

Trial Hearing  
Witness: KEN-OTP-P-0013

(Open Session)

ICC-01/09-01/11

1 International Criminal Court  
2 Trial Chamber V(a) - Courtroom 1  
3 Situation: Republic of Kenya  
4 In the case of The Prosecutor v. William Samoei Ruto and Joshua Arap Sang  
5 - ICC-01/09-01/11  
6 Presiding Judge Chile Eboe-Osuji, Judge Olga Herrera Carbuccion and Judge Robert Fremr  
7 Trial Hearing  
8 Friday, 11 July 2014  
9 (The hearing starts in open session at 9.38 a.m.)  
10 THE COURT USHER: All rise.  
11 The International Criminal Court is now in session.  
12 Please be seated.  
13 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.  
14 Court officer, please call the case.  
15 THE COURT OFFICER: (Interpretation) Thank you, Mr President. The situation in the  
16 Republic of Kenya in the matter of The Prosecutor versus William Samoei Ruto and Joshua  
17 Arap Sang, ICC-01/09-01/11. We are in open session.  
18 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. I take it appearances remain the  
19 same?  
20 MR STEYNBERG: The same for the Prosecution. Good morning, your Honour.  
21 MR NARANTSETSEG: The same, your Honour.  
22 MR KIGEN-KATWA: Your Honour, the same for Mr Sang except that Caroline Buisman  
23 will join us shortly.  
24 MR KHAN: Mr President, your Honours, the same save that I'm joined by my friend David  
25 Hooper, QC.

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

2 Witness, welcome back.

3 Mr Steynberg, before you proceed on the matter of Mr Khan and Mr Kigen-Katwa's  
4 request to be allowed to start only on Monday, we confirm, do we not, that -- or you  
5 confirm rather, that aside from this witness there is no other witness for this segment  
6 before the judicial recess; is that the case?

7 MR STEYNBERG: That is correct, your Honours.

8 PRESIDING JUDGE EBOE-OSUJI: All right, thank you. Let's make our short ruling on the  
9 Defence request.

10 The Defence had indicated that they would need two days to conduct cross-examination of  
11 this witness --

12 MR KHAN: Mr President --

13 PRESIDING JUDGE EBOE-OSUJI: -- but they may be --

14 MR KHAN: -- I do apologise. I do apologise. Your Honour, I've considered matters and  
15 my learned friend says there's only one hour of additional testimony as one session left.

16 Your Honour, depending upon what transpires in that one hour, it may be that we can  
17 proceed today. So, your Honour, I just wanted to raise that now, that if the witness stays  
18 within the parameters of the statement more or less, I can continue today. It's only if we go  
19 into other matters that were raised in the proofing note that I may be in difficulties. I just  
20 wanted to raise that for the attention of the Bench, and I'm terribly sorry for interrupting.

21 (Trial Chamber confers)

22 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, are you saying you will be concluding in  
23 one hour?

24 MR STEYNBERG: Your Honours, I think I said I would try to do my best to do it within one  
25 hour, but certainly before the morning break.

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1 PRESIDING JUDGE EBOE-OSUJI: All right. We were going to deliver our ruling on the  
2 Defence request, but in light of Mr Khan's interjection now we will suspend that ruling.  
3 And, Mr Steynberg, please proceed.

4 MR STEYNBERG: Thank you, your Honours. One preliminary matter is that we've  
5 managed to trace a better quality copy of one of the documents which the Chamber requested.  
6 It's ERN 0041-0770 at tab 4 and it's admitted as EVD-00122. I understand that copies have  
7 been handed up to the Bench. I will request that this matter -- this document be uploaded  
8 into eCourt and we'll discuss with CMS how best to supplement or replace the original  
9 document.

10 WITNESS: KEN-OTP-P-0013 (On former oath)

11 QUESTIONED BY MR STEYNBERG: (Continuing)

12 Q. Good morning, Mr McFadyen. I'll try to be as brief as possible this morning. When  
13 we left off yesterday afternoon, we had just touched on the issue of evidence received by the  
14 commission relating to the causes of the violence and in particular evidence as to whether the  
15 violence was planned or spontaneous.

16 In general, can you outline for the Chamber whether the evidence in this -- in this  
17 regard was consistent or whether there were different views?

18 A. Well, from a general perspective, there were different views. The commission heard  
19 different views from witnesses who appeared before the commission.

20 Q. And briefly, what were those different views?

21 A. Well, on the one hand, some witnesses testified that in their view violence was  
22 spontaneous, and others had a different view in that there was evidence of planning and  
23 organisation.

24 Q. And more specifically, was this also the case in respect to the violence in the Uasin  
25 Gishu and Nandi North areas of the Rift Valley?

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1 A. Well, yes. As I recall it, we had differing views from witnesses who were testifying  
2 around the violence in that area.

3 Q. Are your findings and your discussion of the evidence in that area recorded at page 66  
4 of your report? That's at tab 12 of binder 1. Perhaps you can just turn to that. And the  
5 ERN number is 0001-0440.

6 A. I would need to have a document to look at.

7 MR STEYNBERG: Can the witness please be given the bundles? Did someone take them  
8 away? Your Honours, it seems the witness's documents are not immediately to hand. Let  
9 me see if there's anything else I can discuss in the meantime.

10 PRESIDING JUDGE EBOE-OSUJI: Is it on the eCourt?

11 MR STEYNBERG: Yes, perhaps that for the time being we could do that. Could I ask the  
12 court officer to call up ERN 0001-0364 at 0440?

13 MR KHAN: If it helps my learned friend, I can hand up a clean version of the relevant page.  
14 It's unmarked.

15 PRESIDING JUDGE EBOE-OSUJI: He can also borrow my bundle to a different -- court  
16 officer, please.

17 MR STEYNBERG: I'm in the hands of the court officer, your Honours.

18 PRESIDING JUDGE EBOE-OSUJI: Yes.

19 MR STEYNBERG: It seems they've arrived.

20 Q. Just to repeat that then, it's tab 12, page 66 of the report. From page 66 through -- right  
21 through to page 76 you discuss this and related matters; correct?

22 A. Yes, 66 I think to 77 --

23 Q. Thank you.

24 A. -- of the report.

25 Q. As part of your evidence regarding the violence in the Rift Valley, did you receive

1 evidence from police officials in that area?

2 A. Yes, we did.

3 Q. And what was their view as to the cause of the violence?

4 A. Well, from memory, generally speaking those officials had a view - well, at least a  
5 preliminary view - that the violence was spontaneous.

6 Q. And on what did they base that?

7 A. Well, I'm not fully sure why they based it -- on what they based that premise, other than  
8 I recall one in particular saying that -- that the authorities and the security agencies were  
9 overwhelmed and things happened very quickly.

10 Q. Were any questions -- was any evidence given as to the state of preparedness of the  
11 police?

12 A. Well, yes, there were -- there was. From the witnesses, you mean?

13 Q. From the police witnesses.

14 A. Yes. That varied I'd have to say between witnesses, but from a general standpoint  
15 some preliminary work on their part was -- was completed before the election day. I  
16 think -- I'd have to refer to the document, but I believe that for example some staff were  
17 moved from one place to another because there'd been a history of violence around elections  
18 from time to time. But from our standpoint, generally speaking, the state of preparedness on  
19 the State agencies was completely underwhelming frankly.

20 Q. And from whom was the contrary evidence received that the violence in the area was in  
21 fact planned, generally speaking?

22 A. Well, generally speaking what I'd describe as independent witnesses. Those who gave  
23 evidence before the commission, there were some. Others made statements to investigators  
24 to that effect.

25 Q. And was there any objective or circumstantial evidence before the commission which

1 assisted it in making its conclusions as to the spontaneity or otherwise of the violence?

2 A. Well there were some activities, you could say, that appeared to support the premise  
3 that violence was planned; at least some violence was planned. For example, the sheer  
4 number of attackers, shall we say, who appeared in the same place at the same time armed,  
5 attacking a particular group or groups of people. In some cases, roadblocks were established  
6 very quickly. Those sorts of things.

7 Q. But in general you confirmed the findings contained in this report; correct?

8 A. Yes.

9 Q. Now, in particular you stated that you received testimony from certain police witnesses.  
10 I'd just like you to identify certain evidence, please. Could you turn to tab number 29,  
11 EVD-0006-7770, public document. It's in binder number 2. Sorry, I should have specified  
12 that.

13 MR KHAN: Your Honour, once again I do object for the record. In my submission, this is  
14 wholly improper. The Prosecution are blatantly seeking to put the witness -- take the  
15 witness to a transcript of evidence of an individual that they have not sought to call in these  
16 present proceedings, regarding whom the Defence has never met, never cross-examined and  
17 never tested, and it is a very clear device to circumvent the statutory protections to Mr Ruto  
18 that are enshrined in Article 68. In my respectful submission, it's improper and should not  
19 be allowed.

20 MR STEYNBERG: Your Honours, may I indicate before --

21 MR KHAN: Your Honour, this is -- I do apologise. Your Honour, this is very clearly being  
22 led in an attempt by the Prosecution not as background, but to prove evidence about one of  
23 the important facts in dispute in this case, which is the issue of planning.

24 Your Honour, that's a matter that your Honours must determine in due course. It is  
25 not appropriate for an investigator or a commissioner from another separate

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1 jurisdiction to give his own views and particularly to go behind those findings that  
2 are in the published report to give an independent commentary on a witness that the  
3 Defence has never met. It's not right.

4 MR STEYNBERG: Your Honours, if I may indicate that I only intend at this stage, with these  
5 particular transcripts, for the witness to identify it. The matter may then be argued, as  
6 agreed earlier, in subsequent written submissions.

7 On the second point regarding evidence of planning, et cetera, your Honours ruled on  
8 this point yesterday already, I believe.

9 MR KHAN: Your Honour, if it assists, I can accept that the transcripts the Prosecution seek  
10 to refer to are transcripts that arise from the Waki Commission. So, your Honour, that  
11 should be sufficient.

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

13 MR KIGEN-KATWA: In your ruling yesterday, your Honour, you indicated that even if it  
14 were to be -- if it appears that the witness can make reference to the issue of planning, it does  
15 not necessarily come down to the question of who is responsible for planning.

16 We however submit, your Honour, that even the principal question as to whether or  
17 not there was planning is an issue that you are to determine and it is improper for this  
18 witness, or another witness through this witness, to have to make reference to that  
19 issue. Your Honour, we submit that that --

20 PRESIDING JUDGE EBOE-OSUJI: You are agreeing with the ruling we made yesterday, or  
21 are you speaking now to what is on the table?

22 MR KIGEN-KATWA: It is in reference to what is in the table now, your Honour, yes.  
23 We -- we -- we identify ourselves with the submissions made that it is improper for this  
24 witness to attempt to suggest to you issues that are meant to be determined by yourselves,  
25 your Honour.

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1 PRESIDING JUDGE EBOE-OSUJI: That's not the point. The point now is that there is a  
2 document that the Prosecution is taking the witness to and Mr Khan objects that the witness  
3 may not take into that document. That is the issue on the table.

4 MR KIGEN-KATWA: We take the same position, your Honour. We object to the reference  
5 to that document through this witness.

6 PRESIDING JUDGE EBOE-OSUJI: All right.

7 MR STEYNBERG: Thank you, your Honours.

8 I've indicated then that -- I'm grateful. May I just inquire from my learned friend for  
9 Mr Sang whether he makes the same admission as Mr Khan as to the authenticity of  
10 this document?

11 MR KIGEN-KATWA: We do make that admission, your Honour.

12 PRESIDING JUDGE EBOE-OSUJI: All right, Mr Steynberg. So you will move on then.

13 MR STEYNBERG: Yes. Well, if I can just indicate for the record the portions of this  
14 document on which I in due course will intend to rely. If the Court will bear with me, please?  
15 It is ERN numbers 7770 to 7927, encompassing the evidence of Mr Stephen Ikua, Mr Mabea  
16 Mogaka, DC of Nandi North, and Mr Adan Gedow, DC I believe of Kipkelion. Thank you,  
17 your Honour.

18 Q. Do you confirm, sir, that those three witnesses appeared before the commission?

19 A. I'm sorry, can you take me to the reference again? I haven't got much room here.

20 PRESIDING JUDGE EBOE-OSUJI: One second. One second, Witness.

21 Mr Khan and Mr Kigen-Katwa already have admitted that this document is a  
22 transcript of the Waki Commission.

23 MR STEYNBERG: Your Honour, thank you. I'll move on then.

24 PRESIDING JUDGE EBOE-OSUJI: Yes.

25 MR STEYNBERG:



1 Q. Now, you've mentioned in your evidence yesterday, Mr McFadyen, that representatives  
2 or persons were called before the commission to testify regarding issues surrounding the  
3 media; is that correct?

4 A. Yes, that's right.

5 Q. And I can't recall offhand and so I'll ask you again, did any representative of the  
6 government testify in this regard?

7 A. Yes, yes. I need to refer to the report I think, but from memory the -- it might have  
8 been the private secretary I think - the PS - of communications, or something to that effect,  
9 who was responsible for communications for the government I believe.

10 Q. And perhaps then I could just take you to the relevant chapter of the report.  
11 I understand it's Chapter 8, commencing at page 295, if you'd like to refer to that. The ERN  
12 number is 0001-0669, and I think you'll find at Chapter 2 there's a reference to the permanent  
13 secretary from the Ministry of Information and Communications; is that correct?

14 A. Yes, that's right.

15 MR STEYNBERG: Please bear with me one moment, your Honours.

16 Q. Could I ask you to look at tab 24 of your binder, please. EVD-0005-2817. It's binder  
17 number 2.

18 MR KHAN: Your Honour, same objection.

19 MR STEYNBERG:

20 Q. Can you identify the witness in this regard?

21 MR KHAN: Your Honour, sorry. The same objection. I made -- I made an objection.  
22 I can make the same concession as well. So I'd ask that my learned friend proceed in the  
23 same manner as before.

24 PRESIDING JUDGE EBOE-OSUJI: So your concession is that the transcript --

25 MR KHAN: Is a true record of what transpired at the Waki Commission, and that the

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1 individual named therein appeared before the Waki Commission.

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

3 MR KIGEN-KATWA: Your Honour, we make the same concession and we raise the same  
4 objection.

5 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg.

6 MR STEYNBERG: Thank you. Just one point of clarification then.

7 Q. Do you confirm Mr Bitange Ndemo is the permanent secretary referred to in your  
8 report?

9 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, do you need to ask the witness that  
10 question?

11 MR STEYNBERG: Your Honours, it will -- it will appear from the -- obviously from the  
12 transcript of the report, so perhaps we can leave it at that.

13 Q. Mr McFadyen, please tell the Court why you felt it necessary or why the commission  
14 felt it necessary to call this witness.

15 A. Well, the issues relating to the media was a key element, we believed, and that we  
16 needed to address in our -- in the commission's work and, in addition, there had been, of  
17 course -- some witnesses stated that some elements of the media were -- were, in fact,  
18 broadcasting.

19 MR KIGEN-KATWA: Your Honour, may I take an objection to that line of questions. Your  
20 Honour, you have already determined that, in view of the concession we've made, it would  
21 not be proper that this witness adduces evidence in respect what was conducted before the  
22 commission.

23 Your Honour, we would pray that in view of the fact that this document is -- has been  
24 considered by ourselves to the extent to which it confirms that that is what was done at the  
25 Waki Commission, your Honour, we pray that questions in terms of the detail as to what was

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1 said in the commission should not be allowed, your Honour, because that would border on  
2 having testimony adduced through this witness.

3 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, the objection is overruled.

4 The question was why the commission felt it necessary to call that witness. It's not about  
5 what the witness was discussing in those terms before the commission.

6 Mr Steynberg, proceed.

7 Q. Thank you. You were interrupted mid answer, Mr McFadyen. Would you like to  
8 complete your question (sic) or I can --

9 A. Well, the -- we felt it necessary to -- to hear from the government's representative and  
10 communications, and I'd have to say one of the things we were looking to -- to secure, if  
11 possible, was evidence around what was and wasn't communicated during the -- or, the lead  
12 up to the elections of 2007 and around the election violence period.

13 Q. To what extent were you able to obtain recorded or records of what or was -- or was not  
14 transmitted at that time?

15 A. Well, unfortunately, we were unable to secure evidence that we thought would have  
16 been available. In fact, this witness provided, I think, one -- one transcript, if you like, or one  
17 piece of evidence around a communication that was quite late in the piece.

18 Q. And in that regard, can I ask you to turn to tab 27. Perhaps before I move on from this  
19 document, I can just indicate that I will -- the State will be requesting the admission of the  
20 entire document in due course. That's 0005-2817 all the way through to 2864.

21 PRESIDING JUDGE EBOE-OSUJI: What tab, sorry?

22 MR STEYNBERG: Sorry. This is the tab we were at a moment ago, tab 24. It's the  
23 transcript of the evidence of Bitange Ndemo, public.

24 PRESIDING JUDGE EBOE-OSUJI: Now you've moved to tab 27?

25 MR STEYNBERG: 26, your Honour.

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1 PRESIDING JUDGE EBOE-OSUJI: Twenty-six.

2 MR STEYNBERG: The ERN number is 0010-0034 and if the Court will bear with me one  
3 second? Before I -- may I just ask one or two questions about the level of confidentiality of  
4 these documents, your Honours.

5 Q. I understand from the transcript at tab 24 that Mr Ndemo testified in public; is that  
6 correct?

7 A. Yes, that's -- that's right.

8 Q. And he was, I understand, Witness Number 3 before the commission; is that right?

9 A. Number 3?

10 Q. Let me just double check. Sorry, I have that wrong. One moment, please. All right,  
11 I'll leave that for the time being. You've confirmed that Mr Ndemo gave you certain  
12 transcript or certain evidence relating to a recording. Do you recognise the document at tab  
13 26? It's ERN 0010-0034.

14 A. Yes, I've -- I've seen that document as part of the Waki Commission work.

15 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, you may want to return and clarify with  
16 the witness what he meant in the characterisation of the permanent secretary's evidence. I  
17 see your last question giving it a certain characterisation. We want to be clear what the  
18 witness meant, whether he meant that the permanent secretary had given a piece of evidence,  
19 or whether he meant that the permanent secretary's testimony was evidence that the  
20 commission had received. They're not exactly the same thing.

21 Maybe, Witness, do you understand my drift?

22 THE WITNESS: I -- I think so, your Honour.

23 PRESIDING JUDGE EBOE-OSUJI: Yes. Can you please clarify?

24 THE WITNESS: Well, mister -- I believe, perhaps, Dr Ndemo appeared before the  
25 commission as a witness and, you know -- and provided testimony in public. Now, in terms

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1 of -- I can't exactly recall whether in fact there was evidence in-camera here or not, but  
2 provided through his office, as my understanding, was another document about -- that  
3 described a -- some radio -- I don't know how to describe it actually, but a radio transmission,  
4 shall we say.

5 PRESIDING JUDGE EBOE-OSUJI: All right, thank you.

6 MR STEYNBERG: Thank you, your Honours. What was worrying me was the level of  
7 confidentiality of this document. I see it does contain the name of a volunteer of media  
8 monitoring unit and, given that it's uncertain it seems whether this was produced publicly or  
9 not, I would ask that this be regarded as a confidential document.

10 Your Honours, I can also add for the record that this Prosecution alleges this is

11 a -- this report relates to a transcript which the Prosecution has already had admitted  
12 as exhibit 22, Prosecution Exhibit 22, through Witness Number 268.

13 The Prosecution seeks the admission of this evidence and perhaps -- perhaps we can  
14 deal with that now, if possible.

15 PRESIDING JUDGE EBOE-OSUJI: We're referring to the document ending with ERN  
16 number 0034, is that it?

17 MR STEYNBERG: That's correct, your Honours.

18 MR KIGEN-KATWA: Your Honour, on our part, we confirm that it is true that the audio  
19 under -- together with the transcription was already produced --

20 THE INTERPRETER: Microphone.

21 MR KIGEN-KATWA: -- as an exhibit, and -- I'm sorry, together with -- and that  
22 cross-examination has been conducted on the audio and the transcript in respect of that audio,  
23 that we admit, your Honour.

24 We, however, object to the production of this complaint together with the  
25 interpretation given to the substance of that audio as reflected in this document.

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1 Your Honour, we already gave the Prosecution notice of our intention to object to that and we  
2 submit that it is an issue that should be left to the arguments that we propose to make in  
3 writing.

4 PRESIDING JUDGE EBOE-OSUJI: Mr Khan.

5 MR STEYNBERG: Your Honour, in view of my learned friend's attitude, I'm happy to deal  
6 with it in that manner rather than waste further time.

7 PRESIDING JUDGE EBOE-OSUJI: All right, then we'll proceed.

8 MR STEYNBERG:

9 Q. During the testimony of the permanent secretary, was there any measure -- evidence  
10 given about measures taken during the course of the violence to control the media?

11 A. Well, the one that I recall, there was -- there was a blanket ban put on the media at one  
12 stage during -- or, during the period of the post-election violence.

13 Q. And in that regard, can I ask you to turn to tab 25, ERN 0010-0021. I understand this is  
14 a document which is admitted. Do you recognise that document?

15 A. Yes, I've seen that document.

16 MR KIGEN-KATWA: Your Honour, for the record, we admit that document.

17 MR STEYNBERG: I understand the Ruto Defence has also indicated they admit this  
18 document.

19 MR KHAN: That's correct.

20 PRESIDING JUDGE EBOE-OSUJI: The document will be tendered and marked as the next  
21 in the -- is admitted and to be marked as the next in the Prosecution exhibits.

22 THE COURT OFFICER: (Interpretation) Document KEN-OTP-0010-0021, marked  
23 confidential, will have the number EVD-T-OTP-000130, Prosecution Exhibit 130.

24 MR STEYNBERG: Thank you.

25 Q. Mr McFadyen, what --

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1 PRESIDING JUDGE EBOE-OSUJI: Haven't we seen this document before? It's all right.

2 MR STEYNBERG: Thank you, your Honour.

3 PRESIDING JUDGE EBOE-OSUJI: Proceed.

4 MR STEYNBERG:

5 Q. Mr McFadyen, can you give any further details as to the nature of this ban as to which  
6 media it affected and what type of broadcasts?

7 A. Not specifically. I thought it was a total ban actually.

8 Q. All right, but I presume the evidence will be contained in your report?

9 A. Yes. There was quite a bit of debate about -- about the ban and its effect.

10 MR KIGEN-KATWA: Your Honour, with your permission, may I react to the observation  
11 you made that we have had -- we have encountered this document in the past? Your  
12 Honour, we confirm that this document is a document that had been introduced at a certain  
13 point by the -- Sang's Defence with a view to arguing that there was a certain ban to the media  
14 around the time of the post-election violence and that it was marked as an MFI on the part of  
15 Mr Sang's Defence.

16 PRESIDING JUDGE EBOE-OSUJI: Yes. That's what Ms Bossette had -- what she stood up  
17 to tell me, yes.

18 MR STEYNBERG: Thank you, your Honours, which is why it didn't come up in our searches.  
19 I didn't realise it was a Defence MFI.

20 Q. All right. I'd like to move on then to another aspect, and can you turn please to tab  
21 number 23 and tell the Court whether you recognise this document, 0001-0002.

22 A. Yes, I recognise this document.

23 Q. And is it as the cover suggests, a report of the Kenyan National Commission for Human  
24 Rights, titled "On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007  
25 Election Violence"?

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1 A. Yes, it appears so.

2 Q. And how did the commission get a copy of this report? Who produced this report?

3 A. This report was produced to the commission by -- by a witness who was called to give  
4 evidence, and that person I believe is the chair or -- of this organisation or was then.

5 Q. I'll return to that -- I beg your pardon. I'll return to that in a moment.

6 Besides the actual report, did the commission have access to any other information or  
7 evidence from the Kenya National Commission on Human Rights?

8 A. Yes, we did.

9 Q. And please tell the Court what was that?

10 A. We had by agreement limited access to their database, well, and specifically a database  
11 relating to information and data they had around the post-election violence.

12 Q. Did that access include access to the statements of witnesses interviewed as part of their  
13 investigations?

14 A. Yes, I believe it did.

15 Q. And can you tell the Chamber to what extent the commission examined that database  
16 and particularly those underlying witness statements?

17 A. Well, it's difficult to describe the extent really, but -- but we did have, as I say, limited  
18 access and that access included reviewing or looking at statements of witnesses that we felt  
19 would assist our understanding and their work of course.

20 Q. And are you aware whether any of those witnesses were interviewed directly by CIPEV  
21 staff?

22 A. I'm not sure whether they were or not necessarily.

23 Q. Can I ask you then to refer to tab number 22. It's ERN-0003-0048 and I believe it is  
24 admitted that this is a copy of the agreement that you made with the KNCHR; is that correct?

25 A. Yes, it appears to be the agreement that was made between the commission and the



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1 KNCHR.

2 MR STEYNBERG: Your Honours, I'd ask that this be admitted as the next in the series of the  
3 Prosecution exhibits.

4 MR KIGEN-KATWA: Your Honour, we do not object on our part.

5 MR KHAN: Similarly, no objection.

6 PRESIDING JUDGE EBOE-OSUJI: Admitted as the next in the Prosecution exhibits.

7 MR STEYNBERG: Your Honour, I refer -- I intend to next refer to the tabs 20 and 21, which  
8 will be transcripts.

9 PRESIDING JUDGE EBOE-OSUJI: Let --

10 MR STEYNBERG: I'm sorry.

11 PRESIDING JUDGE EBOE-OSUJI: -- the court officer register.

12 THE COURT OFFICER: (Interpretation) Confidential document KEN-OTP-0003-0448 will  
13 have the number EVD-T-OTP-00137, Prosecution Exhibit 131.

14 MR STEYNBERG: Thank you, your Honours. As I was saying, I intend to refer to the  
15 transcripts of the witness who introduced this document. I anticipate the same objections  
16 from my learned friends. Perhaps I can just indicate whether they will admit that these are  
17 the transcripts of the evidence of one Florence Jaoko, the chairperson of the Kenyan National  
18 Commission for Human Rights who handed in this report.

19 MR KHAN: Yes, that's accepted.

20 MR KIGEN-KATWA: We do accept also on our part, your Honour.

21 MR STEYNBERG: Your Honours, for the record the ERNs of the two documents which are  
22 respectively the public and confidential testimonies of this witness are 0005-5398, that's the  
23 public testimony, and 0005-37 -- sorry. I'll say that again. 0005-3079, the record of the  
24 private hearing.

25 The Prosecution will --

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- 1 PRESIDING JUDGE EBOE-OSUJI: Where is the --
- 2 MR STEYNBERG: Tabs 20 and 21, your Honours, but given the admissions I don't intend to
- 3 go to the -- specifically to the contents of the transcripts.
- 4 PRESIDING JUDGE EBOE-OSUJI: So, Mr Khan, Mr Kigen-Katwa, kindly confirm that both
- 5 documents you do admit as being part of the true records of the CIPEV.
- 6 MR KHAN: Indeed. I'm grateful.
- 7 MR KIGEN-KATWA: Yes, your Honour.
- 8 PRESIDING JUDGE EBOE-OSUJI: Please proceed.
- 9 MR STEYNBERG:
- 10 Q. In more general terms, Mr McFadyen, did this witness give explanations about the
- 11 manner in which the report was compiled and the methodology used?
- 12 A. Yes, she did.
- 13 PRESIDING JUDGE EBOE-OSUJI: And by the report we are back to tab 23, is that the case?
- 14 MR STEYNBERG: Indeed, your Honours.
- 15 PRESIDING JUDGE EBOE-OSUJI: All right.
- 16 MR STEYNBERG: And perhaps at this stage I can indicate the portions of the report which
- 17 the Prosecution will seek to tender. Your Honours, the first few pages are just
- 18 acknowledgment signatures and acronyms, et cetera, but I think that those should be included
- 19 as well. So --
- 20 PRESIDING JUDGE EBOE-OSUJI: Just indicate them by the ERN number.
- 21 MR STEYNBERG: Yes, I will do so. So from the contents page, 0001-0004.
- 22 PRESIDING JUDGE EBOE-OSUJI: Wait. I take it you'll want the cover page as well?
- 23 MR STEYNBERG: Well, yes, we may as well --
- 24 PRESIDING JUDGE EBOE-OSUJI: So we begin with that.
- 25 MR STEYNBERG: 0001-0002 to double -- 0001-0016 up to paragraph 24 only, then 0018 to

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1 0043, 0058 to 0084 and 0137 to 0147. Your Honours, I will ask that the whole report goes in,  
2 but those are the -- the sections which the Prosecution intends to rely on.  
3 There are findings contained in this report of criminal responsibility which the  
4 Prosecution does not rely on, and the Prosecution does not rely on any details of acts  
5 and omissions specifically by the accused in this case. Bear with me, please.

6 PRESIDING JUDGE EBOE-OSUJI: Defence counsel, is there any issue that this document is  
7 indeed the report of the Kenya National Commission on Human Rights?

8 MR KHAN: Your Honour, certainly it was one of the reports, perhaps the final report.

9 MR KIGEN-KATWA: Your Honour, we are taking the position it's one of the reports. Yes,  
10 your Honour.

11 MR STEYNBERG: Thank you, your Honours.

12 Q. Moving on then, you've told the Court that you heard from various medical staff who  
13 provided information about deaths and injuries in their respected areas, correct?

14 A. Yes, we did.

15 Q. And in this regard I'd like you to identify transcripts at tab number 27. ERN is  
16 0005-7542. And I can indicate -- well, perhaps you can just identify that to start off with.

17 MR KHAN: Your Honour, the same point. There is no dispute that the transcripts emanate  
18 from the Waki Commission.

19 MR KIGEN-KATWA: No dispute on our part, your Honour.

20 PRESIDING JUDGE EBOE-OSUJI: Thank you, your Honours. Then I can just indicate the  
21 relevant portions the Prosecution intends to rely on. It is the testimony of Professor Harun  
22 Mengech from 0005 --

23 PRESIDING JUDGE EBOE-OSUJI: Can you spell that for the record.

24 MR STEYNBERG: Yes. It's Harun, H-A-R-U-N, Mengech, M-E-N-G-E-C-H. And yes, it's  
25 0005-75 - well, we may as well start at the beginning - 42 until 7700. Then the evidence of

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1 Dr Stephen Kaiya from 0005-7706 to 7735. That includes both the evidence of Dr Stephen  
2 Kaiya, K-A-I-Y-A, Stephen with P-H, as well as Dr Shadrack Kemei, K-E-M-E-I.

3 And finally at 7756 to 7769, the evidence of Dr Stephen Ikua, I-K-U-A. Once again  
4 the Prosecution will seek to admit the whole document, but rely on those portions.

5 Q. And then if I can ask you to turn to tab 30. And I suspect we will have the same  
6 objection. This is ERN 0006-0493. And if I can just indicate the portions the Prosecution  
7 intends to rely on. It's ERNs 0519 to 0535, 0552 to 0568, and 0571 to 0589. It's the evidence  
8 of crime-based witnesses (Redacted)  
9 (Redacted)

10 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, can you stop and look at the front cover.

11 MR STEYNBERG: Yes, I've just been notified of that, your Honours. We will take the  
12 necessary action.

13 PRESIDING JUDGE EBOE-OSUJI: All right.

14 MR STEYNBERG: We can specify the rest of those details in due course.

15 Unless there are the same admissions, I will ask the witness to turn to this tab.

16 PRESIDING JUDGE EBOE-OSUJI: Counsel, do you admit that this document is part of the  
17 true records of the Waki Commission?

18 MR KHAN: Yes, your Honour.

19 MR KIGEN-KATWA: We do admit, your Honour. There is something I would wish to  
20 mention in private session, your Honour, on this issue.

21 PRESIDING JUDGE EBOE-OSUJI: Let's go to private session briefly.

22 \*(Private session at 10.32 a.m.) Reclassified as Open session

23 THE COURT OFFICER: (Interpretation) We are in private session, Mr President.

24 MR KIGEN-KATWA: Your Honour, I confirm again that we do admit that these are a true  
25 representation of what went on in the CIPEV commission.

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1 Your Honour, we would, however, object to the production or reference to these  
2 documents because they relate to testimony of witnesses, at least two of --

3 PRESIDING JUDGE EBOE-OSUJI: That's not -- we're not there yet. We understand that  
4 you have standing issues with certain documents. And what we've been doing now is  
5 minimising the area of dispute. It's one thing to say, yeah, these are part of the two records  
6 and then the rest of it is -- but you object to the introduction onto the record of these  
7 proceedings.

8 MR KIGEN-KATWA: Your Honour, then may I confirm that they are a true reflection of  
9 what went on in the proceedings. I just wanted to mention for the record, your Honour, that  
10 at least two of them are witnesses who have already appeared before you. That's all I  
11 wanted to mention, your Honour.

12 PRESIDING JUDGE EBOE-OSUJI: You will also be reflecting that in any written  
13 submissions you'll be making.

14 MR KIGEN-KATWA: Thank you, your Honour.

15 PRESIDING JUDGE EBOE-OSUJI: Yes.

16 MR STEYNBERG: Your Honour, may I just indicate that one of the witnesses is, in fact, a  
17 witness who has appeared before us, but he's not a witness upon whom I rely, which is why  
18 I was specifying the particular areas, it's one Samson Some, but we do not ask to tender his  
19 evidence, because he's already testified. Of course, my learned friends are free to refer to it if  
20 necessary.

21 I apologise for the --

22 PRESIDING JUDGE EBOE-OSUJI: Does that coincide with your concern, Mr Kigen-Katwa?

23 MR KIGEN-KATWA: Yes, your Honour, only that I wish to express concern it's an issue  
24 which we intend to raise with the Prosecution that in fairness they should have disclosed this  
25 to us earlier than this.

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- 1 PRESIDING JUDGE EBOE-OSUJI: We will move on.
- 2 MR STEYNBERG: For the record, your Honours, this was disclosed before May last year.
- 3 There is nothing new here.
- 4 PRESIDING JUDGE EBOE-OSUJI: All right. We'll move on. So you will be making your
- 5 requests for deletion from delayed broadcast of the names mentioned?
- 6 MR STEYNBERG: I understand it's on the way, your Honours.
- 7 PRESIDING JUDGE EBOE-OSUJI: Yes.
- 8 MR STEYNBERG: I apologise.
- 9 PRESIDING JUDGE EBOE-OSUJI: All right. We will then go back to public session.
- 10 (Open session at 10.35 a.m.)
- 11 THE COURT OFFICER: (Interpretation) We are in public session, Mr President.
- 12 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, proceed.
- 13 MR STEYNBERG: Thank you, your Honours.
- 14 Q. My colleague has just pointed out something to me, Mr McFadyen, that perhaps you can
- 15 clarify.
- 16 PRESIDING JUDGE EBOE-OSUJI: When you say "your colleague" on the record, it might be
- 17 better to specify on which side.
- 18 MR STEYNBERG: My colleague on the left, Ms Renton.
- 19 PRESIDING JUDGE EBOE-OSUJI: Okay.
- 20 MR STEYNBERG:
- 21 Q. If you can turn to the actual report, the Table of Contents, that's at tab 12 in the first
- 22 binder, starting at 0364, and turn over to 063 -- sorry -- 0365. It appears that the report goes
- 23 from Chapter 4 to Chapter 6, Chapter 4 at page 162 to Chapter 6 at page 237.
- 24 Can you just clarify, sir, whether there has been anything omitted from -- omitted
- 25 from the report or whether that is an error in the Table of Contents, should I say, an

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1 error in the report?

2 A. I believe it's an error in the Table of Contents, well, in the -- in the structure. I would  
3 have to have a look at the --

4 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, what does your version say?

5 MR KHAN: Your Honour, my version also has that chapter missing or that pagination  
6 jumping.

7 MR STEYNBERG:

8 Q. Is there anything you can add to that? It appears that it does in fact in the body of the  
9 report go from Chapter 4 to Chapter 6.

10 A. That's right. I believe there is nothing missing. It's -- it's an error in the pagination  
11 arrangements.

12 Q. Thank you. I think one more document I need to deal with.

13 PRESIDING JUDGE EBOE-OSUJI: So, Mr Steynberg, Mr Khan, there is no Chapter 5, is that  
14 it?

15 MR STEYNBERG: That's my understanding, your Honour.

16 Q. One more document I would like to deal with. When witnesses testified, did any  
17 witnesses produce statements to be handed in as part of their evidence?

18 A. Yes, yes, some witnesses did.

19 Q. And if I could just ask you to turn to identify the document at tab 28, ERN 0006-1045.  
20 Can you confirm, sir, that that is a statement produced by Bernard Njue Kinyua,  
21 district commissioner or formerly district commissioner of Uasin Gishu?

22 A. Yes, it appears that's the case.

23 MR STEYNBERG: Your Honour, this -- this statement is -- goes with the transcript of the  
24 evidence that was handed in as part of the transcript of his evidence at the previous tab.

25 And the Prosecution will once again submit to have -- will request to have this admitted as

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1 part of that testimony in due course.

2 PRESIDING JUDGE EBOE-OSUJI: Defence counsel, again, do you dispute that that  
3 document forms part of the records of the Waki Commission?

4 MR KHAN: That can be accepted.

5 MR KIGEN-KATWA: Your Honour, it's not quite part of the record, but we do not dispute  
6 that it was used in the commission proceedings.

7 PRESIDING JUDGE EBOE-OSUJI: That's good enough. Please proceed.

8 MR STEYNBERG: Your Honour, if the Court will give me one moment, I think I'm more or  
9 less wrapping up. I would just like to do a double-check.

10 Thank you, your Honours. No further questions.

11 PRESIDING JUDGE EBOE-OSUJI: All right. Ordinarily we'll be taking our morning break  
12 at 11, but let us take the morning break now and come back at 11.30, at which time you tell us  
13 where things stand with you. Also, we will review -- to begin with, do you think you would  
14 be able to start or would you --

15 MR KHAN: Your Honour, I'm most grateful to the Bench and your Honours for your kind  
16 consideration of the application. Hearing the testimony, I can start straight after the break.  
17 I'm grateful.

18 PRESIDING JUDGE EBOE-OSUJI: We will take our morning break now, Witness. We'll  
19 come back at 11.30.

20 Court adjourned.

21 THE COURT USHER: All rise.

22 (Recess taken at 10.42 a.m.)

23 (Upon resuming in open session at 11.36 a.m.)

24 THE COURT USHER: All rise.

25 Please be seated.



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

2 Mr Khan -- sorry. Mr Khan, before I get to you, there's something Ms Bosette wants  
3 to do on the record. There's a correction she needs to make.

4 THE COURT OFFICER: (Interpretation) Thank you, Mr President. We seek to correct the  
5 record and in that regard would like to confirm whether document KEN-OTP-0003-0448 is  
6 given the EVD number T-OTP-00131 and not 137. That is a correction in regard to what I  
7 previously announced. Thank you.

8 PRESIDING JUDGE EBOE-OSUJI: Thank you, Ms Bosette.

9 MR STEYNBERG: Your Honour, I'm sorry. Before my learned friend commences, can I  
10 also just make one clarification regarding the original or CIPEV report that the State seeks to  
11 tender? I've had someone look into the records and I can confirm that we have received --

12 PRESIDING JUDGE EBOE-OSUJI: You mean Prosecution.

13 MR STEYNBERG: Oh, I said it again. Yes, the Prosecution. I beg your pardon. I believe  
14 I said that this morning as well. I no longer represent my State, but the Prosecution.

15 What I can confirm is that, having looked into the records, the version which the  
16 Prosecution has put up is identical to a version which was received from the panel of  
17 eminent African experts who provided the CIPEV material to the Prosecution and  
18 who were the custodians of that material, so my submission is that is a complete and  
19 accurate copy of the record.

20 We've been unable to find a bound version in our records, but we do note that the  
21 CIPEV material that was handed over was handed over to us in bound copies and  
22 perhaps that -- that is what my learned friend saw a picture of.

23 PRESIDING JUDGE EBOE-OSUJI: All right, we will move on now.

24 Mr Khan and Mr Kigen-Katwa, before the witness came into the Court you had  
25 requested that initially - that was yesterday - that you be allowed to start

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1 cross-examination on Monday and we were about to make a ruling this morning on  
2 the matter, but you intervened and said you may be able to start today after all.  
3 Now in the meantime, as you know, things shift. The Appeals Chamber will be  
4 using this courtroom to deliver a judgment by 4.30 and the logistics of delayed  
5 broadcast for our case, which takes -- a 30-minute delay requires that there must be a  
6 30-minute delay before the Appeals Chamber starts. That means we must be done  
7 by 4 today.

8 Now, are both of you able to conclude your cross-examination - both of you - by 3.50,  
9 I say 3.50 allowing the possibility of ten minutes of re-examination by the Prosecution,  
10 so that this witness will be discharged today so he can go home for the weekend?

11 Are you able to do that, because if that is not the case it means he will have to come  
12 back on Monday anyway if you don't conclude by 3.50?

13 MR KHAN: Your Honour, I've had discussions with my learned friend, lead counsel for  
14 Mr Sang, and if the Court would be willing to accommodate the Defence by shortening the  
15 lunch break it would be our very -- we would very much hope that we could finish by 3.50 or  
16 4 p.m. both of us today. That's the hope.

17 PRESIDING JUDGE EBOE-OSUJI: Well, we don't want to leave it to the matter of hope.

18 MR KHAN: Your Honours, if we get half-an-hour for lunch, I think that should be possible.  
19 I've curtailed my cross-examination based upon what's actually said and I'm not going into  
20 issues that were raised in the proofing notes, so that should save a considerable amount of  
21 time.

22 PRESIDING JUDGE EBOE-OSUJI: The concern is so the witness doesn't have to come back  
23 on Monday, but if the witness is going to come back on Monday because you're not able to  
24 finish then we might as well consider adjourning at 1 o'clock and leaving it at that and coming  
25 back on Monday. That is the thinking. But if you're not -- if you're going to make that

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1 commitment to completing by 3.50, then we can shorten -- I'm sure we can shorten the lunch  
2 break and have you conclude by 3.50.

3 MR KHAN: Your Honour --

4 PRESIDING JUDGE EBOE-OSUJI: Both of you that is.

5 MR KHAN: -- could we do this perhaps? If you would allow me to make further  
6 submissions by 1 o'clock, by the time we adjourn for lunch, and then hopefully I'll be in a  
7 position to make a little bit more accurate submissions, is that all right?

8 PRESIDING JUDGE EBOE-OSUJI: Yes, that's fine.

9 MR KHAN: I'm most grateful.

10 PRESIDING JUDGE EBOE-OSUJI: Mr McFadyen, Mr Steynberg, as you will have noticed,  
11 has completed his examination-in-chief and now Defence counsel will start their  
12 cross-examination, starting with -- who is starting first? Mr Khan, you?

13 MR KHAN: Your Honour, my learned friend is kind enough to allow me to go first.

14 PRESIDING JUDGE EBOE-OSUJI: Yes, counsel for Mr Ruto will start his cross-examination.  
15 Please keep in mind the advice we've given to you earlier. Of course you are familiar with  
16 how our inquiries work, but the only thing is to again keep in mind the need for the pause  
17 between the conclusion of the questioning and your beginning to answer the question.  
18 Part of the difficulty we have to contend with in our work is that, when you have the  
19 questioner and the witness speaking the same language, the temptation to compress  
20 the pause is greater. So keep that in mind. Both of you speak English and that  
21 means the temptation for you to immediately start answering the question, and he too  
22 will keep in mind the need to observe the pause.

23 Mr Khan, please.

24 QUESTIONED BY MR KHAN:

25 Q. Mr McFadyen, good morning. As you heard, we'll try very much to get through your

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1 evidence without unnecessarily delaying you here in The Hague. We're all very grateful that  
2 you've taken the time and the trouble to travel such a long distance to give your evidence to  
3 the Bench, so thank you very much for that.

4 Now, we've heard that for many years you were a police officer in New Zealand.

5 That's right, is it not?

6 A. Yes, that's right.

7 Q. And you've given evidence many times before different courts; is that right?

8 A. Well I have, but not for some time.

9 Q. And, of course, you've been cross-examined back home in New Zealand in criminal  
10 proceedings?

11 A. Yes, that's right.

12 Q. Before you were appointed to the Waki Commission in 2008, had you ever been in  
13 Kenya?

14 A. No.

15 Q. So that the first time you went to Kenya was when you went to commence your duties  
16 as a commissioner. That's right, is it not?

17 A. Yes, that's right.

18 Q. And you gave evidence that in Papua New Guinea you reviewed three by-elections; is  
19 that right?

20 A. Yes, that's right, with others.

21 Q. And in that you looked at the processes of the by-elections, audit, costs and security; is  
22 that right?

23 A. Yes, that's right.

24 Q. That had nothing to do with any post-election violence, did it, in the general election in  
25 Papua New Guinea?

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1 A. No, it didn't, although part of what we looked at was the form of those by-elections,  
2 which in some way was designed to reduce the propensity for violence, and I believe we  
3 made recommendations about that through to the general elections in their country.

4 Q. And that review, how long did it last?

5 A. Not long. Maybe -- maybe four to six weeks altogether including the writing.

6 Q. And, again, before you commenced your duties as a commissioner for the Waki  
7 Commission, had you ever worked in Africa?

8 A. No, I'd never worked in Africa.

9 Q. Now, one of the challenges from the start as everybody knew was that there was going  
10 to be an awful lot of work to do in a very short period of time; is that right?

11 A. Yes, that's correct.

12 Q. And I think the report itself details that the commission commenced work on 23 May  
13 2008; is that right?

14 A. That's the date that the commission was established by Gazette reference, I believe.

15 Q. Yes. And you arrived when in Kenya?

16 A. Shortly after that.

17 Q. Shortly after?

18 A. Yes.

19 Q. And then I think the commissioners, you spent about a month or so sorting out office  
20 space and basic logistical necessities; is that right?

21 A. That's right, about a month.

22 Q. And then you had to recruit staff for the commission?

23 A. It was during the same period.

24 Q. And you started substantive work on 25 June 2008, is that right, according to the report?

25 MR KHAN: And, your Honour, it's tab 12, KEN-OTP-0001-0377 just for reference.

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1 Q. So the work, substantive work started according to the report on 25 June 2008; is that  
2 right?

3 A. Yes.

4 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, as one would notice, that is a very large report.

5 MR KHAN: Your Honour, it's tab 12 of the Prosecution --

6 PRESIDING JUDGE EBOE-OSUJI: Yes, I know.

7 MR KHAN: Page 3.

8 PRESIDING JUDGE EBOE-OSUJI: My point is if you wouldn't have difficulty with the  
9 witness looking at the report.

10 MR KHAN: Your Honour, not at all.

11 PRESIDING JUDGE EBOE-OSUJI: Yes.

12 MR KHAN: He can look at it --

13 PRESIDING JUDGE EBOE-OSUJI: To refresh his memory maybe.

14 MR KHAN: -- as you wish. But I'm referring directly from the I think non-contentious  
15 matters that are contained on the face of the report. So if I could --

16 PRESIDING JUDGE EBOE-OSUJI: It is for that reason that I say that --

17 MR KHAN: Yes, by all means.

18 PRESIDING JUDGE EBOE-OSUJI: -- since it is not contentious --

19 MR KHAN: Yes. It's not contentious.

20 Q. By all means, sir, if you wish to look at tab 12 of the Prosecution file, and it's at page 3,  
21 the ERN is 0377. Please take your time to find that. So it's on page 3. And you'll see at the  
22 top of the page the commission finally acquired office space on 17 June 2008. By 25 June  
23 2008, most of staff were on board?

24 A. Yes.

25 Q. And the commission was able to begin substantive work. So you agree I'm --

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1 A. Yes.

2 Q. -- stating things accurately?

3 A. Yes.

4 Q. I'm grateful. And in fact the first hearings that were held by the commission took place  
5 on 9 July. That's right, isn't it?

6 A. Yes, that's correct.

7 Q. And you've given evidence about extensions that were granted. I'm not going to  
8 repeat that. But ultimately after you were given a one-month extension and then a fewer  
9 two-week extension, the commission concluded its work and submitted its report on 22  
10 September 2008; is that right? That's when it finished its work?

11 A. No, it was August that the report was submitted -- sorry, October, I believe. I'm just  
12 looking right here.

13 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, are you looking at a reference in the report for  
14 that question?

15 MR KHAN: Well, your Honour, I'll come back to that. I was looking at the one-month  
16 extension and plus the two-weeks' extension and looking at the various Gazette notices, but  
17 I can move on.

18 Q. The report itself was transmitted to the President of the Republic of Kenya on 16  
19 October 2008; is that right?

20 A. That's correct.

21 Q. But the invest -- the work and the report itself had been finished before that, hadn't it?

22 A. Yes, we -- we finished the report before we handed it in.

23 Q. And it was bound and then presented in a properly bound and formalized manner  
24 along with the letter of transmission -- transmission to the president; is that right?

25 A. That's correct.

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1 Q. But it's correct to say, is it not, that by 2 September 2008 investigations were over?

2 A. Well, I can't -- I can't exactly remember when -- when we would have determined that  
3 investigations were over. The -- some work continued through until early October. In fact,  
4 we heard from two or three people in October, and one of our investigators did some  
5 investigations in Nairobi I believe post I think -- did you say 3 September?

6 Q. I said 2 September --

7 A. I'm sorry, the 2nd.

8 Q. -- was the last formal hearing.

9 A. Oh, formal hearing.

10 Q. Am I wrong on that?

11 PRESIDING JUDGE EBOE-OSUJI: Well, that's a different question now.

12 THE WITNESS: Well, that's a different -- sorry.

13 MR KHAN: No, I'm clarifying it, your Honour. It is a different question. I'm clarifying in  
14 light of the witness's answer.

15 Q. 2 September, is that the last formal hearing?

16 A. Well, if we have a record here that it is the last formal hearing, then that would be so.

17 MR KHAN: And, your Honour, just for the Prosecution, I'm referring to Prosecution  
18 statement KEN-OTP-0091-01203.

19 And perhaps before we go on, I've prepared bundles, perhaps this is an opportune  
20 time to pass those on to the Prosecution and to the Honourable Chamber.

21 And your Honour, you'll see -- have you got that, your Honour? It's a bundle, yes.

22 And you'll see at tab --

23 PRESIDING JUDGE EBOE-OSUJI: Does the witness have a bundle also?

24 MR KHAN: I believe yes.

25 PRESIDING JUDGE EBOE-OSUJI: Yes.



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- 1 MR KHAN: Your Honours, it's tab 11 and it's a Prosecution's investigatory report with Bob  
2 Grinstead just for the record. In the first paragraph Bob Grinstead said, "The final  
3 investigative work was completed around 2 September 2008 and the CIPEV itself came to an  
4 end at about 15 September."  
5 Your Honour, that's just the basis of my questioning so there's no misunderstanding.
- 6 Q. And, Witness, you say in your statement to the Prosecution the writing of the report  
7 took about six weeks; is that right?
- 8 A. Well, a little less than that, less than that actually, yes.
- 9 Q. And the report itself was written in Diani, on the coast; is that right?
- 10 A. Yes, yes.
- 11 Q. That was a retreat essentially so the commissioners could focus exclusively on writing  
12 the report; is that right?
- 13 A. That's right.
- 14 Q. And then I think when you came back to Nairobi some additional work was done as  
15 well --
- 16 A. That's right.
- 17 Q. -- is that correct? So the actual hearing of witnesses, the actual investigations during  
18 the Waki commission was about seven weeks; is that right?
- 19 A. Well, it would be in the order of two months.
- 20 Q. Two months?
- 21 A. Yes, I guess.
- 22 Q. And it was a very intense period of work; is that right?
- 23 A. Yes, it was.
- 24 Q. You held hearings in Nairobi; correct?
- 25 A. Yes.

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1 Q. And you also criss-crossed different parts of Kenya. That's right, isn't it?

2 A. We went to different parts of Kenya, yes, we did.

3 Q. For example, you went to the coast and had hearings in Mombasa?

4 A. That's right.

5 Q. You went to Nakuru and Naivasha?

6 A. Yes, although not in that order.

7 Q. And three days were spent by the commission in Eldoret; is that right?

8 A. Yes, I believe so. Yes.

9 Q. And that was between 5 and 7 August 2008; is that right?

10 MR KHAN: And, your Honour, that's again page 3 of –

11 Q. And, Witness, that's page 3 of the report, third paragraph, which details the various  
12 commission hearings that took place, Nairobi, Naivasha, Nakuru, Eldoret, Kisumu, Borabu,  
13 Mombasa and so on. So you had three days of hearings in Eldoret?

14 A. Yes.

15 Q. And because of the challenges of work, and I think you talk about time constraints and  
16 lack of time about 14 times in your statement, is it right that work was divided amongst the  
17 commissioners and the staff to try to make things as efficient as possible? For example,  
18 Melinda Rix was designated as the point person on doing work on gender-based violence; is  
19 that right?

20 A. Yes, she was, and she would have overseen that area.

21 Q. And your fellow commissioner, Pascal --

22 MR STEYNBERG: I'm sorry, your Honour, but there were two questions asked and I believe  
23 the witness has only answered the second part of that. The first one was whether or not  
24 work was divided to try and make things as efficient as possible. Perhaps the witness could  
25 be given an opportunity.

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1 MR KHAN:

2 Q. Yes, Witness, please, if you had something more to say?

3 A. Well, I mean, the structure of the commission was there were divisions of labour, if you  
4 like. Obviously with any organisation that's true. So some people were involved in  
5 administrative work and others were involved in investigations and others were involved in a  
6 legal -- from a legal perspective, so clearly.

7 Q. I'm grateful. And is it correct also that between you and your other international  
8 commissioner, Mr Pascal Kambale, there was essentially a specialisation where you with your  
9 background focused on State security operators, police, acts and omissions by the State. And  
10 Pascal Kambale with his background in human rights was focussing on, essentially on  
11 non-State actors. Is that how you divvied up the work, so to speak, in broad terms?

12 A. Well, in broad terms, the commissioners looked at the witnesses and evidence across the  
13 board frankly. And obviously from my background one of the things that I did focus on was  
14 acts and omissions of State security agencies and others, but not to the exclusion, I would  
15 hope, of looking at other aspects of the post-election violence.

16 Q. Of course. But there was from a resource imperative, so to speak, it's correct, is it not,  
17 that you were really the point person with a very keen grasp on acts and omissions possibly  
18 against the police, the security operation, operators in the State. And Pascal Kambale, with  
19 his human rights background, he was allocated and it was decided he would look at the  
20 activities of non-State actors. Broadly that was right, isn't it?

21 A. I wouldn't put the distinction as marked as that, frankly.

22 Q. And time certainly was an issue, wasn't it?

23 A. Well, yes, from the outset.

24 Q. Now, there had been other commissions in Kenya before the Waki Commission. I'm  
25 right, aren't I?

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1 A. Well, I believe there were as many as 30 --

2 Q. Yes.

3 A. -- previous commissions of inquiry.

4 Q. For example, two that you reference in your report is the K-I-L-I-K-U, the Kiliku  
5 Commission. Do you recall that one --

6 A. Yes.

7 Q. -- from the 1990s?

8 A. Yes.

9 Q. And also the Akiwumi Commission, which is very well-known and was -- received the  
10 attention of the commission; is that right?

11 A. Yes.

12 PRESIDING JUDGE EBOE-OSUJI: Spelling?

13 MR KHAN: A-K-I-W-U-M-I, I'm grateful. Akiwumi Commission.

14 Q. And it's at page 498 of the report, but I think there's no dispute between the parties that  
15 the Akiwumi Commission sat between 1 July 1998 and 31 July 1999, submitting its report on  
16 19 August 1999. That sounds right, doesn't it?

17 A. Well, look --

18 Q. You can look at page 498 of your report, if you wish?

19 A. Well, I can, but that would be a matter of public record surely.

20 Q. Do you accept it, or not? It's in your report. If you don't --

21 A. Well --

22 Q. -- please take the time to read.

23 A. What's the reference again?

24 Q. 498 of the Waki report. Witness, just bear with me a moment. I'll give you the  
25 reference. It's my mistake completely. Yes, it's 448. I do apologise, 448 in part 12, dealing

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1 with impunity, and it states -- I think on your copy it's 446. The ERN is 0820. And it says,  
2 "The Akiwumi Commission was appointed on 1 July '98 and its life was variously extended  
3 up to 31 July 1999, when it completed its report and submitted it to President Daniel arap  
4 Moi on 19 August '99." So you accept --

5 A. Yes, that's right.

6 Q. -- that timeline?

7 A. Yes.

8 Q. So compared to the Akiwumi Commission, you had significantly less time to conduct  
9 investigations and analyse facts; isn't that right?

10 A. Yes, that's right.

11 Q. And looking at The Gazette notice that you went through with the Prosecution, of  
12 course the Commission of Inquiry was a non-judicial body, wasn't it?

13 A. Yes, that's right.

14 Q. In fact given the task and the time allocated, or the time allocated in reference to the task,  
15 in fact it was known affectionately or otherwise by commissioners and others as a "baby  
16 commission," am I right? Do you remember that term being used by you and your  
17 commissioners and staff?

18 A. I remember the term, but it was used by others, not the commissioners, initially I would  
19 have to say.

20 Q. Did you ever hear your colleagues referring to it as a "baby commission"?

21 A. Not my colleagues, but I did hear the term "baby commission". In my understanding it  
22 was from -- I don't know where it was from, but it was from outside the commission.

23 Q. Did you ever hear Melinda Rix call it a "baby commission"?

24 A. Not specifically, no.

25 Q. Bob Grinstead?

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1 A. Not that I can recall.

2 Q. Never used it in conversations with you?

3 A. Not that I can recall, no.

4 Q. And am I right that, when the commission was established and started work, emotions  
5 in many respects were still raw? They were raw in Kenya?

6 A. Well, that would be correct.

7 Q. For understandable reasons. A lot of emotion, bitterness and anger remained at the  
8 time you started your work; is that right?

9 A. Well, I believe that would be the case particularly in certain areas.

10 Q. From your assessment as a commissioner, is that your impression?

11 A. Well that's a pretty general statement, to be fair. One of the abiding memories I have of  
12 talking to people directly was the sheer resilience frankly of some of the people that had been  
13 victimised, and it was extraordinary to me to see the resilience and how some of these people  
14 conducted themselves having been through an extraordinary torrid time personally.

15 Q. Yes, resilience aside - and of course that's fully accepted - from the inquiries that  
16 you -- from the hearings that you sat in on, do you accept that feelings and emotions were still  
17 raw at the time that the commission was conducting its hearings, or is that wrong?

18 A. Well, I think there'd be certainly an element of that. Things -- it was quite recent still  
19 after the conclusion of the post-election violence and there -- a couple of areas stood out, I'd  
20 have to say, as -- that we went to where there was some pretty obvious and palpable tension.

21 Q. And I'm right, am I not, that the Waki Commission was established in part to try to deal  
22 with some of these problems of the past and to make sure that a proper inquiry took place so  
23 that the causes of violence could be understood and that Kenya could move forward in peace  
24 and harmony without such violence hopefully occurring in the future? Is that generally  
25 right, one of the motivating factors of the Waki Inquiry?

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1 A. Well, the mandate of the Waki Commission was clearly articulated in The Gazette notice,  
2 so part of the mandate - I'd need to read it again - was to make suggestions and  
3 recommendations going forward.

4 Q. Well, let's do that. Let's go to tab 1 of the file in front of you, the Defence file. It's the  
5 green one. Yes, you've got the right one. The Prosecution took you to two pages of that.  
6 You accept that is the document that agreed upon establishing the Commission of Inquiry on  
7 Post-election Violence? It's that document, isn't it?

8 A. Yes, that's -- that's the agreement.

9 Q. Yes. And if you go on page 2 of that agreement, the second from last paragraph, it's  
10 KEN-D09-0037-0001 at 0002, you'll see that at the outset the commission have stated that its  
11 reports would be presented to the president upon -- and made public within 14 days of its  
12 final submission; is that right?

13 A. Yes, with a copy to the panel.

14 Q. Yes. And if you go to the next page, you will see the signatories to that agreement.  
15 Can you see that?

16 A. Yes, I can.

17 Q. And it's correct, isn't it, that in two parallel columns you have various signatories that  
18 are signing on behalf of the government/PNU and on the other side individuals signing and  
19 establishing this commission - agreeing to establish this commission - on behalf of ODM; is  
20 that right?

21 A. Yes, that's correct.

22 Q. For example, for the government you see the "Honourable Martha Karua," don't you, at  
23 the top?

24 A. Yes.

25 Q. She was the Minister of Justice; correct?

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1 A. I couldn't be absolutely sure what role - what position - she held at that time, to be  
2 honest.

3 Q. Going to the next column, do you see the name "Honourable William Ruto"?

4 A. Yes, I do.

5 Q. So you see his signatory -- signature there?

6 A. Yes, I do.

7 Q. And he was part of the Serena Group, wasn't he? Are you aware of that, the Serena  
8 Group?

9 A. What do you mean by "the Serena Group"?

10 Q. Do you know what the Serena Group is?

11 A. I couldn't give a definition of what the Serena Group is, no.

12 Q. Not a definition, but as a commissioner had you heard of the Serena Group?

13 A. Well, I don't recall a group called the Serena Group. No, I don't actually.

14 Q. We'll move on. If you turn over the page -- and, your Honour, I'll ask for that firstly to  
15 be exhibited. So KEN-D09-0037-0001 until 0003, if that could be marked as a Defence  
16 exhibit?

17 PRESIDING JUDGE EBOE-OSUJI: Prosecution?

18 MR STEYNBERG: No objection, your Honours.

19 MR KIGEN-KATWA: No objection, your Honour.

20 PRESIDING JUDGE EBOE-OSUJI: That document is admitted as the next in the Ruto  
21 Defence exhibits.

22 THE COURT OFFICER: (Interpretation) Document KEN-D09-0037-0001, public, will have  
23 the number EVD-T-D09-0029. Number 219.

24 THE INTERPRETER: 219, corrects the interpreter.

25 MR KHAN: I'm grateful.



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- 1 Q. And, sir, if you could move then to tab 2, you will see another document. It's  
2 KEN-D09-0037-0004 and it is again under the auspices of the Kenya National Dialogue on  
3 Reconciliation Independent Review Committee Terms of Reference. You can see that, can't  
4 you?
- 5 A. Yes, I can.
- 6 Q. That ultimately became called the Kriegler Commission, am I right?
- 7 A. Yes, that's right.
- 8 Q. And as your commission was to focus on the causes of violence, the broad mandate of  
9 the Kriegler Commission was to look at issues of the election itself, the modalities and the  
10 accuracy of the election itself; is that right?
- 11 A. Yes, I believe so.
- 12 Q. And if you turn to the fourth page - it has the ERN number, sir, on the bottom right  
13 0007 - can you see again that once again signatures were appended?
- 14 A. Yes, I can see that.
- 15 Q. And do you remember seeing that document in your work as a commissioner?
- 16 A. I believe I may have seen this document in my work as a commissioner. I should say  
17 that I have subsequently seen these documents in another forum.
- 18 MR KHAN: Your Honour, I would ask once again that an exhibit number be given to those  
19 documents starting 0004 until 0007.
- 20 PRESIDING JUDGE EBOE-OSUJI: Prosecution?
- 21 MR STEYNBERG: No objection, your Honours, and I can indicate that similarly we have no  
22 objections to the documents at tabs 3 and 4.
- 23 MR KHAN: I'm grateful.
- 24 MR KIGEN-KATWA: We have no objection to all of them, your Honour.
- 25 MR KHAN: And --

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1 PRESIDING JUDGE EBOE-OSUJI: One at a time. Let's deal with the one Mr Khan has  
2 referred to so there is no confusion. So that document is admitted as the next in the Ruto  
3 Defence exhibits.

4 THE COURT OFFICER: (Interpretation) Document KEN-D09-0037-0004, public, will have  
5 the number EVD-T-D09-00220, Prosecution Exhibit 220.

6 MR KHAN: I'm grateful.

7 Q. And, sir, if you could go to tab 3, the Prosecution has accepted they have no objections  
8 to this, but you'll see, and it's KEN-D09-0037-0008, and it's entitled, "Longer Term Issues and  
9 Solutions, Constitutional Review." So this is also part of the picture, isn't it, that you had a  
10 review on the elections, a review on the causes of violence and this was a commitment to look  
11 at creating a new solid constitution that would provide a solid legal basis for Kenya moving  
12 forward; is that right?

13 A. I believe so, yes.

14 Q. And if you turn over the page to 0009, once again you'll see that the signatures were  
15 added again separately to this document. You see that don't you?

16 A. Yes, I do.

17 MR KHAN: Your Honour, I would ask that that also be given an exhibit number, please.

18 PRESIDING JUDGE EBOE-OSUJI: Prosecutor, you already indicated you do not object.

19 MR STEYNBERG: Yes, I have to objection to that, your Honours, but may I just indicate that  
20 the court officer referred to the previous exhibit as Prosecution Exhibit 220; it should, of  
21 course, be Ruto Defence Exhibit 220.

22 MR KHAN: And, your Honour, can I just say, while that's being done, I'm told that the  
23 smell of burning can be smelt at the back. So just to raise that with the court officer. I'm  
24 grateful. I wish it was the sizzling cross-examination, but alas it's not.

25 PRESIDING JUDGE EBOE-OSUJI: All right. Can you make the correction in the meantime.

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- 1 THE COURT OFFICER: (Microphone not activated)
- 2 THE INTERPRETER: Microphone.
- 3 THE COURT OFFICER: (Interpretation) Document KEN-D09-00037-0004 will have the  
4 number EVD-T-D09-00220, or Defence Exhibit -- Ruto Defence Exhibit 220.
- 5 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 6 MR KHAN: I'm grateful.
- 7 Q. And, Witness, if you could then go to tab 4, you'll see another piece of the jigsaw for  
8 rebuilding Kenya which starts at KEN-D09-0037-0010, and it's a document entitled, "Truth,  
9 Justice and Reconciliation Commission." Can you see that?
- 10 A. Yes, I can.
- 11 Q. And this was an agreement to establish in tandem with the Kriegler Commission and  
12 the Waki Commission the constitutional review, also a commission that was dealing with  
13 peace and justice and reconciliation; is that right?
- 14 A. I believe so, yes.
- 15 Q. And if you turn over the page, and you go to KEN-D09-0037-0012, you'll once again see  
16 that amongst the other signatures is the name of William Ruto supporting that initiative; is  
17 that right?
- 18 A. That's true, yes.
- 19 Q. I'm grateful.
- 20 Your Honour, once again I'd ask that an exhibit number be given to this document, please.
- 21 PRESIDING JUDGE EBOE-OSUJI: Prosecutor?
- 22 MR STEYNBERG: No objection, your Honour.
- 23 MR KIGEN-KATWA: No objection, your Honour.
- 24 PRESIDING JUDGE EBOE-OSUJI: The document is admitted as the next in the Ruto  
25 Defence exhibits.

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1 THE COURT OFFICER: (Interpretation) Mr Khan, could you confirm if this is the  
2 document ending in 0010?

3 MR KHAN: It is ending 0012. So it starts KEN-D09-0037-0010 and then continues to 0012.  
4 Thank you.

5 THE COURT OFFICER: (Interpretation) Thank you very much. Document  
6 KEN-D09-0037-0010 will have the number EVD-T-D09-00221, or Ruto Defence Exhibit  
7 Number 221.

8 MR KHAN: I'm grateful.

9 Q. Sir, if you could then go to tab 5 you'll see another document and it's headed, "The  
10 National Accord and Reconciliation Act 2008", and the preamble starts: "There is a crisis in  
11 this country. The Parties have come together in recognition of this crisis, and agree that a  
12 political solution is required." Can you see that document?

13 A. Yes, I can.

14 Q. And you're aware, are you not, that this was the foundation of what became the  
15 coalition agreement that saw ODM members headed by the Honourable Raila Odinga joined  
16 the government that was presided over by His Excellency Mwai Kibaki? You're aware of  
17 that, are you?

18 A. Yes, I believe so. Yes.

19 Q. And so collectively, the landscape that you saw upon your arrival -- you saw of course a  
20 crisis and a recent conflict, but already at the time of your arrival there was Kenyan initiatives  
21 in way that were quite far-reaching in healing the divide; is that right?

22 A. Well, yes, there were a number of arrangements put in place to -- well, initially to stop  
23 the violence and to -- I can't comment too much on what impact that would have had at that  
24 stage on -- on Kenyan society.

25 Q. Yes.

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- 1 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, what do you want to do with document? Is it  
2 already on the record?
- 3 MR KHAN: Your Honour, it's not. I'd ask that it be given an exhibit number, please.
- 4 PRESIDING JUDGE EBOE-OSUJI: Prosecutor.
- 5 MR STEYNBERG: No objection, your Honour.
- 6 MR KIGEN-KATWA: No objection, your Honour.
- 7 PRESIDING JUDGE EBOE-OSUJI: Admitted as the next in the Ruto Defence exhibits.
- 8 THE COURT OFFICER: (Interpretation) Mr Khan, could you give us an ERN number,  
9 please.
- 10 MR KHAN: KEN-D09-0037-0013 until 0014. Thank you.
- 11 THE COURT OFFICER: (Interpretation) Thank you. Document KEN-D09-0037-0013 will  
12 have the number EVD-T-D09-00222, or Ruto Defence Exhibit Number 222.
- 13 MR KHAN: Your Honour, I hesitate to rise. I wonder is that exhibit 222 or 223? I'm  
14 grateful.
- 15 Q. Now, sir, you have mentioned various internationals, non-Kenyans, that were working  
16 to support the commission; you recall that?
- 17 A. Yes.
- 18 Q. For example, Pascal Kambale, Bob Grinstead, Melinda Rix and Susanne Mueller; you're  
19 aware of that?
- 20 A. Yes.
- 21 Q. And are you aware that Susanne Mueller was met and was questioned by the  
22 Prosecution on 14 December 2009?
- 23 A. No, I wasn't aware of that.
- 24 Q. Are you aware that Mr Bob Grinstead was met and questioned by the Prosecution on 16  
25 December 2009?

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1 A. I was aware that Bob Grinstead had spoken to the -- well, somebody here, but I wasn't  
2 sure about what or --

3 Q. In 2009?

4 A. Oh, well, I'm not sure of the time frame, no.

5 Q. Are you aware that Pascal Kambale met and was questioned by the Prosecution on 17  
6 January 2010?

7 A. No, I wasn't.

8 Q. I'm grateful. Are you aware that Melinda Rix met and was questioned by the  
9 Prosecution between 27 and 28 January 2010?

10 A. No, I wasn't aware.

11 Q. You recall that you were interviewed, you were met and were questioned by the  
12 Prosecution on 8 February 2010; is that right?

13 A. Yes.

14 Q. And that was before the Judges of the International Criminal Court had authorised  
15 investigations in the Kenya situation; that's right, isn't it?

16 A. Yes, I believe so. Yes.

17 Q. I think, in fact, the Prosecution told you that?

18 A. Yes, I guess. I'm -- I'm not sure about whether they did or not.

19 Q. Are you aware that (Redacted) was interviewed on 25 February 2010?

20 A. I wasn't.

21 Q. Are you aware --

22 MR STEYNBERG: Your Honours, I -- I'm sorry to interrupt my learned friend. I'm not sure  
23 if anything turns on this, but when my learned friend says "interviewed by" and "questioned  
24 by" -- these people were spoken to certainly by the OTP, but no statements or -- were taken  
25 from them at that time.

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1 MR KHAN: Well, your Honours, I've got notes of about 21, 22, 25 pages. Whatever they're  
2 called they were quite significant.

3 Q. Witness, when you spoke to the Prosecution in February 2010, and I think, am I  
4 right -- how many investigators came and sat down when you met with the Prosecution?  
5 There was three -- there was three staff members; is that right?

6 A. Well, I don't recall to be honest.

7 Q. All right.

8 A. No.

9 Q. I can move on from that. Are you aware at that time, 8 February 2010, was anything  
10 said by the Prosecution indicating that they'd already indicated -- already identified certain  
11 witnesses in Kenya that they wished to place under witness protection?

12 A. No, I don't recall any specific reference to any specific witnesses, no.

13 Q. If there wasn't reference to any specific witness, do you recall anything said about  
14 witnesses having been identified and being placed under protection in Kenya?

15 A. No, I don't recall that.

16 Q. Did they say anything that made you believe that certain suspects had already been  
17 identified?

18 A. No.

19 Q. They spoke to you about William Ruto, did they not?

20 A. I don't have much recollection of those conversations at all, actually.

21 Q. Okay, I'll move on. I'm grateful.

22 Witness, you've previously verified that there were three days of hearings in Eldoret between  
23 5 and 7 August 2008, and I'm going to ask you some questions which are based, in fact, upon  
24 page 10 of the Waki report, and it's at tab 12, KEN-OTP-0001-0384.

25 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, it might do to refer to the ERN number since

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1 there may be some disparity between your hard copy and what we have.

2 MR KHAN: Your Honour, the ERN is 0384.

3 Q. Now, sir, you'll see that the last paragraph, if you wish to refer to it, but -- the  
4 commission heard witness testimony from 30 witnesses in regard to the Rift Valley Province;  
5 that's right, is it not?

6 A. Yes.

7 Q. These were the viva voce witnesses that appeared before the commission that appeared  
8 before you; that's right, isn't it?

9 A. Yes, they would have appeared before the commission.

10 Q. Yes. Now, you'll also see that your investigators -- the commission investigators, I  
11 should say, took signed statements in private from 24 individuals, 17 of whom did not testify  
12 before the commission. Can you see that?

13 A. Yes, I can see that.

14 Q. So it's right --

15 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, can you hold that question. Apparently the  
16 statics on, lack thereof, generated by the smell information, interrupted the recording of a  
17 certain Defence exhibit so we need to do that now.

18 MR KHAN: I'm most grateful. Thank you very much.

19 PRESIDING JUDGE EBOE-OSUJI: Yes.

20 MR KHAN: Thank you.

21 THE COURT OFFICER: (Interpretation) Thank you, Mr President. Document  
22 KEN-D09-0037-0008 will be given the EVD number T-D09-00223 or Ruto Defence Exhibit  
23 Number 223.

24 PRESIDING JUDGE EBOE-OSUJI: Thank you.

25 Mr Khan, sorry about the interruption.



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1 MR KHAN: No, I'm most grateful.

2 Q. Witness, I was saying that as your report notes - as the Waki report notes - that the  
3 commission investigators took statements from 24 individuals, 17 of whom did not testify  
4 before the commission. So you agree with me that seven witnesses interviewed by  
5 commission investigators did testify before the commission viva voce?

6 A. Yes, that would appear to be true.

7 Q. So seven out of the 30 individuals spoken to with regard to the North Rift, only seven of  
8 those were spoken to by commission investigators; that's right, isn't it?

9 A. Could you say that again?

10 Q. I said out of the 30 witnesses that gave evidence before the Waki Commission, only  
11 seven of those were spoken to, statements were taken by commission investigators; seven out  
12 of the 30 were Waki Commission witnesses, so to speak?

13 A. Oh, I see. Yes. That would --

14 Q. That's right?

15 A. That would -- the numbers would certainly say that, that's right.

16 Q. Yes, thank you. And so for the bulk of the witnesses, these 23 witnesses, they came  
17 before the commission by various other means; is that right?

18 A. Yes.

19 Q. For example, lawyers with standing?

20 A. Yes.

21 Q. They would bring witnesses?

22 A. Yes, they would.

23 Q. And these witnesses, these lawyers with standing who brought their witnesses, I'm right,  
24 am I not, that those witnesses had not prepared statements. They came before the  
25 commission, were asked questions, normally led through their evidence by their lawyer, and

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1 then any questions that existed would be put; is that right?

2 A. That's not always the case. I remember that some, if not all, did have statements.

3 Q. But casting your mind back to the North Rift region and these 30 witnesses, did most of  
4 the witnesses arrive before you with statements or without statements?

5 A. Well, I don't know about most witnesses, but some witnesses did and some didn't. For  
6 example, the PCs or police officers or what have you may not have tendered a statement and  
7 others did.

8 Q. And just to be clear, out of the 30 witnesses - so I'm not misleading anybody - out of the  
9 30 witnesses that were heard by the Waki Commission in relation to the North Rift Valley, 25  
10 of those were heard in Eldoret and the other five were heard in Nairobi; is that right? It's on  
11 the face of the report.

12 A. Yes, that's right, yes.

13 Q. I'm grateful. And even in circumstances, sir, when lawyers with standing came before  
14 the commission and presented a witness and there was, in any case, a statement, they were  
15 circulated normally for the first time at the commission hearing; that's right, isn't it?

16 A. Yes, that was right.

17 Q. And so the questioning of those witnesses was limited either to direct responses and  
18 direct questioning in the face of viva voce evidence, but there wasn't time to do investigations  
19 to test the assertions that the witness was making whilst the witness was before you; is that  
20 right?

21 A. Well, with those particular witnesses, you're right, they were not interviewed by our  
22 investigators before appearing before us.

23 Q. The first time you had the opportunity, sir, of seeing those witnesses and hearing those  
24 witnesses was when they appeared before you at the commission; is that right?

25 A. Yes.

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- 1 Q. And 25 witnesses over three days in Eldoret, again, simple mathematics, approximately  
2 you had eight witnesses a day; is that right?
- 3 A. I'm not sure if the split was as even as that but --
- 4 Q. Well, I can be precise. On 7 August you heard 12 witnesses and then --
- 5 PRESIDING JUDGE EBOE-OSUJI: Do you -- do you have any difficulty referring this  
6 witness to the source of the proposition? It's been a while --
- 7 MR KHAN: Your Honour --
- 8 PRESIDING JUDGE EBOE-OSUJI: -- and we don't expect him to have a photographic --
- 9 MR KHAN: Of course.
- 10 PRESIDING JUDGE EBOE-OSUJI: -- or video memory of everything that happened at the  
11 time.
- 12 MR KHAN: Your Honour, it's on the witness list that's been provided by the Prosecution  
13 which is at tab 9, I'm grateful, and --
- 14 PRESIDING JUDGE EBOE-OSUJI: Whose tab 9? Yours?
- 15 MR KHAN: Prosecution's tab 9. I'm grateful. Prosecution's tab 9. Prosecution Exhibit  
16 127. Your Honour and Mr Witness, it starts at -- it's very small, unfortunately, but it's 0755  
17 on the bottom. KEN-OTP-0041-0755. Maybe it's easier. It's at 65A it starts.
- 18 PRESIDING JUDGE EBOE-OSUJI: 0755 you said?
- 19 MR KHAN: I'm sorry, your Honour?
- 20 PRESIDING JUDGE EBOE-OSUJI: Did you say we're looking at 0755?
- 21 MR KHAN: 0755 is the start of the hearings that took place on 5 August 2008. And the  
22 report makes it clear that the hearings continued up to and including 7 August 2008. So  
23 there were three days of hearing.
- 24 Q. But, Witness, the point I'm trying to get across is sometimes -- well, the average, again  
25 just generally, of course there are always exceptions, but the average time a witness spent

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1 with you was normally about 45 minutes to an hour, sometimes an hour and a bit, is that right,  
2 broadly speaking?

3 A. Well, it varied quite a bit. I mean, you know, what we tried to do was hear a number  
4 of representative witnesses and in some cases we -- in fact many cases -- many days of our  
5 hearings we didn't stick to a court approach of starting at 10 and finishing at 4. We would  
6 start earlier sometimes and finish as late as 11 p.m. So, you know, you would have to split  
7 that time up among the witnesses and they're not equally apportioned I wouldn't think.

8 Q. Well, I can appreciate that as it's very fair.

9 PRESIDING JUDGE EBOE-OSUJI: Before you proceed, Mr Khan, just to reassure everyone,  
10 the report back about the smell, the security department investigated it, it has nothing to do  
11 with the building. Just some smell out in the motorway that found itself to the courtroom  
12 somehow.

13 MR KHAN: I'm grateful. I think everyone looks forward to lunch --

14 PRESIDING JUDGE EBOE-OSUJI: To reassure everybody.

15 MR KHAN: Your Honour, perhaps we can move on.

16 Q. Witness, casting your mind to the hearings, the three days hearings in Eldoret, would  
17 you agree with me broadly, sometimes you spent even less in fact, but generally you would  
18 spend about an hour or so with witnesses in Eldoret in those three days?

19 A. Well, as I said before, I'm not sure of the -- I've just -- some witnesses would take longer  
20 than others, frankly, depending on the length of their evidence. The other thing you have to  
21 remember is that often evidence in camera actually goes through a little quicker. Formalities  
22 are a little tighter and work more quickly.

23 Q. Witness, let me try to narrow it down a little bit. You didn't spend, for example, half a  
24 day, half a day, let's -- half a day with any witness in Eldoret, did you?

25 A. Oh, I would think not. I don't know whether it was there or not, but one witness we

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1 concluded one day and started the next. I'm not sure whether that was Eldoret or not, but  
2 generally speaking you are quite correct. We wouldn't spend half a day with a witness.

3 Q. Yes, I'm grateful. And --

4 PRESIDING JUDGE EBOE-OSUJI: That's a very efficient system, I must say.

5 MR KHAN: Your Honour, I hope the Bench doesn't get ideas.

6 Q. Now, Witness, you've spoken in your examination-in-chief regarding your own  
7 appointment and the Honourable Pascal Kambale and of course about Justice -- His  
8 Excellency Justice Waki, but in relation to the secretary to the inquiry and the counsel  
9 assisting, David Majanja and George Kegoro, in fact, they were not appointed by way of  
10 mutual consultation but directly by the Minister of Justice, Martha Karua; that's right, isn't it?  
11 Approved by the president, of course, but appointed and selected by Martha Karua, the  
12 Minister of Justice?

13 A. I -- I have no knowledge about how they were selected. I only know that their names  
14 appeared in The Gazette reference on their appointment.

15 Q. You're aware, and we can take you to it, in the Gazette notice establishing the  
16 commission, the only reference to mutual consultation between ODM and PNU dealt with the  
17 three commissioners; that's right, isn't it?

18 A. I'm not sure. I'd need to --

19 Q. Well, it's before the Bench and I can move on. It's there.

20 Are you aware that George Kegoro got the job, so to speak, became the secretary of the  
21 inquiry because he received a phone call from Gichira Kibara, G-I-C-H-I-R-A, Kibara,  
22 K-I-B-A-R-A, who was the PNU secretary to the Kenya National Dialogue and Mediation  
23 Process? Are you aware of that?

24 A. No, not at all.

25 MR STEYNBERG: Your Honour, may I at this stage just request that my learned friend not

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1 frame his questions as facts. These are not facts that are admitted. So I have no objection if  
2 he asks my learned friend (sic) whether he can confirm or deny that, but when you say are  
3 you aware that something happens, it -- it creates the impression that it's a fact.

4 MR KHAN: Well --

5 MR STEYNBERG: And the witness may or may not be aware of it.

6 MR KHAN: Your Honour, I can clarify. I base this upon Prosecution evidence.

7 KEN-OTP-0037-0947 and also KEN-OTP-0061-0002 at paragraph 16. And this individual  
8 told -- (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted) That's the Prosecution's evidence, your Honour.

12 Q. But that's the basis of my question, Witness. Had you ever heard that from  
13 Mr Kegoro?

14 A. No.

15 Q. And dealing with the actual operation of the commission, it's right, isn't it, that David  
16 Majanja and George Kegoro shared an office in the commission buildings? They shared the  
17 office?

18 A. Yes, they did.

19 MR KHAN: And your Honour, that's KEN-OTP-0091-16 -- 1206 and it's in the bundle before  
20 you at tab 11, page 4 of 21.

21 Q. Now, did you ever hear from Mr Grinstead that he felt really a bit in limbo  
22 because -- well, he wasn't Kenyan, was he, Bob Grinstead?

23 A. No.

24 Q. And did ever say that he felt a bit frustrated because, understandably perhaps, David  
25 Majanja and George Kegoro, being Kenyan, had all the contacts and most of the time they just

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1 referred Mr Grinstead to people without much background information or the reason and  
2 modalities these people were recommended? Did he express those kind of concerns to you?

3 A. No, I don't remember him saying anything like that to me at all.

4 Q. Did you ever hear anybody else say that the reason David Majanja and George Kegoro  
5 were in the commission is that they were Martha Karua's people?

6 A. No.

7 Q. Now, Witness, you said, sir, yesterday that Susanne Mueller came to assist the  
8 commission; is that right?

9 A. Yes, that's right.

10 Q. And she was effectively an academic; is that a fair assessment?

11 A. Well, that would be my assessment, yes.

12 Q. And in fact she arrived in Kenya -- well, do you know that the -- she got the job by  
13 ringing the secretary of CIPEV and expressing her interest in assisting the commission's work  
14 and George Kegoro accepted that offer and that's how she got the job?

15 A. No, that's not so. I believe that she did approach the commission - others did too  
16 I would have to say, a number of others from all over the world - to assist the commission.  
17 Her name - from memory there might have been others too - put up to the commissioners.  
18 We had a discussion about it and she was appointed there. That -- that was how that was  
19 handled, not -- she wasn't appointed by Mr Kegoro in the absence of discussion with us.

20 Q. But she instigated the contact. I'm not saying there's anything wrong with it, I'm  
21 saying she instigated the contact with the secretary of the commission and said "I'm very  
22 interested in assisting the work of the commission." That's right, isn't it --

23 A. Oh, yes --

24 Q. -- to the best of your knowledge?

25 A. Oh, to the best of my knowledge, but I mean in context, dozens and dozens of people

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1 contacted the commission to be helpful.

2 Q. Is my -- is the answer to my question yes?

3 A. Yes.

4 Q. I'm grateful. And she arrived in August 2008, correct?

5 A. Can't guarantee exactly how she arrived without looking at some documentation, I  
6 guess.

7 MR KHAN: And your Honour, again for the reference of the Prosecution,

8 KEN-OTP-0087-0877.

9 Q. At the time she arrived most of the field work had been completed; is that right?

10 A. Yes, that's right, most of it would have been.

11 MR KHAN: Your Honour, for the Prosecution, it's the statement of Ms Susanne Mueller at  
12 0878.

13 Q. It's right, is it not, that Ms Mueller was in fact given the responsibility -- sorry, 0877, the  
14 bottom paragraph over to page 2, 0878. Ms Mueller remained in Kenya for two months; is  
15 that right?

16 A. I believe she did, yes.

17 Q. And she was involved in drafting or redrafting five chapters of the final CIPEV report  
18 and these chapters were the introduction, a redraft, the background chapter, the chapter on  
19 the North Rift section in the Rift Valley chapter, Chapter 3, the sexual violence chapter,  
20 Chapter 6, redraft, and the mass media chapter, Chapter 8. The CIPEV report was partly  
21 written in Mombasa and then completed in Nairobi; that's right, isn't it?

22 A. I believe it's an overstatement of her involvement with our commission.

23 Q. You didn't draft the Rift Valley section yourself, did you, sir?

24 A. I didn't write the first draft, but I certainly read --

25 Q. Yes.



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1 A. -- all of the drafts.

2 Q. And Ms Mueller, she never went to the North Rift Valley, did she?

3 A. No.

4 Q. She never attended the commission hearings in the North Rift Valley?

5 A. No.

6 Q. And of course she wasn't a lawyer, was she?

7 A. I don't expect so. I don't believe she was, no.

8 Q. Did she ever tell you -- do you agree with the proposition, and let me know if it's right  
9 or -- or wrong, that she was -- she wrote the chapter the North Rift section in the Rift Valley  
10 chapter? The chapter and others were based on witness statements, testimonies and other  
11 official or unofficial sources and submissions; do you agree with that or not?

12 PRESIDING JUDGE EBOE-OSUJI: Those are multiple questions. Can you break it up?

13 MR KHAN: I can indeed.

14 Q. Do you agree she wrote the Chapter 3 dealing with the North Rift Valley?

15 A. No, that's not my recollection at all.

16 Q. I'll move on. Are you aware in fact, while I'm on to the issue of Susanne Mueller, that  
17 it was her -- she was an expert on Kenya, was she? She was -- she knew quite a lot -- bit  
18 about Kenya as an academic; is that right or not?

19 A. Yes, I believe so, yes.

20 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, if you can look at the clock on the wall, and  
21 how are things going about whether you can complete, both of you, by 3.50 today? If not,  
22 then --

23 MR KHAN: Your Honour, if the Bench is minded to shorten the lunch break, we would  
24 finish, I hope -- we'll finish by 4 o'clock. Not I hope. We'll finish by 4 o'clock. Just bear  
25 with me one moment.

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1 Your Honour, I think -- your Honour, I think perhaps it's more prudent, instead of trying to  
2 squeeze things in and then breaching a promise, if the Court is so minded we could adjourn  
3 and come back on Monday. I would very much hope that we would be finished by lunch on  
4 Monday at the latest, but we'll be finished with the witness -- just to reassure, that we'll finish  
5 with the witness hopefully on -- on Monday.

6 PRESIDING JUDGE EBOE-OSUJI: Witness, I mean this concerns you as well. We want to  
7 make it as easy as possible for everyone, and if the Defence will not be completing today, we  
8 might as well come back on Monday. That's the concern. Also in light of your own  
9 condition, squeezing the lunch break down from one and a half hours to one hour and then  
10 coming back and taking the risk of not finishing any way might be a wasted exercise.

11 THE WITNESS: Thank you, your Honours. From a personal position it would have been  
12 better to conclude today if that was possible, obviously.

13 PRESIDING JUDGE EBOE-OSUJI: Yes, that's of course what -- we thought that. Yes, that's  
14 also what we think, but it seems that we might as well adjourn at 1 o'clock and come back on  
15 Monday.

16 MR STEYNBERG: Your Honours, if it's any assistance, I can indicate that at this stage the  
17 Prosecution has no re-examination.

18 MR KHAN: Your Honour, I'm alive to -- to the witness, and of course we want him to go  
19 back and we appreciate he's come here when perhaps it's been difficult for him. Your  
20 Honour, if the Court could indulge us and shorten the lunch break, we'll finish by -- by 4  
21 o'clock.

22 PRESIDING JUDGE EBOE-OSUJI: So we're back to the discussion -- so normally we would  
23 have taken one and a half hour lunch break, but shortening means shortening it down to only  
24 one hour. I hope that doesn't cause you a lot of stress.

25 THE WITNESS: No, your Honour. We can be prepared for that. Thank you.

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- 1 PRESIDING JUDGE EBOE-OSUJI: All right. We will shorten the lunch break and return at  
2 2 o'clock instead of the usual 2.30. Maybe we should take that break now.  
3 The Court will adjourn and will come back at 2.  
4 THE COURT USHER: All rise.  
5 (Recess taken at 12.57 p.m.)  
6 (Upon resuming in open session at 2.02 p.m.)  
7 THE COURT USHER: All rise.  
8 Please be seated.  
9 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.  
10 Mr Khan, please proceed.  
11 MR KHAN: I'm grateful, Mr President, your Honours.  
12 Q. Witness, I'll try to move briskly so that you can finish today and go home, but there may  
13 be some questions out of order and so please bear with me.  
14 I'm correct, am I not, that Melinda Rix and Bob Grinstead were the only  
15 members -- the only members of the investigative team that had criminal  
16 investigation experience? (And, your Honour, I refer to the reference tab 16,  
17 KEN-OTP-0087-0996.) Is that right?  
18 A. Yes, that's right.  
19 Q. I'm grateful. And in fact there was no Kalenjin investigator, was there? There was no  
20 investigator from the Kalenjin community that was on the books of CIPEV? That's right, isn't  
21 it?  
22 A. I don't recall whether there was or whether there wasn't, actually.  
23 Q. You saw the list of names earlier. You can see it again, if you wish? Did you recall  
24 seeing any Kalenjin name?  
25 A. No. I don't recall seeing any Kalenjin name specifically, no.

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1 Q. You had a member --

2 MR STEYNBERG: I beg your pardon. Sorry to interrupt, your Honour, but perhaps the  
3 witness could be asked whether he would recognise a Kalenjin name if he saw it?

4 MR KHAN: Yes, of course.

5 THE WITNESS: Well I can recognise some I believe Kalenjin names, but I wouldn't -- I  
6 wouldn't back myself on that frankly.

7 MR KHAN:

8 Q. I'm grateful. You don't recall there being any Kalenjin investigator in your team?

9 A. No, I don't recall it.

10 Q. You remember an individual called George Morara, do you? He was an investigator.

11 A. Yes, I believe I remember that name. Yes.

12 PRESIDING JUDGE EBOE-OSUJI: Spell.

13 MR KHAN: M-O-R-A-R-A, for the record.

14 Q. I'm grateful. Are you aware, sir, that in fact he was an active member of Vijana na  
15 Kibaki?

16 A. Well, I don't and I don't know what that is.

17 Q. Have you heard of the term "Vijana na Kibaki"?

18 A. Not that I can recall, no.

19 Q. It didn't arise during the commission hearings?

20 A. Well, I don't recall that it did. The term is foreign to me.

21 Q. Are you aware that George Morara, your investigator, was an active member of the  
22 presidential election campaign team of His Excellency Mwai Kibaki?

23 A. No.

24 Q. In the -- the commission struggled particularly in its early days for space and  
25 organisation; is that right?

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1 A. Well we had to work hard to satisfy our needs in that regard, yes.

2 Q. Well tell me, sir, if you agree with this? (And, your Honours, again it's the statement of  
3 Melinda Rix, KEN-OTP-0087-0995, at tab 16 of the Defence file):

4 "At the KICC building, potential witnesses would often present themselves without  
5 an appointment and investigators would meet with them. There were no real  
6 interview rooms and it was not uncommon for multiple interviews, e.g. four or five,  
7 to take place in the same room. Investigators would more often than not  
8 be one-on-one with the client and utilise the corner of the room so as not to disturb  
9 the other interviews taking place."

10 Are you aware of that?

11 A. No, I'm not.

12 Q. You'd agree with me that in normal criminal investigations - and of course criminal  
13 investigations, not Waki - that would be completely improper, wouldn't it?

14 A. In a criminal investigation, yes, it would.

15 Q. Yes, but there are some of the difficulties perhaps that beset the hard work of the  
16 investigators trying to discharge their mandate; is that right?

17 A. Well I guess that's certainly not ideal, but maybe nothing that could be overcome  
18 actually.

19 Q. Can I ask by the way, you were informed, were you not, that there was a complaint of a  
20 certain disconnect between the investigators on the ground doing the work and the  
21 commission itself? That came to the attention of the commissioners, did it not, yourself,  
22 Pascal Kabale?

23 A. I'm not sure that that was as specific as that. From time to time, the commissioners  
24 involved in fact the head of investigations, you know, round our -- round our table when we  
25 were discussing how we'd gone and how we were going to go next.

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1 Q. Do you remember, or would you agree -- (And, your Honours, it's the statement of Bob  
2 Grinstead at page 3.) Do you agree that there was little cohesion between the investigation  
3 team and the commissioners and that was found a bit frustrating by some of the  
4 investigators?

5 A. Well, I can't comment on what Mr Grinstead said or didn't say.

6 Q. Well, you'd be aware, were you not, that there'd been a request that transcripts be  
7 prepared and sent to investigators on the ground so that they could follow what was  
8 happening in the commission hearings? You're aware of that?

9 A. Yes, I believe so. Yes.

10 Q. And that was a repeated complaint by the investigators, that they didn't know what was  
11 happening in the hearing rooms? You heard that, didn't you, from Melinda Rix and Bob  
12 Grinstead?

13 A. Well one of them, Bob Grinstead, may have mentioned that to me, but I'm not sure that  
14 Melinda did frankly. But that was an issue that had come up at one stage, that's true.

15 Q. And it's correct, isn't it, that the first time transcripts were sent to the investigators on  
16 the ground, so there would be some kind of joined up process, was towards -- was in August  
17 some time, close to the end of the investigations? Would you agree with that?

18 A. Well, no, I'm not sure.

19 Q. You're not sure. Would you agree that certain individuals had their own personal  
20 agendas? And let me give you an example. (And, your Honours, the basis of the question  
21 is at page 5 of tab 11, 1207.) Is a reason why the commission went to Kisii, which was a  
22 really small area, because George Kegoro simply came from that area?

23 A. No.

24 Q. And tell me, sir --

25 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, the pause.

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1 MR KHAN: Yes, of course. I'm grateful.

2 Q. And, Witness, certain lawyers with standing and their -- the organisations behind them  
3 were a bit suspect, were they not?

4 A. Well, what does that mean?

5 Q. They were pushing their own agenda in a biased manner.

6 A. Well, from my position they were representing their constituency in the way they felt  
7 they needed to in open hearings mainly.

8 Q. Let me put this to you. (Your Honour, again it's tab 11, page 9.) "I believe some of the  
9 people prepared by the NGOs were politically motivated." This is Bob Grinstead's statement,  
10 your Honour:

11 "An NGO known as the Centre for Women and Children constantly lobbied the CIPEV, but  
12 the witnesses they channelled appeared biased and this was one group we really felt we could  
13 not rely on. They seemed to appear in every location we went to with a list of witnesses.  
14 They appeared to have a political agenda and served that purpose. They appeared  
15 PNU-Kikuyu front."

16 Do you agree with that statement?

17 A. Well, no, I can't comment on that statement at all.

18 Q. Did you notice anything in the hearing where the centre, the lawyers for the Centre for  
19 Women and Children appeared to be slanting very clearly in a pro PNU, pro Kikuyu manner?

20 A. Well, no, not from my perspective at all.

21 Q. You remember the lawyer, Peter Maundu, was the lawyer with standing for the Centre  
22 for Women and Children? Do you remember that?

23 A. I believe I remember. There were a number of lawyers with standing, frankly.  
24 I'm -- I'm sure I remember that that's his role.

25 Q. But it was known, was it not, sir, it was known actually at the commission amongst you

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1 commissioners that he was a front for the PNU?

2 A. Well, not to my knowledge, no.

3 Q. And regarding other groups - and again, it's the same page, 0091-1211 - some of these  
4 other NGOs and women's groups -- well, tell me if you agree with this, "Some women  
5 groups ...", page 9, your Honours, "... sometimes went over the top in their counselling role to  
6 GBV victims to a point that nearly tampered with the witnesses. Several of these NGOs  
7 presented witnesses repeatedly and they had previous counselling sessions and group  
8 sessions with these women to the extent it could have interfered with victims' evidence, so  
9 I had to direct those NGOs that the amount of counselling or the need for it had to come from  
10 the victim and not forced on the victim. GBV's counselling groups has become a business in  
11 Kenya, and these women appear to have been considerably influenced by these counselling  
12 groups."

13 Would you agree with that statement of Bob Grinstead, your chief investigator?

14 A. There are a lot of threads in that statement that you just made, frankly. One thing  
15 I would say, that if Mr Grinstead did find some cause to -- to counsel witnesses and others,  
16 that's a good thing I would have thought, but I don't have any -- I can't comment really any  
17 more than that on his statement.

18 Q. But counselling and coaching --

19 MR STEYNBERG: I beg your pardon. Your Honours, I've -- I've restrained from  
20 interrupting my learned friend for as long as possible, but I do note that what's being put to  
21 this witness are opinions expressed by another person. We have thus far -- or the Bench has  
22 thus far restrained counsel from putting statements by other witnesses to witnesses in  
23 cross-examination. And yes, as the witness has just noted, I would have thought that the fact  
24 that the head investigator was alive to these possible biases would have -- would have been a  
25 plus mark for the CIPEV commission rather than something to -- to attack this witness with.



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1 MR KHAN: Well, your Honour, the latter -- latter is argumentative, and I won't respond  
2 other than of course there's a difference between counselling and coaching and undue  
3 influence being brought to bear on witnesses before any commission of inquiry.

4 Q. But I was simply putting a statement to you for your opinion and your comment  
5 bearing in mind the time you spent as a commissioner as to whether or not you said that  
6 would be a fair reflection of some of the dangers that existed in the commission and some of  
7 the motivations that infected certain groups, lawyers with standing and GBV groups to name  
8 but two.

9 A. As a general comment, there is always a risk that anyone representing any group will do  
10 so vigorously. And -- and as a -- as a commissioner I can speak for myself, I looked to be  
11 alive to that as best I could.

12 Q. But, Commissioner --

13 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, remember to --

14 MR KHAN: The pause.

15 PRESIDING JUDGE EBOE-OSUJI: -- observe the pause and also watch your pace.

16 Mr Steynberg, the point you made, I was alive to it, about the limits to which counsel  
17 may put what another witness said -- or somebody else said to a witness on the stand.  
18 Of course we know the nature of the witness we have on the stand, one; and secondly,  
19 the material being referred to came from the Prosecution side apparently. Keep  
20 that -- keep that in mind.

21 MR STEYNBERG: On that point, your Honours, obviously, this is what somebody told the  
22 Prosecution. We can't vouch that that is correct or not. In fact it's an opinion, but -- but in  
23 light of the time constraints I won't -- I won't press the matters, your Honour.

24 PRESIDING JUDGE EBOE-OSUJI: Yes. And Mr Khan of course I'll be asking you whether  
25 you are going to call Mr -- what's his name again?

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1 MR KHAN: Robert Grinstead.

2 PRESIDING JUDGE EBOE-OSUJI: Grinstead, yes.

3 MR KHAN:

4 Q. Now, Witness, in your statement to the Prosecution, it's at page 21, 0643, at the time you  
5 made your statement, you told the Prosecution you had certain notes - handwritten notes - of  
6 some of the witnesses that gave evidence during the hearing that you referred to. Do you  
7 remember that?

8 A. Yes, I do.

9 Q. Did the Prosecution ask you for those handwritten notes?

10 A. I'm not sure that -- that they asked me for them. I did make a comment about the  
11 nature of them to -- to the investigators -- to the interviewers.

12 Q. Yes. And you said that they're difficult to read. It's your opinion of witnesses and  
13 you don't think that they would be very useful. That's what you said; is that right?

14 A. Yes. The -- most of the notes that I took at the time was around witnesses appearing in  
15 public and reminding myself of, I think, questions to ask them, that sort of thing.

16 Q. My question is quite simple. The Prosecution didn't ask you for those documents, for  
17 those notes, did they?

18 A. No.

19 Q. And back home of course in New Zealand, to use an analogy, notes of a police officer  
20 that are used in giving a statement normally you preserve them and you'd expect them to be  
21 taken by the Prosecution, wouldn't you?

22 A. Well, not necessarily. What would usually happen is that the -- the person making the  
23 notes could refer to them if they were giving evidence, and of course they could be viewed  
24 by -- by the Court.

25 Q. I'm grateful. Now, Witness, I'll try to move quickly on. Now, you gave evidence that

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1 the commission made a conscious decision that counsel with standing would not be allowed  
2 to represent the ODM or the PNU. Do you remember that?

3 A. Yes, I do.

4 Q. And that was after applications were received. You'd said when applications were  
5 received, you made a decision, no, we're not having political parties represented. That's  
6 right, isn't it?

7 A. I believe that's how that happened, yes.

8 Q. For instance, you remember, if I can exhibit my learned friend, my learned friend  
9 Mr Katwa Kigen, he applied to represent the ODM before your commission. Do you  
10 remember that?

11 A. I don't remember that specifically, but I do remember your learned friend being given  
12 standing in a certain respect.

13 Q. Do you remember denying the application that Katwa Kigen be allowed to represent the  
14 Orange Democratic Movement?

15 A. Well, if Mr Katwa applied under that regime, that would have been the case.

16 Q. And in short order, sir, once that application to represent the ODM was rejected, up  
17 popped my learned friend Katwa Kigen again, this time representing athletes. That's right,  
18 isn't it?

19 A. Yes, he represented athletes, I believe, yes.

20 Q. Tegla Lour – Lorupe. T-E-G-L-A L-O-U-R -- L-O-R-U-P-E. That was the name of the  
21 group that was represented by Mr Katwa Kigen; is that right?

22 A. Something like that it was, yes.

23 Q. And in fact, it was known, was it not, to commissioners that that was nothing but a  
24 guise for representing actually the ODM or representing the ODM at the same time as also  
25 representing ostensibly these athletes; that was known to the commissioners, was it not?

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1 A. Are you saying Mr Katwa looked to deceive the commission?

2 Q. I'm asking you a question. It was known to the commission that Mr Katwa Kigen and  
3 other lawyers were representing other interests besides those that they were given standing to  
4 represent. It was a route in to appear before the commission. That was known to you and  
5 the other commissioners, was it not?

6 A. Well, not in that -- not in that way. I mean --

7 Q. Okay. Let --

8 A. You point --

9 Q. Carry on, please.

10 A. You point out that I'm not a Kenyan but, you know, you could say the same thing about  
11 any of the -- anybody before the commission with standing, frankly, about their politics.  
12 I don't know what they were.

13 Q. Well, that's one of the hazards. But let me take you to tab 10 of the green bundle you  
14 have in front of you, 10A, starts at KEN-OTP-0005-546 -- sorry, bear with me a moment. Tab  
15 10, yes. KEN-OTP-0005-5468. Have you got that at hand, sir?

16 A. Yes.

17 Q. Page 4373. If you go to the top --

18 MR STEYNBERG: Your Honour, may I just inquire? I see my learned friends have both  
19 expressed serious objections to the Prosecution relying on any of the transcripts in this matter.  
20 Is -- am I to understand that my learned friend wishes this to be admitted?

21 MR KHAN: Your Honour, I'll make any application at the appropriate time, but I'm  
22 inquiring as to the real character of the individuals that were appearing before the  
23 commission and who they were actually representing and the knowledge of the  
24 commissioners as to the undercurrents, not just the undercurrents, the quite obvious interests  
25 that were being represented. Your Honour, it's clear from the top of the page, if I --

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1 MR STEYNBERG: I would just like to say the Prosecution would object to selective  
2 references to the transcripts of the proceedings. If they're going to go in, then perhaps they  
3 should all go in.

4 MR KHAN: Your Honour, I'll make that application myself if that's what I seek to do. I  
5 haven't made such an application at the moment. So my question is quite focused to revive  
6 the witness's memory given that he was present at the time. So, your Honours, perhaps if I  
7 could have leave to proceed.

8 PRESIDING JUDGE EBOE-OSUJI: Proceed.

9 MR KHAN: I'm grateful.

10 Q. Witness, if you could be so kind as to go to the top of the page. And you'll see, in fact,  
11 this is a part of the testimony when the secretary general of the ODM, Professor Anyang'  
12 Nyong'o, appears. And you'll see the chairman, Mr Justice Waki, saying, "Next shall we  
13 have - well Mr Maundu." M-A-U-N-D-U. "I suppose you will now remove the mask of  
14 women and children and wear the PNU mask. You ask your questions on behalf of PNU.  
15 Three minutes please."

16 Do you see that?

17 A. Now, I'm obviously not on the right page.

18 Q. Sorry. It's tab 10.

19 A. Yes.

20 Q. In the green file, yes.

21 A. I've got that.

22 Q. It's page 4373 in the original pagination. And the ERN -- so tab 10A, sir. It's the  
23 second page, 4373. Tab is 5468. Can you see that, sir?

24 A. Yes.

25 Q. And then it's just the chairman at the top of the page. If you take your gaze there:

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1 "CHAIRMAN: Shall we -- next shall we have, well, Mr Maundu."

2 Can you see that?

3 A. Yes, I can.

4 Q. "I suppose you will now remove the mask of women and children and wear the PNU  
5 mask. You ask your questions on behalf of PNU. Three minutes, please."

6 Do you see that?

7 A. Yes, I do.

8 Q. Justice Waki of course is a Kenyan and he was very intimately alive to the various  
9 interest groups and under currents in Kenya, at least perhaps it would be fair to say to a  
10 greater extent understandably than yourself or Pascal Kabale; is that right?

11 A. Well, that would go without saying.

12 Q. And if you turn over the page in fact, at 4375, KEN-OTP-0005-5470, you see Mr Harun  
13 Ndubi. Harun Ndubi was representing NSIS; is that right?

14 A. No.

15 Q. Representing the police?

16 A. No.

17 Q. Who was Harun Ndubi representing?

18 A. I would have to look it up, but he wasn't representing the police.

19 Q. And you see Harun Ndubi say, "Thank you, my Lords. Luckily for me I have no mask  
20 to remove." Can you see that? I'm sorry, he was representing civil society. It's clear from  
21 the chairman. The chairman says:

22 "Thank you very much. Civil society, your most important questions only, three  
23 minutes.

24 HARUN NDUBI: Thank you, my Lord. Thank you, my Lord. Luckily for me I  
25 have no mask to remove."

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1 Can you see that?

2 A. I can see that.

3 Q. Yes. And then if you go over the page again to KEN-OTP-0005-5490, you see the  
4 chairman go to Mr Katwa Kigen?

5 PRESIDING JUDGE EBOE-OSUJI: What page again did you say?

6 MR KHAN: 5490, my Lord. 0005-5490.

7 Q. And the chairman says, "Thank you very much. Lastly, Mr Katwa, you may also  
8 remove your mask of Tegla Lorupe and wear the mask of ODM, three minutes." Do you see  
9 that?

10 A. Yes, I do.

11 Q. So you'd agree with me that the chairman at least knew that Katwa Kigen was acting at  
12 least as a sympathiser, if not a surrogate, for ODM in the same way that Mr Maundu was  
13 acting as a surrogate for the PNU? That's a fair assessment, is it not?

14 A. Well on the surface of it, but I can't comment on that and I guess your colleague would  
15 be able to comment better than I.

16 Q. You don't know?

17 A. No.

18 Q. Sir, do you remember a (Redacted) who testified before the commission?

19 A. I don't recall the name specifically.

20 MR KHAN: If you'd bear with me a moment?

21 Your Honour, I'll hand up very briefly, with the Court's leave, a transcript just for  
22 reference.

23 MR STEYNBERG: Could we have the ERN numbers, please?

24 MR KHAN: The ERN number is KEN-OTP-0007-0852.

25 Q. And, Witness, if you have that to hand you'll see a (Redacted)

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1 (Redacted) That's appeared -- that's apparent the third speaker

2 from the top of the first page. Can you see that?

3 MR STEYNBERG: Your Honours, may we go into private session for a moment please?

4 PRESIDING JUDGE EBOE-OSUJI: Private session.

5 \*(Private session at 2.31 p.m.) Reclassified as Open session

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

7 MR STEYNBERG: I regret again to interrupt my learned friend, but I do note that these  
8 proceedings are also private. I'm not sure if my learned friend has reason to believe that this  
9 evidence can be dealt with in public, but if so could he please outline those reasons?

10 MR KHAN: Your Honour, I won't go further. It's -- I think it's absolutely safe to proceed.  
11 I'm not going into the substance of the testimony. Simply -- and I've got reason to say it's all  
12 in order to refresh the witness's memory about this individual testifying. I don't need to go  
13 into the substance.

14 MR STEYNBERG: The point of course is that the witness was a confidential witness and I  
15 think my learned friend has made the same mistake I made earlier.

16 MR KHAN: Your Honour, this individual, as the Prosecution well knows, has repeatedly  
17 made public statements, revealed that he was a witness before Waki and has made very clear  
18 comments as to what transpired. That's in the press in Kenya and the Prosecution are I'm  
19 sure well-briefed about what he has said about Waki and the veracity or otherwise of his  
20 account.

21 So, your Honour, there's no jeopardy by the witness. It's been waived by the witness  
22 himself in public many times. Your Honours, I'm not going into the substance.

23 PRESIDING JUDGE EBOE-OSUJI: Well, let's not mention the witness's name in public.  
24 You can ask the question in private session --

25 MR KHAN: I'm grateful.



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1 PRESIDING JUDGE EBOE-OSUJI: -- in terms of the name.

2 MR KHAN:

3 Q. Witness, are you aware -- well, you'll see, won't you?

4 (Pause in proceedings)

5 MR KHAN: Your Honour, I'm grateful. So if we could go back into public and I won't refer  
6 to the name again.

7 Q. So, Witness, I'm going to ask you some questions about Mr Rono. So you've seen the  
8 name. Just looking at the document, does that help refresh your memory that he was a  
9 witness before your commission and he was led by his lawyer with standing, Peter Maundu?

10 PRESIDING JUDGE EBOE-OSUJI: Not just the witness's name, but any identifying  
11 information about what this witness or person might have said before the commission as  
12 indicated in this record. If it is a confidential record of the commission, let's keep it that way  
13 for now.

14 MR KHAN: Your Honour, in that case I shall proceed.

15 Q. Are you aware that in fact -- well, firstly, does that help refresh your memory that you  
16 heard the evidence?

17 A. Well, yes, I would have, because it's in the same format as all the rest of the hearings.

18 Q. Yes. And do you know how William Rono came into contact with Mr Maundu?

19 A. No, I don't.

20 Q. You recall -- do you know if Mr William Rono provided evidence to the KNCHR?

21 A. No, I don't know if he did or not.

22 Q. Do you know if the KNCHR report relied upon what Mr William Rono told them?

23 A. No, I've got no comment to make on the -- on that report in relation to this witness.

24 Q. Looking at that document again, and remembering what I said about the description of  
25 Bob Grinstead describing Peter Maundu as a PNU Kikuyu front effectively, does that help jog

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1 your memory as to certain tendencies or preferences that were exhibited by Peter Maundu in  
2 the focus of his questioning and how he conducted himself?

3 A. No, not within my memory.

4 Q. Do you know for example that William Rono was in fact a project of the Ministry of  
5 Internal Security in Kenya and an orchestrated attempt to deceive Waki and implicate the  
6 ODM in the post-election violence? Are you aware of that?

7 MR STEYNBERG: Your Honours, again my learned friend states it as a fact, so if he's going  
8 to state facts could he please provide the source?

9 MR KHAN: Your Honours, we will in due course.

10 Q. Are you aware of that?

11 A. Well, no, I have no knowledge of that.

12 Q. Do you know that William Rono was recruited, identified and paid money from  
13 Mr Iringo, the Deputy Permanent Secretary of Internal Security, and Honourable Mwai  
14 Kibaki's political adviser, Nancy Gitau, to provide evidence to Waki? Are you aware of that?

15 A. I haven't heard of any such activity at all.

16 Q. And in fact they were taken under the government's -- government's wing, or the wing  
17 of those two people, Iringo -- Mr Iringo and Ms Nancy Gitau, and paid even to go to the  
18 Kenyan National Commission of Human Rights as part of an orchestrated project. Are you  
19 aware of that?

20 A. No, not at all.

21 Q. And part of that project was to create noise to silence the allegations that PNU had  
22 stolen the election. Are you aware of that?

23 A. I'm not aware of any of this relating to this particular person, no.

24 Q. Are you aware if William Rono in fact tasked -- was tasked to identify other individuals  
25 that he also brought on board and presented to the Kenyan National Commission of Human

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1 Rights and that he and Peter Maundu and others also presented to Waki? Are you aware of  
2 that?

3 A. No.

4 Q. You remember a Mr Samuel Kosgei giving evidence, do you?

5 A. I'd need to refresh my memory, but I remember the name Kosgei.

6 Q. Yes.

7 PRESIDING JUDGE EBOE-OSUJI: Was it also, Mr Khan and Mr Steynberg, in part of the  
8 confidential records of the CIPEV, the Kosgei?

9 MR KHAN: Yes, that is so.

10 PRESIDING JUDGE EBOE-OSUJI: Okay.

11 MR KHAN: Yes.

12 Q. And, Witness, this is very important actually. I'm grateful. One of the unique  
13 features when one gave confidential evidence to Waki there was no cross-examination, was  
14 there?

15 A. There was no -- well, there was an examination from time to time by the commissioners  
16 and by counsel assisting.

17 Q. There was no cross-examination by parties, was there?

18 A. Not -- you mean by other counsel with standing?

19 Q. Yes, counsel with standing brought the witness. There were no other participants there  
20 to test the account given except the commissioners and counsel to the inquiry; is that right?

21 A. That's right.

22 Q. And very often, in fact in the vast majority of cases, you'll agree with me that those  
23 witnesses turned up out of the blue, were presented to the commissioners and the first time  
24 you had to hear their account is when they gave it sitting on the seat before you; isn't that  
25 right?

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1 A. Well, you've covered a bit of ground there. The first thing I would say is not  
2 necessarily out of the blue. Counsel with standing were asked, because -- to provide  
3 witnesses where they could, because some of them indicated that's what they would do. So  
4 we were expecting some witnesses from some of the counsel with standing.

5 Q. And the material possibility -- in all candour, Mr Witness, the material possibility of the  
6 commission to test and controvert those accounts was minimal, given that you hadn't  
7 conducted investigations about their account and the first time you saw the account or heard  
8 the account was largely when they appeared before you; is that right?

9 A. Yes, we first heard from them when they appeared before us.

10 Q. Now, Witness --

11 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, you would have noticed that I have not  
12 intervened a lot in your questioning of this witness, because this witness is a former senior  
13 police officer and so we didn't need to manage his testimony as much as others, but be careful.  
14 Don't overdo it. There's a lot of multiple propositions in questions and even assumptions of  
15 facts, as the Prosecutor --

16 MR KHAN: Indeed.

17 PRESIDING JUDGE EBOE-OSUJI: -- indicated before. We want you to move quickly and  
18 get it over with, but be careful.

19 MR KHAN: I'll be so guided and I'm trying to move on, but I appreciate it.

20 Q. Witness, you remember a lawyer with standing called Njenga Mwangi? N-J-E-N-G-A,  
21 Mwangi, M-W-A-N-G-I?

22 A. Yes, I believe I remember.

23 Q. And he represented certain alleged victims from the Rift Valley; is that right?

24 A. Yes, I believe that's true.

25 Q. Are you aware that in fact Mr Samuel Kosgei and others were sent to Njenga Mwangi

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1 by Martha Karua, the Minister of Justice? Are you aware of that?

2 A. That's making an -- as I say, making an assumption that that actually is the case. I have  
3 no idea whether that occurred or not.

4 Q. And are you aware that in fact Samuel Kosgei was even before that identified by  
5 William Rono in accordance with instructions he had received from Mr Iringo, the Deputy  
6 Permanent Secretary of the Ministry of Internal Security. Had you heard anything about  
7 that?

8 A. Who was he? I mean --

9 Q. That's my question.

10 A. What --

11 Q. Had you heard that?

12 A. No, I haven't heard that, but you're asking a whole lot of "might be"s and "if be"s and  
13 "could be"s, and it's difficult for me to respond in any useful way, I believe.

14 Q. Let me put it again. What do you say to the proposition that Samuel Kosgei came  
15 before your commission because he was identified originally by the Ministry of Internal  
16 Security and told to give his story to Waki? What do you say to that?

17 A. Well, I've got no comment to make about that, but I'd find that surprising.

18 Q. But you had no independent means - it's no criticism - you had no independent means  
19 given the circumstances of the commission and how much was jam packed into two months  
20 or so to go behind witnesses and find out their motivations or why they were coming before  
21 you. You were really limited to hearing their accounts; is that right?

22 A. Well, yes, yes. There were -- the time limits were tight and we conducted our  
23 commission in a way we thought best given the time frame. Now -- and the report, frankly,  
24 speaks for itself. In terms of the weight some of these witnesses would have been given may  
25 be a different story.

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1 Q. Are you aware that Mr William Rono and Mr Samuel Kosgei were both high-level PNU  
2 officials in the North Rift during the presidential election campaign of 2007? Were you  
3 aware of that?

4 A. I don't -- I can't make any comment about that one way or the other. I don't know.

5 Q. You don't know?

6 A. No.

7 Q. And have you followed Kenya since you left, proceedings in Kenya?

8 A. Not too much. I was back in Kenya briefly at the end of 2009 to attend a conference,  
9 but other than that, no, not too much.

10 Q. Had you heard anything in the public - I've said it in court already - that in fact William  
11 Rono, who testified before you, has subsequently repudiated his account and explained why  
12 he gave a false account to the Waki Commission? Have you followed any of that or --

13 A. No.

14 Q. -- that's news to you?

15 A. No.

16 Q. We're still in private session, so before we go into public, just one more question. You  
17 speak in your statement about a James Maina Kabutu. Do you remember that?

18 A. Yes.

19 Q. And it's correct to say you and your fellow commissioners considered him a key insider;  
20 is that right?

21 A. We considered that he may be able to provide evidence to the -- to our commission that  
22 would be helpful.

23 Q. I'm grateful. Hopefully not too much longer. And it's correct, is it not, that in fact the  
24 evidence he gave formed a basis of certain findings in the Waki report?

25 A. I don't recall that any one witness and their testimony would be the basis for findings in

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1 the Waki Commission report. The findings are the basis of a collective view across evidence  
2 and other information that we gained in the course of our work.

3 Q. Let me try to jog your memory. He was the only witness, wasn't he, that gave evidence  
4 about a meeting, an alleged meeting between President Kibaki and Uhuru Kenyatta,  
5 Mr Uhuru Kenyatta as he then was, at State House involving Mungiki. He was the only  
6 witness that testified on that issue before Waki. Does that help jog your memory?

7 A. I know that he did. I'm just -- I'm just trying to recall whether in fact he was the only  
8 one.

9 Q. Can you remember another one, and if so, who?

10 A. Not as we sit here, no.

11 Q. And your Honour -- are you aware -- well, you won't be aware. Your Honour, it's a  
12 stipulated fact - I might as well read it into the record by the Prosecution - that they accept  
13 that James Maina Kabutu lied, stated he lied in his previous accounts to the Prosecution and  
14 was no longer relied upon as a Prosecution witness. That's a stipulated fact by the  
15 Prosecution. And I'm grateful to my learned friend and also to Mr Benjamin Gumpert for --

16 PRESIDING JUDGE EBOE-OSUJI: Okay, let's --

17 MR KHAN: -- bringing that.

18 PRESIDING JUDGE EBOE-OSUJI: I see Mr Steynberg standing.

19 MR STEYNBERG: I'm sorry, your Honours. That does require some contextualisation. I  
20 did -- in fact, my learned friend has the exact language of the stipulation. Perhaps he could  
21 read it out. What -- what was stipulated to was that he gave -- subsequently gave a  
22 conflicting version. We don't know which version is correct, whether he lied when he gave  
23 the original version, whether he lied when he said his -- he had -- he recanted material  
24 portions of his earlier version. So we can't stipulate to the fact that he lied in his evidence  
25 before the commission.

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1 MR KHAN: Your Honour, I can accept that, and we'll file it in the normal way and move on  
2 if I may.

3 Witness --

4 And your Honours, we can go to open session perhaps.

5 PRESIDING JUDGE EBOE-OSUJI: Open session.

6 (Open session at 2.48 p.m.)

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

8 PRESIDING JUDGE EBOE-OSUJI: Thank you. Mr Khan, how are we doing?

9 MR KHAN: Your Honour, we're on course. And I've been in consultations with my friend,  
10 so we'll -- the witness will be released, God willing, at -- by 4 p.m.

11 Q. Witness, you recall a time when my client, Mr William Ruto, approached the  
12 commission; is that right?

13 A. Yes, he did.

14 Q. And he wished to come to speak to you; is that right?

15 A. Yes, that's right.

16 Q. And the reason he wanted to speak to you is that he had been adversely mentioned in  
17 the report of the KNCHR and he wanted to make himself available; is that right?

18 A. Yes, I believe that's why he wanted to speak to us.

19 Q. And you'll recall, will you not, that one of his complaints is that he was never afforded  
20 the opportunity by the Kenya National Commission of Human Rights to counter any  
21 allegations or put his side of the story. He was adversely mentioned without being heard.  
22 And he told you that, didn't he?

23 A. I believe he did.

24 Q. And he actually came to you towards the end of the work of the commission; is that  
25 right?



1 A. Yes. I -- I believe it was in October.

2 Q. In fact, is it right that you had come back from Mombasa? You had almost finished  
3 writing the report, and it was one of -- it was an ad hoc hearing after you had come back  
4 from -- sorry -- after you had come back from your retreat?

5 A. I believe so. It was either then or we -- we specifically went -- went back to Nairobi to  
6 hear him and a couple of others.

7 Q. Yes. There was no recording of that meeting, was there?

8 A. I -- I believe there were notes taken by the secretary, but -- but it wasn't a hearing as  
9 such --

10 Q. Yes?

11 A. -- with -- that was recorded electronically, no.

12 Q. Yes. So it wasn't a hearing. You simply accepted his request to see you and he could  
13 speak to you; is that right?

14 A. Yes.

15 Q. Now, under your -- under the Waki report, it's page 16 of the Waki report, it says, "One  
16 of the fundamental principles of law is ..." that the application of the rules of natural justice  
17 in the -- "... is the application of the rules of natural justice in the adjudication of disputes.  
18 The other is the presumption of innocence." As "... one of the rules of natural justice, which  
19 the commission jealously guards, is that no one should be condemned without giving them an  
20 opportunity to be heard. Pursuant to this principle, the commission hoped that it would  
21 have an opportunity to serve all individuals adversely mentioned during its inquiry with  
22 notices of such mentions and grant them an opportunity to record their evidence with the  
23 commission. For this commission that opportunity never arose for a large number of  
24 adversely mentioned persons except for a few who came before us."  
25 You recall those words of the report?

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1 A. Yes, I do.

2 Q. When Mr Ruto came before you, he was never confronted by the commission and told  
3 this is said about you or that is said about you? That never happened, did it?

4 A. No. I don't believe so.

5 Q. No. And yet he was never given a chance by you to counter any of the allegations that  
6 you had heard in your two months, had he? That's right, isn't it?

7 A. That's right.

8 Q. Did his name appear in the envelope, the famous Kofi Annan envelope given to the  
9 Prosecutor of the ICC? Did his name include -- was his name included in that envelope?

10 A. I believe it was.

11 Q. And the report says, the bit I read, that nobody -- many were not given the opportunity  
12 except those that came before you. When he came before you complaining that he hadn't  
13 been given an opportunity to explain what he said was a false and fabricated account at the  
14 Kenya National Commission of Human Rights, do you really think it was fair for the  
15 commissioners to sit silent and not give him a chance to explain before his name was put in an  
16 envelope that started this ICC case? In actual fairness, what's your answer, sir?

17 MR STEYNBERG: Your Honours, may I at this point object? This witness has testified that  
18 the commission's findings made no adverse findings in their report about any individuals as  
19 far as their criminal responsibility was concerned.

20 MR KHAN: Your Honour, I don't want evidence from the bar with the greatest of respect.  
21 That's an improper objection.

22 MR STEYNBERG: This is --

23 MR KHAN: I referred to the Waki Commission. The rules of procedure say the same thing.  
24 The substantive text talks about rights of confrontation to those --

25 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, let Mr Steynberg finish his objection.

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1 MR STEYNBERG: In the context from which my learned friend takes us was the debate  
2 which my -- which the witness testified about in his evidence in-chief about the decision to  
3 name or not to name individuals who were implicated in criminal offences. And at the end  
4 of the section, the report explains why it decided not to name those individuals and in fact  
5 the --

6 PRESIDING JUDGE EBOE-OSUJI: What's your objection, Mr Steynberg?

7 MR STEYNBERG: My objection, your Honour, is -- is that taxing this witness -- well, this  
8 witness is being accused of unfairness, but in fact, the witness made no adverse findings  
9 against Mr Ruto. The fact that his name was referred for subsequent investigations in a  
10 proceeding -- in proceedings in which he is represented and have been given -- has been given  
11 adequate opportunity to defend himself, with my -- with respect is unfair to this witness.

12 MR KHAN: Your Honours, may I continue?

13 PRESIDING JUDGE EBOE-OSUJI: Yes. Can you respond to the objection?

14 MR KHAN: Your Honour, actually, I didn't view it as an objection rather than an argument  
15 with the greatest of respect.

16 PRESIDING JUDGE EBOE-OSUJI: He says you're being unfair.

17 MR KHAN: Your Honour --

18 PRESIDING JUDGE EBOE-OSUJI: He said that's an unfair question.

19 MR KHAN: Your Honour, with the greatest of respect, it's not an unfair question in our  
20 respectful submission. It is a tremendously unfair process that contradicted the stated rules  
21 of procedure of the commission and the report itself which says that people, a few that came  
22 before us, were given that opportunity.

23 And when William Ruto, one of the high-ranking, most high-profile politicians came  
24 before the commission pleading with them to be heard because of an unfairness in the  
25 Kenyan National Commission of Human Rights report that he's relied upon by the

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1 Waki Commission. He, in breach of their own rules of procedure, and we say the  
2 rules of natural justice, was not given an opportunity to explain, "Mr Ruto, did you  
3 give guns at your house? Did you expel, try to expel non-Kalenjins and Kikuyus  
4 from the North Rift?"

5 Why on earth not give an individual an opportunity to respond, but secret their name  
6 away in an envelope to give to a foreign Prosecutor? We say that violates the  
7 mandate of the Waki Commission and is massively unfair to William Ruto because at  
8 no stage has he been given, we say, until he's come before your Honours, far too late  
9 in the day, and we say needlessly, if these basic rights had been adhered to, has he  
10 been given an opportunity to explain himself?

11 And your Honour, my learned friend is wrong, he says nobody was named.

12 PRESIDING JUDGE EBOE-OSUJI: Mr Khan.

13 MR KHAN: It's not true that nobody was named. People were named in an envelope and  
14 my question is to that. It's page 18 of -- page 18 of CIPEV.

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

16 MR KHAN: Well, witness -- if I can put a different question.

17 Q. Witness, that was unfair, wasn't it?

18 PRESIDING JUDGE EBOE-OSUJI: It doesn't change it. It's precisely an argumentative  
19 question that which you can make submissions upon at the end of the day, isn't that the case.

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

21 PRESIDING JUDGE EBOE-OSUJI: Objection sustained.

22 MR KHAN:

23 Q. Witness, what was your legal basis -- well, did you give an envelope with names to the  
24 president of the Republic of Kenya that appointed you?

25 A. No.

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1 Q. Why not?

2 A. The rationale, I guess, for what we did in terms of the envelope is included in the report,  
3 I believe, in the --

4 Q. As a commissioner, I'm asking you because I haven't seen it in the report. Why didn't  
5 you give an envelope with names to the -- to the president of the republic? Why?

6 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, he says that the rationale is in the report. We  
7 can leave it at that.

8 MR KHAN: Your Honour, it's simply not in the report. I've read it till it's dog-eared and  
9 falling to pieces. It's not in the report. There is no mention in the report about giving the  
10 letter to the president. The only thing is, as we all know, a letter with great fanfare was  
11 presented to the Prosecutor of the ICC.

12 So, your Honours, in my respectful -- this is a very important question. If the Waki  
13 Commission was there to try to improve a domestic process, why not give it to the president  
14 of the country so that the domestic mechanisms also could investigate?

15 MR STEYNBERG: Your Honours, I'm afraid my learned friend is mistaken. The envelope  
16 was not given by the commission to the ICC. And this is, indeed, set out in the report at the  
17 top of 18 and I'll read it. After debating all of the problems about hearing adversely  
18 mentioned people, the commission said, at the top of page 18, 0392:

19 "The Commission has carefully weighed the choices available to it and has decided  
20 against publishing the names of alleged perpetrators in its report. Instead, these  
21 names will be placed in a sealed envelope, together with its supporting evidence.

22 Both will be kept in the custody of the Panel of African Eminent Personalities pending  
23 establishment of a special tribunal to be set up in accordance with our  
24 recommendations."

25 And it was only in default of Kenya setting up such a tribunal that the alternative

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1 recommendation that the names should be forwarded to the ICC was brought into  
2 motion. So it's not correct to say that the -- the commission sent those names to us.

3 MR KHAN: Your Honour, let me put the question a little bit more accurately in that case, if  
4 that's the parameters of the objection.

5 Q. Witness, why were individuals adversely mentioned by your commission, put in a  
6 sealed envelope and given to foreigners, the Panel of Eminent African Personalities and not  
7 given to your appointing authority that paid for you and paid for the commission? Why?

8 A. The -- the process, as has already been stated, the commission determined not to  
9 mention anyone in the report adversely in the way that others had, and we felt that as one of  
10 the opportunities, if you like or say whatever the term is, safeguards to assist a process, would  
11 be to make a recommendation as to where -- how we thought things might -- the special  
12 tribunal be established, that sort of thing, and that the evidence could be secured in a neutral  
13 way, I guess, and be afforded to that tribunal for investigation.

14 Q. Let me try some -- and be a little bit clearer. Is it correct that confidential material from  
15 the Waki Commission was deposited with the president of the Republic of Kenya?

16 A. My understanding that some confidential material, including confidential material  
17 relating to witnesses, would have been deposited with the -- the African Union -- with the  
18 Eminent African Personalities Panel.

19 Q. Can you point to any provision in your appointment, in the rules of procedure, that  
20 authorised you to give information, confidential or otherwise, to foreigners and not to the  
21 appointing authority, namely the president of the Republic of Kenya? What was the legal  
22 basis for that -- that choice to exclude the president of the republic that appointed you?

23 A. I don't have a legal background, so I can't make any comment about that.

24 Q. I'll move on.

25 Witness --

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1 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, wouldn't that be a matter of interpretation of  
2 the terms of reference of the commission and whether or not there was an (indiscernible)  
3 mandate pressing that way.

4 MR KHAN: Well, your Honour, we can argue that later, but I was asking what was the --

5 PRESIDING JUDGE EBOE-OSUJI: Exactly.

6 MR KHAN: -- legal provision or authority that the commissioner himself relied upon  
7 informing the decision to discriminate, we say, against the president of the Republic of Kenya,  
8 His Excellency Mwai Kibaki, and not give information to him as the appointing authority  
9 that's paying for the whole thing and to give it to foreigners. That's my question and I don't  
10 have a satisfactory answer. If the witness doesn't know, we can move on.

11 PRESIDING JUDGE EBOE-OSUJI: As you rightly said, it's a matter of interpretation of the  
12 terms of reference on which arguments may be made later if need be.

13 MR KHAN: All right.

14 Q. Witness, it's correct, is it not, and I'm relying upon page 17 of the Waki Commission,  
15 that alive to the purpose of your work, the purpose of the Waki Commission and some of its  
16 difficulties and limitations, you held, or you found -- or, you accepted I should say, you  
17 accepted that "The evidence that the commission has gathered so far is not, in our assessment,  
18 sufficient to meet the threshold of proof required for criminal matters in this country that is  
19 beyond a reasonable doubt. It may even fall short of proof required for international crimes  
20 against humanity."

21 Do you remember that?

22 A. Yes.

23 Q. And that -- and when you say "short of proof required for international crimes against  
24 humanity," what did you mean? The widespread and systematic nature of the attack could  
25 not be proved?

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1 A. I can't comment on that -- on that specific piece, I must say.

2 Q. I'm grateful. Now, Witness, of course, in the heat of conflict, so to speak, and even in  
3 the commission I'm sure, different accounts came forward and had to be assessed. It's  
4 correct, is it not, and it's page 72 of the report, and I'll read it.

5 PRESIDING JUDGE EBOE-OSUJI: What paragraph?

6 MR KHAN: Your Honour, just bear with me a moment.

7 Your Honour, it's -- in your bundles it's KEN-OTP-0001-0444 and to -- continues over to the  
8 page to 0445. And it starts, "The attacks on the Kiambaa church was caused by some  
9 councillors who spread propaganda that the church had Mungiki adherents from Central  
10 Province who were ready to attack the local Nandi community."

11 Do you remember hearing that evidence?

12 A. I'm sorry, page?

13 Q. At page 70, sir.

14 A. 70?

15 Q. The bottom -- right at the bottom, last line, halfway through. "The attacks on the  
16 Kiambaa church was caused by some councillors who spread propaganda that the church had  
17 Mungiki adherents from Central Province."

18 MR STEYNBERG: Again, in fairness to this witness, the quote starts with, "Another witness  
19 interviewed by CIPEV's investigators claims that," and then there's a quote. So this is a  
20 reference to the evidence of one witness.

21 MR KHAN: Yes. Your Honour, it's not a matter of fairness. It's -- it's simply the point.

22 Q. Witness, do you remember that being said?

23 A. I must be on the wrong page. I'm on page 70 of the report which --

24 PRESIDING JUDGE EBOE-OSUJI: Page 70.

25 MR KHAN:



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- 1 Q. 70. It says 0444 on the bottom corner. 0444.
- 2 A. Yes, that's right. In the bottom, "Furthermore in a statement ..."
- 3 PRESIDING JUDGE EBOE-OSUJI: Yes.
- 4 MR KHAN:
- 5 Q. Yes, exactly.
- 6 A. Oh, I see. Sorry.
- 7 Q. And then it says at the last line, and I was reading the bit I wanted, "The attacks on the
- 8 Kiambaa church was caused by some councilors ..." over the page, spread, "... who spread
- 9 propaganda that the church had ..." --
- 10 A. Right.
- 11 Q. -- "Mungiki adherents from Central Province who were ready to attack the local Nandi
- 12 community."
- 13 A. Yes.
- 14 Q. So a lot of rumour, speculation, allegation, counter-allegation was -- was raised by
- 15 various people before the commission; is that right?
- 16 A. Yes. There was certainly different views from -- from different witnesses.
- 17 Q. Yes. And then I want to take you, sir, to page 347 and 348.
- 18 PRESIDING JUDGE EBOE-OSUJI: You mean native to the report or --
- 19 MR KHAN: Yes, same report, sir, your Honour.
- 20 PRESIDING JUDGE EBOE-OSUJI: 347.
- 21 MR KHAN: And it's headed "Findings In Relation to Causes and Patterns of the
- 22 Post-Election Violence" in part -- Chapter 9, "Consequences, " page 346.
- 23 Q. And it's at paragraph 2, Mr Witness. Mr McFadyen.
- 24 A. Yes.
- 25 Q. It's at paragraph 2, sir.

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1 A. Yes.

2 Q. And it says, "Initially ..." -- this is the causes and patterns of post-election violence,  
3 "Initially, the violence witnessed was spontaneous and was in ..." -- "... and was in part a  
4 reaction to the perceived rigging of elections. In areas like the Rift Valley and the Coast, it  
5 targeted members of the Kikuyu and Kisii communities perceived to be associated with the  
6 PNU party and with President Kibaki who were seen as the beneficiaries of the 'rigged'  
7 elections, while in Nyanza and Western, the spontaneous violence was mostly directed  
8 towards government facilities and gradually took the form of looting and destruction, and  
9 while it also targeted Kikuyus and Kisiis, the intention appeared to be not to kill them but  
10 rather to be expel them and destroy their property."

11 It goes on in the next paragraph, sir, paragraph 3 --

12 PRESIDING JUDGE EBOE-OSUJI: Before you continue, the record must reflect that the  
13 word "rigged" appears in quotes --

14 MR KHAN: Indeed. Indeed.

15 PRESIDING JUDGE EBOE-OSUJI: -- in the report, yes.

16 MR KHAN: I'm grateful.

17 Q. And then in paragraph 3, "Subsequently the pattern of violence showed planning and  
18 organisation ..." -- "Subsequently the pattern of violence showed planning and organisation  
19 by politicians, businessmen and others who enlisted criminal gangs to execute the violence.  
20 That was the case particularly in the Rift Valley and Nairobi. In places like Naivasha,  
21 Nakuru and the slum areas of Nairobi, Kikuyu gangs were mobilised and used to unleash  
22 violence against Luhyas, Luos and Kalenjins and to expel them from their rented residences  
23 and, similarly, organised Kalenjin youth particularly in the North Rift attacked and drove out  
24 Kikuyus living there."

25 You remember that being in the report? That's an accurate part of the report, is it

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1 not?

2 A. Yes. I should make a comment about paragraph 2.

3 Q. Yes.

4 A. There appears to be a blunt finding there stating, "Initially the violence witnessed was  
5 spontaneous."

6 Q. Yes, if I can just pause there. That -- this is, you accept, a proper version of the Waki  
7 report that was approved by the three commissioners --

8 A. Yes.

9 Q. -- and was given to the president of the Republic of Kenya?

10 A. Yes, it is.

11 Q. Yes, thank you.

12 MR STEYNBERG: May the witness now be allowed to finish his last answer, please?

13 MR KHAN: Well --

14 PRESIDING JUDGE EBOE-OSUJI: Let him finish. He was going to make a comment on  
15 paragraph 2.

16 THE WITNESS: Yes. In reading this, it appears that that first sentence taken boldly off the  
17 document here is applying to the whole of Kenya or all of the violence. Now, I can't explain  
18 why that would say that because that's not the findings in some other parts of the report.

19 MR KHAN:

20 Q. Yes. Anything else, Witness, or is --

21 A. Right.

22 Q. -- that it? I was taking -- if you look at the next sentence, then I'll move on, "In areas  
23 like the Rift Valley and the Coast, it targeted members of the Kikuyu and Kisii communities  
24 perceived to be associated with the PNU party" and it goes on to other spontaneous violence  
25 in Nyanza and Western. So you accept that that is a true record of the findings of the Waki

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1 Commission.

2 One thing I wanted to ask you about, in the report, it's at page 379, it's actually said,

3 379, it's under Chapter 11, State Security Agencies, and then under KSIM it is stated in

4 the first paragraph, it is understood -- page -- page 376, your Honour. Page 376.

5 377, sir, I beg your pardon, 377. Under KSIM, and then we're almost done, it says, "It is

6 understood that in fact the NSAC did not actually meet during the crisis period and

7 communicated by other means and it can be assumed that the CSC ...", that's the Cabinet

8 Security Commission -- Committee, "... was not functional during this important period."

9 Do you remember that being stated?

10 A. Yes.

11 Q. Are you aware in fact that the National Security Advisory Commission sat almost every

12 single day during the violence? It was attended by people like General Gichangi, Thuita

13 Mwangi from the foreign office, the Attorney-General Amos Wako and so on and so forth. It

14 was fully operational and sat almost every day during the violence. Are you aware of that?

15 A. No. I've got no comment to make.

16 Q. You're not aware of that?

17 A. No.

18 Q. Now, I wanted to ask you if I -- if you could help me, based upon your very impressive

19 and huge experience as a very senior police officer, certain questions regarding best practice.

20 Of course, we know Waki Commission was not a criminal -- was not a criminal investigation,

21 but I wanted to ask you a question: If you were conducting a criminal investigation, you're

22 the chief investigator, and the allegation was that somebody had been driven out of their

23 home and they had been forced to sell the land, what would you have done to check the

24 veracity of that story? The most basic thing you would have done. Somebody had sold

25 their land because he had been expelled, what would you have done, sir?

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1 A. Really hypothetical --

2 Q. Yes.

3 A. -- question obviously?

4 Q. Yes, please.

5 A. I'd ask you to repeat the ingredients.

6 Q. An individual --

7 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, we don't have a lot of time. Why don't you  
8 put your proposition to him and let's --

9 MR KHAN: Okay. I'll --

10 PRESIDING JUDGE EBOE-OSUJI: -- get his --

11 MR KHAN: -- put it directly.

12 PRESIDING JUDGE EBOE-OSUJI: -- reaction.

13 MR KHAN:

14 Q. Is it right, sir, that as a senior respected and -- law enforcement officer if you were  
15 confronted with a complainant who said that he had been expelled from his land and had  
16 been forced to sell it, one of the things you would have done is check the land records for the  
17 sale; is that right?

18 A. Among other things, in my -- and in my experience in my own jurisdiction,  
19 investigations are comprehensive and cover every aspect of a -- of a criminal complaint.

20 Q. And that's important where in a criminal trial the standard is beyond a reasonable  
21 doubt; is that right?

22 A. Well, that's why.

23 Q. And is it a fact --

24 PRESIDING JUDGE EBOE-OSUJI: And also, Mr Khan, don't forget the time constraint not  
25 only for us but for them at the time.

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1 MR KHAN:

2 Q. Yes. Sir, this is not a criticism of -- of you at all. I'm seeking to glean your experience  
3 for the benefit of the Court and for the record about what is expected of a senior experienced  
4 investigator when confronting serious allegations in a criminal trial. So it's not a criticism at  
5 all of you or of Waki. I understand completely. There was a massive amount of hard work  
6 in a short period of time and you're to be applauded for it. So I just wanted to clarify that.  
7 Let me give you another example. Is one of the basic things you would have done that in  
8 fact you would expect even from one of your junior constables would have been to go to the  
9 neighbours and ask the neighbours what had happened if people had been driven out? Is  
10 that one of the things you would have done?

11 A. Well, it's part and parcel of a -- what I would describe as a normal investigation. I  
12 mean, I know that a number of those things weren't done by the Kenyan police service  
13 because they were under pressure.

14 Q. And if an individual -- if that same individual says that as part of that process of fleeing  
15 he took refuge in a school, presumably you would have expected one of your junior officers to  
16 go to the school and ask the principle or the people in charge of that school: What happened?  
17 Did anybody stay here? If so, who stayed here? That's what you'd expect, isn't it?

18 A. Well, among other things, yeah.

19 Q. And maybe knowing it's a criminal trial and somebody's liberty is at stake, you may also  
20 have gone to look out for some of the family members and asked the family members: What  
21 did you experience? Is that true? Quite common, is it not?

22 A. Well, it's common to -- depending on the seriousness of the -- obviously of the crime to  
23 exhaust as many avenues as you can to -- to get to the truth of it.

24 Q. So definitely for crimes against humanity, a very serious crime indeed, you'd expect that  
25 basic investigative action, is that right, in a criminal trial?

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1 A. Investigators would -- would exhaust every avenue open to them. In some cases that  
2 may be easy. In some cases that may be impossible if not difficult.

3 Q. Yes, I'm grateful. And if you could go now, my last question, it's page 456 of your  
4 report --

5 PRESIDING JUDGE EBOE-OSUJI: I hope we've moved away from that subject.

6 MR KHAN: Yes, yes.

7 PRESIDING JUDGE EBOE-OSUJI: I was wondering about the relevance of it. That was not  
8 a criminal trial -- criminal inquiry, was it?

9 MR KHAN: Your Honour, I will come to that --

10 PRESIDING JUDGE EBOE-OSUJI: Yes.

11 MR KHAN: -- but we've already intimated we're seeking to call the investigator in charge of  
12 the Prosecution case. And when a witness is able to speak to relevant matters that provide a  
13 foundation or a standard as to what should be expected in a criminal case as far as  
14 investigations are concerned --

15 PRESIDING JUDGE EBOE-OSUJI: So your -- your last --

16 MR KHAN: Was focused on what happened in this case by this Prosecution.

17 PRESIDING JUDGE EBOE-OSUJI: And not --

18 MR KHAN: Not at all --

19 PRESIDING JUDGE EBOE-OSUJI: -- on what was done --

20 MR KHAN: -- on the commission.

21 PRESIDING JUDGE EBOE-OSUJI: -- by the --

22 MR KHAN: Not at all.

23 PRESIDING JUDGE EBOE-OSUJI: -- Waki Commission.

24 MR KHAN: Not at all. It's what was not done by this Prosecution opposite.

25 Q. Witness, if you could be so kind as to turn to page 456, Chapter 12, "Impunity."

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1 A. Yes.

2 Q. I believe it's page 443, sir.

3 PRESIDING JUDGE EBOE-OSUJI: Did you say 456 or 443?

4 MR KHAN: Your Honour, I probably gave the wrong number. It's actually page 454,

5 KEN-OTP-0001-0828. And it's the second paragraph.

6 Q. Have you got that, witness?

7 A. Yes, I have.

8 Q. And I'm immensely grateful. Your report stated this, and I want to read it to you and

9 ask you if it's correct, "A flawed investigative process is the very antithesis of a successful

10 prosecution. In other words, the quality of the investigation affects the outcome of both the

11 prosecution and the adjudication of the matter."

12 Do you agree with that statement, sir?

13 A. As a general principle, that's -- I'd agree with that.

14 Q. It's bang on right, isn't it?

15 PRESIDING JUDGE EBOE-OSUJI: He said he would agree with it.

16 MR KHAN: I have no further questions. Thank you very much, Witness, for bearing with

17 us, and I know learned friend that you will be happy to go by 4 o'clock. Thank you so much.

18 THE WITNESS: Thank you.

19 MR STEYNBERG: Your Honours, if I may just briefly indicate that since the luncheon

20 adjournment there are one or two aspects I would like to re-examine on. It won't be more

21 than five minutes.

22 PRESIDING JUDGE EBOE-OSUJI: We have to vacate this courtroom and discharge this

23 witness at 4 o'clock, no later than that. Mr Kigen-Katwa, how much time would you need?

24 The Prosecutor has indicated he would need 5 minutes so far to re-examine.

25 MR KIGEN-KATWA: My estimate is not more than 20 minutes, your Honour. I could



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1 make it shorter, your Honour.

2 PRESIDING JUDGE EBOE-OSUJI: Very good. Please proceed.

3 QUESTIONED BY MR KIGEN-KATWA:

4 Q. Now, Mr McFadyen, I would like to take you to page 302 of the Waki -- the CIPEV  
5 report.

6 MR KIGEN-KATWA: Your Honour, for the record, that ERN reference is  
7 KEN-OTP-0001-0676.

8 PRESIDING JUDGE EBOE-OSUJI: What paragraph are you looking at?

9 MR KIGEN-KATWA: I'm looking at the last paragraph, your Honour.

10 Q. Mr McFadyen, you can see the last paragraph. Are you there, Mr Witness?

11 A. Yes, I am.

12 Q. Now, I'd like you to confirm that this is what you said in -- as part of your report headed:  
13 "The Media and the Post-Election Violence," which is -- which starts at page 295,  
14 KEN-OTP-0001-0669. Now, this is what you said, that "The commission would like to have  
15 thoroughly analysed a full body of transcripts from Kenya's vernacular FM stations given the  
16 allegations against them made by a member of commission's witnesses."

17 You confirm that you recognise this observation as part of your report, isn't it?

18 A. Yes, that's part of the report.

19 Q. Now, the first question I would like to ask you in respect to that is that in actual fact, as  
20 you state in the second line, you were interested in thoroughly analyzing a full body of  
21 transcripts from Kenya's vernacular FM stations. And my emphasis is on the fact that it was  
22 more than one station. Isn't it, Mr McFadyen?

23 A. Yes.

24 Q. Now, I would like to take you back for one moment to page 295 of the same report, just  
25 a few pages back. And the ERN number is KEN-OTP-0001-0669.

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1 Now, Mr McFadyen, I have reference to -- I just want you -- I want to invite you to the  
2 last paragraph about the last -- the sentence in the middle starting with the words  
3 "These included the vernacular music and negative ethnicity ..." Can you see that,  
4 Mr McFadyen?

5 A. Yes.

6 Q. Now, if I could read it and then you confirm, "These included the vernacular  
7 music -- vernacular music and negative ethnicity allegedly coming from Kikuyu FM stations,  
8 including Kameme, Inooro, Coro and others in other parts of the country." Can you see that,  
9 Mr McFadyen?

10 A. Yes, I can.

11 PRESIDING JUDGE EBOE-OSUJI: Spell.

12 MR KIGEN-KATWA: The first station is Kameme, K-A-M-E-M-E. The next one is Inooro,  
13 I-N-O-O-R-O. The third one is C-O-R-O, Coro.

14 Q. Mr McFadyen, I'd like to take you next to page 299 of the same document you're on.  
15 And I would like to invite you to the second paragraph of that page starting with the words  
16 "Dr Bitange Ndemo." Can you see that?

17 A. Yes.

18 Q. Now, could you confirm this is what you -- the observations you made. "Dr Bitange  
19 Ndemo submitted to the commission -- to the commission of letters and internal memos his  
20 ministry had received from two pastors, one voicing concerns about Kass FM Breakfast Show  
21 Lene Emet on 19 February 2007 and another on 29 November 2007 complaining about various  
22 aspects of Kiss FM," comma, "Classic FM and EC FM." Can you see that, Mr McFadyen?

23 A. Yes, I can.

24 Q. Now, without necessarily having to go back to what I invited you at page 295, you  
25 would confirm that as it were, you already have seven stations you were looking at being

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1 variously Kameme, which we've just seen; Inooro FM, which you've just spelled out; Coro; EC  
2 FM; Kiss FM; Classic FM; and Kass FM, isn't it?

3 A. Yes, there are a number of stations.

4 Q. Mr McFadyen, I would like you also to look at page 300 of the same report, page 300.

5 The ERN number is KEN-OTP-0001-0674. And I have a particular interest in what is  
6 contained in the middle of that, the second paragraph in the middle, starting with the words  
7 "He admitted that he did not have specific examples ..." Can you see that, Mr McFadyen?

8 A. Yes, I can.

9 Q. Then I'll read. "He admitted that he did not have specific examples of what actually  
10 was said by Kass FM or by Changey FM, the two vernacular stations in his area." Can you see  
11 that, Mr McFadyen?

12 A. Yes, I can.

13 PRESIDING JUDGE EBOE-OSUJI: Spell "Changey."

14 MR KIGEN-KATWA: Your Honour, the spelling here is C-H-A-N-G-E-Y, but I think it's an  
15 agreed position that the real spelling for that station is C-H-A-M-G-E-Y, M in place of N.

16 MR STEYNBERG: The Prosecution does not dispute that, your Honours. But I wonder if  
17 my learned friend is going to finish the sentence.

18 MR KIGEN-KATWA: I will, your Honour. I had no intention to avoid finishing it.

19 Q. "He admitted that he did not have specific examples of what actually was said by either  
20 Kass FM or by Chamgey FM, the two vernacular stations in his area. Nevertheless, adding  
21 that 'It is common knowledge that it is what happened,' referring to the hate and incitement  
22 allegedly propagated by Kass FM."

23 PRESIDING JUDGE EBOE-OSUJI: Also, in the quotes "It is common knowledge that this is  
24 what happened," the phrase appears in quotes within the paragraph. You don't need to react  
25 to that. Please proceed.

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1 MR KIGEN-KATWA: Thank you, your Honour.

2 Q. Now, lastly, Mr McFadyen, in terms of the stations that were brought to your attention,  
3 the FM stations, I want you to go to page 302, 302, ERN reference KEN-OTP-0001-0676.

4 Mr McFadyen, I'd like you to go to paragraph 3 starting with the words "Some few  
5 exceptions ..." Can you see that?

6 A. Yes, I can.

7 Q. Now, could you confirm this is the report you made in respect to this issue? "Some few  
8 exceptions to the above generalisation of no concrete information are two examples of FM  
9 hate speech the commission received, one from Bahasha FM in Nakuru recorded  
10 on -- recorded at 8 a.m. on 30 January 2008 and received by Kenyan National Commission on  
11 Human Rights, notes KNCHR ...", in quotes, "... 'Kikuyu are like mongoose which is ready to  
12 eat chickens. All other tribes ...", comma, "... 'i.e. Luo, Kisii, Luhyas are all animals in the  
13 forest. They cannot be able to lead this country like Kikuyus,'" close of quotation.  
14 "Second ..." --

15 PRESIDING JUDGE EBOE-OSUJI: Always spell the words. The court reporters, I'm not  
16 sure they have this report on hand. Even if they do, it's more efficient to spell the words as  
17 we encounter them.

18 MR KIGEN-KATWA: I apologise, your Honour. I will read it again and spell them as I  
19 come to them.

20 PRESIDING JUDGE EBOE-OSUJI: "Bahasha," you need just to spell "Bahasha" and move on.

21 MR KIGEN-KATWA: The spelling of "Bahasha" is B-A-H-A-S-H-A.

22 PRESIDING JUDGE EBOE-OSUJI: Now you were beginning to read "Second."

23 MR KIGEN-KATWA:

24 Q. Witness, you proceeded "Second, Nam Lolwe station in Kisumu ..." -- the spelling of  
25 Nam Lolwe is N-A-M and then space L-O-L-W-E. This is what you said, "Second, Nam

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1 Lolwe station in Kisumu broadcast the following from an anonymous caller," quotation,  
2 opening of quotation, "'Our people are dying in Naivasha and Nakuru and some other tribes  
3 are living with us. They should be flushed ...'" into brackets "'... (sic) out of those who don't  
4 belong to this town,'" and then the close of quotation.

5 You can see that, Mr Witness, and you can confirm that was part of what you  
6 observed in your report, isn't it?

7 A. Yes, I can see that, and it's part of the report.

8 Q. Now, I would like to take you to page -- to page 300 of the report, just before I ask you a  
9 question, page 301, page 301, before I take you back to that page 302.

10 PRESIDING JUDGE EBOE-OSUJI: You're a minute to your 20 minutes, Mr Kigen-Katwa.

11 MR KIGEN-KATWA:

12 Q. Now, Mr McFadyen, can you see in the second paragraph the place where the CCK and  
13 the KNCHR, you can see that?

14 A. I'm sorry, we're on which page again?

15 Q. Page 301. ERN KEN-OTP-0001-0675. You can see that, Mr Witness?

16 A. Yes, I'm on that page.

17 Q. Can you see the words "CCK" and the "KNCHR" just below "2007." Can you see that?

18 PRESIDING JUDGE EBOE-OSUJI: What paragraph?

19 MR KIGEN-KATWA: It's second paragraph, towards the end of that second paragraph.

20 THE WITNESS: "CCK" did you say?

21 PRESIDING JUDGE EBOE-OSUJI: Yes.

22 THE WITNESS: Yes.

23 MR KIGEN-KATWA: CCK.

24 PRESIDING JUDGE EBOE-OSUJI: About seven lines up from the bottom of that paragraph.

25 THE WITNESS: Yes, I see that.

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1 MR KIGEN-KATWA:

2 Q. Okay. I want to read from the full stop, immediately after the full stop "KNCHR."

3 And this is what you said, "The result is that the commission was unable to acquire any tapes  
4 or transcripts -- transcripts by the Kass FM or other FM vernacular stations from before,  
5 during or immediately after the 2007 elections. Hence, to some extent the commission's  
6 situation is not dissimilar to that of the DC for Koibatek. It heard many allegations of what  
7 was said, but it does not have the actual transcripts of who said exact -- exactly what during  
8 this very critical period."

9 Could you confirm that's the observation you made, Mr Witness?

10 A. I can confirm that's part of our report.

11 Q. Now, just for emphasis, Mr McFadyen, could you confirm that in fact it is your position  
12 that you did not receive any transcript at all?

13 A. No, I don't recall receiving a transcript.

14 Q. Could you also confirm from the observation you make in that statement that it was not  
15 only Kass FM but also the other, the other FM stations I've just invited you to?

16 A. Well, the commission was interested in any hate speech or other -- other -- other such  
17 broadcasts from any stations.

18 Q. And lastly on that page, Mr McFadyen, I would like you to look at the second sentence  
19 of that paragraph starting with the words "In his testimony." Can you see that? The same  
20 page 301, paragraph 2, the second statement starting with the word "In his testimony."

21 PRESIDING JUDGE EBOE-OSUJI: Line 3 from the top of that paragraph.

22 THE WITNESS: Yes, yes.

23 MR KIGEN-KATWA:

24 Q. Could you confirm this is -- my interest in that paragraph, in that sentence is the time  
25 frame, that this is the observation you made: "In his testimony to the commission,

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1 Dr Ndemo said he would provide the commission with tapes from the ministry

2 monitoring -- monitoring from Kass FM from October 2007 until May 2008."

3 Could you confirm that's the position?

4 A. Yes.

5 Q. Lastly, Mr McFadyen, you confirm that your inability to access any transcripts is not a  
6 situation that related to only Kass FM but to all the other FM stations, isn't it?

7 A. Yes, I believe that's right.

8 Q. Mr McFadyen, I would like to request you to go to page 030, ERN reference is  
9 KEN-OTP-0001-0677. And I would like you to look at the last sentence you've made in that  
10 report. Are you there? You have seen that?

11 A. Yes, I have.

12 Q. Starting with the word "However ..."

13 A. Yes.

14 Q. Could you confirm that this is the conclusion you made in the entirety of your  
15 investigation relating to media, that this is what you said, "However, the commission does  
16 believe that hate-speech in the media including in vernacular FM radio stations aiming to  
17 foment ethnic hatred and/or incite, organise or plan for violence should be investigated  
18 thoroughly in a timely fashion when it occurs."

19 Could you confirm that's what you said?

20 A. Yes, indeed.

21 Q. Now going back to page 302, Mr McFadyen, paragraph 3 -- are you there?

22 A. Yes.

23 Q. The sentence starts -- that paragraph starts with these words, "Some few exceptions to  
24 the above generalisation of no concrete information are two examples of FM speech the  
25 commission received."

- 1 You can see that?
- 2 A. Yes, I can.
- 3 Q. Do you confirm as a general proposition that in fact the two exceptions of lack of  
4 concrete information does not include Kass FM? Let me put the question differently.  
5 Could you confirm that in fact at the end of the day you did not receive any concrete  
6 complaint about Kass FM?
- 7 A. Did you say that we hadn't received a complaint?
- 8 Q. Okay. I'm making specific reference to what you said in your report at that paragraph  
9 and you've identified a few exceptions being the two stations, isn't it?
- 10 A. Sorry, you asked a different question before about whether we'd received complaints  
11 about FM stations, which there was certainly information received about FM stations  
12 including Kass FM, but this here says about examples of -- examples of hate speech  
13 specifically.
- 14 Q. Yeah, I would put it differently, Mr McFadyen, that in this paragraph you cite instances  
15 when you had concrete information, isn't it?
- 16 A. Yes, that's right.
- 17 Q. And my question is that, in the scope of the instances when you had concrete  
18 information, Kass FM is not one of them, isn't it?
- 19 A. Well, I mean it's easy to look to analyse line by line out of a report frankly, but --
- 20 Q. Okay, we'll move on to --
- 21 A. Well --
- 22 Q. Sorry?
- 23 A. No.
- 24 Q. Did you want to say something?
- 25 A. No.



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1 Q. Now, you were also shown the letter at tab 25 I think referring to a ban of broadcast and  
2 you were about to explain what that ban -- the exact scope of that ban. Could you explain?

3 A. Well I'd have to have a look at the document, but it's a one page document. I don't  
4 know if I'm --

5 PRESIDING JUDGE EBOE-OSUJI: Can we --

6 THE WITNESS: -- fully able to explain the impact of it, frankly.

7 MR STEYNBERG: If I can assist my learned friend, this part of the evidence is referred to in  
8 the report at page 297, the first paragraph, what exactly was banned.

9 MR KIGEN-KATWA:

10 Q. If you could look at tab 25, Mr McFadyen, a letter invoking powers of Section 88 of the  
11 Communication Act. Are you there?

12 A. Not yet. I am now.

13 Q. Now, Mr McFadyen, this letter is dated 30 December 2007 and you'd confirm that this is  
14 a period that the commission was interested in, isn't it?

15 A. Yes, it is.

16 Q. And what was the commission's understanding of what this ban entailed?

17 A. There was quite a bit of discussion about this ban before the commission. Dr Ndemo  
18 explained about it and from memory the then Attorney-General, is it, also had a view about  
19 the ban? Now, this is just a one page piece and I would need to refer to other commentary to  
20 refresh my understanding about the ban, but suffice to say I believed that it was a blanket ban  
21 on the media, on radio. I just -- I don't want to --

22 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa - Mr Kigen-Katwa - we don't have much  
23 time. You will have to stop in two minutes. Can you put your proposition to the witness  
24 on that.

25 MR KIGEN-KATWA:

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1 Q. Mr Witness, is it your recollection that the ban made a ban to all broadcast, or what is  
2 the extent of the broadcast that was allowed vis-à-vis what was banned?

3 A. Well, I'm not sure. I don't want to say the wrong thing, or something that's wrong I'm  
4 sorry, but I thought it was a blanket ban that was in place for some time on -- that would  
5 impact a number of media.

6 Q. Okay, two last questions. You've been asked very specifically whether the name of  
7 William Ruto was in the envelope that you delivered separately from the -- you delivered  
8 separately to the eminent Africans, as opposed to the president. May I ask you if you recall  
9 if Mr Joshua Sang's name was in that envelope?

10 A. No, I don't recall.

11 Q. Now, when you met the Prosecution, you gave them some documents of some pages  
12 that were missing from the report. Do you recall that?

13 A. I don't understand the question.

14 Q. When you met the Prosecution, you indicated to them that there are some pages which  
15 were missing from the report that they had shown you. Do you recall that?

16 A. Oh, I'm sorry. Yes, there were some appendices and things. Yes.

17 Q. Did it include the contents of what is referred to as being names in an envelope?

18 A. No.

19 Q. I would like to ask you lastly about the observation -- the observations you were asked  
20 to make in respect to the bundle, the blue bundle, if you could go there please.

21 PRESIDING JUDGE EBOE-OSUJI: Green, not blue.

22 THE WITNESS: The green one?

23 MR KIGEN-KATWA:

24 Q. Green, sorry. Green bundle, tab 10, at page 4395, KEN-OTP-0005-5490. Can you see  
25 that, Mr McFadyen?

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1 A. Just a moment. 4395? Yes, I have 4395.

2 Q. Now, your attention was taken directly to what is contained -- the observations made by  
3 the chairman. Can you see that? "Thank you very much. Lastly, Mr Katwa, you may also  
4 remove your mask of Tegla Lorupe and wear the mask of ODM, three minutes." Can you  
5 see that?

6 A. Yes, I can.

7 Q. Could you confirm that, in the subsequent observations and comments made, the  
8 person referred to did not admit that in fact it is the case that he was wearing any mask?

9 A. Look, I don't -- I don't remember.

10 MR STEYNBERG: Well, what does this have to do with the charges before this Court?

11 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, we have to leave it at that. It was your  
12 learned friend that made that suggestion.

13 MR KIGEN-KATWA: Your Honour, if you could just allow me to have the witness answer  
14 that question? That's important for me.

15 MR STEYNBERG: I have no objection to the transcript being admitted into evidence, if that  
16 helps?

17 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, let's not --

18 MR KIGEN-KATWA: With that, your Honour, I'm okay with that.  
19 Your Honour, that should be all the questions I had for this witness.

20 PRESIDING JUDGE EBOE-OSUJI: Thank you.

21 Mr McFadyen, the Defence counsel have finished their cross-examinations.

22 THE WITNESS: Yes, sir.

23 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, you said you have questions in  
24 re-examination?

25 MR STEYNBERG: I see we have exactly five minutes left, so I'll be held to my promise I'm

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1 sure. Yes, your Honours, one or two.

2 QUESTIONED BY MR STEYNBERG:

3 Q. Perhaps I can start in reverse order with some of the material covered by my learned  
4 friend for Mr Sang. My learned friend referred you to page 295 of the report, ERN 0669, and  
5 to the third paragraph where he singled out two sentences. I'd just like you to read the  
6 sentence that was left out starting with, "In particular ...", and confirm that the report said, "In  
7 particular, they singled out Kass FM as having contributed to a climate of hate, negative  
8 ethnicity and having incited violence in the Rift Valley." Is that part of your report?

9 A. Yes, it is.

10 Q. So where it was put to you that there were no complaints about Kass FM, that was not  
11 correct?

12 A. No.

13 PRESIDING JUDGE EBOE-OSUJI: That is argumentative.

14 MR STEYNBERG: As the Court pleases.

15 Q. Now, as regards the nature of the political broadcast, can I ask you to cast your eye to  
16 the next page, 296. Two-thirds of the way down that paragraph, after the quotes, "The  
17 country on the brink," if you look for the quotation --

18 PRESIDING JUDGE EBOE-OSUJI: Where are you, sorry?

19 MR STEYNBERG: Page 296, the second paragraph, two-thirds of the way down, a sentence  
20 starting, "Faced with unprecedented ..." -- "... an unprecedented outbreak of violence." Just  
21 over halfway down, in fact.

22 THE WITNESS: Yes, I have that.

23 MR STEYNBERG:

24 Q. "Faced with the unprecedented outbreak of violence following the announcement of the  
25 presidential results and threats of more violence, the witness ...", and this is Dr Ndemo, "...

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1 said, 'The ministry asked the media houses to desist from live broadcasts concerning politics,  
2 even though the ministry itself had no way of fully enforcing its demands.'"

3 Does that refresh your memory as to the nature of the ban?

4 A. Yes, it does.

5 Q. Does that accord with your memory?

6 A. Yes, that's right.

7 Q. Now, you were asked by my learned friend --

8 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, don't do that again. That's not the way to  
9 do it.

10 MR STEYNBERG: I beg your pardon, my Lord. I'm trying to proceed as quickly as  
11 possible.

12 Q. You were asked about whether or not you had access to transcripts or recordings of  
13 vernacular broadcasts. Do you recall that?

14 A. Yes, I do.

15 Q. And can I refer you to page 301 of the report. Besides the requests from the ministry,  
16 did you make any attempts to obtain such recordings from the stations themselves according  
17 to your recollection?

18 A. My recollection is that we did, but none were forthcoming.

19 Q. Now, my learned friend for Mr Ruto asked you various questions about the proper way  
20 of conducting examinations. You've confirmed that there was certain evidence regarding the  
21 vernacular stations that you would have liked to have had, but you were unable to obtain  
22 such evidence. In your experience in your domestic jurisdiction of New Zealand, if you -- if  
23 police were interested in obtaining records of land transactions, would they normally be able  
24 to access that information?

25 A. Currently sales of properties are accessible in New Zealand, usually at a cost, on-line in

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1 fact.

2 Q. And are there any parts of New Zealand where investigators are unable to access due to  
3 security concerns?

4 A. Certainly none that I'm aware of.

5 Q. And in New Zealand generally speaking in criminal matters, is there a need to observe  
6 secrecy as to the identity of witnesses due to fear of reprisals?

7 A. On -- on occasion, but infrequently, and of course in that respect that particular  
8 jurisdiction is fortunate enough to have a comprehensive witness protection arrangement.

9 Q. If I can ask you to turn briefly to page 345 and 346 of your report, you were referred to  
10 paragraph 2 of page 346 by my learned friend for Mr Ruto. Can I just direct your attention to  
11 page 345, and that's ERN 0719, and in the first paragraph the report sets out the vast number  
12 of documents and witness statements reviewed by the commission. Could I just ask you to  
13 read out the second paragraph, please?

14 A. Starting "The preceding ..."?

15 Q. Indeed.

16 A. "The preceding chapters make various findings in relation to the topics discussed and  
17 those findings remain valid. What follows is a summary of the broad findings as distilled by  
18 the commission."

19 Q. You can stop there.

20 A. I'm sorry.

21 Q. (Microphone not activated ) Now, as regards paragraph 2 on page 356 -- as regards  
22 paragraph 2, on page 346, you made some comments about how this what we now know is a  
23 broad finding corresponded with other more specific findings in your report. Would you  
24 like to enlarge upon that; specifically what's contained here about initially the violence  
25 witnessed was spontaneous?

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1 A. Well, yes. That particular piece, you know, can't apply to the entire -- all of the areas of  
2 Kenya. I mean it does say what it says, but in my view it has to be seen in the context of  
3 what was -- what was findings in different areas.

4 MR STEYNBERG: Thank you, your Honours. Thank you, Mr McFadyen. I have no  
5 further questions.

6 PRESIDING JUDGE EBOE-OSUJI: Thank you, Witness. The Chamber has no question for  
7 you, and we thank you very much for joining us and we wish you safe travels and we wish  
8 you all the best in your circumstances as well.

9 THE WITNESS: Thank you, your Honours.

10 PRESIDING JUDGE EBOE-OSUJI: Thank you.

11 (The witness is excused)

12 PRESIDING JUDGE EBOE-OSUJI: That brings us to the end of our proceedings for today.  
13 That's the end of the witnesses we have for this segment?

14 MR STEYNBERG: That's correct, your Honour.

15 PRESIDING JUDGE EBOE-OSUJI: The Chamber will be adjourning and we will advise  
16 parties of when next we convene after the judicial recess.

17 MR KHAN: I'm grateful.

18 Mr President, in the course of my questioning - I won't say more in open session - you  
19 asked a question. What I will do, with your leave, is send an email to the Bench and  
20 copy in the Prosecution to that discrete question. I'll do that today, unless you've got  
21 one minute and I can raise that in the absence of the current witness?

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

23 MR KHAN: I'm grateful.

24 PRESIDING JUDGE EBOE-OSUJI: Court is adjourned.

25 THE COURT USHER: All rise.

Trial Hearing  
Witness: KEN-OTP-P-0013

(Open Session)

ICC-01/09-01/11

- 1 (The hearing ends in open session at 4.00 p.m.)
- 2 RECLASSIFICATION REPORT
- 3 Pursuant to Trial Chamber V(a) 's Decision, ICC-01/09-01/11-981, dated 24 September
- 4 2013, the version of the transcript with its redactions becomes Public.