

Trial Hearing
Witness: KEN-OTP-P-0464

(Open Session)

ICC-01/09-01/11

1 International Criminal Court
2 Trial Chamber V(a) - Courtroom 1
3 Situation: Republic of Kenya
4 In the case of The Prosecutor v. William Samoei Ruto
5 and Joshua Arap Sang - ICC-01/09-01/11
6 Presiding Judge Chile Eboe-Osuji, Judge Olga Herrera Carbuccion and Judge Robert
7 Fremr
8 Trial Hearing
9 Monday, 17 February 2014
10 (The hearing starts in open session at 11.37 a.m.)
11 THE COURT USHER: All rise.
12 Please be seated.
13 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. And I see we have a
14 witness on the stand.
15 Witness, we will get to you in a minute. Just give us five minutes. If you can
16 kindly sit and enjoy the -- what remains of a debate. We want to finish up
17 something we started before you came in. And then we will get to you after that.
18 Now, what we will do is, Mr Stewart, you will in five minutes sum up what you
19 wanted to do. We will be then having other parties, everyone, including the
20 attorney general, to, if they want, if you want, file further submissions in writing
21 within a limit of 15 pages, further submissions, anything else you wish to
22 observe -- and that includes you, Mr Nderitu -- on the discussions we've had so far
23 on this matter.
24 The issues are important. Some of them are simpler than others in it, but we want
25 to make sure that everyone has had a good opportunity to ventilate what they

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1 wanted to say on the matter.

2 Mr Stewart.

3 MR STEWART: Thank you for this kindness, Mr President. Our position with
4 respect to Article 64(6)(b) and Article 93(1)(l) is based, we submit, on a plain reading
5 of the Statute. The general power to require the attendance and testimony of
6 witnesses is contained we say in Article 64(6)(b) and reinforced by Article 67(1)(e)
7 which protects the rights of the Defence. And the general obligation to comply with
8 requests from the ICC is found in Article 86.

9 Now, certain exceptions we submit have been carved out, and those exceptions have
10 occupied us mightily in the last couple of days. And I'm referring, of course, to
11 Article 93(1)(e) and Articles 93(1)(f) and 93(7).

12 But our submission is these provisions relating to co-operation deal with very
13 specific concerns of certain States over constitutional impediments to compelling
14 their citizens to travel or be transferred abroad to the seat of the Court.

15 The whole legislative history of these provisions from 1995 on demonstrates that this
16 was the focus of concern. And other methods of obtaining the evidence of
17 recalcitrant witnesses were discussed, such as video link and deposition. I would
18 just ask the Chamber in the quiet of retirement to consider Article 93(7)(b) which
19 requires the Court to return a transferred prisoner and makes it obvious that we are
20 talking about transfer out of a requested State.

21 So those are special provisions. The basket clause or catch-all clause in Article
22 93(1)(l) essentially expands the basic forms of co-operation specified in paragraphs A
23 to K of that sub-article.

24 And in sum, the power in Article 64(6)(b) can be given proper effect if it's linked to
25 Article 93(1)(l).

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1 Let me just support the point with two examples. One is video link testimony. It's
2 contemplated by the Statute and the Rules but is nowhere provided for in Article
3 93(1), but it's the sort of situation where the co-operation of a State Party might be
4 required. And surely the Trial Chamber could seek that under Article 93(1)(l).
5 Certain commentators such as Kress and Prost and Bitti are of the view in what
6 they've written that compelling a witness to attend and to testify via video link is
7 certainly within the power of a Trial Chamber. In state practice, at least as Mr
8 Rastan explained it on Friday, contemplates compelled testimony in such
9 circumstances because none of the problems encountered by compelling people to
10 go outside their country are encountered when you're dealing with video link
11 testimony.

12 The second example would be, of course, the in situ sittings of the Trial Chamber.
13 Article 62 provides that trials will take place at the seat of the Court unless otherwise
14 decided. Rule 100 makes provision for a change in the place of the proceedings.
15 And the sort of assistance which a State Party might have to give in order to facilitate
16 the Court sitting in, for example Kenya, would be found I would submit in Article
17 93(1)(l).

18 On this point the International Crimes Act of Kenya makes provision. And Sections
19 161 to 167 are the relevant sections. And I simply note that Section 162(A) provides
20 that the ICC may sit in Kenya for the purpose of taking evidence. And Section 163
21 provides that while the ICC is sitting in Kenya, it may exercise its functions and
22 powers as provided under the Rome Statute and the ICC Rules. And the marginal
23 note to Section 163 of course includes reference to Article 64.

24 On Friday the issue arose of how Article 93(1)(b) might apply in this case.

25 Respecting commission evidence taken by a Kenyan judge, the ICA implements the

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1 obligation under Article 93(1)(b) through Sections 78, 79 and 80. And subsections
2 80(1) and (2) provide that Kenyan law applies with respect to compelling a person to
3 appear.

4 If the Trial Chamber were itself to be sitting in Kenya, the ICA regime contained in
5 Sections 161 to 167 would apply, but so in our submission would Article 93(1)(b) and
6 the ability to request -- make requests under that article and to expect a compliance
7 given the wording of the article, which in our submission is broad enough to
8 encompass the Trial Chamber actually sitting in Kenya itself to take the evidence.

9 In sum, the power to require the attendance and testimony of witnesses is a power
10 fundamental to a criminal court in any jurisdiction in the world. An ICC Trial
11 Chamber must exercise this power through the co-operation of States Parties because
12 that's how the Rome Statute is structured based on concepts of complementarity and
13 State Party co-operation.

14 That was what I wanted to say about the linkage between those two provisions.

15 On the matter of sanction, I will simply say it doesn't matter if there's a sanction or
16 not in the Rome Statute. I rely on the Blaskic decision, on which reference has been
17 made. Consistent with that decision, the Court should look to national authorities
18 for legal remedies for noncompliance by an individual. That's my submission on
19 that point.

20 Coming then to how Kenya's International Crimes Act plugs the power to require
21 the attendance and testimony of witnesses into Kenya's procedural law. I'll only
22 make one or two points.

23 It's our submission, of course, that the onus is on the Government of Kenya to
24 demonstrate that the assistance requested is prohibited on either the basis that
25 there's a national law not allowing it or an existing fundamental legal principle of

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1 general application.

2 The thrust of the Rome Statute and the thrust of the ICA is that States Parties are
3 bound to do all they can to serve the ends of justice.

4 On January 31st of this year, Justice Mwongo, principal judge of the high court of
5 Kenya at Nairobi, made a decision in a case called Barasa, which has certain levels of
6 notoriety. In paragraph 56 -- and this is to be found at tab 3 of the materials we
7 gave to you on Friday. In paragraph 56 Justice Mwongo described the ICA as
8 giving those parts of the Rome Statute that had been imported into the laws of
9 Kenya legal teeth, legal teeth in the jurisdiction of Kenya. He also found at
10 paragraph 75 that this importation was constitutionally valid. Thus, the
11 incorporation of the Rome Statute in Kenyan law is far more than metaphorical. It
12 is real.

13 PRESIDING JUDGE EBOE-OSUJI: Mr Stewart, I think you're five minutes.

14 MR STEWART: Thank you.

15 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. This is not the first time
16 we -- this Chamber has been faced with a difficult question to decide. We
17 encountered that in the request of excusal, and the Prosecution took a view, the
18 Defence took a view. We construed the Statute and we rendered a decision. We
19 will do the same here.

20 We will -- as I indicated earlier, parties have -- and the attorney general also, you
21 have 15 pages allowance to make further submissions. We can receive that --

22 (Trial Chamber confers)

23 PRESIDING JUDGE EBOE-OSUJI: The Chamber considers that 14 days is generous
24 enough to be able to do that. We will leave it at that on this matter and move on
25 straight to the next issue for which we have a guest witness on the stand.

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1 MR STEWART: Mr President, may we be excused, those of us were engaged
2 particularly in this debate?

3 PRESIDING JUDGE EBOE-OSUJI: You may quietly ease out.

4 What we will do is this. Prosecutor, we will proceed in this way. Mr Steynberg,
5 first there will have to be a voir dire on qualification of the witness in which you will
6 tell us why -- through question and answer, of course, why this is an expert witness
7 who's familiar -- who has expertise in the area, in the subject matter. And then the
8 Defence may cross-examine on that aspect of it, at the end of which there will be
9 submissions. Five minutes each to --

10 MR STEYNBERG: Your Honours, a --

11 PRESIDING JUDGE EBOE-OSUJI: Or ten?

12 MR STEYNBERG: A clarification, please. Five minutes to lead the witness or five
13 minutes to make submissions?

14 PRESIDING JUDGE EBOE-OSUJI: Five minutes to ask the questions of the witness.

15 MR STEYNBERG: I think that it might take rather longer than that. The witness's
16 CV is a little bit more impressive than five minutes might -- might allow. Perhaps
17 ten, your Honours.

18 PRESIDING JUDGE EBOE-OSUJI: Ten minutes then. Ten minutes for the
19 questions, at the end of which you should be able to sum-up -- after
20 cross-examination, you can take five minutes to make the submissions why the
21 witness should be accepted.

22 MR KIGEN-KATWA: With your permission, Mr President, may I put on record the
23 presence of Mr Sang.

24 PRESIDING JUDGE EBOE-OSUJI: Thank you, Mr Kigen-Katwa. Noted.

25 MR STEYNBERG: Your Honours, perhaps for the record if I may also just note that

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1 my colleague, Mr Lucio Garcia, will be leading this witness. He will be testifying in
2 French. We are also joined by counsel Alice Zago and legal assistance Yulia
3 Nuzban.

4 PRESIDING JUDGE EBOE-OSUJI: Thank you.

5 Witness, welcome to the court. You -- you will -- I will not take you through the
6 usual greetings I give the other witnesses who have testified, but I might as well also
7 let you know that you should feel comfortable in the courtroom. It belongs to you
8 as well as it does to any one of us in this courtroom. The fact that we -- this is
9 where we live more or less shouldn't make you feel like a stranger amongst us.
10 Please feel comfortable giving your testimony.

11 It is important that you listen carefully to the question being asked of you and then
12 answer the question. Now, the -- we will take it in two stages.

13 First the Prosecution and the Defence will make inquiries about your expertise.

14 You've been called as an expert witness. Prosecution will ask you questions and
15 Defence will cross-examine you on your qualifications to be an expert in this case.
16 And then there will be submissions after that.

17 We will make a ruling. Assuming that the ruling is positive and we do admit,
18 assuming that we do that at the end, in the course of your testimony it will be critical
19 that you keep it simple.

20 The point about an expert witness is there's an area of expertise that's not very easy
21 to understand and then they come to court to break it down for the Court. It's
22 necessary to not make it more complicated while trying to break it down, you know
23 what I mean?

24 I read your report, and there is some terminology in there, a lot of them that one had
25 to look up in the dictionary to know what they mean. So that sort of thing we will

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1 try to avoid, thank you, in the testimony.

2 So can the witness be sworn in, please.

3 WITNESS: KEN-OTP-P-464

4 (The witness speaks French)

5 PRESIDING JUDGE EBOE-OSUJI: Thank you. Mr Garcia.

6 MR GARCIA: Yes, your Honours. I'm sorry. I think I'm experiencing some
7 technical difficulties. If I could just have a minute, your Honour. My computer is
8 not working and I'm not sure if I'm being heard correctly.

9 PRESIDING JUDGE EBOE-OSUJI: We're hearing you correctly.

10 MR GARCIA: All right. If you could just help us. I am going to solicit the help of
11 the court officer to distribute the bundles.

12 Your Honour, as was stated by Mr Anton Steynberg, I'll be leading the questioning
13 of the witness in French, but all pleadings to the Chamber I will be doing them in
14 English if that is satisfactory to the Chamber.

15 PRESIDING JUDGE EBOE-OSUJI: Fair enough. As long as you know the
16 interpretation rules. Take it slow so that the interpreters can interpret correctly.

17 And also, Witness, there's something else that I forgot to mention to you. There is
18 something we call the gap rule, and that is a rule that avoids crossing the wire on the
19 microphone with the person asking you the questions, because you are being heard
20 through interpretation. The court reporters and interpreters cannot hear you in the
21 courtroom, so if there is an overlap of speakers on the phone -- on the microphone,
22 they will be confused and not hear what you say, understand what you say.

23 Always observe some gap between the completion of the question, from there as
24 well, and you beginning to answer. We say five seconds but at least three seconds
25 at the barest minimum. Thank you.

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1 QUESTIONED BY MR GARCIA: (Interpretation)

2 Q. Good morning, Witness.

3 A. Good morning.

4 Q. Just to repeat what the Judge has just said, it's important -- and obviously I'm
5 going to try and speak slowly and to ask the questions slowly, but it's obviously
6 important to wait for the end of my question, to take a few moments and thereafter
7 to answer so that the interpretation can be as effective as possible.

8 A. Perfect.

9 Q. So, Witness, you have a bundle. If -- I would ask you to look at tab 2. Just
10 quite simply for the case record, please could you confirm this is your CV that you
11 provided to the Prosecution. Could you take a moment to look at it.

12 A. Yes. It is the case.

13 Q. I would therefore like to ask you certain questions with regard to your CV.
14 And when we look at the third part, the functions, I understand that in 2004 -- I
15 understand correctly since 2004 you are an associate professor at the UPPA at the
16 University of Pau; is that correct?

17 A. That is correct. In fact, I'm assistant professor since '91, and I was seconded
18 to -- from one ministry to another, the ministry of national education towards the
19 ministry of foreign affairs between 2000 and 2004 given that there was a position in a
20 research centre. There was a research centre, the CENRS, which was based in
21 Nairobi.

22 Q. Very well. Thank you for the precision in this regard. Now, just to confirm
23 for the case record, when we talk about Maître de conférences, the equivalent in
24 English would be associate professor; am I right there?

25 A. That is indeed the case.

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1 Q. What type of course do you teach at the university of --

2 A. I am a specialist in political science and therefore I teach all the subthemes
3 related to political science, whether in regard to public policy, international relations,
4 sociology, et cetera.

5 PRESIDING JUDGE EBOE-OSUJI: Mr Garcia, one second. Now, of course we are
6 following this voir dire process as a usual course, but before we proceed any further
7 with it, it was the case that Mr Kigen-Katwa had objected to the expertise of the
8 witness.

9 Was that not the case, Mr Kigen-Katwa?

10 MR KIGEN-KATWA: Yes, Mr President.

11 PRESIDING JUDGE EBOE-OSUJI: And I realise that you may have done that
12 before the CV was sent around, or did you have the CV when you made that
13 objection?

14 MR KIGEN-KATWA: Mr President, we maintain our objection.

15 PRESIDING JUDGE EBOE-OSUJI: You maintain your objection regardless of
16 having received the CV in the meantime?

17 MR KIGEN-KATWA: Yes, Mr President.

18 PRESIDING JUDGE EBOE-OSUJI: All right.

19 Mr Hooper?

20 MR HOOPER: Your Honour, our position is this: It rather, I think, conforms with
21 the view reflected in your decision 844, when you came to consider the Sang's
22 written application in respect of Mr Maupeu where at paragraph 23 you stated that
23 the Chamber considers that the subject matter of the expert report appears to fall
24 within the expertise of a social and political background expert.

25 And then you go on to say this, "But whether or not Mr Maupeu is qualified as the

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1 specific expert is a matter to be determined following his examination in court."

2 And reading that, I assumed in my own mind the position was this, rather than a
3 voir dire, we were going to engage in hearing his material and seeing, as it were,
4 how it goes, because it seems more probable than not to us that Mr Maupeu has
5 strengths in certain fields which I suspect he will probably frankly admit he lacks in
6 other fields dealing with this extremely wide area of expertise that he's been invited
7 to display.

8 And I think all this arises from the peculiar and unique nature of experts called
9 uniquely in these courts to address fields of historical background. Because the
10 field is so broad, it's rare to meet an expert whose expertise extends to all the various
11 constituent parts of that field. We saw this in the -- in your decision.

12 PRESIDING JUDGE EBOE-OSUJI: No. The point of the decision was what we're
13 doing now in light of Mr Kigen-Katwa's objection then, then we will follow the
14 process of (indiscernible). Is this an expert generally within the zone
15 notwithstanding what questions may be put on the merits of the expertise when the
16 terms come to it.

17 MR HOOPER: Does this witness fall within the zone then of someone who can
18 bring a level of knowledge about events broadly Kenya -- within Kenya relevant to
19 this case? And we'd say that he would appear to be someone who has a knowledge
20 of Kenya, but we hesitate to say that that actually extends to the areas of inquiry that
21 this Court is particularly focused on in this case.

22 PRESIDING JUDGE EBOE-OSUJI: And that would be a matter for your
23 cross-examination when the time gets to it, isn't it?

24 MR HOOPER: Well, I think that's probably -- that's probably right. So if there's a
25 fence to jump, then perhaps one fence has been jumped, but it would be a fairly low

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1 fence, if I can put it like that.

2 PRESIDING JUDGE EBOE-OSUJI: Okay.

3 MR HOOPER: And then when we look at specific issues as we go along, then the
4 criterion is going to be different. And if --

5 PRESIDING JUDGE EBOE-OSUJI: All right. Let's leave it at that. Let's leave it at
6 that. Okay. Thank you.

7 Please proceed. Make it brief. You've heard the submissions made. And then we
8 will take the submissions.

9 MR GARCIA: But I'm going to ask to have the CV submitted at the end of the
10 examination in chief, so that will facilitate my submissions afterwards.

11 Q. (Interpretation) Mr Witness, I can see that on your CV, which is in tab 2,
12 KEN-OTP-0093-1148, it is stated that you were director of CREPAO from 2004 to
13 2011, and that is the centre for research and studies for Eastern Africa; is that correct?

14 A. That is correct. I was the director of a research centre for a certain number of
15 years specialised in studies on Eastern Africa. The centre has been operational for
16 about 30 years and it is based in Pau.

17 Q. I can look at your CV, and from 2000 to 2004 you were a resident researcher,
18 French Institute of Research in Africa based in Nairobi; is that correct?

19 THE INTERPRETER: Five second rule, please.

20 MR GARCIA: (Interpretation)

21 Q. Can you tell us what were your duties in Nairobi when you worked there
22 from 2000 to 2004?

23 A. The duties of a researcher and sub-director were that I worked on diverse
24 topics including militias. I worked quite a lot on Mungiki as well as the Kikuyu
25 political culture. I also carried out research on elections, and I jointly wrote a book

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1 with other people on the elections in Kenya. And as a director, I had to raise money
2 by drafting research programs, organise symposia and other issues. So I carried out
3 administrative duties, the normal administrative duties in a research centre.

4 Q. Thank you. I can see that from '91 to 2000 you were associate professor in
5 the faculty of law and economics at the University of Pau and that you were a
6 researcher at CREPAO; is that correct?

7 A. That is correct.

8 Q. Regarding your university qualifications, I can see that you have a Maîtrise in
9 public law at the University of Pau and des Pays de l'Adour; is that correct?

10 A. Correct.

11 Q. You also have a DEA in anthropology in Paris; is that correct?

12 A. Yes. In political sociology.

13 Q. You also have a DEA in political sociology and in 1991 you had a doctorate in
14 political sciences from the University of Pau; is that correct?

15 A. Yes, that is correct.

16 PRESIDING JUDGE EBOE-OSUJI: The pause rule it appears has not -- has not been
17 observed the last few questions. Please, we have to observe that little pause.

18 Can you also tell us what DEA means?

19 MR GARCIA: (Interpretation)

20 Q. DEA means Diplôme D'études Approfondies?

21 A. Yes, that is correct. And in the Anglo-Saxon system it is equivalent to the
22 Master's Degree. And ever since the Florentine system was adopted in Europe, the
23 system has been changed to the Master's Degree, but at that time the DEA was
24 equivalent to the MA.

25 Q. I will continue asking you questions, but please remember, and I will

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1 remember also to pause at the end of my question and I will also pause also so as to
2 facilitate interpretation.

3 Now, you mentioned that you had a DEA in political sociology. Can you tell us
4 briefly what is political sociology.

5 A. This is a rather broad question. It is a sub-domain of social sciences that tries
6 to understand power, the organisation of power. And this subject is subdivided
7 into an entire series of other subjects including political sociology, international
8 relations, public policies. In fact, it is a specialised form of social sciences within the
9 study of politics in its broadest meaning.

10 Q. Thank you, Mr Witness. Looking at your CV I can also see that you have
11 been the author of many publications devoted to Eastern Africa and in particular
12 Kenya; is that correct?

13 A. Yes, that is correct.

14 Q. On page 1148 we can see all the publications that you have on Mungiki, and
15 when we look at page 1149 and onwards, this deals with all your publications
16 devoted to Eastern Africa. Would I be correct to say that you have included 51
17 publications devoted to Eastern Africa?

18 A. Yes. That is correct.

19 Q. And out of those 51 publications devoted to Eastern Africa, would I be correct
20 to say that approximately 30 of them deal with Kenya?

21 A. Yes, most of my publications deal with Kenya.

22 Q. I can also see that amongst your publications some of the articles authored by
23 you focus on the conflicts that took place in the Rift Valley as well as the elections in
24 Kenya in '92, '97 and 2007; is that correct?

25 A. Yes.

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1 Q. Let me refer you to the second page that is page 1149. You have number 5,
2 and if I understand correctly, it is an article that you wrote on the Kenyan state and
3 ethnic conflicts in the Rift Valley; is that correct?

4 A. That is correct.

5 Q. What was the substance of this article, Mr Witness?

6 A. As you are aware, between '91 and '93 there was a series of ethnic conflicts in
7 the Rift Valley, so this article presented the context and attempted to explain what
8 had happened. The article was published in '94, and at that time there were not
9 many articles on those conflicts, so the idea was to explain what had happened and
10 which was not broadly reported in Western media. So it was published in a special
11 edition of *Studia Africana*.

12 Q. Thank you, Mr Witness. Let me refer you now to publication number 13,
13 and it is entitled: "Life and death of an electoral pressure group: The example
14 Youth for KANU." You were the author of this article?

15 A. Yes. It is an article for Youth for KANU '92. At that time there was no
16 publication on these pressure groups allied to certain political parties within the
17 multiparty system. And yet during the '92 elections this small group played a key
18 role. They distributed a lot of money, enforced law and order during public rallies.
19 So it was interesting to have a socio-political perspective on this group. There are
20 not many articles published on the Youth for KANU '92.

21 Q. Mr Witness, I will now like to refer you to publication number 23. That is on
22 the third page, page 1150. And it is entitled: "Kenya: The transitional elections."
23 What did this article deal with?

24 A. This article was published in a special edition of *Politique Africaine*, and this
25 special edition was published together with David Anderson, and I jointly published

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1 with him an introductory article which dealt with the general situation of those
2 elections in 2002.

3 PRESIDING JUDGE EBOE-OSUJI: Mr Garcia, your time.

4 MR GARCIA: Yes, your Honour. I just need a couple of minutes more to finish
5 the publications, and I think that that's what is essentially relevant in this
6 question -- in this issue.

7 Q. (Interpretation) Mr Witness, let me refer you now to publication number 44
8 on your list. That is on page 0093-1151. It was published in 2008, and it is entitled:
9 "Return to violence. General elections in Kenya in 2007." What was this article
10 about?

11 A. This article was published shortly after the events of 2008 which analysed this
12 violence. And IFRA published this in 2007.

13 Q. Mr Witness, to summarise, would I -- would I be correct to say that you
14 participated in joint publications, including Eastern Africa, Kenya number 11; is that
15 correct?

16 A. Yes.

17 Q. You also noted the pedagogic, scientific and administrative responsibilities
18 that you had; is that correct?

19 A. That is correct.

20 Q. To conclude, Mr Witness, under activities you mentioned that you were
21 interviewed on several occasions by newspapers and radio stations on these issues
22 mentioned on your CV; is that correct?

23 A. Yes.

24 Q. Thank you, Mr Witness.

25 MR GARCIA: Your Honours, I'd like to tender -- introduce into evidence the CV of

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1 Mr Hervé Maupeu, 0093-1148.

2 PRESIDING JUDGE EBOE-OSUJI: Thank you. Any objections at this stage?

3 MR HOOPER: I'm not quite clear what the question related to, I'm sorry.

4 PRESIDING JUDGE EBOE-OSUJI: He was tendering the witness's CV.

5 MR HOOPER: No objections at all.

6 PRESIDING JUDGE EBOE-OSUJI: No objection. Okay.

7 Mr Kigen-Katwa?

8 MR KIGEN-KATWA: Mr President, in terms of tendering the CV, we have

9 absolutely no objection. And may I explain, Mr President, that our objection is

10 more in terms of the claim of expertise in issues relating to my client. And so my

11 objection should be understood in that light. I'm not saying that he's not qualified

12 or that he doesn't profess what he says he professes. That's not our objection.

13 PRESIDING JUDGE EBOE-OSUJI: All right. Thank you very much. So then the

14 document is admitted as the next in the Prosecution's exhibits.

15 THE COURT OFFICER: Thank you, Mr President. Document

16 KEN-OTP-0093-1148 will bear the following number, EVD-T-OTP-00042, and will

17 also be known as Prosecution exhibit number 42. This document will be registered

18 as public.

19 PRESIDING JUDGE EBOE-OSUJI: Thank you.

20 Now, rather than go through the submissions on it, the position of Mr Hooper is that

21 generally this witness appears to be in the zone of an expert, but that does not mean

22 that you accept his testimony and everything he says. Is that the case?

23 MR HOOPER: It's a bit more than that. Maybe I could just engage in a few

24 questions with the witness --

25 PRESIDING JUDGE EBOE-OSUJI: All right. Go on.

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1 MR HOOPER: -- and we can perhaps see -- define the area a little more properly.

2 QUESTIONED BY MR HOOPER:

3 Q. First of all, a very well good afternoon now, is it doctor, Dr Maupeu, I
4 suppose?

5 A. Doctor.

6 Q. Doctor, indeed. First of all, clearly working within Kenya I assume you have
7 a good command of English even though I understand you'd prefer and feel more
8 comfortable speaking in your own language?

9 And you nod your head. It won't -- a nod unfortunately doesn't make its way on to
10 the transcript, so try and answer yes or no, in fact, as shortly as possible. I'm
11 grateful.

12 A. Regarding my command of English, yes, I have a certain command of English,
13 just like everyone else working on Kenyan issues.

14 Q. Indeed. And presumably you also speak Swahili?

15 A. Yes, I can understand Swahili, but I have neglected it for quite some time.

16 Q. And you don't need to take your earphones off. Just address the
17 microphone. Just to help you.

18 Do you speak Kikuyu?

19 A. I do not speak Kikuyu, but I work with translators on certain concepts,
20 because I have written a number of articles on the Kikuyu political culture. So I
21 worked in collaboration for certain publications in Kikuyu. So the idea was to work
22 collectively in order to have an idea of the recurrent themes.

23 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, so that the exercise has its intended
24 purpose, if you are not going to challenge the expertise of the witness, let's not do
25 this. You can do this during your cross-examination on the merits phase, but so

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1 that we don't --

2 MR HOOPER: Let me ask just a few more questions in relation to this particular
3 area. I won't be long, and I hope it assists the Court in doing so.

4 PRESIDING JUDGE EBOE-OSUJI: Do you intend to challenge the expertise?

5 MR HOOPER: Well, your Honour -- your Honour will see where I'm going.

6 PRESIDING JUDGE EBOE-OSUJI: All right.

7 MR HOOPER: And so will the witness, I'm sure, concede.

8 Q. In fact, looking at your CV, Dr Maupeu, we can just look at that together for a
9 moment. 51 publications, a very -- very honourable, impressive list of publications
10 there. And we can see at page 1 your "Publications consacrées à Mungiki". And I
11 think all together of these publications, 30 you say dealing with Kenya, 13 of them
12 dealing with the Mungiki. So let me make it quite plain. I quite accept you have
13 an expertise, a specialist knowledge in respect of Mungiki, and you obviously
14 recognise that yourself. Is that right? In fact, you're probably -- outside Kenya
15 probably the leading expert, I suppose, on Mungiki?

16 A. Not at all. There are many people who have worked on and published
17 articles in -- on Mungiki, including non-English speaking persons. Yes, of course I
18 am very familiar with the Mungiki, at least the Mungiki groups that existed during
19 the time I was there. I questioned them quite a lot and tried to find out how they
20 operated.

21 PRESIDING JUDGE EBOE-OSUJI: Witness, what I heard in translation was "not at
22 all." I realise this is some of the dangers of counsel asking double-barrelled
23 questions. There were two propositions in his question. The first one was you are
24 an expert in Mungiki. That was the first proposition. And then he continued to
25 say you are the leading expert and then you said "not at all." To what do you say

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1 not at all?

2 THE WITNESS: (Interpretation) I am not the leading world expert on Mungiki. I
3 do not know whether there is a leading expert on that subject. There are many
4 people working on the Mungiki. It is not an Olympic contest. I have worked on
5 the Mungiki. I know the Mungiki groups during a certain period and in certain
6 areas. That is what I can say.

7 MR HOOPER:

8 Q. Very well. And again, coming to your total publications, adding them up, I
9 think 14 relate to religion and religious institutions, another area that you've
10 obviously directed a lot of attention to. I don't need to go through them. We can
11 see glancing at the list. In fact, looking at the main list that starts on page 2,
12 numbered 1 to 51, if one casts one's eye down, there's many articles dealing with
13 Catholic church, with Evangelical movements, methodism, the role of the churches
14 and that sort of thing. So we have Mungiki and the churches.
15 And then you have about ten articles dealing generally with society such as, if we
16 look at it, 39 -- 38, 39, 40, Kikuyu capitalists. 42, intellectuel populaire. You've got
17 articles here on songs in Kikuyu bars and Kikuyu culture at that level. A lot on
18 Kikuyu, in fact, generally. Outside the Mungiki that is, on Kikuyu writers, authors,
19 playwrights, the cultural face of Kikuyu society that you've -- that you've -- that
20 you've written about.

21 And there's also articles here on Tanzania and Uganda, of course.

22 So over all, would you agree that your expertise -- well, first of all, I understand
23 you're to be called in the Kenya II case as an expert on Mungiki; is that right?

24 A. I do not know precisely which group contact me, but there is an ICC group
25 that contacted me, but I really do not know particularly which group was looking for

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1 me.

2 Q. But it would be right to say that this knowledge you have of Kikuyu culture,
3 that wouldn't be the same, for example, if we went to Nandi or Kalenjin culture?
4 That would be right? You're not saying for a moment that you are having expertise
5 in Kalenjin culture?

6 A. No. Of course I do not claim to be an anthropologist or specialist in the
7 Nandis or Kalenjins. That is a very specialised domain, and you don't have many
8 specialists in that area.

9 Q. All right. Thank you very much. And as far as your other articles are
10 concerned, including those that deal with the post-election violence, and in
11 particular, I'm looking at item 44 and 49 -- 44 I remind you is "Retour sur les
12 violences" and 49 is "Les jeunes et les élections au Kenya." Those two articles,
13 dealing with the pair, again have a principal focus, do they not, of Kikuyu areas and
14 Mungiki?

15 A. Not really. I should explain that I wrote my dissertation on the civil society
16 and democratisation in Kenya, particularly the churches and democratisation.
17 There are many publications on the political roles of -- on the political roles of
18 religious leaders, and it is true that I went to Mungiki. I studied Mungiki. And
19 they became a socio-political actor. That interested me because it was an important
20 component of violence in Kenya.

21 And progressively up until 2008, I published an article on violence. And if you look
22 at this document, it deals with violence in all countries but specifically in the Rift
23 Valley, even with my limited competence there.
24 The second article on youth and elections in Kenya, it is more historical in nature
25 and deals with the entire country.

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1 Q. Right. I see that earlier for four years you were based in Nairobi at the
2 university there. I dare say from time to time you've made your way up the Rift
3 Valley. Have you stayed in the northern Rift at all?

4 A. Yes, certainly four years I visited different regions in Kenya and in particular
5 this region, yes.

6 Q. And can I come now to 2007. Were you in Kenya at all in 2007?

7 A. I went to Kenya in the month of April -- I think March or April. And I -- in
8 fact, I had to go to Kenya at the end of December, and the problems started at that
9 time, and the ministry of foreign affairs prevented me from leaving. So I therefore
10 went to Kenya after the end of the problems, the troubles that there were in that
11 area.

12 Q. Thank you very much for that. And now just one question. I see that you
13 start your report in saying this, and I read obviously from the translation: "My
14 primary intention is to consolidate all the research carried out in the social sciences
15 area that will be of relevance to the questions posed." Those being the several
16 questions that have been posed to you by the Prosecution.

17 So in saying that, and in fact looking at that report, you -- it's a consolidation of other
18 social scientists' articles and the like? Other sources of course we can see, but it's a
19 consolidation?

20 MR GARCIA: (Overlapping speakers) -- translation of the CV -- I'm sorry, of his
21 report.

22 THE WITNESS: (Interpretation) In my -- yes, I don't speak about consolidation,
23 no. What I explain at the beginning of my report is that, well, I will have a social
24 sciences perspective, which is very different to criminal law. That means that I will
25 solely try to summarise the different work carrying out in social sciences. But what

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1 I wanted to stress was the fact that the approach of social sciences is very far from
2 the approach of experts in criminal law or criminology who tries to find individual
3 responsibility. In social sciences what we're trying to do is we're looking at
4 structures, we're looking at collective dynamism and such other factors. There's a
5 contrast between your approach as lawyers and my approach as a social scientist,
6 which I highlight right from the very start of my report. I don't know if that's been
7 clearly explained.

8 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, you've been with it now for 15
9 minutes. Last question.

10 MR HOOPER: That was my last question.

11 PRESIDING JUDGE EBOE-OSUJI: Okay, thank you.

12 Mr Kigen-Katwa?

13 QUESTIONED BY MR KIGEN-KATWA:

14 Q. Good morning, Professor.

15 MR HOOPER: I forgot to say as I sat down, thank you very much Mr -- Dr
16 Maupeu.

17 MR KIGEN-KATWA:

18 Q. Professor, you confirm that when you're being led in evidence in respect to
19 your CV, you said you were interviewed on several occasions by newspapers or
20 radio stations on the issues you've extensively written on, isn't it? Professor, you
21 will confirm that?

22 A. (No audible response)

23 PRESIDING JUDGE EBOE-OSUJI: What was the answer to your question?

24 MR KIGEN-KATWA:

25 Q. Professor, if you could just say it in words as opposed to nodding your head.

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1 PRESIDING JUDGE EBOE-OSUJI: Professor, the transcripts do not capture
2 movements so you have to vocalise.

3 THE WITNESS: (Interpretation) I was interviewed very often by the Francophone
4 media. You have to know that when you are in Nairobi and they're looking -- and
5 you're a researcher you're constantly being interviewed by the French-speaking
6 media because there aren't a lot of people they can use as sources. So there's
7 nothing original in that.

8 MR KIGEN-KATWA:

9 Q. Thank you, Professor. My point more is this, Professor, that in all your so
10 many writings you have not dwelled much on the Kenyan media, have you?

11 A. No.

12 Q. Thank you very much, Professor. Now, there is also the last page of your CV
13 where you very specifically said that you translated Kikuyu music and Kikuyu
14 poetry. Do you remember that, Professor?

15 A. Yes, indeed. I was working at the time on a series of authors in Kikuyu, and
16 what we tried to do was to translate a series of songs about which I base myself to
17 write articles on the Kikuyu culture. So that's -- those are the sources, if you like,
18 that I used in order to publish five or six articles on Kikuyu culture. They were the
19 sources. That's all. And I needed -- well, I needed to translate them.

20 Q. Thank you, Professor. My question is very limited. So in actual fact,
21 contrary to the words used in the CV, it is not accurate to say that you personally
22 translated in the sense that you understand the two languages, isn't it?

23 A. No. Furthermore, that's the reason why it's not published. I didn't put it on
24 the Internet. I didn't publish it because these were working documents, and this is
25 a CV that's been made for academics who know how to read this type of CV and

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1 they know what it means. The interest is to know -- well, I've got a stock of data, if
2 you like, which I've worked on and which is available. That's what it's about.

3 Q. Professor, I actually don't need the very long explanation. If you could just
4 listen to my question and answer it briefly.

5 Professor, on the CV you've produced in this court, you have no corresponding
6 equivalent of any translations of any Kalenjin works, isn't it?

7 A. No. No. No, of course not. There is a lack indeed of raw materials, if you
8 like, in Kalenjin which are translated into English or in Kiswahili or other. That's
9 something that indeed is lacking.

10 Q. Thank you, Professor. We will come to that in the substance of your
11 testimony. Now, you say you substantively stayed in Kenya between the period of
12 the year 2000 and 2004; isn't it, Professor?

13 A. That's the case, but I go back every year to Kenya, of course, for several years.
14 And on -- sometimes on several occasions every year.

15 Q. Now, Professor, you were asked the question specifically whether you've
16 stayed in Rift Valley, and you said from time to time you've gone there. Could I ask
17 you to be more specific. Have you stayed in Rift Valley, and what is the longest
18 period you've stayed there, if you have?

19 A. Well, several months in Nakuru, Nyahururu, Kitale and I also worked in
20 Mungiki as well. So what's of interest to me was from Nakuru and in the western
21 part as well. Those were the two areas which were of interest to me.

22 Q. Therefore, Professor, even when if you are in Rift Valley, your interest and
23 attraction was on the functioning and the dynamics of the Mungiki, isn't it,
24 Professor?

25 A. Indeed.

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1 MR KIGEN-KATWA: That should be all, Mr President. And, Mr President, I
2 assume that quite a number of the issues that are in his testimony I can come back to
3 it when we are cross-examining on the substance. I understood you to be giving us
4 that guidance, Mr President.

5 PRESIDING JUDGE EBOE-OSUJI: Certainly the case. The question now is
6 whether we need to go into any submissions on the admission of the witness as an
7 expert per se, and that will be based on whether you're objecting to the general
8 admission of the witness as an expert without prejudice to your right to
9 cross-examine on the substance on the merits of his testimony.

10 MR KIGEN-KATWA: May I say that we do not challenge his expertise. And if
11 you were to say that he's an expert on Mungiki, we admit it and we respect -- respect
12 him for that, Mr President. That's no issue for us.

13 And thank you, Doctor.

14 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper?

15 MR HOOPER: Well, we've never disputed this witness's capacity to assist the
16 Court in terms of the -- of general background matters and reserve as I think the
17 Chamber well understand our position in respect of more specific matters.

18 (Trial Chamber confers)

19 PRESIDING JUDGE EBOE-OSUJI: That being the case, in light of the
20 submissions -- or, rather, the positions indicated by the Defence counsel, Mr Garcia,
21 it will not be necessary for you to make any submissions on admitting the witness as
22 an expert. We will -- we do admit the witness as an expert and without prejudice to
23 the merits of his testimony in the main. So you have now -- we have now 17
24 minutes to luncheon break time, if you can in that time make some headway?

25 MR GARCIA: Yes, I can, your Honour. And just for the record, I want to make it

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1 clear that the Prosecution is presenting this witness as an expert in matters of social
2 and political background information regarding Kenya prior to the post-election
3 violence and during the time relevant to the charges. Just that specific information
4 in light of what Mr Kigen-Katwa stated.

5 Q. (Interpretation) Witness, I would just simply like to go back to tab number 2.
6 No, I'm sorry. I'd like us to go back to tab number 1, and this is your report. Am I
7 right to say that this is the report which you disclosed to the Prosecution in response
8 to 12 questions that were put to you a certain time ago with a view to writing this
9 expert report?

10 A. I confirm it.

11 Q. Also, quite simply for the record, are there corrections or clarifications that
12 you would like to make to any part of it, any part of the report that you wrote at the
13 time when you drafted it?

14 A. Well, it's clear that in speaking I'm not going to literally take up the content of
15 the report if I spoke previously about it now, if my expertise is accepted. But
16 afterwards, no, I don't see any arguments which seem false, bad, poor.

17 PRESIDING JUDGE EBOE-OSUJI: On that basis, along the same general line, has
18 the witness compared the translation of his report with the French original? And if
19 that's the case, whether that's a fair translation?

20 MR GARCIA: Your Honour, no. The witness has not had the occasion of looking
21 at the English translation. Our submission is that the French report, the one written
22 originally by Mr Maupeu, should be the principal document of reference. If there's
23 anything in the English translation that the Defence wishes to challenge, well, the
24 witness can explain if there's any distinction or we can look at the French one.
25 I've looked at the English translation. It seems correct to me, the translation. There

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1 doesn't seem to be any problem or any issue in that -- in that regards. But once
2 again, it's the French report that was given by Mr Maupeu, the one that he wrote
3 himself, that is the primary source of information.

4 PRESIDING JUDGE EBOE-OSUJI: So we will proceed in this way then: If the
5 counsel working in the English -- with the English document engage issues there,
6 then we will -- if that occurs, whether -- if it's the argument of the Prosecution that
7 something in the French is different, we will take it up at that time.

8 MR GARCIA: (Interpretation)

9 Q. Witness, just a last question that I wanted to ask about your report, and you'll
10 see that I go back to the issue of your report later in the examination-in-chief and the
11 questions that I put.

12 Now, I do understand that in your report you quote -- well, you have a bibliography.
13 You mention different articles which you consulted in order to draft your report; is
14 that correct?

15 A. Yes, that is correct.

16 Q. And just so that it's clear for the record, I also see that in certain places you
17 mention -- when you're asked a question, you also mention the name of the author
18 immediately in the answer to the question that's been put; is that correct?

19 A. That is correct.

20 Q. And where it concerns the different works that you have cited in your
21 bibliography, could you explain to us a bit more about what we should understand
22 by the different questions which you've answered to in using these works which are
23 in the bibliography. How did you work? In what way did you function exactly?

24 A. Yes. I made an effort to have an approach which was more of a teacher, if
25 you like, to summarise all the different approaches that there are. You have to

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1 know that with regards to this crisis, there was a multitude of things that were
2 written. And my approach was to try and carry out a summary, if you like, to
3 explain where there were disagreements between researchers and to try and be as
4 clear as possible in that regard. It wasn't a report which was trying to present my
5 opinion, my vision of the violence. No. It was, rather, trying to summarise what
6 others have done.

7 Q. Thank you very much for this clarification. So what I would like to do
8 during my questioning, the questions that I would like to put to you, you have the
9 report in front of you, and I would just like to cover the questions that were put to
10 you at the time, and you can be guided by the questions that I put to you. You will
11 be able to answer the questions and also use your knowledge. You've got the report
12 which you also drafted. I don't think that it's forbidden for you to look at it if you
13 feel a need to go into more depth with regards to an individual question, to go into
14 more depth with regard to a particular answer.

15 Now, first of all, Witness, when we look at your report, it's divided up by the
16 questions that were put to you. So I don't want to start in the same order. Twelve
17 questions put to you at the time.

18 A. Yes.

19 Q. And what I thought I understood in your answer was that if you feel there's a
20 need to clarify things, you will be able to do so during my question when I cover the
21 question during the examination in chief.

22 Now, when I read your report, I think I saw that -- well, you indicated that during
23 the elections in 2007 in Kenya lots of parties were disputing the presidential
24 elections. Among these parties there was the Party of National Unity as well as
25 Orange Democratic Movement; is that correct?

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1 A. Yes.

2 Q. Now, Mr Witness, first of all, I would just like to start with the Orange
3 Democratic Movement which you covered. You answered the question of the
4 Prosecution with regards to this subject. Now, this is questions 3, 5 and 7. I would
5 like to start with question 3. And quite simply I would like us to explain to the
6 Court the origin of this political party which in 2007 disputed the presidential
7 elections, quite briefly.

8 A. Well, before -- well, it would perhaps be interesting to look or to give some
9 information with regards to the background and history of the system in Kenya
10 before going into the individual details of the ODM. What would perhaps be
11 interesting to see is perhaps that since the start of the multiparty system and the
12 return to multipartyism in '91, you are before a partisan system which you have
13 ethnic parties. You have parties which are almost all ethnic, and you have a
14 system -- well, first of all, perhaps I have to explain.

15 Q. Yes, I don't necessarily want to interrupt you, but I do think that obviously
16 you are the expert in this field and perhaps, first of all, you would like to address
17 this multipartyism question, because this is something that we need to address first
18 of all.

19 A. Well, I just wanted to explain that it's very difficult to describe this. You
20 have to go in the different relations that different parties have. You have the
21 partisan system. This is what we call it. And within this framework, just to give
22 you some information with regards to development of the partisan system so that
23 we can -- so that -- how it became ODM, that might be something that is of interest.

24 Q. Please go ahead. We have eight minutes before the break. Obviously you
25 can start your answer, but please keep an eye on the fact that we have to be very

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1 brief and we have to really address the point in question.

2 A. Well, in order to be as quick as possible, perhaps we -- it could be explained
3 that -- well, there are ethnic parties in this partisan system, which is relatively
4 classical or traditional in African system -- political systems, but in our
5 understanding of the partisan systems in Africa has changed considerably. Today
6 we try to see it -- well, we think there are developments which have gone in different
7 directions.

8 And what I wanted to explain to you is that since the '90s, there were two major
9 periods in the partisan system in Kenya. First of all, there was a period where there
10 was a system in the '90s, there was a system that was stable, and that's to say that it
11 was the same parties that you find from one election to another, and it was a
12 partisan system which was fragmented. That means that all you had -- all the
13 opposition parties were very disunited. These were parties that became
14 mono-ethnic over time. And we also had a party which was less hegemonical
15 which obtained the majority of votes, the KANU, gerrymandering and other such
16 methods.

17 Now, after this period, we had a major change of style in the 2000s. And from 2000
18 onwards we have a system which is much more unstable to the extent that during
19 the three general elections that there were in 2000, every time you have different
20 parties. And on the other hand, you have -- you have this unstable system -- well,
21 wait I have to look at my sheets. I'm sorry.

22 So you have a system which is relatively unstable. Yes, that is important,
23 fragmentation, because in the 2000s there was a system of alliances that was set up,
24 and that means that during the three general elections in the 2000s there were two
25 alliances opposed to each other, and there was a system that took up a bipartisan

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1 shape, and this was made possible because there's no longer a dominant party.
2 And what happens is that paradoxically you have -- well, you have two major
3 alliances opposed to each other and you have a multitude of small parties. They are
4 increasing in number. They are increasingly being legalised, et cetera. They are
5 not viable in themselves, and they understand that they have to create alliances.
6 And why is that important? Well, this creates a system or a political style, a
7 partisan system which is very fluid. What does this mean? It means that the
8 politicians, they change easily from one party to another.
9 You have a politician who says that political parties -- when you're not happy with a
10 political party, you change it. And you can just change it. When you're not happy
11 with your party, you can change it.
12 And matter two, it's like a minibus. It's like that type of minibus. And this is a
13 system --
14 PRESIDING JUDGE EBOE-OSUJI: You remember when we started I said -- and not
15 that you've gone there. During the introduction I said it will help us to make it
16 simpler. And the Prosecutor's question was whether you could explain the origin
17 of the political party ODM in 2007.
18 We've had testimony from witnesses who said that the ODM political party that
19 contested the 2007 election was an evolution of an ODM that was used for purposes
20 of the referendum that occurred.
21 Now, that sort of thing, I think that's what you're getting at, isn't it?
22 MR GARCIA: (Interpretation)
23 Q. Witness, quite simply --
24 PRESIDING JUDGE EBOE-OSUJI: One second. One second. So the point is this:
25 You need to listen to the Prosecutor's question carefully. I know you're an

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1 academic, a professor, so this is not a criticism, but it's an observation that will help
2 us. If you listen to his question and answer it, then you may be surprised to know
3 that further questions he may have might go at a convenient point to what you may
4 talk about if left on your own. But if you can follow it that way, listen to the
5 question precisely and answer it, and then if there's a need for further discussion, we
6 will see.

7 THE WITNESS: (Speaks English) Okay.

8 PRESIDING JUDGE EBOE-OSUJI: Thank you.

9 MR GARCIA: (Interpretation)

10 Q. Witness, quite simply, just to remind you, I do understand that all these
11 different multiparty issues are going to be addressed, and one of the last questions is
12 to do with multipartyism. So perhaps, first of all, we could deal with the different
13 issues in this regard. But I do note that there's only one minute left before the
14 break. Witness, we're going to come back at 2.30 and then I'm going to ask you a
15 new question and then we're going to be able to carry on getting your answers.

16 MR GARCIA: Your Honour, we have one minute to the break. I think it will be a
17 good time to pause at this point.

18 PRESIDING JUDGE EBOE-OSUJI: Yes, but can we settle that question I engaged.
19 Is it correct that the ODM that contested the 2007 election was a reconfiguration, if
20 you like, of the ODM that was in play during the referendum?

21 THE WITNESS: (Interpretation) Yes.

22 PRESIDING JUDGE EBOE-OSUJI: All right. Thank you.

23 MR GARCIA: I can continue -- I will be continuing on that point after the break,
24 your Honour.

25 PRESIDING JUDGE EBOE-OSUJI: We will take our luncheon break now and come

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1 back at 2.30.

2 THE COURT USHER: All rise.

3 (Recess taken at 12.58 p.m.)

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

5 THE COURT USHER: All rise.

6 Please be seated.

7 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. Mr Nderitu, I see you
8 have your bib back on.

9 MR NDERITU: Yes, Mr President. I do apologise. I actually put it on during a
10 break.

11 PRESIDING JUDGE EBOE-OSUJI: Very well.

12 MR NDERITU: It was just an omission, sorry.

13 PRESIDING JUDGE EBOE-OSUJI: We just wanted to let you know that you will
14 have the right or privilege of asking this witness some questions when it's your turn
15 if need be.

16 MR NDERITU: Thank you, Mr President, your Honours.

17 PRESIDING JUDGE EBOE-OSUJI: We need not do so now. I'm just letting you
18 know.

19 MR NDERITU: Yes. Just a bit of a difficulty in the sense that I had now again
20 planned to leave tonight.

21 PRESIDING JUDGE EBOE-OSUJI: It's up to you. We're telling you if you want
22 to --

23 MR NDERITU: Yes. But I will make arrangements so we can see between Mr
24 Narantsetseg and I what we can do.

25 PRESIDING JUDGE EBOE-OSUJI: All right.

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1 MR NDERITU: Thank you.

2 PRESIDING JUDGE EBOE-OSUJI: Please proceed.

3 MR GARCIA: (Interpretation)

4 Q. Good afternoon, Mr Witness.

5 A. Good afternoon.

6 Q. Mr Witness, I would like to follow up on the last question that the Chamber
7 asked you about the origins of the ODM party. Can you briefly tell us about the
8 referendum of 2005 and the link, if any, between that referendum and the members
9 of the ODM party in 2007?

10 A. Very clearly, ODM stemmed from the constitutional referendum of 2005, and
11 a no vote won by 58 per cent, and this was unexpected.

12 Q. I'm sorry to interrupt, but what were the stakes of the referendum?

13 A. Maybe we can explain why the no vote won, what were the intentions. It
14 happened in relation to a constitution that had been negotiated over a long period by
15 many segments of the civil society in the bomas of Kenya. And the text was
16 reviewed and amended by the government in a manner that did not correspond
17 with the spirit of the original document. So it was those changes that were rejected.
18 What specifically was rejected, to begin with, the post of prime minister would be a
19 non-executive post. Secondly, the executive would have sweeping powers just like
20 in the '63 system. It is true that decentralisation was envisaged, but it was limited.
21 What caused problems for the Christian churches was the fact that Sharia law would
22 continue to apply to Muslims in the area of family law and others.

23 Q. Thank you, Mr Witness. I would like to ask you to slow down a little bit, and
24 I will also slow down, and we will pause for 5 seconds.

25 You talked about the referendum and the stakes. Now, who were those who were

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1 in support of that constitutional document, and who were those against?

2 A. Amongst the no voters, you had civil society leaders, and you also had those
3 who were later to become members of the ODM, that is, the leadership commission
4 of the ODM which was known as the Pentagon. Maybe we will revisit that later.
5 But outside of ODM there was the particular case of Uhuru Kenyatta, and a good
6 proportion of the members of the KANU party who were some of the strongest
7 supporters of the no vote.

8 Q. You have mentioned the members of the Pentagon of the ODM. Who were
9 the members of the ODM who at that time were against the proposed constitutional
10 reform text?

11 A. You want to know who were the leaders of the Pentagon, who voted no?
12 Well, the leadership of the ODM was broadly made up as follows, you had leaders,
13 original leaders. In the Rift Valley, you had William Ruto. You had Mudavadi for
14 the Luhyas. You had Charity Ngilu for the Kambas. You had Nyangah for the
15 Embus, and that is the Embus and the GEMAs, the GEMAs stands for Gikuyu Embu
16 Meru. That is the ethnic groups of the Central Province.
17 Now, according to Sebastian Elischer, who is a specialist of political parties in Kenya
18 and who has just published a book on that, Uhuru Kenyatta was originally a
19 member of the Pentagon for the Central Province. And then from the coast you had
20 Najib Balala, and I believe that is it.

21 Q. Very well. If I understand you correctly, these were the leaders who were
22 against the constitution proposed during the referendum. Now, which was the
23 government in power which had proposed that constitutional reform at that time?

24 A. This was a sort of coalition government, because we have to go back to the
25 elections of 2002. It was the NAK camp which won the elections, and it was a very

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1 peculiar alliance which was improvised rather hastily.

2 Kibaki had gathered together a pool of financial leaders, and they were able to
3 gather together a lot of money. And this meant that in 2007 they brought to them
4 candidates who no longer had any campaign funds, including Wamalwa and
5 Charity Ngilu. So they created NAK.

6 As from the end of 2002, when Uhuru Kenyatta was nominated as the KANU
7 candidate, many political bigwigs from KANU joined the Kibaki camp to attempt to
8 revive their careers. And so they -- the Kibaki party was negotiated on the basis of
9 an agreement which formed the foundation of the government as from 2002, except
10 that Kibaki did not respect the provisions of that agreement. So over a period of
11 five years you had tensions, and this led to the referendum campaign, which led to a
12 clearly defined position for the two camps.

13 Q. You briefly mentioned the results of the referendum, which means that the
14 proposed document was rejected, is that correct?

15 A. Yes, it was rejected. Maybe I should explain. Apart from the precise stakes,
16 I should add, I should like to add that if so many people rejected that text, it is
17 because many of the communities expressed their frustration relating to the unfair
18 distribution of resources. This meant that the sub-communities voted heavily
19 against the text.

20 Q. Let me stop you there. Can you briefly tell us which way the ethnic groups
21 that for the majority voted in favour of the text and those which rejected it? Was
22 there a difference amongst the ethnic groups, and if so, why?

23 A. As far as I remember, it was only Central Province which returned a majority
24 vote in favour. And then there were two other provinces with slim victory margins
25 in favour of the constitution. So the result was absolutely clear. What was new

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1 was that that document was rejected also by groups which so far had been split
2 between the opposition and the government.

3 At one time the leaders of those communities had advocated a yes vote. There were
4 some of those community leaders who had called for the members of their
5 communities to vote for in favour of the constitution, but those people did not heed
6 the call. So in the final analysis, the vote was individual. The opinion of the
7 leaders really did not count. So there was an opportunity, and the people wanted
8 to take advantage of that opportunity, and after that there would be an electoral
9 campaign over a period of two years. So that was a very special situation.

10 Q. You have mentioned swing communities on several occasions. What
11 communities are you referring to?

12 A. As you know, in order to win elections in Kenya, you have to necessarily win
13 those swing communities, and those are specifically the Kambas, the Luhyas, and
14 the Kisiis.

15 Q. You have mentioned that there were leaders of those swing communities.
16 Do you have names for us?

17 A. Those who called for a yes vote included Vice-President Awori for the
18 Luhyas, Charity Ngilu for the Kambas, and Simeon Nyachae for the Kisiis.

19 Q. Regarding those who belonged to the Kalenjin ethnic group, were they in any
20 one of the two camps? Please pause for a while and then give us your answer.

21 A. In the Rift Valley and amongst the Kalenjins, the political class were
22 unanimous against that constitution. As far as I can remember, President Moi and
23 his camp had called for a vote against that constitution. And there were other
24 young people, including William Ruto and others who were amongst the leaders of
25 the no campaign.

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1 Q. Just to follow up, Mr Witness, to be clear, what specifically -- who specifically
2 was Moi at that time? What did he represent?

3 A. This was someone who had been president from 1978 to 2002, and he left his
4 stamp on the state. So you want to know what influence he still had in the Rift
5 Valley. Well, at that time it was difficult to gauge his influence, because there were
6 primary elections that gave indications of what was happening and also elections
7 inside the KANU party. And there were indications that Moi was losing ground.
8 And there was a new generation of Kalenjin politicians who had prepared the
9 after-Moi era. So there were politicians from the Kalenjin subgroups, including the
10 Nandis and the Kipsigis, who progressively were able to make their majority count,
11 because those two groups are the largest groups amongst the Kalenjin groups. And
12 we must point out that the Kalenjin constitutes a very recent identity that was
13 invented in the '40s and '50s.

14 Q. We will revisit this later, but thank you for the answer.
15 One point of clarification, you said that both Moi and William Ruto were opposed to
16 the proposed constitutional text. Did you carry out any research on this issue?
17 Amongst the Kalenjin people, what was their vision on the proposed text? Why did
18 they reject the reformed constitution?

19 A. They rejected a form of decentralisation that was not consistent with their
20 point of view. They wanted to defend a notion of advanced decentralisation, which
21 is usually referred to in Kenya as majimbo. And majimbo stems from the end of the
22 '50s, early '60s, and it was KADU, it was KADU, which partially developed this
23 notion of majimbo.
24 Now, in relation to the ODM campaign in 2007, majimbo was at the heart of that
25 campaign. But that notion of kajimbo (sic) -- majimbo did not represent the same

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1 thing for the various communities.

2 Q. Thank you. We are going to come back to the ODM itself. But let us dwell
3 on the referendum campaign. You have said that decentralisation was a crucial
4 point for the Kalenjins. Can you explain to us why they rejected that constitution?
5 Why did Moi and the others appeal to the voters to reject it?

6 PRESIDING JUDGE EBOE-OSUJI: Sorry. You can answer that question, but what
7 is KADU? Can you explain this on the record?

8 THE WITNESS: (Interpretation) KADU, I really do not remember precisely, but it
9 should be something like Kenya African Democratic Union. The term "KADU" was
10 used quite frequently in the same way as "KANU" was used later. This was a party
11 that operated until 1964. And the elite of KADU integrated themselves into the new
12 party, which was KANU. But there was also another smaller party, the KPU.

13 PRESIDING JUDGE EBOE-OSUJI: All right. You can now answer the Prosecutor's
14 question about why the Kalenjins rejected the constitution in light of their concerns
15 about decentralisation.

16 THE WITNESS: (Interpretation) To all intents and purposes there is the land issue
17 that has to be scrutinised in detail, but very clearly the fact was that the Kalenjins
18 wanted to revive the customary law over what they considered as their land. They
19 wanted access to land to be reserved to certain groups, and this would be done
20 through a form of decentralisation.

21 So majimbo involved land tenure rights for indigenes or natives and different laws
22 for the outsiders, that is, the people who arrived in the Rift Valley, either between
23 the wars or in the '60s and '70s. It will be necessary to explain under what
24 circumstances, because this is at the heart of the land tenure issue in this area.

25 MR GARCIA: (Interpretation)

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1 Q. Thank you for that clarification, Mr Witness. But, once again, on this issue,
2 you have mentioned the Rift Valley, and it is expected that the natives or indigenes
3 in this area were the Kalenjins. Now, regarding the outsiders who settled between
4 the two wars, which specifically were these people, which ethnic group?

5 A. We have to refer to the background, but broadly speaking the Rift Valley was
6 known as the white highlands. And up until the end of the '50s, land ownership
7 was reserved for the whites, ever since 1904. So they needed workers. And
8 between the wars, they brought in a lot of people, a lot of workers.

9 They did not recruit people from the Rift Valley who were perceived as farmers,
10 pastoralists. But they brought in people from reservations, from areas that were
11 demographically saturated, and this included many Kikuyus. So there were many
12 Kikuyus employed in the area, but there were also Luhyas, Kisiis and Luos.
13 But basically what is known today as "outsider" refers to the people who arrived
14 within the framework of the resettlement of the Rift Valley after the Rift Valley -- in
15 the Rift Valley, because most of those white highlands were bought by the
16 government, which initiated the settlement schemes. And there was a second form
17 of distribution of those lands in the form of land buying companies. And that was a
18 somewhat different phenomenon for political reasons.

19 Q. Indeed, we will touch about that point when we review the causes for the
20 post-electoral violence.

21 Now, for the time being I'd like to finish off with this particular issue of the 2005
22 referendum. You said that the draft constitution was rejected. And what were the
23 consequences of this draft constitution being rejected? In your report,
24 KEN-OTP-0093-0871, if you turn to page 880.

25 A. 0880.

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1 Q. The last four numbers, second paragraph. You said something about the
2 eviction of -- can you find that particular point? You said 2005, all the ministers
3 who were going to vote for the constitution, and this led to only an elite remaining.
4 Now, this relates to the 2005 draft constitution?

5 A. When that draft constitution was rejected, the coalition broke up, and Kibaki,
6 who received a non-confidence vote by way of this referendum, had to step down.
7 And you see, the voter basis, foundation was quite restricted of this politician.
8 Now, he needed to keep a majority in parliament, and he wanted to cling to some
9 legitimacy. There were attempts to drive him out. And these attempts were made
10 by various political camps with a view to creating a proper political foundation that
11 would be operational.

12 And so the government with the largest -- correction. The party with the largest
13 number of ministers that could bring as many people around it, you see, he tried to
14 bring people together from the group that had dropped him. He redistributed the
15 positions to various people with this group, and he thought he would be able to win
16 their support that way.

17 So, once again, a new political balance had been struck. He had cobbled a new
18 group of ministers together. Now, this led to a great deal of frustration amongst the
19 elite who had lost their positions and within a certain community.

20 PRESIDING JUDGE EBOE-OSUJI: I have some questions. I was waiting for a
21 good place to put them, but the more you move, the more questions arise, and it
22 may be better to pose those questions at the point when the witness is speaking
23 about them, so if I may do so.

24 Witness, you had said that Mr Moi, the former president, had called for a no vote
25 during the referendum. In your view, would you -- are you in a position to assess

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1 to what extent he was listened to, especially among the Kalenjins at the time when
2 he called for a no vote to the referendum or in the referendum?

3 THE WITNESS: (Interpretation) Of course. Well, it's very difficult to determine
4 which leader influenced the Kalenjins in 2007 when they rejected the draft
5 constitution -- correction -- 2005. Did this come from Ruto's camp or another camp?
6 In 2005, of course, the issue really was not being brought up. But if we look at this
7 matter in retrospect, we see that this message, this refusal of the draft constitution
8 was so intentional on the part of the Kalenjin that the political leaders had to follow
9 suit.

10 And in retrospect we realised that -- well, which leader emerged from the
11 referendum? It wasn't Arap Moi. It was not Biwott. It was not -- well, it wasn't
12 from the team that led beforehand. It was the new politicians, William Ruto and all
13 the politicians who came in, this new generation of politicians. And we realised
14 that the referendum was the beginning of the new hegemony of the Kalenjin
15 community of William Ruto and his team.

16 This was confirmed in the following year during a statement made by Aldama
17 Ravine, William Ruto was deemed to be the spokesperson of the Kalenjin
18 community, and this was in the presence of several Kalenjin MPs. So the winner I
19 think was William Ruto, far more than Daniel -- when we look at these events after
20 the fact, in 2007, you see --

21 PRESIDING JUDGE EBOE-OSUJI: To get this testimony clear, part of the answer
22 that we were fed, the translation says this, that "Looking at this matter in
23 retrospect" -- someone had highlighted my transcript in purple, and I can't -- all
24 right. Thank you whoever did that. I'll take that again.

25 It said "Looking at this matter in retrospect, we see that this message, this refusal of

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1 the draft constitution was so intentional on the part of the Kalenjin that the political
2 leaders had to follow suit."

3 Can you please explain what you are saying there briefly?

4 THE WITNESS: (Interpretation) Well, what I mean is that the leaders don't
5 necessarily always have the power that they take on for themselves. Often leaders
6 are obliged to say to the people what they want to hear. And in actual fact, the
7 Kalenjin did not want to hear anything except refusal of the draft constitution,
8 because they apparently were quite unanimous within the community regarding to
9 this -- regarding this message about majimbo.

10 And we saw this in particular in 2007 at the time of the violence. We saw that the
11 lower-level notables or community leaders, we saw this amongst the armed groups.
12 And this was quite strongly rooted within the population, this, this need to regain
13 these -- this entitlement over the land.

14 The politicians on certain issues must say such things. They most likely believe in
15 it. But this was a message that they really had to transmit. Those who countered
16 that message would pay the price. In 2007 and 2008, you must remember that some
17 properties of Daniel Moi were destroyed. The property of several Kalenjin leaders
18 who hadn't been very virulent in their defence of majimbo, that property was also
19 destroyed, their farms razed to the ground.

20 You see, there was violence within the community as well. And the people do have
21 their ways of putting pressure on the leaders themselves.

22 PRESIDING JUDGE EBOE-OSUJI: You had also said that majimbo represented a
23 system of decentralisation that meant different laws for those considered to be
24 outsiders. Is that what you said? And what do you mean by that?

25 THE WITNESS: (Interpretation) In actual fact, well, it was more. In the

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1 constitutional draft of 2007 that was brought forward, there was decentralisation.

2 And the no side wanted a form of federalism, a form of federalism. In particular,
3 people in the Rift Valley wanted a form of federalism that would regularise access to
4 land, and this regulation would be handled by local authorities.

5 Majimbo, the Luo version thereof, was more a form of conventional federalism
6 versus the Kalenjin version. You see, it had to do with land tenure, and it revolved
7 around their interpretation of majimbo.

8 PRESIDING JUDGE EBOE-OSUJI: So different people might have been using the
9 term "majimbo," but it meant different things to different people, is that it?

10 THE WITNESS: (Interpretation) Exactly. Some people in some communities had
11 one meaning, other people had other meanings for that word. The Luto (phon)
12 converted to this particular aetiology later on in the year 2000 and thereafter. And
13 you see progressively the Kalenjin concept of majimbo gained traction and, you see,
14 if it had not been for the violence in 2008, there were some strategies on the part of
15 local community leaders quite similar to majimbo practises of the Kalenjin variety.
16 Was it just a reaction to the Kalenjin's attacks, or was it that the Luo people in that
17 area thought we had to find some form of autonomy that would allow the natives to
18 have land tenure in a particular area? Very difficult to say. But what we can
19 confirm is that at the level of the national elites, the Luo elites never developed the
20 ideas of majimbo the way that the Kalenjin did as of the 1990s through multiple
21 speeches, multiple forms of rhetoric within the Rift Valley.

22 PRESIDING JUDGE EBOE-OSUJI: And what was the Kalenjin version of majimbo
23 versus another group's version of majimbo? I believe you had said that the Luo had
24 in mind a conventional form of federalism. Can you explain what was different,
25 Kalenjin version versus other people's versions?

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1 THE WITNESS: (Interpretation) I would say that in the Luo version land tenure
2 was of little importance because, you see, other groups were not envying them for
3 their land. As for the Kalenjins, that was the central issue, land ownership, land
4 tenure. For decades, a century, indeed, they had seen various people arriving and
5 taking land.

6 So what I mean by that is for them, access to land and land ownership had to be
7 regulated by the community of origin. It didn't mean that land ownership would
8 be forbidden to, that non-Kalenjin people couldn't own land or other groups couldn't
9 own land. They were saying that there had to be, that there had to be some higher
10 rights granted to native people, people who were native to the area or greater
11 entitlements.

12 So that led to a vision of a two-tier citizenship. They were in favour of two tiers of
13 citizenship with this distinction between people who were native to a region and
14 then people who were not native to a region. This notion was developed in various
15 speeches, during political rallies and expanded. And this began in the 1990s, not
16 just amongst the Kalenjin community, also amongst Maasai politicians. In short, it
17 was relatively common, this was common rhetoric in the Rift Valley.

18 The Rift Valley is inhabited by other groups, other political elites that also were part
19 of this debate and have been part of this debate for 20 years.

20 PRESIDING JUDGE EBOE-OSUJI: And on that subject, land ownership, you had
21 testified that the Rift Valley was known as the white highlands. In that sense you
22 meant that it was reserved for white settlers. You testified to that. What do we
23 mean by "reserved for white settlers"? Do we mean expropriation without
24 compensation? Can you please explain?

25 THE WITNESS: (Interpretation) Well, perhaps we should review the history of

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1 land ownership within the Rift Valley, which is a complex issue. Why has there
2 been violence in this part of the world? Because the history of land ownership in
3 that area is quite unique. And there have been various institutions. The land
4 tenure institutions are quite unique in comparison to the coast, for example. In
5 other parts of Kenya, the land ownership system is different, and this is because of
6 history.

7 I could briefly review this very special history of the rich Rift Valley. Late in the
8 19th century, the British arrived in the country and quickly occupied the Rift Valley.
9 In 1904, the richest --

10 PRESIDING JUDGE EBOE-OSUJI: We'll continue, but let's make something clear,
11 when you say "arrived" -- and the reason I say this, when I was asking you the
12 question before, you were saying "oui," "oui," and nodding. I don't know whether
13 that came on to the transcript. But you've also now talked about arriving and
14 quickly taking the land. My point was was it expropriation without compensation?

15 THE WITNESS: (Interpretation) Oh, yes. The people who were there in that area
16 were thrown out. Their customary rights were done away with, extinguished, and
17 all the land -- well, the legal status of the land changed. It became crown land, and
18 it belonged to the state. The land belonged to the state, and the state redistributed
19 the land to white farmers. Up until the late 1950s, only white people were able to
20 purchase land in that region.

21 And there was no compensation provided to the people who were operating in that
22 area. I have to explain to you, you see, that this area or these areas, the native
23 populations were pastoralists, so their concept of land ownership was quite broad.
24 So, you see, an area of land might appear to be empty, but actually the land was
25 being used by these people.

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1 So late 19th century, early 20th century, there was a social demographic crisis, a
2 serious one within the region and within the whole, really with -- late in the 19th
3 century, there were a series of famines. And in Kenya, entire populations lost
4 one-third or one-half of their numbers. Once the British arrived, they had the
5 impression that they had stumbled upon an empty land. But, you see, it was just a
6 very unusual set of circumstances that gave that impression, because there had been
7 these events, these famines and so on.

8 The Rift Valley appeared to be empty, but it was not.

9 And so these local populations were thrown out. The Maasai, certain Maasai
10 groups within the Rift Valley were at the other end of the territory. And then the
11 Kalenjin and other Maasai groups were concentrated in small areas, which were too
12 small in comparison to their usual way of life. They were pastoralists. And so
13 they found themselves on the fringes of the white highlands.

14 And so yes, of course, this is why there is this feeling of historical injustice.

15 PRESIDING JUDGE EBOE-OSUJI: That's what we're trying to understand and why
16 whether or not one can understand the unique perception or the unique definition of
17 or understanding of "majimbo" in that particular area.

18 Now, fast forward, you also talked about various people arriving and taking land.

19 I'm quoting from what you testified to earlier. Apart from the colonialists at the
20 time, do we mean anything else when you say, do you mean anything else when you
21 say "various people arriving and taking land"?

22 THE WITNESS: (Interpretation) During the colonial period, during that period,
23 no --

24 PRESIDING JUDGE EBOE-OSUJI: No. I meant apart from the colonial era, did
25 other people also take land, after the colonial period in the area in a manner that

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1 might explain the unique understanding of majimbo-ism that the Kalenjins had?

2 THE WITNESS: (Interpretation) Yes, of course. You can't understand the whole
3 issue of land tenure within the Rift Valley unless you consider the history after
4 independence. I can expand upon that briefly.

5 After independence, most of the white land was bought back by the Kenyan
6 government using moneys provided by the English government. Then we came to
7 a crucial moment in history, and the issue was: What are we going to do with this
8 land?

9 After that juncture there was a division within the political scheme. On the one side
10 we have had, we had the KADU party, which was a gathering of small ethnic groups
11 and the Kalenjin. They asked to be given back their ancestral entitlements to that
12 land and to have a federal system. That's the origin of majimbo.

13 On the other side of this political divide, you had Jomo Kenyatta and his party. He
14 in contrast called, not for federalism but, rather, for a centralised state, and he said
15 no, the customary rights have been extinguished for once and for all, and the land
16 purchased by the government will be redistributed by the government on a national
17 basis.

18 Thus, you must realise in 1963 the elections were quite clear. KADU won by a
19 broad majority. And so the decision was made and the decision was KANU, so a
20 centralized state, redistribution of the land in the Rift Valley by the state. And that
21 was done to the detriment of the Kalenjin. But they swallowed this bitter pill. And
22 later the Kalenjin elite had access to this particular solution for various reasons. The
23 Kalenjin elites took advantage of some redistribution of land and certain positions,
24 for example, vice-president given to Daniel Arap Moi, and he was able to lessen the
25 frustration. Thus, they swallowed this bitter pill.

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1 The Trans-Nzoia area was put in the western part and for most of the Kalenjin. But,
2 you see, at the same time, Luhya and Kalenjin, no elites received large settlements.
3 At the time of the independence when 3 to 4 million hectares of land was being
4 redistributed, half the land was redistributed to small farmers. The other half was
5 either redistributed in the form of large properties, sometimes even more than
6 500,000 hectares, and they were distributed to the elite. And that was used to settle
7 down these elites who were somewhat worked up. Maybe this is a cynical reading,
8 but there you have it. That was the situation.

9 The dismantling of the white lands and the Rift Valley in 1963, the fact that one area
10 went to the west and some areas that were quite rich went to Nyanza, which was a
11 Luo province, this dismantling or carving up of the Rift Valley was not at all
12 appreciated by the Kalenjin elites.

13 And they couldn't help. They called out. They thought it was scandalous. Within
14 the Kalenjin elite and within Moi's regime, there were people within this elite who
15 spoke out, who expressed this message of frustration from the grassroots, but they
16 paid a heavy price.

17 On the Kenyatta government there was one leader, Jean-Marie Seroney, who was
18 one of the Kalenjin leaders who complained bitterly, who said this is a Kikuyu
19 colonisation. He said so, and he spent two years in prison for that statement, and
20 his political career was in ruins thereafter.

21 And so, you see, a whole series of Kalenjin politicians found themselves off on the
22 side-lines if they dared to express these claims, this frustration about the arrival of
23 these other peoples. And this was as of 1963.

24 PRESIDING JUDGE EBOE-OSUJI: What was the name for the record? There was
25 a name, somebody you mentioned, just so the court reporters can find it. Did you

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1 mention the name of the gentleman?

2 THE WITNESS: (Interpretation) Jean-Marie S-E-R-O-N-I-Y.

3 PRESIDING JUDGE EBOE-OSUJI: Thank you. Mr Garcia, please.

4 MR KIGEN-KATWA: Mr President, could I just put that on record, the name of
5 the person being referred to.

6 PRESIDING JUDGE EBOE-OSUJI: Go ahead, please.

7 MR KIGEN-KATWA: Yes. Mr President, the first name is Jean, J-E-A-N. Seroney
8 is S-E-R-O-N-E-Y.

9 PRESIDING JUDGE EBOE-OSUJI: Thank you. Please proceed, Mr Garcia.

10 THE WITNESS: (Interpretation) Well, the actual spelling of the name, it depends on
11 the transcription of the name, and various authors spell it in different ways.

12 PRESIDING JUDGE EBOE-OSUJI: Fair enough. I think that's noted. The point is
13 made.

14 Please proceed, Mr Garcia.

15 MR GARCIA: (Interpretation)

16 Q. Mr Witness, you were talking about the consequences of the rejection of the
17 referendum text. And you said that Mr Kibaki evicted from the government certain
18 people who had opposed him. And to which parties did these people belong to?

19 A. These were mostly Luos and Kalenjins, yes, indeed.

20 Q. Was there a reaction from those people and their communities, that is to the
21 fact that people from their ethnic groups had been evicted?

22 A. This is difficult to say. It was an electoral campaign. And those who had
23 called for a no vote knew very well that they were going into another era of politics.
24 So they were campaigning to defeat Kibaki in the elections. So they did not expect
25 to be part of the leadership. They expressed their frustrations through the electoral

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1 campaign. And to all intents and purposes, yes, this led to frustrations.

2 Were these frustrations expressed later during the violence of 2008? That is what
3 some analysts say. But we can say that this is subjective. It is not something that
4 can be clearly established.

5 Q. Mr Witness, you also started talking about the political platform of the ODM
6 at the time of the elections in 2007. What was this political platform?

7 A. Certain specialists, there is a German who has published something in this
8 nature. He says that the manifesto of the ODM was not very programmatic. But I
9 have my doubts, because this manifesto was well understood by the population.

10 The manifesto included majimbo. There was also a certain degree of anti-Kikuyu
11 populism, and which was embodied in this slogan: 41 against 1. That is 41
12 communities against 1 community.

13 So this was a sort of anti-Kikuyu populism which capitalised on the feelings of
14 frustrations of certain communities, specifically Kalenjins.

15 The best analyst of the Kalenjin identity explains that this is an identity that is forged
16 on the basis of a history of victims. You have Gabrielle Lynch, who published an
17 article and who also published a very good book on the Kalenjin identity. But it
18 was not only the Kalenjins who expressed that feeling of victimisation and
19 frustration.

20 In the ODM manifesto, there were also certain other very important aspects that
21 were very successful during the campaign, particularly the youth programmes. So
22 it was a specialty of the ODM, because in 2007 there was a massive registration of
23 youth for the elections, because up till that time the leadership had had an impact on
24 voter registration. And I can explain that later.

25 But at this particular point the demographic situation was reflected in the voter rolls.

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1 And the ODM felt that the youth would be crucial in the elections. So the ODM
2 broadcast very strong messages intended for the youth, whereas the PNU was
3 instead trying to prevent the youth from working. The ODM had programmes for
4 job creation for youth, minimum social security for the poorest people and a more
5 egalitarian social contract. So the ODM would be a little bit like a centre left party.

6 Q. Let us go back to what you said about the slogan used: 41 against 1. What
7 did this slogan mean?

8 A. This slogan speaks for itself, because you have 41 ethnic communities which
9 have interests that are different from the number 1 community, that is the Kikuyu.
10 So it is understood that Kibaki's first mandate favoured only the Kikuyu, and that
11 the distribution of resources by the state was not done fairly, and that that situation
12 had to be remedied. That was the core message of that slogan, it seems to me.

13 Q. Once again you mentioned that issue of majimbo. Based on your report,
14 would I be correct to say that that entire notion of majimbo evolved over the years,
15 that is, from the colonial period up to the elections of 2007-2008?

16 A. Yes, it did indeed evolve to the extent that that concept had largely
17 disappeared after KADU had been absorbed by KANU. The dissident individuals
18 amongst the Kalenjins had not succeeded in reviving that notion of majimbo, which
19 reappeared only after the restoration of multiparty politics.

20 In the Rift Valley, the leaders were trying to lock in the Rift Valley. Out of about 40
21 constituencies in the Rift Valley, they wanted to win in the maximum of
22 constituencies. In 1992 they had thought that it was possible for them to lose the
23 elections, so to protect their interest, they wanted to win everything in the Rift
24 Valley.

25 So it was within this framework that some leaders started reviving that notion of

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1 majimbo. And it was the close associates of Moi who reactivated that concept
2 during rallies. And this served as justification for a sort of ethnic cleansing in the
3 early '90s.

4 The notion progressed slowly as from the '90s and crystallised after 2000 and
5 thereafter.

6 Q. To follow up on that answer, when you talk about majimbo-ism or majimbo,
7 which was widely discussed in 2007, was there any difference between that majimbo
8 and the one of the past?

9 A. I do not see any major differences, that is regarding the substance and
10 dynamics. It seems to me that those notions were quite similar. And the methods
11 that would be used were similar also. One can say that the notion evolved after
12 2008 or as from 2008 as a result of the trauma created during the crisis of the first two
13 months of 2008.

14 Q. And when you say that the methods were similar, can you explain that?

15 A. I was referring to ethnic cleansing. In the early '90s, there were methods that
16 were put in place to ensure that the opposition in the constituencies of the Rift Valley
17 should be cleaned out. Some leaders started using militia groups to evict members
18 of the population who were known to oppose Kalenjin leaders. In the Kalenjin
19 areas, the Kalenjin people represent about 40 per cent of the rural population of the
20 Rift Valley. So they do not have the majority in all the areas. So in many
21 constituencies, in order to win an election, you have to organise on the basis of the
22 demographics of the constituencies.

23 Q. Just to clarify, what happened in the '90s at the beginning of multiparty
24 politics? When you talk about ethnic cleansing, it was by who and against whom?

25 A. Between 1991 and 1993 after -- or in accordance with reports from the NGOs,

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1 it is stated that there were about 1,500 dead and about 300,000 displaced persons.

2 And this happened mostly in constituencies in the Rift Valley. So there were

3 paramilitary groups which evicted certain segments of the population. I do not

4 know whether you want me to go into specifics.

5 Q. Please simply explain to us what happened. You talked about paramilitary

6 groups. Links to which government and which groups were evicted?

7 A. Very clearly these were groups that were close to the government which,

8 according to those same sources, organised those acts of violence. These were

9 groups of young people who had been trained and were led by former soldiers and

10 former police officers. And all these people and all those groups were close to the

11 government.

12 Now, regarding those who were affected, you can talk about five areas of conflict

13 from 1991 to '93, and this concerned settlement schemes and land-buying companies.

14 So this happened around those areas and exclusively affected members of the

15 population who had brought -- had been brought there within the context of the

16 redistribution of land in the '60s and '70s. This is explained in the reports of the Red

17 Cross and others. So it was only on these -- in these areas that people were targeted

18 contrary to 2007.

19 Q. What ethnic groups were targeted?

20 A. Those communities which had benefited from the settlement schemes and the

21 land-buying companies, the Kikuyus, Luos, Kisiis and Luhyas for the most part.

22 Q. You mentioned specific zones, specific areas. Which are those?

23 A. You don't have a distribution of victims by area, but you have a distribution

24 of displaced families, which was done by the Red Cross. And it shows that certain

25 areas were highly affected by the violence. And these include the Nandi district as

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1 well as the Nakuru district of that time, which was Molo and Kuresoi. Then you
2 had Mount Elgon, where there were a great number of displaced persons, because
3 Mount Elgon was a very specific settlement scheme. And this is something that I
4 can elaborate on if you want.

5 Q. For the time being this is not necessary. You were simply mentioning to us
6 the areas that had been affected. You talked about Molo, Kuresoi, Nandi, Mount
7 Elgon. Were there any others?

8 A. Yes. If you want details of the displacement of the population, I can tell you
9 that in '92-'93 there were 72,000 families displaced; Nakuru, 40,000 families. There
10 were 40,000 in Nakuru; Mount Elgon, 25,000; and Uasin Gishu, 14,000.

11 Q. From the very outset, Mr Witness, you mentioned that it was a group of
12 young people who evicted the people. And to which ethnic group did these young
13 people belong to?

14 A. We suppose that they were Kalenjins, but we have to be honest and add that
15 in the analysis and studies that were carried out, very few of those people who
16 participated in those massacres were actually interviewed. There were few
17 interviews of people from -- former soldiers from the army and security forces. But
18 there was a certain degree of omertà. But what comes out clearly is that these were
19 mainly Kalenjin groups.

20 But what we do not know is whether these people were local people. Did they
21 belong to the local settlement schemes, or were these people who were ferried from
22 one place to another?

23 We can see that many of those militia groups moved about quite frequently, because
24 in the NGO reports it is stated that those militias were ferried from one place to
25 another in government-owned trucks and so on and so forth. So this is something

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1 that was clearly fomented by some bigwigs who wanted to clear out those
2 constitutions, not necessarily those that belonged to them for we do not know.

3 PRESIDING JUDGE EBOE-OSUJI: You mentioned a few times NGO reports. Was
4 it only NGO reports that documented these events you described as ethnic cleansing
5 or eviction of people from certain areas, or were there no commissions of inquiry as
6 well?

7 THE WITNESS: (Interpretation) During those years, that is '91 to '93, given that
8 these were massacres that were taking place far away from Nairobi, which means
9 they were far away from the media, the diplomats and UN agencies, information
10 trickled down slowly. So you had human rights organisations that were interested
11 in these types of violence. And at that time the government was very skilful in
12 passing off these massacres as ethnic clashes. And they claimed that this was due to
13 opposition amongst ethnic groups. And this corresponded to what Arap Moi had
14 said, that as soon as multipartyism was restored, there would be violence.

15 So in the beginning there weren't many investigations, but the sources emerged
16 progressively, including the Red Cross, which arrived in situ almost immediately.
17 Then you had the Catholic church and the Anglican church, because the state
18 refused to take care of the hundreds of thousands of IDPs who were there at the
19 time. So you had the church -- you had the churches who welcomed displaced
20 persons.

21 So most of the information came at that time mainly from the Catholic church and
22 the NCCCK, which is an organisation of Protestant churches and which published
23 periodic documents that reported on the numbers of displaced persons.

24 The United Nations and I believe it was the UNDP started taking care of refugees
25 from a certain area, that is specifically Narok, and this led to the trickling down of

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1 some information. But they abandoned that idea because the government was
2 harassing them.

3 There was -- there were investigations later. There was the Akiwumi report and
4 many other official reports which were published after very long delays, sometimes
5 almost ten years afterwards. So these official reports also serve as a basis for
6 research on these long-standing conflicts.

7 So the Akiwumi report is something that would make it possible to understand the
8 violence from 1992 to 1997, but that violence did not have any direct impact on the
9 political landscape of the country. And this is because --

10 PRESIDING JUDGE EBOE-OSUJI: I just wanted to understand who at the time or
11 who, not even at the time, who might have reported on these events. So when you
12 said NGOs, you would have included the Catholic church, the Protestant church as
13 well as the Red Cross within what you meant by NGOs reporting on those events.
14 Is that the case?

15 THE WITNESS: (Interpretation) Apart from the Catholic church, the Protestant
16 church and the Red Cross, if I remember correctly, there were also reports from
17 Human Rights Watch and also a few reports from human rights NGOs. So we also
18 have the media that published some information about those massacres, even if this
19 information was concealed within the framework of ethnic clashes. But when you
20 read some of those articles, they provide some information on the number of victims
21 and other subjects.

22 So the information was communicated somehow, that is outside of the international
23 community -- or, rather, the diplomatic community particularly because they did not
24 fully understand what was happening.

25 PRESIDING JUDGE EBOE-OSUJI: And you also say that there was the Akiwumi

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1 report that would have retrospectively reported on those events. Is that the case?

2 If that is, are there any other reports apart from the Akiwumi reports that you would
3 say would have been a formal commission of inquiry that captured these events and
4 recorded them, even if that was done much, much later after the fact?

5 THE WITNESS: (Interpretation) There was a whole series of parliamentary
6 commissions of inquiry which documented those events. You also have reports on
7 land tenure such as the Ndungu Commission, which provided quite a good deal of
8 information, not on the massacres themselves but on the manner of distribution of
9 state land to individuals. And you could see that this was linked to the massacres.
10 So indirectly those official reports provided information. Regarding commissions
11 and their reports, we know that commissions are created to study a particular
12 subject, and this is used to appease people, because they are told to allow the
13 commission to work. And if the results of the commission report are not very
14 favourable, the reports are frequently not published or published with long delays.
15 So one cannot say that in Kenya this was totally unknown. Some information was
16 at least disclosed.

17 PRESIDING JUDGE EBOE-OSUJI: Mr Garcia, please proceed. We have two more
18 minutes to 4 o'clock? Can you -- or is it four minutes?

19 MR GARCIA: Two minutes, your Honour. I see two minutes. Just to read into
20 the record, your Honour, I see that there's been -- we haven't spelled out Akiwumi.
21 Just for the record it's A-K-I-W-U-M-I. It's at line -- page 63, line 5 and the page
22 before that as well. I'd like to break at this point. Tomorrow morning I'll be
23 starting a new line of questions for the witness.

24 PRESIDING JUDGE EBOE-OSUJI: Indeed. One second, please.

25 How are we doing with our line-up of witnesses for the rest of -- the remainder of

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1 the session?

2 MR GARCIA: I'll hand the floor to Mr Steynberg, who will be explaining to the
3 Court what is the situation at present.

4 MR STEYNBERG: Your Honour, would it be possible to do this in private session,
5 please?

6 PRESIDING JUDGE EBOE-OSUJI: Indeed, we'll do that in private session. So we
7 will excuse the witness and go briefly into private session.

8 Witness, we have come to the end of today's session. You will rejoin us tomorrow
9 at 9.30. Thank you.

10 (The witness stands down)

11 (Private session at 3.58 p.m.)

12 THE COURT OFFICER: We're in private session, your Honours.

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

14 (Redacted)

15 (Redacted)

16 (Redacted)

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- 15 (The hearing ends in private session at 4.05 p.m.)