a retroactive
5 application because a certain stage had been reached, a ruling had been made which
6 would have to then be undone, and that would -- I do not quibble with, that would be
7 a retroactive application.
8 But the moment we are in the process of a case, a problem has arisen regarding
9 witnesses not wishing to come to court or not testifying according to their statements,
10 a remedy is available at that time and the application of that remedy at that time, in
11 my submission, would not be retroactive.
12 On the issue of whether or not -- well, so it fails on the first leg, in my submission, but
13 even if it could be considered to be a retroactive application, my submission is it is not
14 to the detriment of the accused in this -- in this case.
15 Firstly, it is the retroactive application that must be to the detriment of the accused.
16 It is not sufficient that the accused is faced with incriminatory evidence.
17 The material which the Prosecution seeks to hand in or will seek to hand in is material
18 that the accused have always been, to their knowledge, at risk -- at risk of being
19 confronted with during the course of the Prosecution case. The statements that the
20 Prosecution will seek to tender form a significant part of the basis of the document
21 containing the charges. They have all been disclosed to the Defence many, many
22 months ago and there should be no element of surprise here.
23 The prejudice which may arise, of course, is the fact that in the case of certain of these
24 witnesses, not this witness but certain other witnesses, if they don't come to court, the
25 Defence may be deprived of an opportunity to cross-examine the witness, but that is a

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1 matter of prejudice as a result of the application of the rule, but not as a result of the
2 retroactive application of the rule, and it is a matter which is catered for specifically in
3 Rule 68 because one of the factors which the Chamber is required to consider is
4 whether or not the interest of justice would be served by allowing the prior recorded
5 testimony to be introduced.

6 So it is at that point that such prejudice should appropriately be considered.

7 If the Court will bear with me one moment, please.

8 I also observe that the rule has other important safeguards, such as the threshold
9 which the Prosecution must cross before the -- the documents may be admitted and
10 that is to establish, in my submission, on a balance of probabilities that there has
11 indeed been improper interference and that that has materially affected either the
12 non-appearance of the witness or his failure to testify on material portions of his
13 evidence.

14 PRESIDING JUDGE EBOE-OSUJI: The next point, the next question I have for you,
15 as I said that I had questions in two areas, one is the extrinsic circumstance of 68,
16 which we've seen addressed in Article 51(4), and the second is the intrinsic question
17 of Rule 68. Is it about statements or testimony?

18 MR STEYNBERG: Your Honour --

19 PRESIDING JUDGE EBOE-OSUJI: Is it the same thing?

20 MR STEYNBERG: In my submission, prior recorded testimony includes witness
21 statements. And this issue, if I'm not mistaken, I don't have the references exactly to
22 hand, but this is a matter -- or a concept which is not foreign to the ad hoc tribunals.
23 And I speak under correction, but I'm fairly certain that there is authority in the ad
24 hoc tribunals to the effect that -- to the effect that prior recorded statements include
25 witness statements.

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1 But in -- but in looking at the wording of Article 68(1), from line 3, "... allow the
2 introduction ..." -- the court -- the Chamber may -- "... Trial Chamber may ..." and I'll
3 read from line 3, "... allow the introduction of previously recorded audio or video
4 testimony of a witness, or the transcript or other documented evidence of such
5 testimony ..." other documented evidence. In my submission, the plain language of
6 that, having distinguished it from audio, video and transcripts can only mean -- or,
7 certainly encompasses prior statements made by the witness.

8 PRESIDING JUDGE EBOE-OSUJI: Let's take that again. Let's begin from the
9 beginning.

10 "When the Pre-Trial Chamber has not taken measures under Article 56, the Trial
11 Chamber may, in accordance with Article 69, paragraphs 2 and 4, and after hearing
12 the parties, allow the introduction of previously recorded audio or video testimony of
13 a witness ..." let's stop there.

14 So far it's talking about audio or video recorded testimony.

15 MR STEYNBERG: Yes.

16 PRESIDING JUDGE EBOE-OSUJI: It isn't yet talking about transcript.

17 MR STEYNBERG: No.

18 PRESIDING JUDGE EBOE-OSUJI: And then we continue, the second part.

19 "... or the transcript or documented evidence of such testimony ..." of a witness.

20 So on each occasion provision seems to be talking about testimony, either audio or
21 video recorded, or reduced to transcript, or there's other evidence of testimony.

22 MR STEYNBERG: Your Honours, I do understand that the -- again, in the Lubanga
23 case there is a decision on this matter. If I may just find the reference, please.

24 PRESIDING JUDGE EBOE-OSUJI: In fairness to you, as you rightly pointed out, you
25 had not given prior notice of this argument, but then Defence will say, well, you

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1 should have known what the provision says, including 51(4).

2 The point is -- I make is in order that we're all fully on board with what the law is,
3 what the thinking is, you may in the course of the testimony of this witness, if you see
4 it is necessary to return to this after you've done further research, we can entertain
5 that briefly.

6 MR STEYNBERG: Thank you, your Honour. But the --

7 PRESIDING JUDGE EBOE-OSUJI: Yes. The point, as I say, I wanted to flag that it
8 is in your interest to know where you stand on it so you're not caught by surprise at
9 the end of -- when you want to use -- do a 68 application down the line.

10 MR STEYNBERG: Your Honours, I'm grateful, but I have found the reference I was
11 looking for. Perhaps I can just draw your Honours' attention to that in the meantime.
12 It is a Lubanga decision which is decision 1603, from paragraphs 18 to 19, which holds
13 that "... rule 68 ..." quote "... is directed at the testimony of a witness in a broad sense,
14 given that the various forms of testimony that are specifically included in the rule are
15 audio- and video- records, transcripts or other documented evidence ..." -- I think that
16 should read "or other documented evidence," yes, "... transcripts or other documented
17 evidence of 'such' testimony (namely, the testimony of a witness)."

18 So the Lubanga Chamber interpreted "such testimony" to mean the testimony of a
19 witness but not limited to the audio or video testimony of a witness.

20 The Chamber highlights particularly that the, quote, "other documented evidence,"
21 unquote, in brackets, of the "... (testimony of the witness) is referred to separately, and
22 in addition to the audio- or video- records in the opening paragraph of Rule 68;
23 moreover, in sub-rules a) and b) ..." as they were at that time, "... 'previous recorded
24 testimony' is referred to without limiting its scope to audio and video evidence.

25 Against that background, the Chamber is persuaded that the ambit of Rule 68 permits

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1 the introduction of written statements in addition to video or audio-taped records or
2 transcripts, of a witness's testimony because they are all examples of the 'documented
3 evidence' of a witness's testimony."

4 The Katanga and Ngudjolo decision --

5 PRESIDING JUDGE EBOE-OSUJI: Does Katanga -- was that Lubanga you said?

6 MR STEYNBERG: That was Lubanga, your Honours.

7 PRESIDING JUDGE EBOE-OSUJI: Did it define the term "testimony"?

8 MR STEYNBERG: Your Honours, I don't have the original. I'm quoting from an
9 extract in a -- in a memorandum so I don't have the original with me, unfortunately.

10 I can't answer that question. I don't know that it does, but it may be observed,
11 your Honours, that -- that testimony does not necessary refer only to evidence given
12 in a court of law under oath. I think --

13 PRESIDING JUDGE EBOE-OSUJI: I think -- I think you -- I don't think you get an
14 argument on that. An affidavit, for example --

15 MR STEYNBERG: Yes.

16 PRESIDING JUDGE EBOE-OSUJI: -- yes, may come in under a definition of
17 testimony, an affidavit made under oath.

18 MR STEYNBERG: Yes. Your Honours --

19 PRESIDING JUDGE EBOE-OSUJI: Does it mean that every other statement comes in
20 as well, the police officer at the crime scene?

21 MR STEYNBERG: Your Honours, I wouldn't necessarily say that every other
22 document, but certainly a document in the nature of an affidavit. And I would
23 observe, your Honours, that statements are taken by the Prosecution in this case in
24 one of two manners, generally speaking: Either a written statement will be taken,
25 which is read back and signed by the witness who acknowledges and confirms the

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1 correctness of that statement. Alternatively, for witnesses who are considered at risk
2 of incriminating themselves, the statements would be audio recorded and
3 subsequently transcribed.

4 In my submission it would be very strange if the latter were admitted, but not the
5 former, for the only reason that -- that it was recorded. Both of them amount to
6 statements given by a witness solemnly to the Prosecution, acknowledging that they
7 affirm the correctness of the contents.

8 Referring then, while I'm on my feet, to the Katanga and Ngudjolo decisions, these
9 identify other bases of support and I quote from "Decision on the Prosecution's bar
10 table motion." I don't have the decision number unfortunately, but I can find that.

11 It's paragraph 44 of that decision which says the following:

12 "Clearly statements made out of court can equally qualify as testimony."

13 In fact, that is what we were talking about:

14 "This is apparent from the wording of Article 56(1)(a), which refers to 'a unique
15 opportunity to take testimony' and of Article 91(b) which expressly mentions the
16 taking of evidence 'including testimony under oath.'

17 In the context of assistance provided by State Parties ...", again quoting, "... 'in relation
18 to investigations or prosecutions.' Moreover, a narrow interpretation of the word
19 testimony in Article 67(1)(a) would entirely undermine the very right protected by
20 this Article and deprive Rule 68 of any meaning."

21 If the Court will bear with me for a moment?

22 PRESIDING JUDGE EBOE-OSUJI: Is there a question of fairness arising for a
23 witness if testimony is given that broad an adaptation? So a witness, for instance, is
24 being interviewed by a policeman and the witness is perhaps not telling the truth for
25 any reason, in order to exonerate themselves or for whatever reason, at the end of

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1 which the witness signs the statement after it has been re-read and says, "Yes, this is
2 my statement," and the witness signs it. Later on do we not have an issue for the
3 witness to say, "Well, now you can be prosecuted for perjury because this is
4 testimony"?

5 MR STEYNBERG: Your Honours, I submit that that does not really arise because the
6 definition of perjury, certainly in my jurisdiction, would be evidence given under
7 oath -- false evidence given under oath.

8 PRESIDING JUDGE EBOE-OSUJI: Well, that was a definition of testimony as well.

9 MR STEYNBERG: Your Honour, no. My -- my submission is that it goes broader
10 than simply evidence given under oath, remembering that the Prosecution -- the
11 practice of the Prosecution in this institution is not to take evidence under oath.

12 PRESIDING JUDGE EBOE-OSUJI: Is it defined by the practice of the Prosecution, or
13 an objective legal standard of what testimony is?

14 MR STEYNBERG: Your Honours, what is a crime is defined by the -- by the
15 definition of a crime. A crime certainly in this Court, under Article 70, is giving false
16 evidence having been warned under Article 69. So a witness in this Court who gives
17 a false statement to the Prosecution unfortunately is not liable for prosecution under
18 Article 70(1)(a), because the Prosecution -- because only the Court is given the power
19 to administer that oath.

20 It is a matter which I've long decried and may be a matter which the Assembly might
21 wish to revisit in its wisdom in due course, because in my submission many of the
22 difficulties in this case might have been dealt with - and I don't think my learned
23 friends would argue about this - if witnesses were at peril of prosecution for giving
24 false statements to the -- to the Prosecution -- sorry, at peril of prosecution for giving
25 false statements to the OTP.

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1 PRESIDING JUDGE EBOE-OSUJI: Can you look at Article 70(1)(a) that you just
2 alluded to?

3 MR STEYNBERG: Yes, I have it.

4 PRESIDING JUDGE EBOE-OSUJI: Right. It is a crime to give -- I'll take it:

5 "The Court shall have jurisdiction over the following offences against its

6 administration of justice when committed intentionally: (a) giving false testimony

7 when under an obligation pursuant to Article 69(1) to tell the truth."

8 Does Article 69(1) really add anything when you look at it? What does it do?

9 MR STEYNBERG: Your Honours --

10 PRESIDING JUDGE EBOE-OSUJI: 69(1) says:

11 "Before testifying each witness shall, in accordance with the Rules of Procedure and

12 Evidence, give an undertaking as to the truthfulness of the evidence to be given by

13 the witness," basically the oath.

14 MR STEYNBERG: Yes.

15 PRESIDING JUDGE EBOE-OSUJI: Isn't that it?

16 MR STEYNBERG: Yes, your Honours, but interpreting this provision in its context,

17 which is under Part 6 which deals with the trial, the interpretation that -- the

18 prevailing interpretation, as I understand it, is that that applies to testimony before

19 the Court --

20 PRESIDING JUDGE EBOE-OSUJI: Yes.

21 MR STEYNBERG: -- after an oath is given by the Judge, by the Bench.

22 PRESIDING JUDGE EBOE-OSUJI: All right. So you say that -- your point is that,

23 on that basis, before this Court such a witness -- no witness may be prosecuted if all

24 they did was give a statement that was deemed to be a testimony by some legal

25 mechanism.

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1 What about prejudice to the witness outside of this Court, if there is some law that
2 says anybody who gives false testimony may be prosecuted? Say, for example, it
3 wasn't the Prosecutor that took this statement from the witness, but maybe the
4 Prosecutor received the assistance of a State using the national mechanisms to obtain
5 a statement from the witness, under the national mechanism can the witness not be
6 prosecuted?

7 MR STEYNBERG: Your Honours, my submission is that these -- these hypotheticals
8 do not affect the definition of testimony for the purposes of Rule 68. Whether or not
9 a witness is liable to prosecution in their national jurisdiction is an issue which is
10 quite separate from the determination of this Chamber about whether or not his prior
11 statement amounts to testimony. That's my one observation.

12 But again I can't speculate as to that because it would all depend on the law in that
13 country, whether the law in that country would -- would recognise a statement made
14 to the Prosecution under a solemn declaration, I think we can refer to it as, as liable to
15 prosecution for perjury, or whether or not they require a higher standard, but my
16 submission is that it's a very fascinating argument, but perhaps one that need not
17 engage us for present purposes.

18 PRESIDING JUDGE EBOE-OSUJI: While you can see it as fascinating I feel that
19 counsel for witnesses may not think it is fascinating or beyond the realms of
20 something that should worry them, but if you have finished speaking on the matter
21 we can leave it at that.

22 MR STEYNBERG: I think for now that has exhausted my reserves.

23 PRESIDING JUDGE EBOE-OSUJI: Mr Khan?

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

25 If I may, dealing briefly with the first matter, my learned friend once again has

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1 referred to the Lubanga case and, your Honours, the Defence can do no better than to,
2 with the greatest of respect, endorse the position postulated by your Honour at
3 paragraphs 3, 4 and 12 as to the distinguishing features that led the Lubanga Trial
4 Chamber to make the decision that it did.
5 But, your Honour, in assessing the merits of the application of the Prosecution, we say
6 it's important to step back. And what is the purpose? There's no magic in a label
7 hostile, or even in cross-examination.
8 The Prosecution and -- have said, the Defence have said and the Bench have reiterated
9 on many occasions that one of the key objectives is to get to the truth. And, your
10 Honour, at paragraph 19 and 20 of the Lubanga decision, the learned Trial Chamber
11 were very clear that one of the reasons why they allowed -- apart from the issues of
12 fairness that your Honour referred to in the earlier part of the decision, they said not
13 allowing the Prosecution to cross-examine would potentially impede the Chamber in
14 the pursuit of the truth. And similarly at the end of the paragraph:
15 "If the Prosecutor is restricted to neutral questions, he would be unable to explore
16 adequately the circumstances of the change of account."
17 Your Honour, we say that's important because there's been really, if not no attempt,
18 very scanty attempt by the Prosecution to attempt thoroughly to sieve out truth and
19 fiction from any previous accounts from the witness. And, your Honour, that can be
20 done by way of neutral questions.
21 Your Honours have -- will of course be alive to the fact that we're not here judging the
22 veracity of an affidavit, or the veracity of a previous statement given to the
23 Prosecution or a domestic authority. What the Court wants to do, and it's to
24 encourage witnesses - hence the importance of the Article 70 warning - is that you
25 have a most onerous responsibility. This is a sombre occasion. To speak the truth,

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1 knowing that the consequences that the Court is assessing that evidence. And,
2 your Honour, that's why the key objective must be getting the truth and as full
3 account as possible from the witness in the box.
4 Your Honour, given even the Lubanga decision -- I referred yesterday to Katanga.
5 Your Honour, there's been no persuasive reason, we respectfully submit, as to why
6 the Prosecution can't make further and proper investigations by way of non-leading
7 questions. There's no persuasive reasons why leading questions are necessary in
8 order to prevent -- in order to allow the Trial Chamber to get to the truth. That can
9 be done in the normal way as we do with normal witnesses.
10 And, your Honour, let me give you an example. The witness has said, "Parts of the
11 testimony are true. Parts are false." It may be the same with the affidavits. That
12 can be inquired into.
13 Your Honour, on previous occasions the Prosecution have been extremely --
14 PRESIDING JUDGE EBOE-OSUJI: But what the Prosecution is now saying is it
15 wasn't -- they didn't begin with their submissions with that, when they made the
16 application, the first run of it, but in reply they've now pointed out saying, "Here are
17 some -- we've done neutral questions here. The answer we received from the
18 witness is inconsistent with what the witness said in the statement, a lot of it. We've
19 done neutral questions there and it's inconsistent. We've done it here and there.
20 It's inconsistent." So they've now outlined areas in which they have asked neutral
21 questions and did not get -- got an answer that they say is materially inconsistent
22 with - or fundamentally inconsistent with - the testimony. They -- sorry, testimony
23 that's inconsistent with what they have in the statement.
24 The question then is: Should they continue to ask neutral questions in all the other
25 areas of interest to them, or is it to say, "Well, there's enough now to consider whether

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1 to allow the Prosecution to really go all out and try and get to the truth," as you said?

2 MR KHAN: Yes. Well, your Honour, one of my submissions yesterday was that it

3 was premature - the application was premature - because the Prosecution haven't

4 done that which is necessary, even on their own case we say, to declare a witness

5 hostile.

6 Your Honour will recall - the Bench will recall - that on several occasions during the

7 witness's testimony, when a question was posed my learned friend, Mr Steynberg,

8 says, "I'll come back to that." On many occasions, or at least on one or two occasions,

9 the witness said, "I can't remember."

10 Your Honours will be -- will recall well that in previous witnesses the Prosecution

11 couldn't wait to refresh a witness's memory. Why on earth now are they so reluctant

12 to refresh a witness's memory that says, "I can't remember."

13 Your Honour, so what we say is important, given the nature of the account -- and

14 there would be no objection to it. Whatever the term of art is one wishes to ascribe

15 to it, the Prosecution can go -- can ask certain questions and, if the Court give leave,

16 can say, "Okay, Mr Witness, you gave a statement. Is this the statement?" "Yes."

17 "You said this. Why did you say that?", and get an explanation.

18 Your Honour, if the witness is not desirous of telling the truth, if the witness is

19 refusing to answer, a contumacious refusal in the face of the Court, certain action may

20 be taken, but we don't need to jump to discredit a party's own witness.

21 Your Honour has already pointed out one of the many differences between this and

22 the Lubanga case. The Prosecution have conduct of their case. They make their

23 strategic choices, not us, and they chose to call this witness notwithstanding the

24 affidavit.

25 Now, your Honour, this is not contrary to the summons because what your Honours

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1 decided in the summons is that a witness should be called, it didn't deal with the
2 modalities of questioning, and so they are completely unrelated aspects. So your
3 Honour, that's my submission in relation to hostility.
4 If we want to get to the truth, let the witness explain, and it can be done in a
5 methodical manner; "You've said this. Did you say that? Yep, okay. Is it the truth?
6 Yes or no?" If yes, they've got it. If no, "Why did you say it?" And, your Honour,
7 that's the proper way to do it. And, of course, the Court can keep it under review.
8 The Prosecution can make other applications later, but they're jumping the gun,
9 which is why I said yesterday it's premature, and for that reason it should be
10 defeated.
11 Your Honour, in relation to the Rule 68, your Honour has turned, in fact, to the
12 correct document in the Assembly of State Parties. And my learned friend's attempt
13 to say, well, it is a procedural rule should be given a short shrift, in relation to
14 Article 51.
15 It was for that very reason why the Assembly of State Parties wished to underscore
16 the -- and emphasise the importance that that Rule would not be used by the
17 Prosecution in ongoing cases.
18 And, your Honour, Ambassador McKenna is in the gallery, she was the
19 representative of Kenya at the Assembly of State Parties. It -- I said a couple of days
20 ago, I think it was a couple of days ago, that it's bad faith of the Prosecution --
21 PRESIDING JUDGE EBOE-OSUJI: Let's not bring Ambassador McKenna into it, just
22 make your submission please.
23 MR KHAN: Your Honour, I said it was bad faith because the Prosecutor was
24 present, they have the Statute talking about non-retroactivity. This is consistent, in
25 fact, with the ICTY Rules of Procedure and Evidence, which Rule 6, I think it is, says

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1 that "a Rule change will not be applied to the detriment of an accused." A rule
2 change.
3 But, your Honours, the Assembly of State Parties made it even clearer that it applied
4 to a specific procedural rule, so the argument that it shouldn't apply because it is
5 procedural really falls flat on its face, we say. The Assembly of State Parties wish to
6 emphasise it and it was passed on undertakings that it would not be used in relation
7 to ongoing cases.
8 And for the Prosecution, and the Prosecutor herself and her representatives were
9 present in the ASP, to now seek to put forward arguments that somehow they wish to
10 do that which they know is not allowed, we say, is regrettable. And I've said bad
11 faith previously.
12 Your Honour, the other aspect: Rule 68 doesn't even apply at all to this present case
13 because the witness is here. And Rule 68(2), of course, primarily is talking about
14 evidence of a witness who is not before the Court. But, your Honour, even when a
15 witness is before the Court, if one looks at 68(2)(d)(1), the Prosecution, and this again
16 supports my argument about the proper procedure, they haven't said, "Witness,
17 you've said this. Can you explain?" And so the witness has not failed to give
18 evidence with respect to a material aspect, including in his prior statement.
19 The Prosecution are not even attempting to go there; instead they want to introduce,
20 they've said repeatedly, what we've called a wild-goose chase, Article 70 and other
21 matters to controvert the witness. Let's stay focussed on the PEV, the veracity of the
22 account because the Prosecution said, and it is their own words, "Why would
23 anybody interfere with a witness that's not telling the truth?" We agree with that,
24 actually. But, your Honour, we say that the Prosecution have failed to understand
25 the proper ambit of Rule 68, how it applies in the present circumstances. And it's

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1 directly linked to the proper procedure that should be adopted with the witness that
2 your Honours have before you. I'm grateful.

3 MS BUISMAN: Thank you, Mr President. Again --

4 PRESIDING JUDGE EBOE-OSUJI: If you don't need to add to it you can just adopt
5 things and move on.

6 MS BUISMAN: I will adopt everything that's been said, but I have, like, very few
7 things to add. If we are speaking about Rule 68(b), well, we have already one
8 commentary who says that there are non-retroactivity applies to the definition of
9 crimes as well as the general principles of the procedural and evidentiary regime.

10 This is Schabas in his commentary on the Rome Statute. I'm sure we will discuss this
11 at a later stage, I just wanted to point that out.

12 But -- and Rule 68(b), according to our -- to your own decision, and this is number 847,
13 this is the decision on conduct of proceedings --

14 PRESIDING JUDGE EBOE-OSUJI: How much longer? Not that you've spoken too
15 much already, just that we actually streamed past the break point.

16 MS BUISMAN: Two minutes.

17 PRESIDING JUDGE EBOE-OSUJI: All right.

18 MS BUISMAN: This is your decision on the conduct of the proceedings, number 847,
19 and let me just read out paragraph 28, which states that: "When a party wishes to
20 introduce prior recorded testimony in accordance with Rule 68(b), it shall file an
21 application to that effect at least 21 days before the witness is scheduled to appear."
22 So I think in any event this -- this Article -- this Rule cannot apply to this particular
23 situation.

24 In addition, just one line: I do agree, but it is particularly -- I think the testimony is
25 clearly in -- not just in my view or yours, we can find authorities, sworn testimony,

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1 which is not what we have, and it is particularly delicate when you want to rely on a
2 prior statement if someone later on recants. There is a real prejudice there.
3 And the only case I can think of this has happened before, in the ICTY, this was one of
4 those old recorded -- you had a video recorder, this was the most important aspect of
5 that decision, I can cite it for you. I'm a bit worried about the time. The reason why
6 they said we can tender these statements is because we can see the demeanour from
7 the video. And, at the end of the day, in their decision, they did not rely on these
8 witnesses because they were not trustworthy.

9 We are not in this situation. As I said Rule 68 doesn't even come into it. And
10 so -- and it would be incredibly unfair if we would go that route.

11 PRESIDING JUDGE EBOE-OSUJI: Thank you.

12 We will adjourn now, but one second, please.

13 (Trial Chamber confers)

14 We will adjourn now. We will come back at 10 past 12.

15 THE COURT USHER: All rise.

16 (Recess taken at 11.39 a.m.)

17 (Upon resuming in open session at 12.20 p.m.)

18 THE COURT USHER: All rise.

19 Please be seated.

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

21 We will make our ruling on the Prosecutor's application to declare Witness 604 a
22 hostile witness at this stage.

23 Before making that ruling, I want to be clear that we're not yet going to make any
24 ruling on the applicability of Rule 68. It is something that we'll take up again if the
25 need arises to do that. But it was useful to signal whether or not there may be a fight

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1 on that matter when the time comes, a fight between the parties on it. To that extent,
2 that is, the extent of the exercise on 68.
3 But now the ruling on rule -- on whether or not that witness is to be declared a hostile
4 witness.
5 We have an obligation, the Chamber, to strike a balance that takes all appropriate
6 interests into account, including, of course, the interest of the witness under Article 68.
7 To that end, it is important to reduce as much as possible the state of affairs in which
8 the witness is subjected to cross-examination by every counsel who asks him
9 questions. As I said, to the extent that it is possible to avoid that, that would be the
10 best course. It may well come to the point where that is what happens in the process,
11 especially if there is a risk, a real risk of jeopardy to the search for the truth.
12 But the Chamber's position is that it is premature at this stage to declare this witness a
13 hostile witness without prejudice, of course, to the facility to the Prosecutor further on
14 to revisit the application if he considers it necessary to do so, but in the meantime we
15 know that the Prosecutor has already indicated areas in which he has elicited
16 testimony that appear inconsistent with what the witness had deposed to -- or, rather,
17 given to in the statement to the Prosecutor. It's important that the Prosecutor also
18 continues to explore other areas of interest or critical interest to the case.
19 That is the ruling of the Chamber at this time.
20 MR STEYNBERG: As the Court pleases, your Honours. May I just seek one point
21 of clarity. Your Honour, mentioned in the course of argument, the possibility of
22 exploring previous or the prior inconsistent statements through asking closed or
23 leading questions. Is it your Honours' ruling that at this stage the Prosecution may
24 resort to that technique, or that I should continue to lead the witness as a normal
25 Prosecution witness at this point?

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1 PRESIDING JUDGE EBOE-OSUJI: One second.

2 (Trial Chamber confers)

3 PRESIDING JUDGE EBOE-OSUJI: The clarification, first of all, is of course to cover

4 other areas, broadly speaking that the Prosecutor wants to explore, and these -- we

5 have those areas. Within that there is a good sense in seeing whether or not a little

6 more prodding, through the other methods, may work, including the possibility of

7 refreshing memory, but these things are not set in stone. Just a human process. At

8 some point there comes a point where a determination needs to be made either by the

9 Prosecutor, or apparent to the judges, that it may be a wasted exercise to do it.

10 So -- if that is the case, but until we see that, let's try and see if that is what is

11 happening or not.

12 MR STEYNBERG: Thank you, your Honours. I'm so guided.

13 PRESIDING JUDGE EBOE-OSUJI: We will now bring in the witness, and we will go

14 today until 10 past 1 and then we are -- but no later than that for our luncheon break.

15 THE COURT OFFICER (via video link): Mr President, the witness will be escorted

16 in.

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

18 (The witness enters the video-link room)

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

20 (The witness gives evidence via video link)

21 THE COURT OFFICER (via video link): Mr President, the witness has been brought

22 inside the transmission room.

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

24 Witness, welcome back. We are back in open session and the Prosecutor will

25 continue asking you questions.

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1 I remind you again, please, try and observe the pause. Wait for the Prosecutor to
2 finish his question, count to five in your mind before you start answering. Also, be
3 mindful to not indicate when we're in the public session to indicate information that
4 might reveal of your identity -- might be revealing of your identity, okay?

5 THE WITNESS: Yes, Mr President.

6 PRESIDING JUDGE EBOE-OSUJI: Thank you.

7 Mr Steynberg, please proceed.

8 MR STEYNBERG: Thank you, your Honours.

9 QUESTIONED BY MR STEYNBERG: (Continuing)

10 Q. Good morning, Mr Witness.

11 A. Good morning.

12 Q. Mr Witness, just by way of reminder, you are of course still under your former
13 oath that you took yesterday. Do you remember that?

14 A. I've not gotten you well.

15 Q. I'm reminding you that you are still under oath to tell the truth that the learned
16 Judge, the learned President referred you to yesterday. Do you understand?

17 A. Yes.

18 Q. Thank you. Mr Witness, when -- just before we adjourned yesterday, we were
19 dealing with a document, an affidavit that you had attested to in the presence of your
20 lawyer, Mr Mutai. Do you recall that?

21 A. Yes.

22 Q. And just so there can be no misunderstanding, you confirm that you're familiar
23 with the contents of this statement -- this affidavit?

24 A. Yes.

25 Q. In fact, I presume you have a copy of this affidavit; is that right?

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1 A. Yes.

2 Q. And, again, so there can be no understanding (sic), what do you say about the
3 content of this affidavit here before the Court? Is it true, or is there anything in this
4 affidavit which is untrue or incorrect? I'm referring the affidavit you made before
5 Mr Mutai.

6 Do you understand the question?

7 MR FAAL: Mr President, I think the affidavit is about three pages, and it's only fair
8 that it be put in front of the witness and let him have a look at it in order to be able to
9 assess whether there is anything in it he does not wish to confirm to be correct or not
10 because now, as it is, it's like he's just speaking from a vacuum. He does not have
11 any reference to the affidavit. It's difficult for him to say at the top of his head that
12 everything in it is correct.

13 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg?

14 MR STEYNBERG: Your Honours, we're dealing here with a two-page -- two-page
15 and three-paragraph affidavit that was made three weeks ago, an affidavit that the
16 witness is in possession of.

17 As a general matter -- I will come to the specifics. I will come to the specifics, but as
18 a general matter, I would like to ask the witness, as he sits there now, whether there is
19 anything he knows to be incorrect in his statement. Maybe I should take it at that
20 level first.

21 PRESIDING JUDGE EBOE-OSUJI: But the objection, rather, is whether that the
22 document be put in front of the witness so that he is looking at it. Is that not a fair
23 point?

24 MR STEYNBERG: Your Honours, it is a fair point if one is to test the minutia and
25 the correctness of the minutia, but let me ask him -- if he has told any falsities in this

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1 statement that is something which is not a question of memory, he should -- he
2 should know exactly what that is.

3 So let me first deal with the truth of the affidavit and then we can deal with the
4 reliability and the accuracy in the manner my learned friend suggests. That is my
5 proposal, your Honours.

6 (Trial Chamber confers)

7 PRESIDING JUDGE EBOE-OSUJI: Let's have the witness answer the question.
8 Let's see how it goes.

9 MR STEYNBERG: Thank you, your Honours.

10 Q. So, Mr Witness, let's start with the question: At the time you gave this affidavit
11 before Mr Mutai, were you satisfied that what you were telling him was the truth, or
12 is there anything that you told him which was, to your knowledge, false?

13 A. It is true.

14 MR STEYNBERG: Thank you, your Honours.

15 Q. And what was the reason why you decided to attest to this affidavit?

16 A. Because I knew that the evidence I had recorded was false. So I had -- I didn't
17 see any need or going and testifying something which I knew it was false.

18 Q. So the -- well, certainly, one of the main purposes you now pointed out was to
19 establish what was false about your statement that you made to the ICC investigators;
20 is that right?

21 A. Yes, it is right.

22 Q. And what about the reasons for your making that false statement? Did that
23 have anything to do with your making this affidavit to tell why you had made a false
24 statement?

25 A. Sorry?

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1 Q. You've told the Court that you wanted to make a statement to the effect -- you
2 wanted to make an affidavit to the effect that your original statement was untrue,
3 correct?

4 A. Yes.

5 Q. I notice in your affidavit you give certain reasons why your statement was
6 untrue, why you gave an untrue statement to the investigators. Was that also one of
7 the reasons for this affidavit?

8 A. Yes.

9 Q. And I presume then that you would have told your lawyer all the important
10 facts surrounding why you made a false statement and what was false in the
11 statement; is that fair?

12 A. I'm not getting you well.

13 Q. Was it important to you that all the important information relating to why you
14 gave a false statement to ICC investigators was recorded in your affidavit? Do you
15 understand?

16 PRESIDING JUDGE EBOE-OSUJI: If you still do not understand, you can say so.

17 THE WITNESS: Yes, I still don't understand.

18 MR STEYNBERG:

19 Q. Okay. You told the Chamber a moment ago that one of the reasons you gave
20 this statement was to explain why your statement to the ICC investigators was false.
21 Correct?

22 A. Yes.

23 Q. And, in fact, you talk in this statement about certain promises that were made to
24 you by the investigators; do you remember that?

25 A. Yes.

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1 Q. Was it important to record all the details of why you gave the false statement,
2 all the important details?

3 A. I didn't have the statement by myself, so I would -- I couldn't point out
4 which -- which were facts and which were false.

5 Q. Well, for the time being, let's accept that, but I'm not talking about now what
6 was false in your statement, I'm talking about why you gave the statement which was
7 false. You understand? You understand the difference?

8 A. Yes.

9 Q. So I'll repeat the question. Was it important for you to record in this affidavit
10 all of the important reasons why you gave a false statement?

11 A. Still I'm not getting you.

12 MR STEYNBERG: I think perhaps this is a matter which I might return to at a later
13 stage in a different way.

14 PRESIDING JUDGE EBOE-OSUJI: Do you -- Witness, are there other reasons -- are
15 there other reasons why in your mind you gave the false statement to the Prosecutor,
16 which other reasons you have not indicated in the affidavit that you swore? Do you
17 understand that question?

18 THE WITNESS: Yes, Mr President.

19 PRESIDING JUDGE EBOE-OSUJI: That is are there additional reasons that you did
20 not include in the affidavit?

21 MR FAAL: Mr President, this is why I thought that it was only fair that the affidavit
22 be placed in front of the witness so that he could, in his mind, check whether there are
23 other reasons and whether those reasons are contained in the affidavit or not.

24 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, is that the question you were
25 driving at?

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1 MR STEYNBERG: That was the destination, but not the starting point. The starting
2 point that I'm trying to establish was whether or not in the witness's mind, at the time
3 he made the affidavit, he appreciated the importance of giving a full account of the
4 reasons why he deposed or gave a false statement to the Prosecutor. The contents
5 was then a follow-up question which I was leading to. Perhaps I can ask -- I can
6 answer this question -- I can ask this question.

7 Q. Now, this is not a statement that you -- this is not an affidavit that you drew up
8 yourself. You drew it up with the assistance and advice of your lawyer, Mr Mutai; is
9 that correct?

10 A. Correct.

11 Q. And you knew that this was a statement that you would have to swear to the
12 truth to; is that right? You knew you were going to take an oath as to the truth of the
13 statement?

14 PRESIDING JUDGE EBOE-OSUJI: The affidavit.

15 MR STEYNBERG: Affidavit.

16 Q. The affidavit, I beg your pardon?

17 A. Yes.

18 Q. And in fact at paragraph 20 it's stated that, "All that is stated herein is true to the
19 best of my knowledge, information and belief;" is that correct?

20 A. Yes.

21 Q. Did your lawyer explain to you the importance then of accuracy in an affidavit
22 that you were going to take an oath as to the correctness and truth of? Did you
23 understand it was important to be accurate in what you said?

24 A. Yes.

25 MR STEYNBERG: Thank you.

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1 Mr Court Officer, may I please ask that you call up this document at this time? The
2 ERN is KEN-OTP-0135-1135 and the page I'm looking for is 1137, please.

3 Q. While -- while that is coming up, Mr Witness, can I just ask you this question.
4 You say you have a copy of this statement. When last did you read through it, this
5 affidavit?

6 A. On Tuesday.

7 Q. Tuesday this week?

8 A. Yes.

9 Q. So it's fair to say, isn't it, that you have a very good idea of what's contained in
10 this affidavit?

11 A. Yes.

12 MR STEYNBERG: Mr Court Officer, can you confirm when it's on the screen please?

13 THE COURT OFFICER (via video link): I confirm that the document as referenced
14 by counsel at page 1137 is presented to the witness.

15 MR STEYNBERG: Thank you, Mr Court Officer.

16 Q. Can I ask you, please, to read through the paragraphs 1 to 7 as they appear on
17 that page? Let us know when you're finished, please. Can I just have confirmation
18 that you can hear us because the picture is frozen?

19 A. Yes, I hear you.

20 MR STEYNBERG: Thank you. Then I can't see you, so please let me know when
21 you've finished reading.

22 Your Honour, I see we've disconnected.

23 (Pause in proceedings)

24 MR STEYNBERG:

25 Q. Have you finished reading, sir?

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1 A. Yes, I've finished.

2 Q. All right. Now, getting back to the question which His Honour, the President,
3 posed to you earlier, does this statement reflect - accurately reflect - the reasons why
4 you gave a false statement to the ICC investigators?

5 A. Yes.

6 Q. And does it completely describe the reasons why you gave the false statement,
7 or is there anything you've left out?

8 A. For now, I don't think I've left -- I don't think I left anything out.

9 Q. Okay. You're satisfied with that -- with that version; correct?

10 A. Yes.

11 MR STEYNBERG: All right. Can I ask you please to turn to -- well, the court officer
12 to call up the next page which is ERN 1138 of the same series?

13 THE COURT OFFICER (via video link): 1138 is being presented to the witness.

14 MR STEYNBERG: Thank you.

15 Q. And I direct your attention to paragraph 8, if you could please read through
16 paragraph 8. Just paragraph 8, please, the first four bullet points. Let me know
17 when you are done. Have you done with paragraph 8?

18 A. Yes.

19 Q. And I understand that you say you didn't have your statement with you, that
20 there may be other areas of your statement that were incorrect, but what appears
21 there under bullets (i) to (iv), is that correct, those things you told the investigators,

22 (Redacted)

23 (Redacted) You

24 recall that you told that and that was false?

25 A. Yes.

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1 Q. And secondly that you had mentioned persons by the name of (Redacted),
2 (Redacted)
3 (Redacted).

4 MR FAAL: Mr President, I think we are in public session.

5 MR STEYNBERG: Your Honours, the witness says that these things never happened.
6 I'm not sure I understand on what basis my learned friend thinks these would be
7 identifying.

8 MR FAAL: It's the same basis to which counsel put that information on a PIS.

9 MR KIGEN-KATWA: On our part, Mr President, we support that this be conducted
10 in the open.

11 MR STEYNBERG: Your Honours, I'm in the Chamber's hands. I'm happy to do
12 this in private session, if necessary.

13 MR FAAL: Mr President, we are happy to have this conversation in the open, but it
14 is counsel's case. He put this information on a PIS I suppose for a particular reason,
15 unless we are being told that what is contained in the PIS is of no use.

16 PRESIDING JUDGE EBOE-OSUJI: All right, let's proceed.

17 MR STEYNBERG: Thank you, your Honours. Obviously context is everything.

18 Q. Do you recall -- is it correct that you made those statements in your initial
19 statement and that they are false?

20 A. Yes.

21 Q. And thirdly - and this is certainly not identifying - that you falsely stated, point
22 (iii), "Words such as 'Kimurkelda' and 'Kamama' as used in Mr Joshua Arap Sang's
23 program on Kass FM's 'Leen ne Emet' were code words meant to identify and
24 victimize members of the Kikuyu community." You gave that false statement to the
25 investigators; is that correct?

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1 A. Yes.

2 Q. And just for the record, what does "kimurkelda" mean? It's a Kalenjin word
3 firstly; is that right?

4 A. Yes.

5 Q. And what does it mean?

6 A. "Kelda" in Kalenjin, the word "kelda" means teeth and then "kimur" means teeth
7 which is stained teeth.

8 Q. And when that word is used to refer to somebody what does it normally mean,
9 or to whom is that word generally used to refer?

10 A. It is used to refer to any person whose teeth are affected by -- is it called
11 chlorosis?

12 Q. All right. And if in general conversation someone was to say something like
13 "Oh, well, the kimurkelda did this," who would -- who would that refer to? Let me
14 rephrase that. You don't seem to understand.

15 Is this word used to refer to any particular ethnicity, people of any particular
16 ethnicity?

17 It's a simple question, sir. Do you not understand?

18 A. Can you repeat again.

19 Q. Is the word "kimurkelda" -- and for the record it's K-I-M-U-R-K-E-L-D-A -- is the
20 word "kimurkelda" used to refer to people of any ethnicity?

21 A. I don't know.

22 Q. You don't know?

23 A. Yes.

24 Q. Kamama, K-M -- K-A-M-A-M-A, what does that word mean?

25 A. It means your uncle.

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1 Q. And same question, are you aware whether this is used to refer to persons of
2 any particular ethnicity?

3 A. I'm not aware.

4 Q. And then finally, is it correct that you told -- that you falsely told the
5 investigators that you had witnessed arson and destruction of property during the
6 post-election violence?

7 A. Yes.

8 Q. And the reason why you told the investigators this, as you've confirmed, is set
9 out in your affidavit. And perhaps you can just in your own words explain again
10 why you decided to give this false evidence to the investigators.

11 A. Yes. Yesterday I said that in April last year 2013, I was approached by a
12 certain lady, who told me that she was -- she had some connection with -- with the
13 ICC. Then she told me that -- because she was a PNU supporter, I was a PNU
14 supporter, she approached me and told me that she was speaking with some people
15 from -- from the ICC. Then she told me that they were looking for some more
16 witnesses because the key witnesses at that time had started withdrawing so that the
17 ICC was looking for some witnesses to go and testify. And then she told me that the
18 main intention was to -- to victimize the two parties, William Ruto and Joshua Sang,
19 in the post-election violence that took place in 2007-2008.

20 Then she told me that once you are a witness, you're going to be able to get a lot of
21 support. You may -- your children will go to good schools, you will get -- you will
22 live a luxurious life, you will pursue further education and also you will be relocated
23 in the country of your choice and not here in Africa.

24 Q. Are you then saying that this is what prompted you to give a false statement to
25 the investigators?

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1 A. Yes. After being promised all those, I saw it was wonderful, then I joined in
2 giving the -- the false statement.

3 MR STEYNBERG: Your Honour, perhaps we can just for the last few minutes of this
4 session go into private session and just elicit some details about this conversation.

5 PRESIDING JUDGE EBOE-OSUJI: Private session.

6 *(Private session at 12.57 p.m.) Reclassified as Open session

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

8 MR STEYNBERG: Thank you, your Honour.

9 Q. For the record then, Mr Witness, what is the name of this lady that you spoke
10 to?

11 A. She's called (Redacted).

12 Q. And besides (Redacted) telling you what benefits you might expect as a witness of
13 the ICC, did you discuss -- did you have any further discussions about the nature of
14 the evidence you were going to give to the ICC?

15 A. Yes.

16 Q. Yes. What was that? Tell us about that, please.

17 A. She told me that --

18 MR FAAL: Mr President, can we have this information in public? I mean, we
19 have -- already have information in private session as to the source of the information.
20 That would be protected. But the nature of the information, what he was supposed
21 to have said, perhaps that could be heard in public.

22 MR STEYNBERG: I'm in your Honours' hands. The difficulty is that I don't know
23 what the witness is going to say. I have no record of that so I can't judge whether or
24 not that will be identifying either of himself or of the other witness concerned.

25 MR FAAL: He could be reminded not to mention any names.

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1 PRESIDING JUDGE EBOE-OSUJI: The reason you called to go into private session,
2 was it to discuss the whole of that or just the risk of identifying information, for
3 instance, the lady?

4 MR STEYNBERG: Well, the main purpose was to get the identity of the lady, but
5 new information is emerging regarding discussions about the contents of the
6 witness's statement he was going to give. This is information which is new to me,
7 and I simply don't know what the witness is going to say.

8 PRESIDING JUDGE EBOE-OSUJI: The point is your question is: Did you have any
9 further discussion about the nature of the evidence you were going to give? Since
10 the objective here, whether any further discussion was had with (Redacted), or is it about
11 the nature of the evidence he was going to give?

12 MR STEYNBERG: Your Honour, firstly, he has, if I understand, confirmed that there
13 was a discussion, and now I need to get the details of that discussion and
14 what -- what evidence was discussed. I do see in any event that it is -- I trust we're
15 taking the break at the normal time.

16 PRESIDING JUDGE EBOE-OSUJI: No. We'll go until ten past.

17 MR STEYNBERG: Ten past. That's right.

18 PRESIDING JUDGE EBOE-OSUJI: Yes.

19 MR STEYNBERG: I beg your pardon.

20 PRESIDING JUDGE EBOE-OSUJI: Let's do this: Witness, we will go into public
21 session now. The Prosecutor had asked -- the question was whether you had any
22 further discussion with (Redacted) about the nature of the evidence you are going to give.
23 We will go into public session. In answering that question, be careful to not again
24 mention (Redacted) name in public or any aspect of that discussion that might be unique
25 in a way that identifies you. Do you understand?

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1 THE WITNESS: Yes, Mr President.

2 PRESIDING JUDGE EBOE-OSUJI: All right. Public session.

3 (Open session at 1.01 p.m.)

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

5 MR STEYNBERG: Thank you, your Honours.

6 Q. Mr Witness, I can maybe just repeat in public session the topic we are going into
7 now. The lady who you mentioned, you identified to us in private session, you told
8 us that besides telling you of the benefits you might expect as a witness of the ICC,
9 that you had further discussions about the nature of the evidence you were going to
10 give to the ICC; is that correct?

11 A. Yes, correct.

12 Q. And what were the discussions you had or what did you discuss about your
13 evidence?

14 A. Number one was that I could talk about political rallies that were -- that was
15 attended by William Ruto, and if William Ruto was not there, I should mention his
16 close allies or his close friends, because she said that it will be presumed that even if
17 Ruto was not there and his supporters were there, then it will -- it will be accepted
18 that Ruto sent them to represent him in that meeting.

19 Two, I should talk about that I attended a meeting at William Ruto's home, and in that
20 meeting, it was a planning for -- for attack against the Kikuyu community.

21 Then three, I should talk about the violence that took place in Turbo and the violence
22 that took place in Eldoret.

23 Q. Those three things, is that what you discussed, nothing else?

24 A. It may be there, but maybe I have forgotten.

25 Q. Would those be the most -- three most important things then that you

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1 discussed?

2 A. Yes.

3 Q. And from -- were there any other reasons then that you gave false statement to
4 the investigators or was that the primary reason?

5 A. That was the primary reason.

6 Q. Are there any other reasons you can recall now why you decided to give this
7 false statement to the investigators? I'm giving you lots of time to think.

8 A. I can't recall any now.

9 Q. Okay. So you told the Court a while ago that you appreciated the importance
10 of the accuracy of your affidavit. Do you remember that?

11 A. Yes.

12 Q. And you told us that one of the important reasons why you made this affidavit
13 was to explain the reasons why you would give a false statement to the ICC. Do you
14 remember that?

15 A. Yes.

16 Q. And both yesterday and today when I asked you why you would give a false
17 statement, the first thing you mention is that it was the lady who we identified that
18 had told you about all the benefits you could get and who today you also say advised
19 you what sort of false evidence or what evidence you should discuss or give to the
20 ICC. Did I understand you correctly?

21 A. Yes.

22 Q. Can you explain please, Mr Witness? Help me out here. You've just read
23 through your affidavit. Is there any reason why you didn't tell your attorney what
24 you've told us now about the lady promising you benefits if you became an ICC
25 witness? Is there any reason that's not in this statement, this affidavit?

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1 A. Sorry?

2 Q. Is there any reason why your affidavit makes no mention of the fact that the
3 lady told you that if you became an ICC witness, you would receive many benefits,
4 and that is why you decided to make a false statement? Why is that not here?

5 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, what does paragraph 6 say?

6 MR STEYNBERG: Your Honour, paragraph 6 does not say that the lady was the
7 person who conveyed this information to him. In fact, if one reads in conjunction
8 with earlier paragraphs it would seem that the inducement was made by somebody
9 completely different, and that's the point I'm getting at.

10 PRESIDING JUDGE EBOE-OSUJI: All right, okay.

11 Q. I've repeated the question. Do you understand?

12 A. Yes.

13 Q. And what is your answer? Why is that information not here? Yes, we're
14 waiting. Can you hear me?

15 A. Can you repeat again, please?

16 Q. Very well. For the third time, what I want to know is why your affidavit that
17 you attested to before Mr Mutai makes no mention of the fact that it was in fact the
18 lady who told you that you could get benefits by becoming an ICC witness, and that
19 is why you gave a false statement? Why is that not here?

20 A. Can you allow me to read that affidavit once more?

21 Q. Very well.

22 MR STEYNBERG: Mr Court Officer, can you call up the affidavit at page 1137.

23 Q. But before it's called up, is there nothing you can remember as you sit there now
24 before looking at your statement? Is that a no?

25 MR STEYNBERG: Mr Court Officer, is the document up? The picture is frozen

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1 again.

2 THE COURT OFFICER (via video link): The document is not up because I
3 understood you wanted the witness to respond before I show it up. If you want me
4 to show it, I can show it now. We hear you loud and clear and we see you well.

5 MR STEYNBERG: Well, I think the record should reflect that there was no response.

6 Q. Let's repeat that question one more time, sir, so that there is no
7 misunderstanding. You can't recall as you sit there any reason why the affidavit
8 does not say: That lady firstly told me about benefits I could get if I became a
9 witness and secondly told me what information to give the investigators? You can't
10 recall any reason for that?

11 A. I can't recall it now. Maybe if I can read first and then I digest it.

12 Q. Okay. We're talking about the statement you read on Tuesday, is that right,
13 the affidavit?

14 A. Yes.

15 Q. All right. Have another look then. It's 1137.

16 MR STEYNBERG: Please call it up, sir.

17 THE COURT OFFICER (via video link): It is being presented to the witness,
18 page 1137.

19 MR STEYNBERG:

20 Q. Now --

21 MR STEYNBERG: Sorry to interrupt. Carry on.

22 THE COURT OFFICER (via video link): Paragraphs 3, 4, 5, 6 and 7 are being
23 presented.

24 MR STEYNBERG:

25 Q. Yes. But before you say anything, please don't mention the name of the lady.

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1 We're in public session. And perhaps I can just direct you to paragraph 3. You
2 mentioned the lady there, is that correct?

3 A. Yes. I'm there.

4 Q. Let's just go through that paragraph. You say that "I was recruited by..." and
5 you gave the name of the lady. "And she introduced me to the investigators," is that
6 right?

7 A. Yes.

8 Q. You can read through the statement if you like, sir, but counsel will correct me if
9 I am wrong, but there is no other mention of this lady in this statement at all, is there,
10 in the affidavit?

11 MR FAAL: Mr President, perhaps let the witness be allowed to read this statement
12 and then he would answer the question.

13 MR STEYNBERG: Your Honours, I'm content to do so. Perhaps, perhaps may I
14 suggest this, it is now 10 past, perhaps we should give this witness an hour or an hour
15 and a half to read his statement and familiarise himself with it thoroughly, and we
16 can take it from there when we resume.

17 PRESIDING JUDGE EBOE-OSUJI: All right. You have no objection to that,
18 counsel?

19 MR FAAL: To reading the affidavit?

20 PRESIDING JUDGE EBOE-OSUJI: Yes. All right. Witness, we will now take our
21 lunch-break and we'll be back at 2.30. In the meantime the Prosecutor has requested
22 that you will be allowed, that you be allowed to review that affidavit again, look at it,
23 read it carefully. When we return at 2.30, he will continue asking you questions on
24 the affidavit.

25 MR STEYNBERG: Your Honour, if I may just say that there is a further handwritten

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1 document that the witness identified yesterday. May I ask him to also have a look at
2 that in the meantime.

3 PRESIDING JUDGE EBOE-OSUJI: As well as a handwritten document that you had
4 identified yesterday.

5 Can we be more particular about that?

6 MR STEYNBERG: Yes, your Honours. It's KEN-OTP-0135-1140. It's in the nature
7 of a handwritten statement signed by the witness. This is not an affidavit. It's just
8 a -- just a statement.

9 PRESIDING JUDGE EBOE-OSUJI: All right.

10 MR FAAL: Mr President, may I request -- (microphone not activated) -- if it is
11 technically possible to provide the witness with a hard copy of the affidavit, perhaps
12 that is better instead of looking at it from a distance on a screen. That makes it a
13 little more difficult.

14 PRESIDING JUDGE EBOE-OSUJI: If it is possible, court officer --

15 MR FAAL: Thank you.

16 PRESIDING JUDGE EBOE-OSUJI: -- to print out the affidavit referred to as well as
17 KEN-OTP-0135-1140 to give to the witness, it would be greatly appreciated.

18 Thank you very much. We'll adjourn now and come back at 2.30.

19 THE COURT USHER: All rise.

20 (Recess taken at 1.15 p.m.)

21 (Upon resuming in open session at 2.38 p.m.)

22 THE COURT USHER: All rise.

23 Please be seated.

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

25 Mr Khan, we will dispose of your outstanding request. The Chamber's eighth

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1 condition on the excusal from continuous presence at trial does say "... five days of
2 hearing starting after a judicial recess." We will leave it at, "five days of hearing," so
3 that Mr Ruto will need to be here on Monday.

4 MR KHAN: I'm grateful.

5 PRESIDING JUDGE EBOE-OSUJI: Thank you.

6 MR STEYNBERG: Thank you, Mr President.

7 May I continue?

8 PRESIDING JUDGE EBOE-OSUJI: Yes, you may.

9 MR STEYNBERG:

10 Q. Good afternoon, Mr Witness.

11 A. Good afternoon.

12 Q. Were you provided access over the luncheon adjournment to your affidavit and
13 the handwritten statement accompanying it?

14 A. Yes.

15 Q. And did you have occasion to read through it at your leisure?

16 A. Yes, I've gone through.

17 Q. Okay. Can I return then -- again without mentioning
18 names, can you confirm that the only time that the name of the lady whose name
19 appears at paragraph 3, the only time she is mentioned is in that paragraph of your
20 statement; is that correct?

21 A. Pardon?

22 Q. Are you having difficulty hearing me, Mr Witness? Can you hear me clearly?

23 A. Yes.

24 Q. All right, please listen carefully. The lady who you've been speaking of, do
25 you know who I'm talking about?

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1 A. Yes.

2 Q. Her name appears at paragraph 3 of your -- your affidavit; correct?

3 A. Yes.

4 Q. Can you confirm that there's no other mention of her other than in paragraph 3
5 of your affidavit?

6 A. Yes.

7 Q. And can you confirm that there's no mention in your affidavit of her telling you
8 information to the effect that you could receive benefits - financial benefits - by
9 becoming an ICC witness? It's not there, is it?

10 A. Yes.

11 Q. Yes, it's not there?

12 A. Yeah.

13 Q. And it's also not in your statement that this -- this lady told you --

14 MR KHAN: Affidavit.

15 MR STEYNBERG: Affidavit, thank you.

16 Q. It's also not in this affidavit, sir, that you told that -- let me start again. Do you
17 confirm that there's also no mention in this affidavit that this lady discussed with you
18 false evidence to give to the investigators? Is that right?

19 A. My affidavit was written in general. So I didn't actually specify some issues,
20 but I wrote just in general.

21 Q. Yes, I understand what you're saying, Mr Witness, but please focus your answer
22 first to my question and then we can discuss other explanations you might have. Do
23 you confirm that there's no mention in your affidavit that this lady discussed with
24 you false evidence which you should present to the Prosecution? Is that correct?

25 A. Yes.

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1 MR STEYNBERG: Thank you. If the Court will bear with me?

2 Q. I just want to make sure I don't get your words wrong, if you would give me
3 one minute, please, Mr Witness. Could you tell the Chamber, Mr Witness, why it is
4 that this important reason was not contained in your statement?

5 MR KHAN: Affidavit.

6 MR STEYNBERG: Affidavit, thank you.

7 THE WITNESS: Sorry?

8 MR STEYNBERG:

9 Q. Can you please explain or tell the Chamber why these important facts, that this
10 lady told you about benefits you could get and discussed with you evidence you
11 should give to the -- to the Prosecution, why is there no mention of that in your
12 statement -- in your affidavit?

13 A. Yes. As I had said before, the affidavit I wrote was in general. I didn't go in
14 details. So once I am available, I can explain, I can tell how it happened.

15 Q. I don't follow. Once you're available for what?

16 A. When now I have come to express myself, is I can elaborate more because
17 the -- the -- the affidavit was written in a shallow way. It never went deep
18 explaining how the process took on.

19 Q. So when you say coming "to express yourself," are you talking about coming to
20 express yourself as you testify before the Chamber?

21 A. Yes, that I am here now, I can elaborate more.

22 Q. Just so I don't understand you -- misunderstand you, I beg your pardon, are you
23 suggesting that when you made this affidavit, you only spoke in general because you
24 intended to elaborate when you came to testify?

25 A. No. I am -- I am saying that I wrote it in general so that I didn't give it in

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1 details. So I was saying that if the details is needed, I am there to -- to -- to give.

2 Q. Do you regard the discussions you had with this lady as being simply details?

3 Is this just a detail?

4 A. I think there I said that I was recruited by (Redacted). That is --

5 Q. There's no further information, is there?

6 A. Yeah, that is -- that is what I was saying, that I was recruited by her. Now that
7 recruitment, that recruitment carries these details that we talked with her.

8 Q. Yes. So let's look at what you did talk about in your statement -- affidavit. In
9 your affidavit you say that the lady introduced you to (Redacted),
10 who are investigators employed by the OTP.

11 A. Sorry, I think we are in open session.

12 MR STEYNBERG: Perhaps we could go into private session, your Honours?

13 PRESIDING JUDGE EBOE-OSUJI: Private session.

14 *(Private session at 2.47 p.m.) Reclassified as Open session

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

16 MR STEYNBERG:

17 Q. I'll repeat that. You say that "She introduced me to (Redacted)

18 (Redacted), who are investigators employed by the Office of the Prosecutor ... in

19 (Redacted) on the 6th to the 8th of July 2013." Is that right?

20 A. Yes.

21 Q. And that during the course of the discussions you held with the said persons,
22 you were informed that you were free to provide information to them on what you
23 knew about post-election violence in Kenya in December 2007 and 2008; is that right?

24 A. Yes.

25 Q. And then this is the interesting part: That the said two individuals also told

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1 you that "I was to provide information that would portray Messrs William Samoei
2 Ruto and Joshua Arap Sang as the perpetrators of the post-election ..." -- "... of the said
3 post-election violence, and thus fix them, even if such information was false and
4 untrue;" is that right?

5 A. Yes.

6 Q. What does -- what did you understand or what did you mean by "fix them"?

7 A. Fixing the way I understood is that if -- even if something they never did, I try
8 as much as possible to -- to make -- to make people believe that they did.

9 Q. I see.

10 MR STEYNBERG: Your Honours, perhaps we can just go back into public session.

11 Thank you.

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

13 (Open session at 2.49 p.m.)

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

15 MR STEYNBERG:

16 Q. Thank you, Mr Witness. So you've just explained that by the word "to fix," you
17 understand that to mean that you should try as much as possible to make people
18 believe they did things even if they never did it. Is that a fair summary of what you
19 said?

20 A. Yes.

21 Q. Was that a word that you used, or was that a word that these investigators used
22 when talking to you?

23 A. That is the word they used.

24 Q. And you go on to say that "I co-operated with them and gave them false
25 information as requested as they promised to give me money and finance a luxurious

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1 life," correct?

2 A. Correct.

3 Q. You then go on to say, again, this is another important part, "That the said
4 investigators wanted information or other evidence in regard to meetings allegedly
5 held in William Samoei Ruto's home to plan violence ..." your "... recollection of what
6 Mr Joshua Arap Sang said on the radio during the relevant period and details of
7 lootings and killings that took place during the post-election violence that I had
8 witnessed. The investigators told me that I should fix Mr Ruto ..." and "... where that
9 wasn't possible, his supposed close confidants," and then you name certain persons.
10 Now, isn't that exactly what you said or almost word for word what you said was
11 told to you by the lady to say?

12 A. Yes.

13 Q. So which is correct, Mr Witness? Was it the lady that told you that or was it
14 the investigators that told you that?

15 A. What we discussed with the lady -- what the lady told me is what exactly when
16 I met the investigators said again. So whatever the lady was telling me and what the
17 investigators were telling me was -- was the same.

18 Q. I see. All right. I'd like to put this aside for one moment, your affidavit, and
19 just ask you one or two questions about your visit to the doctor prior to your
20 testifying. And I'm not going to mention his name in public session. But do you
21 know what I'm talking about, the doctor you visited on 27 August?

22 A. Yes.

23 MR KHAN: Mr President, there is an issue here. You would have noted that since
24 your Honour's ruling at the outset, that my learned friend should probe more before
25 cross-examining or leading. My learned friend almost immediately jumped into

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1 cross-examination mode, and I didn't rise, we didn't object.

2 But, your Honour, in our respectful submission, the spirit of the ruling of the

3 Chamber is clear, that the first task -- I'm not saying the Prosecution can't do this.

4 The question is when should they do it.

5 In my respectful submission, given that what we're focusing on is the account, the

6 statement given back to the Prosecution and in particular whether or not the witness

7 is willing to speak the truth or the whole truth or part of the truth today, it's

8 incumbent upon the Prosecution before further seeking to discredit their own witness

9 that they probe that statement, do it paragraph by paragraph and ask him: Is that

10 what you said? Is it true? If not, why not?

11 And your Honours, we may get to the ultimate point, but there's a certain path that

12 the Prosecution need to travel, need to traverse before we get there. And I'd ask that

13 my learned friend from now on be so kind as to conduct himself in that manner that

14 we say is consistent with the ruling of the Chamber.

15 PRESIDING JUDGE EBOE-OSUJI: And also from now on I think you should be the

16 one making submissions for the rest of this witness's testimony. The matter of you

17 standing up and Mr Faal as well --

18 MR KHAN: Yes.

19 PRESIDING JUDGE EBOE-OSUJI: -- that's not something we --

20 MR KHAN: Indeed.

21 PRESIDING JUDGE EBOE-OSUJI: Yes.

22 MR KHAN: Your Honour, for the sake of clarification, the issues of hostility would

23 be dealt with by me, and my learned friend Mr Faal will be cross-examining the

24 witness. So that's the division, issues of hostility and cross-examination. I

25 would -- the issues of hostility that I would ask to speak to, but my learned friend

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- 1 Mr Faal will be in due course cross-examining this witness.
- 2 But, your Honour, I'm mindful of the injunction and will act according.
- 3 PRESIDING JUDGE EBOE-OSUJI: Yes.
- 4 MR KHAN: I'm grateful, of course.
- 5 PRESIDING JUDGE EBOE-OSUJI: Let's not have both of you getting up.
- 6 MR STEYNBERG: Your Honour, there was just one discrete piece of information I
- 7 wanted to confirm with this witness. This is in fact a document that the witness
- 8 provided. All I wish to do was confirm what is reported to -- he is reported to have
- 9 told the doctor, because it is relevant to the issue of his affidavit and the
- 10 circumstances in which that was made.
- 11 So I would request leave to confirm one thing, and then I will return to the issues of
- 12 the affidavit and statement immediately after that.
- 13 PRESIDING JUDGE EBOE-OSUJI: Let's see how -- go on. We will see.
- 14 MR STEYNBERG: Thank you, your Honours.
- 15 PRESIDING JUDGE EBOE-OSUJI: But the point made by Mr Khan you also need to
- 16 keep in mind --
- 17 MR STEYNBERG: As the Court pleases.
- 18 PRESIDING JUDGE EBOE-OSUJI: -- whether you haven't already started doing
- 19 that cross-examination.
- 20 MR STEYNBERG: As the Court pleases. I'm so guided.
- 21 Q. (Redacted)
- 22 (Redacted)
- 23 A. (Redacted)
- 24 Q. (Redacted)
- 25 (Redacted)

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1 (Redacted)

2 (Redacted)

3 A. (Redacted)

4 Q. (Redacted)

5 A. (Redacted)

6 Q. (Redacted)

7 (Redacted)

8 PRESIDING JUDGE EBOE-OSUJI: Private session.

9 *(Private session at 2.57 p.m.) Reclassified as Open session

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

11 MR STEYNBERG: Thank you, your Honours.

12 PRESIDING JUDGE EBOE-OSUJI: Thank you.

13 Witness, proceed now. We are in private session.

14 THE WITNESS: (Redacted)

15 (Redacted)

16 MR STEYNBERG:

17 Q. Well, as you sit here before the Court today, what is your financial status? Can
18 you tell the Court about -- about your financial status?

19 MR KHAN: Your Honour, my previous objection stands. This is premature. This
20 is clearly setting the witness up for something. And I'm not saying it's impermissible.
21 But what I said earlier remains true, my learned friend should be a little bit -- we
22 should hold fire until certain steps have been taken. And of course it may be that if
23 the Bench give leave later on, the witness can be asked these type of questions.
24 But, your Honour, we're dealing with collateral matters, incidental matters, and I'm a
25 little bit concerned that there seems to be some reluctance by the Prosecution to really

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1 deal with the veracity of the allegations dealing with the post-election violence, and
2 that's what really should be the first focus.

3 After evidence has been heard, of course if the Bench give leave, and the witness is
4 declared -- certain rulings are made, further questions can be put by the Prosecution
5 to test that, but, your Honour, once again my learned friend is seeking to short-circuit
6 matters in regard to a previous ruling the Chamber has already made on the issue.

7 MR STEYNBERG: Your Honours, I understand the ruling and I'm certainly not
8 reluctant and I certainly will get to the statement.

9 The question which I asked was certainly not a leading question. I asked what is the
10 (Redacted). I'm not yet challenging him on anything.

11 It may be that later the information which I have elicited in the normal fashion may
12 be used to challenge the witness on something, but I'm afraid that on this occasion my
13 learned friend's objection is premature. I'd just like the witness to -- to explore this
14 area with the witness in a neutral manner. And my next port of call will, indeed, be
15 to turn to his statement.

16 MR KHAN: Mr President, for a question to be permitted it must be relevant,
17 relevant to a fact in issue; therefore, it begs the question relevant to what, and it's
18 clearly relevant only in a certain scenario.

19 Your Honour, I haven't raised the issue of doctor-client privilege, I haven't raised the
20 issue about asking a witness regarding what he told the medical practitioner, but,
21 your Honour, these are matters that should be dealt with later because it can only
22 possibly be relevant in the event that the Chamber make a certain ruling.

23 That ruling has not been made, therefore the question becomes irrelevant and should
24 not be asked and -- at this moment. And that's the simple focus of my objection.

25 Let's deal with the substance of the testimony, let's hear what the witness has to say

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1 about the statement he made, about what he saw and witnessed in 2007 and to the
2 extent that there's any departure between what he says today under oath and what he
3 said to the Prosecution previously. Explanations in a non-leading way should be
4 asked, "Well, if that's the case, why did you say that?" Let's hear the explanation
5 before we jump certain quite critical steps that will assist, we say, the Chamber
6 assessing -- and all of us, in fact, in assessing the credibility or otherwise of this
7 witness.

8 (Trial Chamber confers)

9 PRESIDING JUDGE EBOE-OSUJI: Objection is sustained.

10 MR STEYNBERG: Thank you, your Honours. I'll move on for the time being.

11 PRESIDING JUDGE EBOE-OSUJI: But without prejudice, of course, to -- because it
12 is premature. That's the point.

13 MR STEYNBERG: As the Court pleases.

14 Q. Mr Witness, I'm now going to turn back to your first statement.

15 PRESIDING JUDGE EBOE-OSUJI: Should we go to public or remain in private?

16 MR STEYNBERG: Perhaps -- perhaps while we're in private session, I can just deal
17 with one aspect.

18 Q. You've told the Chamber that you were (Redacted).

19 Do you remember that?

20 A. Yes, I remember.

21 Q. And you told the Chamber that there was -- I think you used the word hatred
22 towards Kalenjins who supported the PNU, or perhaps I'm using the wrong word,
23 but certainly Kalenjins who supported the PNU were not well-regarded by the
24 majority who supported the ODM; is that fair?

25 A. Yes.

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1 Q. Subsequent to the elections and subsequent to the violence, were there ever any
2 incidents relating to -- (Redacted)? Did anything like
3 that ever happen?

4 A. Sorry?

5 Q. Were there ever any incidents in which you experienced difficulties as a result
6 of the fact (Redacted)?

7 A. Yes.

8 Q. Can you please tell the Chamber about those incidents or that incident.

9 A. That was in January 2008. There was a day I had gone to church, on a Sunday,
10 and then when I came back in the evening, at around 5, (Redacted)

11 (Redacted)

12 (Redacted).

13 Q. And what happened after that?

14 A. When -- when the group went the grazing field, where the cows were grazing,

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 Q. And where were you when this took place?

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- 1 A. I was in the church.
- 2 Q. (Redacted)?
- 3 A. Yeah --
- 4 Q. We're in private session.
- 5 A. When I -- I -- I was told the names.
- 6 Q. We're in private session, so you can mention the names.
- 7 A. Yes. One of them was called (Redacted).
- 8 Q. Anyone else?
- 9 A. There is another one called (Redacted).
- 10 Q. All right.
- 11 A. And -- and a whom called (Redacted).
- 12 Q. Are those the only names you recall?
- 13 A. Yeah, those are the only ones I recall.
- 14 Q. And besides this incident, were there any other incidents -- well, firstly, what
- 15 was the ethnicity of these people (Redacted)?
- 16 A. They were the Kalenjins.
- 17 Q. And was this the only occasion or were there other occasions when there was
- 18 trouble (Redacted)?
- 19 A. I can't remember having another situation.
- 20 Q. All right. Is this a matter, sir, that you discussed in your statement that you
- 21 gave to the investigators in July 2007?
- 22 A. Yes, I told them.
- 23 Q. Would it assist you to refresh your memory from your statement in this regard?
- 24 A. Sorry?
- 25 Q. Would it assist you, would it assist your memory, to refresh your memory from

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1 what is written in your statement?

2 PRESIDING JUDGE EBOE-OSUJI: Can you point him to what you're saying
3 regarding whether there is another situation of difficulty.

4 MR STEYNBERG: I'm sorry I didn't quite catch your Honour's comment.

5 PRESIDING JUDGE EBOE-OSUJI: Can you direct the witness's mind to matter to
6 which you might want the memory refreshed.

7 MR STEYNBERG: Yes.

8 Q. I'm referring to incidents that occurred (Redacted)

9 (Redacted). You've said that you mentioned this

10 subject or you discussed this subject in your statement of July 2013. My question is:

11 Would it help your memory to read what is written in that statement as to various
12 events that might have happened? Would you like to read your statement?

13 A. Yes, I can read.

14 Q. All right. Mr Court Officer, can I please ask you to pull up the witness's first
15 statement of 6 to 8 July, it's KEN-OTP-0109-0019, at page 0046.

16 THE COURT OFFICER (via video link): The witness is being presented the
17 document at page 0046, paragraph 166.

18 MR STEYNBERG: Very well.

19 Q. Could I direct your attention to paragraph 168 below the heading "My return to
20 (Redacted) January 2008." If you could please read through paragraphs 168 through
21 to 174.

22 Have you finished?

23 A. Yes, I have finished.

24 Q. Does that refresh your memory about any other incidents, sir?

25 A. No.

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1 Q. Well, let's have a look at what is recorded here and then you can explain to us
2 whether or not this is correct, all right?

3 A. Yes.

4 PRESIDING JUDGE EBOE-OSUJI: Prosecutor, is there any particular paragraph
5 that -- instead of the range?

6 MR STEYNBERG: Yes.

7 PRESIDING JUDGE EBOE-OSUJI: Is there only one that --

8 MR STEYNBERG: Well --

9 PRESIDING JUDGE EBOE-OSUJI: -- brings it up that may jolt memory, if there is
10 memory to be jolted?

11 MR STEYNBERG: If the Court will bear with me. It's pretty much all of them that
12 are engaged, your Honours.

13 Q. Let's start with paragraph 173. Can you just look at paragraph 173. Have you
14 read that?

15 A. Yes, I've read it.

16 Q. What do you say about what appears there?

17 A. I am not getting your question well.

18 Q. What do you have to say about what appears in paragraph 173? Does that
19 refresh your memory as to any incidents that occurred?

20 MR KHAN: Mr President, maybe I misunderstood. I thought the question earlier
21 was, at page 100, to ask the witness if he recalled other incidents that occurred to him
22 (Redacted) after the post-election violence. I wonder if 173

23 relates to that or if, in fact, the previous -- one the previous paragraphs refers to that,

24 but it seems to me to be a separate issue. It would be perhaps useful to get -- give

25 the witness a chance to answer the question originally posed, which was in relation to

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1 any difficulties encountered after the PEV (Redacted)
2 (Redacted), and I think that was the focus of the initial questions. We
3 haven't got a response to that. We've moved on to something different, we say.
4 MR STEYNBERG: I will try to clarify, your Honours. We're leading up to
5 something - we're leading up to a certain incident - and these are all precursors, if it
6 can be called that, but perhaps I should rather start with paragraph 170.
7 MR KHAN: Can I help, your Honour, and I hope it helps. I'm not objecting. I
8 know that there are certain formalities regarding memory refreshing, but I've got no
9 problem with the witness being asked to look at certain paragraphs and then asked,
10 "Is that the truth, yes or no? If not, why not?", and we can do that quite methodically
11 and in the end it will end up being much shorter than the process that we're currently
12 embarked upon.
13 And so my learned friend doesn't need to jump through hoops. He can simply
14 say -- and we accept this is the statement. We accept it was signed by the witness.
15 Now your Honours want to assess it as against other evidence.
16 So I don't have an objection for my learned friend to take the witness to a specific
17 paragraph with a series and say, "Is that true? Is that true, yes or no?", and if not get
18 an explanation. "Did you say it?" "Yes." "Why?", and get an explanation. And,
19 your Honour, in the end I think that will be a much quicker process and it would
20 allow the witness to be released earlier.
21 I hope that helps. I'm not putting the Prosecution -- I'm not seeking in our
22 submissions to require the Prosecution to jump through some additional hoops before
23 the document can be put to the witness in relation to some specific questions.
24 PRESIDING JUDGE EBOE-OSUJI: In fairness to the Prosecution there have been
25 instances in the past when you had insisted as such, but you're saying on this

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1 occasion you are willing to --

2 MR KHAN: Your Honour, quite right. Normally we would, but this is a situation
3 in which, consistent with my earlier submissions as to the proper way of proceeding,
4 I'm not going to go against that.

5 PRESIDING JUDGE EBOE-OSUJI: All right. You're saying on this occasion --

6 MR KHAN: Indeed.

7 PRESIDING JUDGE EBOE-OSUJI: -- you're willing to --

8 MR KHAN: Indeed.

9 PRESIDING JUDGE EBOE-OSUJI: Okay.

10 Mr Steynberg, do you accept that offer?

11 MR STEYNBERG: Thank you. I do, your Honours, provided that my learned
12 friends for Mr Sang concur as well.

13 PRESIDING JUDGE EBOE-OSUJI: We will turn to him.

14 MR STEYNBERG: Yes.

15 PRESIDING JUDGE EBOE-OSUJI: Yes.

16 MR STEYNBERG: That would make my job much easier --

17 PRESIDING JUDGE EBOE-OSUJI: Yes.

18 MR STEYNBERG: -- as you quite rightly point out following previous procedures.

19 MR KIGEN-KATWA: Your Honours, we also confirm that we do not contest that
20 this is his statement, we have no objection to going directly to the paragraph and we
21 would be very much agreeable to a situation where the witness is given an

22 opportunity to explain in case of a departure from what he has said in the statement.

23 PRESIDING JUDGE EBOE-OSUJI: Right. So the agreement is that the Prosecutor
24 can read out the paragraph in question and then get the witness's reaction to it?

25 MR KIGEN-KATWA: We do confirm, your Honours.

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- 1 PRESIDING JUDGE EBOE-OSUJI: "Yes," Mr Khan says.
- 2 All right. Mr Steynberg?
- 3 MR STEYNBERG: Thank you, your Honours.
- 4 Q. In that case, Mr Witness, can I start with the heading above paragraph 168 which
- 5 reads, "My return to (Redacted) January 2008." Did you in fact return to (Redacted)
- 6 on (Redacted) January 2008? Is that correct?
- 7 A. As I had said yesterday, I didn't go anywhere during that post-election violence.
- 8 Q. So it's incorrect to say then that you returned to (Redacted) on (Redacted) January?
- 9 A. Exactly.
- 10 Q. And why is that contained in your statement? Why does your statement --
- 11 A. Yes, that is --
- 12 Q. Sorry, why does your statement say then that, "My return to (Redacted) on
- 13 (Redacted) January ..."?
- 14 A. That is what I had said yesterday that I wrote a false statement.
- 15 Q. Is this something that -- well, let me come back to that.
- 16 Paragraph 168 reads as follows, "On (Redacted) January 2008 at 9 p.m. I received a phone call
- 17 from (Redacted) ..."
- 18 PRESIDING JUDGE EBOE-OSUJI: Pace.
- 19 MR STEYNBERG: Paragraph 168, your Honours, on the same page. It's 0046.
- 20 PRESIDING JUDGE EBOE-OSUJI: I said "pace."
- 21 MR STEYNBERG: Oh, pace. Sorry, I thought you said --
- 22 PRESIDING JUDGE EBOE-OSUJI: Pace. You were moving too fast.
- 23 MR STEYNBERG: I beg your pardon. Let me repeat that.
- 24 Q. "On (Redacted) January 2008 at 9 p.m. I received a phone call from (Redacted)." Is that
- 25 correct?

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- 1 A. No.
- 2 Q. "He told me to return home." Is that correct?
- 3 A. No.
- 4 Q. (Redacted)
- 5 Correct?
- 6 A. No.
- 7 Q. "He asked me to talk with a man called (Redacted) who was also a
- 8 neighbour." Is that correct?
- 9 A. No.
- 10 Q. Is (Redacted) in fact your neighbour?
- 11 A. Yes, he's my neighbour.
- 12 Q. It then goes on, "I phoned (Redacted) and he also told me that I should go back
- 13 (Redacted)." Is that correct?
- 14 A. No.
- 15 Q. And the next paragraph deals with the fact that you returned home on
- 16 (Redacted) January at (Redacted). and you've already told us that that was not correct. The
- 17 following paragraph, paragraph 170, states that, "In the morning of (Redacted) January 2008 I
- 18 met a neighbour called (Redacted)." Is that correct?
- 19 A. No.
- 20 Q. (Redacted) -- well, it follows then that everything that he allegedly told you
- 21 at that meeting also didn't happen; is that right?
- 22 A. Yes.
- 23 Q. The following paragraph, paragraph 171, describes a meeting you allegedly
- 24 attended (Redacted)
- 25 (Redacted). Did that happen?

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- 1 A. Yes, the meeting happened, but I didn't attend.
- 2 Q. How did you find out about this meeting?
- 3 A. I was told by (Redacted).
- 4 Q. And from what he told you, do you know whether he attended this meeting?
- 5 A. Yes, he attended.
- 6 Q. According to this statement, (Redacted) was your neighbour. Is that correct?
- 7 A. Yes, he was my neighbour.
- 8 Q. All right. It goes on then to say, (Redacted)
- 9 (Redacted)" Is that correct?
- 10 A. Yes, it is correct.
- 11 Q. (Redacted)
- 12 (Redacted)
- 13 (Redacted) Is that correct?
- 14 A. Yes.
- 15 Q. It says that, paragraph 172, "The meeting was chaired by (Redacted), the
- 16 other leaders were (Redacted)," and that there
- 17 were (Redacted) people there. Is that correct?
- 18 A. I was told. I never attended, but I was told by (Redacted).
- 19 Q. Is that a correct reflection of what you were told by (Redacted)? Is that, as it
- 20 stands here, what (Redacted) told you?
- 21 A. Yeah, I think that was what he told me.
- 22 Q. When did he tell you this?
- 23 A. The day after.
- 24 Q. The day after this meeting allegedly happened in January 2008?
- 25 A. Yes.

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1 Q. I see. Then in paragraph 173, "(Redacted) told ..." you "... that there had been
2 a meeting on (Redacted) January (Redacted)
3 (Redacted)." Did that happen?

4 A. No.

5 Q. Moving on to paragraph 174, you talk about (Redacted)
6 (Redacted). Did that ever
7 happen?

8 A. No.

9 Q. Right. Going back to (Redacted), what is his ethnicity?

10 A. (Redacted) is a Kalenjin.

11 Q. And do you know who he supported during the elections?

12 A. Yes, I know.

13 Q. Who was that?

14 A. He supported President Kibaki and the PNU.

15 Q. (Redacted)

16 (Redacted)

17 A. I don't remember.

18 MR KHAN: Mr President, can I just ask do we have to remain in private session for
19 all of this? To the extent any names are mentioned, there's a PIS form and the
20 witness will have the direct statement in front of him when certain paragraphs are put.
21 And so it can be read without mentioning any names anyway, and at least that way
22 the public can hear and follow the thrust of what is occurring. So I'd ask that we go
23 to private (sic) session. The witness of course can be informed by my learned friend,
24 or by the Court, not to mention any names to the extent that will reveal his identity,
25 but your Honour at least quite a lot of the important aspects can get into the public

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1 domain.

2 PRESIDING JUDGE EBOE-OSUJI: I think at this stage it's easier for the Prosecutor
3 to just read out what's in the statement.

4 MR KHAN: I'm grateful.

5 PRESIDING JUDGE EBOE-OSUJI: And then if later on there's a need to have
6 discussion away from the text of the affidavit, then we can use the PIS.

7 MR STEYNBERG: Thank you, your Honours. There is also, I should probably
8 point out I think, a practical issue and that is that my understanding is that the -- for
9 security reasons the Court Management have not printed the PIS and I'm not sure
10 whether it's possible to have both the PIS and the statement on the screens at the same
11 time. I don't know whether the court officer can speak to that issue, or whether we
12 should just continue?

13 PRESIDING JUDGE EBOE-OSUJI: Let's continue with the text of the affidavit for
14 now. Once we get the text on the record --

15 MR STEYNBERG: Yes.

16 PRESIDING JUDGE EBOE-OSUJI: -- in its full integrity, then we can move out to the
17 public session to discuss -- to conduct any discussion that may be necessary.

18 MR STEYNBERG: Thank you.

19 Can I ask you please, Mr Court Officer, to call up the following page, page 0047? I'd
20 like to finish this subject.

21 THE COURT OFFICER (via video link): The page 0047 is being presented to the
22 witness, paragraph 175.

23 MR STEYNBERG: Thank you.

24 Q. There's no need to read it. I'll read through it as we go. At paragraph 175 you
25 state that, (Redacted)

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- 1 (Redacted) Now, you've stated that you didn't attend the meeting and so
2 I presume that's false?
3 A. Yes.
4 Q. (Redacted)
5 (Redacted) They
6 said that in order ... (Redacted)
7 (Redacted)
8 Did that ever happen?
9 A. (Redacted)
10 (Redacted)
11 Q. I see. And this is the same meeting, if I understand correctly, that
12 (Redacted) attended?
13 A. Yes.
14 Q. Did you speak to (Redacted) about what happened at that meeting?
15 A. Yes, when he arrived he told me.
16 Q. What did he tell you?
17 A. He told me that the group, or those people that were assembled there, (Redacted)
18 (Redacted). Then he (Redacted)
19 (Redacted).
20 Q. I see. And did he tell you about (Redacted) being at that meeting?
21 A. Yes, he told me.
22 Q. So from what I understand then you had two sources of information about that
23 meeting: (Redacted)?
24 A. Yes.
25 Q. From what (Redacted) told you, is it correct that certain people (Redacted)

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1 (Redacted)?

2 A. He never said (Redacted).

3 Q. All right. And then the final paragraph you deal with an incident, that's
4 paragraph 178, following Sunday mass when (Redacted)
5 (Redacted). Is that the incident you told us about earlier?

6 A. The incident happened, but I was not at home.

7 Q. I see. So where it says in the first sentence that "The following Sunday after
8 mass when I was sitting at home (Redacted) came to my home." You
9 say you weren't at home?

10 A. I wasn't at home.

11 Q. And the rest of the paragraph, is that correct?

12 A. Let me go through it shortly.

13 Q. Have you had a chance to read that?

14 A. Yes, I've read some. A part of it is true, part of it is not true.

15 Q. All right. Can you tell us the parts which are not true? You've already dealt
16 with the first sentence, so let's start from the second sentence.

17 A. So it is true that those (Redacted) came. And
18 then it is true that --

19 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, so we can make better sense of the
20 record later on, can you do what you've done before, take --

21 MR STEYNBERG: Yes.

22 PRESIDING JUDGE EBOE-OSUJI: -- the witness through that paragraph sentence
23 by sentence.

24 MR STEYNBERG: As the Court pleases.

25 Q. So I think we've dealt with the first two sentences. Starting from the third

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- 1 sentence, (Redacted)
- 2 Is that right?
- 3 A. I was told. Because I was not there, when I arrived home, I was told he did
- 4 that.
- 5 Q. By whom?
- 6 A. By my wife.
- 7 Q. Okay. "He told me to come outside." I presume that's incorrect because you
- 8 weren't there?
- 9 A. Yes.
- 10 Q. (Redacted)
- 11 A. (Redacted)
- 12 Q. (Redacted)
- 13 A. (Redacted)
- 14 Q. (Redacted)
- 15 A. (Redacted)
- 16 Q. (Redacted)
- 17 A. Yes, I was told that they did that.
- 18 Q. (Redacted)
- 19 A. Yes, I was told that happened.
- 20 Q. (Redacted)
- 21 A. Yes.
- 22 Q. (Redacted)
- 23 (Redacted)
- 24 A. Yes, I'm told they did that.
- 25 Q. (Redacted) You've already said that that

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- 1 happened. (Redacted) You've already
2 confirmed that, correct?
3 A. Sorry?
4 Q. You've already confirmed that they (Redacted)
5 (Redacted).
6 A. (Redacted)
7 Q. (Redacted)
8 A. Yes.
9 Q. "After this I was left in peace."
10 All right. Before we go into public session, the meeting to which we referred earlier,
11 according to (Redacted), who was chairing that meeting? Who called
12 that meeting?
13 A. Yes, I was told by (Redacted) -- I was not told who called it, but he told me
14 that the person who was chairing was somebody called (Redacted).
15 Q. And who is Mr (Redacted)? Does he hold any position in the community?
16 A. (Redacted).
17 Q. Yes. And in the community does --
18 A. He --
19 Q. Yes?
20 A. He doesn't -- he doesn't hold any post.
21 Q. All right. And besides (Redacted), who else presided over this meeting?
22 A. (Redacted)
23 Q. Mm-hmm.
24 A. Yes.
25 Q. Anyone else?

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1 A. Yes, even (Redacted).

2 Q. Yes. And anyone else?

3 A. No, I can't recall at this --

4 Q. Maybe I can just refer you, according to your paragraph 172, you also
5 mentioned (Redacted) or you told that as well?

6 A. Yes, I was told that he was there.

7 Q. (Redacted)

8 A. (Redacted)

9 MR STEYNBERG: All right. I'm just considering, your Honours, the extent to
10 which I can ask the following follow-up questions in public session. We can try, but
11 there are some fairly specific details that might make it difficult.

12 PRESIDING JUDGE EBOE-OSUJI: Even with the PIS?

13 MR STEYNBERG: If the Court will bear with me.

14 MR KHAN: Mr President, without delaying matters, can I also ask that the court
15 officer in Nairobi consider printing out the PIS for Monday. It may make things a
16 little bit easier.

17 MR STEYNBERG: Your Honours, I understand that has been considered and a
18 decision was taken not to. So the Chamber would have to speak on that issue I think
19 with the -- with the court officer if there is to be a change.

20 MR KHAN: Your Honour, I would ask that it be done. I don't think there will be
21 any great danger at the end of every day if my friend the court officer, if he doesn't
22 feel his room or whatever is secure for any reason, it can be shredded at the end of
23 every day. But at least for the next two or three days, however long we are, it would
24 make questioning in public easier. So I would ask if there's no insurmountable
25 obstacle, if it could be printed out, it can be kept in the custody of the court officer. It

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1 looks like he has statements printed out and other documents or that they were
2 provided to the witness. And, your Honour, it can be shredded at the end of the day
3 if there's not security.

4 I do note I think there's a court or registry office I think in Nairobi. I would think
5 that would be safe and secure. But, your Honour, I will say no more.

6 MR STEYNBERG:

7 Q. Perhaps just before we go into public session so I know who we're talking about,
8 there are two (Redacted) discussed in your statement. One is described as coming
9 (Redacted) and the other one is described as coming from (Redacted). Which of these
10 two (Redacted) is it that you were told presided over this meeting?

11 A. The one from (Redacted).

12 MR STEYNBERG: Thank you. Thank you, your Honour. We can go into public
13 session then.

14 PRESIDING JUDGE EBOE-OSUJI: Witness, we will go into public session now.
15 Please be careful about taking care to not reveal identifying information, okay?

16 THE WITNESS: Yes, your Honour.

17 MR STEYNBERG:

18 Q. And before we do, if I can just say when I refer to in public session "your
19 position," I'm referring to your position (Redacted). Do you understand?

20 A. Yes.

21 PRESIDING JUDGE EBOE-OSUJI: Public session.

22 (Open session at 3.38 p.m.)

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

24 MR STEYNBERG:

25 Q. Thank you, Mr Witness. We've been dealing with certain evidence that you

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1 gave to the investigators relating to incidents that were alleged to have happened to
2 you after the post-election violence. And according to your statement, it says you
3 (Redacted)

4 (Redacted)

5 (Redacted) You've told us that you never attended such a meeting.

6 Why did you tell the investigators that you attended a meeting like that?

7 A. It is part of the falsehood that I created to -- in order to -- to fit to be a witness.

8 Q. But can you explain why it was necessary, if as you say the meeting did happen
9 and compensation was demanded from a family member of yours, why was it
10 necessary to say that you yourself were at that meeting?

11 A. I never got you well.

12 Q. Why did you think it necessary to tell the investigators that you personally
13 attended the meeting rather than giving them the version which you've just told the
14 Chamber, namely, that you heard from two sources that the meeting took place and
15 that the persons presiding were demanding compensation from you because of your
16 activities?

17 A. I have said earlier that I was told that I should give statement even if false, but
18 provided it will portray that the post-election violence was planned and there was
19 that revenge mission. So in that matter I had to fix -- to fix myself that I went there
20 so that my statement can be -- can be more concrete.

21 Q. I see. This information that you gave in this section, I just want to be clear as to
22 the source of this information. Is this something that you yourself decided to tell the
23 investigators or is this something that the investigators told you they wanted to have
24 in your statement?

25 A. I told them.

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1 Q. You told them. So you made this up; is that right?

2 A. Yes.

3 Q. I see. Thank you. I think we can move on then to another area. Just one
4 second.

5 All right. I'd like to turn to some other issues, to follow up on some other issues that
6 you mentioned at the beginning of your evidence. Let's start off with the issue of
7 Mr Ruto and his position in the Kalenjin community. You recall yesterday that
8 when I asked you what was Mr Ruto's position in the community, you described him
9 as the point man for the Kalenjin. Do you recall that?

10 A. Yes, I recall.

11 Q. And I asked you if you could recall any examples or incidents that reflected the
12 influence which he had in the community and you said you could not recall any such
13 incidents. Do you recall that?

14 A. Yes.

15 Q. Could I ask the court officer, please, to call up page 0022, ERN-0022 of the same
16 series?

17 THE COURT OFFICER (via video link): Page 0022 is presented to the witness at
18 paragraph 18.

19 MR STEYNBERG: And I'm interested at -- for the time being, from paragraph 20
20 onwards. And let's go through that. I think this can all be done in the public
21 session.

22 Q. Paragraph 20 you state, "The leading politician in my area is Honourable
23 William Ruto."; is that correct?

24 A. It is correct.

25 Q. He is referred to as "kirgit," which is a Kalenjin word to mean "king." The

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1 literal translation of the word is "bull" which, in the Kalenjin culture, is a symbol of
2 power and refers to "king"; is that right?

3 A. It is not right.

4 Q. What is incorrect?

5 A. From sentence number 2 to where you have stopped.

6 Q. It's not correct?

7 A. Yes.

8 Q. So -- all right. So let's start with the word "kirgit." What does the word
9 "kirgit" mean in Kalenjin?

10 A. Kirgit means "a bull."

11 Q. It means "a bull"?

12 A. Yes.

13 Q. Is it correct that that is a symbol of power in the Kalenjin culture?

14 A. No.

15 Q. It's not correct?

16 A. Yes.

17 Q. And it's not correct that it's synonymous with "a king"?

18 A. Yes.

19 Q. I see. Next sentence: "Ruto is a mighty person" --

20 MR KHAN: Your Honour, again, I don't want to belabour the point. It is supposed
21 to examination-in-chief. The obvious question is what does it mean and does it have
22 any connotations?

23 MR STEYNBERG: Well, I've established the literal meaning. I'm, at this stage,
24 interested in the meaning -- the correctness of the statement. Obviously my learned
25 friend is more than welcome to ask any follow-up questions he wishes when his turn

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1 comes or, rather, Mr Faal's turn comes.

2 PRESIDING JUDGE EBOE-OSUJI: Objection is overruled.

3 MR STEYNBERG:

4 Q. "Ruto is a mighty person in the Rift Valley." Is that correct?

5 A. No.

6 Q. What is incorrect about that statement?

7 A. That Ruto is a mighty person in Rift Valley.

8 Q. So how would you describe Mr Ruto's position in the Rift Valley? Is he an
9 insignificant person?

10 A. Yeah, I describe him to be a leader.

11 Q. Are there any leaders in the Rift Valley more important than Mr Ruto?

12 A. I think that question vary with individual. Some people may look him as very
13 important than any other person, some people may -- maybe -- may see another
14 leader to be important than -- than Ruto.

15 Q. Let's not speculate about other people, Mr Witness. I'm asking you. How
16 would you describe Mr Ruto? Are there any more important leaders, according to
17 you, in the Rift Valley than Mr Ruto?

18 A. At the present, because he is the deputy president, I -- I don't see any other
19 leader that is above him.

20 Q. What about in 2007-2008 at the time of the elections, were there any other
21 people more important than Mr Ruto?

22 A. Yes, we had other leaders.

23 Q. Such as?

24 A. Such as we had the chairman of the ODM who was called Henry Kosgey.

25 Q. Was he a more important person in the Rift Valley than Mr Ruto at the time?

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1 A. Yes, because he was the party chairman he was more important.

2 Q. I see. And what was the relationship between Mr Ruto and Mr Kosgey; do you
3 know?

4 A. I don't know, but I -- what I know is that they were both leaders of ODM in Rift
5 Valley.

6 Q. I see. All right. So you say that Mr Ruto was not a mighty person in the Rift
7 Valley. Going on, "By that I mean almost all the inhabitants in my area believed that
8 Ruto determines their fates. And therefore people must follow what he says." Is
9 that right?

10 A. No.

11 Q. What's incorrect?

12 A. That Ruto could determine the fate of the people.

13 Q. The statement says that people believed that they could -- that he could
14 determine their fate. Is that correct, whether or not he actually could? Is that
15 correct, that people believed he could determine their fates?

16 A. Yeah, some people believed.

17 Q. I see. Now, you give a number of examples in the following paragraph of
18 occasions on which Mr Ruto, according to you, has shown his influence.

19 MR KHAN: Sorry, your Honour, before we move on, and I notice my learned friend
20 was going paragraph by paragraph, your Honour there hasn't been a question posed
21 so there shouldn't be ambiguity; in the last sentence, of paragraph 20, "And therefore
22 people must follow what he says." Does the witness say that is true or not? It's
23 quite important. And, your Honour, I don't want to move on so there's ambiguity in
24 the Court record. I think it was part of the question that hasn't been answered by the
25 witness.

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1 MR STEYNBERG: Your Honour, I can certainly clarify that but perhaps I should get
2 some clarity, too.

3 The Prosecution will obviously deal with areas of the affidavit which it feels it has to
4 for the purposes of determining what is correct and for the next --

5 MR KHAN: Statement.

6 MR STEYNBERG: -- statement, and for the next steps that one might take.

7 Obviously, my learned friend, if there is anything which remains unclear, Mr Faal can
8 clarify that in his cross-examination. I do not propose to go through each and every
9 word in this statement just for the sake of -- of removing ambiguity. But certainly in
10 this occasion I will follow it up.

11 PRESIDING JUDGE EBOE-OSUJI: It's definitely -- you can see the importance of
12 that.

13 MR STEYNBERG: Yes. Yes, on this occasion I will clarify that.

14 PRESIDING JUDGE EBOE-OSUJI: Also while you clarify that, in light of a certain
15 distinction the witness has made between time periods, also --

16 MR STEYNBERG: Yes.

17 PRESIDING JUDGE EBOE-OSUJI: -- mindful of the tenses in which words appear
18 on the statements you might want to clarify what time periods we're talking about.

19 MR STEYNBERG: Yes.

20 Q. Mr Witness, just to clarify firstly the time periods. This statement is written in
21 2013 we know, and you state there that "Ruto is a mighty person in the Rift Valley."
22 Was that -- was that correct in 2013?

23 A. I think I -- I didn't admit that Ruto is a mighty person.

24 Q. So neither in 2007, nor in 2013 would you say that he was a mighty person?

25 A. Yes.

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1 Q. All right. Then on the last issue --

2 MR KHAN: Sorry, and just for clarity, your Honour, because it's important to what
3 your Honour said. At the time of the statement Mr Ruto is already the deputy
4 president of the Republic of Kenya, so, your Honour, just for that obvious point.

5 PRESIDING JUDGE EBOE-OSUJI: I noted that.

6 MR STEYNBERG: I'm not sure if that was an objection, your Honours, but I'll move
7 on.

8 PRESIDING JUDGE EBOE-OSUJI: Move on.

9 MR STEYNBERG:

10 Q. You finish off by saying pertinently, "... therefore people must follow what he
11 says," meaning Mr Ruto. Is that correct?

12 A. No, it is not correct.

13 Q. And in 2007, did people follow what Mr Ruto said?

14 A. What happened in 2007 is that Ruto himself had to follow what the -- what the
15 people said.

16 Q. So it was Mr Ruto who was following what the people said?

17 A. Yeah, in 2007.

18 Q. I see. Paragraph 21 you give an example of the influence that Mr Ruto had
19 pertaining to the election of one Wilson Mutai?

20 A. I think we are in open session.

21 Q. And it's not a matter which is identifying at all for yourself. Is that correct?

22 There is nothing in this paragraph that identifies you, Mr Witness.

23 A. I think --

24 PRESIDING JUDGE EBOE-OSUJI: Let's do this. Let's go to private session to see
25 what's bothering the witness.

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1 *(Private session at 3.55 p.m.) Reclassified as Open session

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

3 PRESIDING JUDGE EBOE-OSUJI: Thank you.

4 MR STEYNBERG:

5 Q. Yes, would you like to tell us what's worrying you, Mr Witness?

6 A. Yes. When -- you know when you talk of (Redacted)

7 (Redacted)

8 (Redacted).

9 Q. Well, I -- I don't know that that follows, but I'm quite happy to deal with this in
10 private session.

11 PRESIDING JUDGE EBOE-OSUJI: Yes, let's do it in private session.

12 By the way, Mr Khan, the message from Nairobi is that your suggestion is not one
13 that, at this stage, should work, that is printing out the PIS and shredding it at the end
14 of the day in Nairobi.

15 MR KHAN: I'm grateful.

16 PRESIDING JUDGE EBOE-OSUJI: It's not about Nairobi, it's just about -- at the
17 place where the proceeding is taking place.

18 MR KHAN: I'm obliged. Thank you.

19 PRESIDING JUDGE EBOE-OSUJI: Yes.

20 MR STEYNBERG:

21 Q. Perhaps I can ask you then to have a look through, just read through
22 paragraphs 21 and 22 quickly. We are running out of time. Have you done that?

23 A. Yes, I have gone through 21 and 22.

24 Q. All right. Now, just to summarise, what in essence you're saying was that at
25 this stage Mr Mutai was considered to be a political outsider but that Mr Ruto offered

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1 his support for Mr Mutai; is that correct?

2 A. It is not correct.

3 Q. And as a result of this political support, as we read over to the following page,

4 I'll come to that in a moment, but you say that as a result of his support, Mr Mutai

5 won a KANU seat in 2002; is that correct?

6 A. Yes, he -- he won the seat, but he was not supported by Mr Ruto.

7 Q. I see. So he was not supported at all by Mr Ruto?

8 A. Yes.

9 Q. And why did you mention that to the investigators?

10 A. It was dealing with the issue of influence.

11 Q. So is that something you just made up?

12 A. Yes.

13 Q. I see.

14 Can I ask the court officer to call up the following page: 0023?

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

16 MR STEYNBERG: Thank you.

17 THE COURT OFFICER (via video link): Top page, paragraph 24.

18 MR STEYNBERG:

19 Q. Well, perhaps we can shortcut this. There are other incidents you give here or

20 examples you give which, according to the statement, are examples of Mr Ruto's

21 influence. Are any of those true? Can you tell us now whether any of those are

22 true, or would you like to read through those?

23 A. Give me a second, one minute to read.

24 I have gone through.

25 Q. Are any of them correct?

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1 A. The only thing which is correct there is that in the year 2002 Honourable Ruto
2 was appointed minister for home affairs.

3 Q. I see. Dealing specifically with paragraph 29, and I will go through this
4 paragraph, you state the following: "The community believed that people who were
5 against Ruto are considered to be against the community." Is that correct?

6 A. It is not correct.

7 Q. What is incorrect about it?

8 A. That the community believed that those people were against Ruto are against
9 the community.

10 Q. "They believe that all the community will be successful if Ruto is successful."
11 Is that correct?

12 A. It is not correct.

13 Q. "Any failure of Ruto was a failure of the whole community." Correct?

14 A. It is not correct.

15 Q. "The Kalenjin community places Ruto at the highest top, and I previously said
16 he is their king." I take it you dispute that too; is that -- is that correct?

17 A. Not true.

18 Q. Not true.

19 MR KHAN: And Mr President, I think all this can be in public session.

20 MR STEYNBERG: Yes.

21 PRESIDING JUDGE EBOE-OSUJI: Indeed so. We'll go to public session. And
22 Mr Steynberg, when will be a convenient point to adjourn because we --

23 MR STEYNBERG: Yes.

24 PRESIDING JUDGE EBOE-OSUJI: -- we are out of time.

25 MR STEYNBERG: Your Honours, if I can just finish this paragraph, I think that

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1 would be a convenient point to stop.

2 PRESIDING JUDGE EBOE-OSUJI: All right.

3 MR STEYNBERG: It's also the end of this subject.

4 PRESIDING JUDGE EBOE-OSUJI: We'll go to public session.

5 (Open session at 4.02 p.m.)

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

7 MR STEYNBERG: Thank you.

8 Q. Mr Witness, in the private session you've just confirmed that various examples
9 that you've given in your statement of Mr Ruto's supposed influence in the Kalenjin
10 community were incorrect.

11 A. Yes.

12 Q. We're reading through paragraph 29 and we're about halfway through now.

13 You state at line -- end of line 4: "In fact Ruto was installed as ..." the "... Kalenjin
14 leader back in 2007 (but I don't remember well the exact date)." Did something like
15 that happen?

16 A. Yes, it happened.

17 Q. So that's correct?

18 A. Yes.

19 Q. How do you know about that?

20 A. Yeah, I saw in the media.

21 Q. You saw in the media.

22 A. Yes.

23 Q. And what does it mean to be installed as the Kalenjin leader?

24 A. When you become a Kalenjin leader, you become a consultant and you can
25 advise the people.

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1 Q. You advise the people?

2 A. Yes.

3 MR KHAN: Mr President, just for the record, the statement doesn't say "the Kalenjin
4 leader," it says "installed as Kalenjin leader" just for the sake of accuracy.

5 PRESIDING JUDGE EBOE-OSUJI: I was going to come to that and there has
6 been -- it is something that requires clarification. I -- actually, at line 10 I see that
7 Mr Steynberg is recorded as saying "the Kalenjin leader," but what I actually heard
8 him -- well, my own ears was "a Kalenjin leader".

9 Now, let's clarify what you meant, for purposes of that paragraph whether you meant
10 "the leader" or "a leader".

11 MR STEYNBERG: Yes.

12 PRESIDING JUDGE EBOE-OSUJI: What's of interest, that is the point.

13 MR STEYNBERG: Well, in fact, as my learned friend points out, what the statement
14 said was, "In fact Ruto was installed as Kalenjin leader ..." So it doesn't say "a
15 Kalenjin leader"; it doesn't say "the Kalenjin leader."

16 PRESIDING JUDGE EBOE-OSUJI: There was no article, there is no article in the
17 statement. The question is: Are you interested in one in terms of the definite article,
18 "the Kalenjin leader" or just indefinite as a Kalenjin leader?

19 MR STEYNBERG: Well, perhaps we should explore that with -- with the witness.

20 Q. When your statement says that Mr Ruto was installed as Kalenjin leader, does
21 that mean leader of the whole Kalenjin or one of many leaders?

22 A. I meant one of many leaders.

23 Q. I see. And I think you were -- yes, you told us that he became a consultant and
24 could advise the people. Advise them of what, Mr Witness?

25 A. On political issues.

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1 Q. And when a Kalenjin leader issues advice on political issues, would the Kalenjin
2 people be expected to follow that advice?

3 A. Some may follow; some may -- may decline to follow.

4 Q. I see. Would a Kalenjin leader be regarded as an influential person in Kalenjin
5 society, any Kalenjin leader?

6 A. I'm not sure of that.

7 Q. What does a leader mean, Mr Witness? Is a leader not an influential person?

8 A. Yes. Leader can be an influential, he can be a servant to the people.

9 Q. I see. We're over time so let me finish up quickly. They're considered -- they
10 are considered, this is now -- sorry. He view -- "He viewed to the ultimate
11 authority ..." and only -- "... and the only one capable of protecting their interests ..."
12 I think that should be "he was viewed," I'm not sure, but that's what it reads, "He
13 viewed to the ultimate authority and the only one capable of protecting their interests,
14 and especially their land against the Kikuyu." Is that correct?

15 A. It is not correct.

16 Q. "Those who are against are considered outcasts." Is that correct?

17 A. It is not correct.

18 Q. "They are considered by the community and they can't get involved in any
19 activity within the community." Correct?

20 A. Not correct.

21 Q. "They are verbally abused regularly by other members of the community, which
22 could lead to mental torture." Is that correct?

23 A. Not correct.

24 Q. And I'll just read out the last. There's no need to call up the page.

25 "Sometimes, they are also victims of physical aggression." Correct?

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1 A. Not correct.

2 Q. "And this is what happened to all PNU supporters in ..." the 2007 -- "... in
3 2007-2008 ..." Is that correct?

4 A. Not correct.

5 Q. So PNU supporters weren't considered outcasts, Kalenjin PNU supporters?

6 MR KHAN: Your Honour, in fairness to the witness, the proposition in the
7 statement was this happened to all PNU supporters and then my learned friend asks
8 a secondary question which is a little bit different than the all-encompassing all, and
9 it's only fair I think to see what the witness said, if it's agreed, and if not, why.
10 Your Honour, otherwise we, you know, set up a proposition and then the following
11 question is something quite different.

12 MR STEYNBERG: Your Honours, I am following up on that question, but perhaps it
13 can be left - I see we're now well over time - for Monday morning.

14 PRESIDING JUDGE EBOE-OSUJI: Yes, this is the convenient point to adjourn.
15 We'll take it up again on Monday morning.

16 Witness, we will adjourn for the weekend and we will reconvene on Monday. Please,
17 you will still -- be warned that you're still under oath and you're still subject to the
18 subpoena and in -- while you're outside of court, that is in the meantime, you must
19 not discuss your testimony with anybody. Do you understand?

20 THE WITNESS: Yes, your Honour.

21 PRESIDING JUDGE EBOE-OSUJI: All right. Thank you very much. So you will
22 rejoin us on Monday.

23 Court is adjourned for the day.

24 THE COURT USHER: All rise.

25 (The hearing ends in open session at 4.11 p.m.)

Pursuant to Trial Chamber V(a) 's Decision, ICC-01/09-01/11-981, dated 24 September 2013, and the instructions in the email dated 8 January 2015, the version of the transcript with its redactions becomes Public

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1 RECLASSIFICATION REPORT

- 2 Pursuant to Trial Chamber V(a) 's Decision, ICC-01/09-01/11-981, dated 24 September
- 3 2013, and the instructions in the email dated 8 January 2015, the version of the
- 4 transcript with its redactions becomes Public.