

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 and Joshua Arap
5 Sang - ICC-01/09-01/11
6 Presiding Judge Chile Eboe-Osuji, Judge Olga Herrera Carbuccion and Judge Robert
7 Fremr
8 Trial Hearing
9 Wednesday, 19 February 2014
10 (The hearing starts in open session at 9.36 a.m.)
11 THE COURT USHER: All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
15 Court officer, please call the case.
16 THE COURT OFFICER: Thank you, Mr President. Situation in the Republic of
17 Kenya, in the case of The Prosecutor versus William Samoei Ruto and Joshua Arap
18 Sang, ICC-01/09-01/11, and we are in open session, your Honours.
19 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
20 Witness, welcome back with us.
21 Appearances remain the same?
22 MR GARCIA: The same for the Prosecution. Good morning, your Honours.
23 PRESIDING JUDGE EBOE-OSUJI: Thank you.
24 MR NARANTSETSEG: Same for the victims. Thank you.
25 PRESIDING JUDGE EBOE-OSUJI: Thank you, Mr Narantsetseg.

1 MR KIGEN-KATWA: On our part, Mr President, we are joined by one Joel Bosek,
2 Mr President.

3 MR HOOPER: We're the same. Mr Khan and Ms Alagendra have rejoined us.

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

5 Mr Garcia, please proceed. You said you have 15 minutes. You requested for 15
6 minutes?

7 MR GARCIA: Indeed, your Honours. I have no more questions - substantive
8 questions - for the witness. As I stated yesterday, the 15 minutes that I needed for
9 this morning's session were simply to plead on the introduction into evidence of the
10 expert report and two documents. So that's the only reason I needed the time this
11 morning.

12 PRESIDING JUDGE EBOE-OSUJI: All right. That is the only reason, okay, the
13 introduction of the expert report and two documents. Why don't we take them one
14 at a time. The report.

15 MR GARCIA: Indeed, your Honour. So it would be introduction of the report,
16 which is KEN-OTP-0093-0871, the translation as well. And two documents, both
17 documents I think I mentioned yesterday, but it's the document "Courting the
18 Kalenjin: The Failure of Dynasticism and the Strength of the ODM Wave in Kenya's
19 Rift Valley Province." And that's KEN-OTP-0046-0014. And also a document by
20 Jacqueline M. Klopp, titled "Ethnic Clashes and Winning Elections, The Case of
21 Kenya's Electoral Despotism." So those are documents that the Prosecution wishes
22 to tender.

23 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper?

24 MR HOOPER: Your Honour, may I respectfully suggest that Defence submissions
25 in respect of that come at the end of this witness's testimony? It doesn't really

1 matter when the particular items if they become exhibited are exhibited, but the
2 reason for that being that then the Court sees the overall testimony and any
3 references or not that the Defence might make to the documents, which might be or
4 may be not a relevant consideration.

5 PRESIDING JUDGE EBOE-OSUJI: Mr Garcia?

6 MR HOOPER: I'm merely suggesting that the consideration is deferred until the
7 totality of the evidence in respect of Mr -- or I should say Dr Maupeu and Professor
8 Maupeu.

9 PRESIDING JUDGE EBOE-OSUJI: So that is not at this point an outright objection?
10 No, you're saying we can take it up later.

11 Mr Kigen-Katwa, what is your own position?

12 MR KIGEN-KATWA: We take the same position as Mr Hooper, Mr President.

13 PRESIDING JUDGE EBOE-OSUJI: And Mr Garcia?

14 MR GARCIA: Your Honours, I leave it to the discretion of the Chamber. I'm fine
15 either way.

16 (Trial Chamber confers)

17 PRESIDING JUDGE EBOE-OSUJI: Flexibility is a good thing when we can manage
18 it. So the Chamber will -- he called this as an expert witness and we will take up the
19 matter at the end of the cross-examinations then.

20 All right. Mr Hooper, then you may -- who goes first? Is that Mr Hooper, or Mr
21 Kigen-Katwa?

22 MR HOOPER: Yes. The coin fell to me, so I go first.

23 PRESIDING JUDGE EBOE-OSUJI: All right.

24 Witness, Mr Hooper will be -- one second.

25 Mr Narantsetseg, you were about to rise.

Trial Hearing
Witness: KEN-OTP-P-0464

(Open Session)

ICC-01/09-01/11

1 MR NARANTSETSEG: Mr President, your Honours --

2 THE INTERPRETER: Microphone, please.

3 MR NARANTSETSEG: Sorry. Good morning, your Honours, Mr President. You
4 have obviously observed the absence of Mr Nderitu. So we have consulted, and
5 after having read carefully the report prepared by Mr Maupeu and also evidence
6 provided in court, the legal representatives have decided not to ask any further
7 questions -- I mean, any more questions in addition to those questions already asked
8 by the Prosecution, but at the same token we would like to notify that the next
9 witness, who is dual status, for that witness that Mr Nderitu will come to court and
10 will question the witness himself. Thank you.

11 PRESIDING JUDGE EBOE-OSUJI: Thank you very much for that indication, Mr
12 Narantsetseg. So that settles the matter of the questioning of this witness by
13 victims' counsel.

14 Mr Hooper, please proceed.

15 Witness, Mr Hooper will now ask you his own questions in cross-examination.

16 Thank you.

17 WITNESS: KEN-OTP-P-0464 (On former oath)

18 (The witness speaks French)

19 QUESTIONED BY MR HOOPER:

20 Q. Good morning. Professor, or Dr Maupeu?

21 A. Doctor.

22 Q. Doctor. Dr Maupeu. First of all, it might be helpful if you have a copy of
23 your report in front of you, if you don't have it at present, and perhaps in particular
24 a copy in English, because my understanding is that you are totally at ease with
25 reading English and working in English. And on the basis that our understanding

1 is that the report has been accurately translated, it would be helpful and timesaving
2 if we just refer to the one.

3 Now, on reflection overnight, I can say now I don't have a great many questions of
4 you today, and I think that we can probably conclude certainly my questioning I
5 hope by the second session of this morning.

6 First of all, thank you very much for your evidence. And thank you for what was
7 clearly an effort on your part to be as objective as possible. And also thank you for
8 being very straightforward in describing your own spheres of expertise, where your
9 strengths are and where they're not so strong, and in particular, of course, in respect
10 of the Kalenjin.

11 I was interested to hear yesterday a point that you spoke about towards the
12 conclusion of your evidence, and that was in respect of Mungiki. And of course
13 you are, I think we can all consider, an expert in the Mungiki group, Kikuyu group.
14 And your view yesterday that you expressed was quite clear that at the end of 2007,
15 having suffered all the depredations they did at the hands of the Kibaki government,
16 or more particular the police, 500 of them killed and all the rest of it, that by the end
17 of 2007 they were in your view and opinion a spent force and, therefore, not really in
18 a position one would conclude to conduct attacks of any size or the like.

19 Their reputation -- and I see you nodding and that's sufficient. I put your nod on
20 the transcript as it were, if I can deal with it like that.

21 PRESIDING JUDGE EBOE-OSUJI: I think he nods because he realises he should not
22 cross wires on the phone, on the microphone.

23 MR HOOPER: Yes.

24 PRESIDING JUDGE EBOE-OSUJI: So maybe if you allowed him time, we might
25 record his voice.

1 MR HOOPER: Yes, yes.

2 PRESIDING JUDGE EBOE-OSUJI: We need some gap for him to do that.

3 MR HOOPER:

4 Q. I'll give you the occasional opportunity to say something obviously, Dr
5 Maupeu, but I'm stepping over what was clearly stated yesterday and I think you
6 would not disagree with my brief summary of your view?

7 A. Yes, indeed.

8 Q. But you told us, of course, they had this satanic reputation. And that
9 reputation lived on and invested the thoughts you accepted of perhaps particularly
10 many Kalenjin youths looking on to this situation and inspired fear and rumours
11 among them. That, you clearly accept, is that right?

12 A. Yes.

13 Q. Now, your question 9 -- I say "your question," but the question 9 that was
14 posed to you, and I'm looking here at the English translation, which starts at
15 KEN-OTP-0093-1330. It's question 9. It's quite a long answer you give there. And
16 I'm looking at the third page of it, which is in the English version if you have that is
17 at 1333.

18 And you've been asked -- I'll let you get that. One appreciates particularly sitting in
19 the witness box, it's not easy rummaging around with papers. But if we look at
20 1330, question 9, you're asked: Who are the main factions in the post-election
21 violence? What were the reasons why they divided along those lines? Please
22 answer with reference to Kenya as a whole and the Rift Valley in particular, which
23 sounds rather like an exam question to me.

24 And you start off by making clear that you're not happy with the terminology, that
25 the word "faction" is a loaded word and not neutral. And in that second paragraph

1 of your answer, you state that there were three main types of actor. And instead of
2 using the word "militia groups," you use the phrase that's translated into English as
3 "violent, violent youth groups, violent youth groups."

4 And for my part I understand why you used that, and perhaps it's the preferred
5 word, "violent youth groups," because "militia" has perhaps an added connotation to
6 it. Now, violent youth groups.

7 Now, if we turn to page 1 of 333 of that document, it's 3/4 pages on and look at the
8 start of the third paragraph, "State officials," it starts, and we read in -- you talk
9 about State officials. And then you say "but the actors par excellence." Have you
10 got that bit?

11 PRESIDING JUDGE EBOE-OSUJI: Where are you?

12 MR HOOPER: I'm at page 1333, and I'm at line, line 10, "But the actors par
13 excellence," and I hope our interpreters also have copies of this document.

14 PRESIDING JUDGE EBOE-OSUJI: So we're looking at the big paragraph?

15 MR HOOPER: Yes.

16 PRESIDING JUDGE EBOE-OSUJI: That's the third paragraph down, the second
17 line?

18 MR HOOPER: Yes. It's the second complete paragraph of that page and it starts
19 "State officials." I'm looking at, "But the actors par excellence," because I'm looking
20 at "violent youth groups/militias."

21 Q. So if we have that, I'm just going to read into the transcript what's said there
22 and then take it up from there. So if you can follow it, I'm just reading it into our
23 transcript, Dr Maupeu. "The actors par excellence during this period were the
24 militias, both those linked to the opposition and those which were government
25 aligned, but the academic literature on the 2008 crisis scarcely presents any original

- 1 data on this type of actor.
- 2 A significant case in point is that of G. Lynch. For the past decade, her papers on
- 3 the field of Kalenjin politics have drawn admiration from all specialists. She
- 4 naturally devoted several papers to the 2008 post-election crisis in Rift Valley where
- 5 she dissects the causes of the election results, the triggers of the violence, and the
- 6 discourses of all the actors.
- 7 But she completely omits to deal with the perpetrators of the violence, that is, she
- 8 goes back over what the official reports produced when the country was emerging
- 9 from the crisis and studies by human rights NGOs say. This silence on the part of
- 10 the social sciences regarding the groups involved in the post-election violence is
- 11 ironic in that the researchers routinely studied the violent youth gangs."
- 12 Now, just stopping there, and if we drop down to the penultimate paragraph -- well,
- 13 in fact, the beginning of the next paragraph, because you then go on to the
- 14 Mungiki -- and you go -- having spoken briefly about the Mungiki you go,
- 15 "Researchers were no more forthcoming about the Kalenjin militias, indeed, vigilante
- 16 and militia groups that committed ruthless acts outside election periods were barely
- 17 studied. As a result, they guessed at the characteristics of these youths by
- 18 scrutinising the course of the clashes."
- 19 Now, just stopping there, in the course of your studies --
- 20 A. (Coughs)
- 21 Q. It's The Hague, I'm afraid, it does that to us.
- 22 First of all, having read the English of that, do you accept that is a fair translation of
- 23 what you said in the French?
- 24 A. Yes, that corresponds to what I wrote in French.
- 25 Q. And, indeed, you reflected that in your evidence as I recall, and indeed you

1 spoke about the lack of even more recent material.

2 And so the position that we're left in is essentially this, that in the world or the field
3 of political science research, there has been no research into what the primary actor,
4 the youth, violent youth, what -- what he says or explains his motives to be. That's
5 the difficulty, is it not?

6 A. In fact, I alluded on several occasions yesterday and before yesterday to the
7 fact that we have a real problem, because there is a lack of sources about these
8 militias, how they functioned, how they were set up, we have sources such as NGOs,
9 human rights organisations, particularly human NGOs. But these are things that
10 have been rarely considered by the social sciences specialised in militia groups,
11 but in spite of everything, even though we did not have a specialist that specialised
12 on these particular groups, we can look at other analyses on the functioning of
13 similar groups, of such groups. And such analysis come from other branches of
14 social sciences that seem to be far away from this domain, particularly the analysis of
15 the land tenure system, the structures of the land system and how it functions.
16 These are the people who tell us the most interesting things that help us to interpret
17 the situation. But they do not add any new information.

18 Q. Thank you, thank you very much. Now, I notice you go on just very briefly
19 to speak about the role of opinion leaders and, again, a term that you expanded on
20 yesterday, in your article here, in your article, in your report here you speak of
21 business communities. I'm looking at the opposite page, 1334, the fourth
22 paragraph, where you say "Throughout the country, business communities are key
23 actors."

24 And you also just dropping your eye down a few lines, you refer to reports by
25 human rights NGOs as well as those by the ICG, that's the International Crisis

1 Group of 2008, and the KNCHR report of 2008, which you say spoke of the role of
2 former Kalenjin athletes. And you also talk of several studies have highlighted the
3 influences of certain school teachers, for example.

4 And you then say this, "It should be noted that all the information we have on the
5 role of opinion leaders during the 2008 post-election violence comes from official
6 investigation reports linked to crisis recovery procedures or from NGOs," full stop.
7 And then you say this, "The information is accurate and the data factual, but they're
8 still incomplete."

9 Now, just pausing there, on reflection, it would be fair to say that as a political
10 scientist you might rely on such things, but would you concede, but, of course, we
11 don't know if the information is accurate and the data factual, unless of course we
12 know and have presented and have examined the sources of that information. It's
13 the difference perhaps between the legal and the political scientist approach.
14 Would you concede that?

15 A. Yes. Based on those primary sources from the NGOs, it is necessary to assess
16 the quality of the information and try to cross-check with several NGOs in order to
17 determine whether the information is consistent so as to have information coming
18 from various regions and try to see whether this information matches each other.
19 So there is a great deal of work of assessment of sources which has to be done. And
20 those NGO sources of course cannot be accepted on their own. So you have to put
21 them in perspective, put them into context, and assess the quality.

22 Q. And one issue, of course, is because of the relative lack of research, for
23 example, amongst the armed violent groups, that NGOs are -- I'm sorry -- NGOs are
24 really having to often eat, as I can put it this way, the same dish. In other words, it's
25 a self-perpetuating difficulty, isn't it, because once you get some item of bad

1 information into the circuit as it were, it can corrupt and alter views, which is why
2 you've made this point, is it not, that you do need objective research? And that
3 hasn't taken place, not certainly to a standard that you would like.

4 A. Yes. What's lacking at the moment is data, prime resources, and analysis.

5 With regards to the human rights NGOs, you have to explain the situation in Kenya.

6 It's very particular with regards to other countries in Africa. There is an

7 extraordinary wealth of this in this milieu, in this environment. You don't have one

8 type, one single type of human rights NGOs. You have a very great diversity of

9 organisation of sources with, in particular, human rights NGOs, for example, very

10 traditional, classical types inspired from western structures, but at the same time you

11 have structures which come from churches as well.

12 The churches with regard to this violence have given a lot of information, because

13 they're right at the heart of the process. They are the ones who receive the

14 displaced people. They're at the heart of this process here. And from them we

15 have a massive amount of information. Sometimes they don't give it directly, it

16 goes via other human rights NGOs.

17 So there is a whole work to get to know that environment sufficiently in order to see

18 who is providing the sources, are they reliable. In particular, do those who have

19 given the sources, do they really know the field? When there are people from the

20 religious area who took in the refugees, they have information which is completely

21 reliable. It would seem to me very often that that would give an indication.

22 Now, if they go through another NGO, it's different. They might do so because of

23 political reasons, perhaps they don't want to pass on the information directly.

24 Q. I'll give you an example if I may, for example, just take one example, on page

25 1337, looking at the fourth line from the bottom, and you're talking about some

1 communities form militias which attack their own neighbours. And then you go on
2 to say this, "Thus, several studies" -- and help yourself to a glass of water. Don't feel
3 constrained by being in court in that way. It's not nice having a cough. "Thus,
4 several studies have highlighted the fact that initiation ceremonies for young people
5 transitioning into adulthood were apparently used for training and indoctrinating
6 these people," and you quote there that the ICG report of 2008 and the OHCHR
7 report of 2008.

8 So there is a statement that's been made. We don't know, of course, looking at that
9 whether it's true or not, but the footnote in the OHCHR report refers to this
10 information, further information, that there were reports that the initiation
11 ceremonies had been moved to October and November instead of December in order
12 to train up their militia. Now, let's just pause there.

13 So that's the kind of information that's now being used to justify that statement, but
14 that information, you see, could be wholly wrong, as it is in that case, I suggest.

15 We've certainly heard no evidence here of ceremonies in October or November or a
16 change like that.

17 So do you see the point I'm making? Once it starts, once it starts moving, that kind
18 of information, it can start to emerge here and there, and it becomes accepted as a
19 fact; whereas the original source perhaps may not have been examined as well as
20 perhaps you would have liked to have examined it if you were researching, perhaps
21 looking for corroboration, looking for -- almost taking a legal view of it. Do you see
22 the point I'm making?

23 So from time to time in these reports and in your report, you yourself pick up on
24 information. You don't know the source. You don't know the truth and accuracy
25 of it. But for a political scientist, making a report, it sufficiently, appears sufficiently

1 reliable to include in a report. There is the difficulty, isn't there? Do you see the
2 difference between the political scientific method perhaps and the legal method?
3 MR GARCIA: I object, your Honour, just on the form, the manner in which the
4 question is put. The question has lasted about two or three minutes. It contains
5 about three or four different propositions. Mr Hooper has incorporated in some of
6 those propositions his own view on the evidence. I think it's a bit complex, and I
7 think if we want to further the debate and get to the determination of the truth and
8 what the witness knows and doesn't know, the questions should be a bit shorter and
9 contain one proposition or two at most.

10 PRESIDING JUDGE EBOE-OSUJI: Not two. One is best. Objection is sustained.

11 MR HOOPER:

12 Q. Yes, sorry. It was a multi -- a multifaceted question, but you get the point.
13 And what, what would your comment be in terms of my concern?

14 PRESIDING JUDGE EBOE-OSUJI: Why don't you ask the question again. The
15 objection is sustained. So that question needs to be redone, redone.

16 MR HOOPER: I just noticed that Dr Maupeu was nodding his head at me, and I
17 was trying actually.

18 Q. The problem, Dr Maupeu, is a statement of facts such as that could be -- leave
19 aside whether it's right or wrong, it could be right, it could be wrong. We don't
20 know unless we're in a position to examine the source. That's I suppose
21 self-evident, isn't it?

22 A. Yes. Well, I understand your argument. You're referring to something
23 which is very real. When you have a primary source, there is an infinite repetition.
24 It's repeated over and over again, the same thing, even if we don't know if the
25 primary source is information which is reliable, yes, there is that phenomenon.

1 That's very real and it's undeniable.

2 But there are also sources that appear, for example post crisis, there were a whole
3 series of commissions which interviewed a lot of people, and, therefore, through
4 these interviews they carried out they brought new information, new primary
5 information and sources, not linked to what had been said previously in the reports
6 which had been made at the time, I feel like the hottest time in the crisis, when the
7 ICG Human Rights Watch, et cetera, when they came out.

8 There are some reports to the best of my knowledge linked to these witness
9 interviews which refer to that, but they don't give precise information. Where you
10 have names that are given, these are names with regards to places or where these,
11 allegedly these ceremonies took place, the dates, they are in reports of the human
12 rights commission, Kenyan National --

13 Q. K -- you caught me on it now. KNCHR, Kenya National Human Rights
14 Commission --

15 A. That's it, that's it indeed.

16 Q. -- which we've heard quite a lot about in this case. There is a very good
17 example, is it not?

18 A. Oui.

19 Q. It's taken, it's gone out, seen people and made a report based on what it's
20 heard from those people, is that right?

21 A. Yes.

22 Q. And that's, in fact, a principal source I see in your report, is it not?

23 A. It's an important source, yes.

24 Q. Thank you very much. Very well. Now, I move from methodology if you
25 like, and I just want to go through a little bit about the history or particularly the

1 political history that you touched on yesterday and thank you for your help in that.
2 And I want to go back and start with the very early years. And much of my source
3 material, my source material comes from Daniel Branch, who appears in your
4 bibliography, Gabrielle Lynch of course, Ms Wrong, who is your named book. And
5 you're nodding in recognition of all those names, are you not, just for the transcript.
6 In the early years, 1963, Kenya became an independent Sovereign State, and it
7 became an independent Sovereign State with a constitution. And here is my
8 question: That constitution had been a constitution that had been agreed between
9 the KANU and KADU elements principally; is that right?

10 A. That's correct.

11 Q. And that constitution was essentially a federal constitution?

12 A. Yes.

13 Q. And when we talk about majimbo, we use the word "majimbo," all that
14 "majimbo" means is that it's a Swahili word meaning regional or based on the word
15 in Swahili for "region;" is that right?

16 A. Oui.

17 Q. So if I'm a Kenyan hearing "majimbo" being used, I'm hearing the phrase as if
18 it were regionalism or region. Very well.

19 Now, the first president of Kenya as we know was Jomo Kenyatta, and is it right to
20 say that he set about with those around him at dismantling that agreed federal
21 constitution?

22 A. Yes. You used the terms of concern, but it was a constitutional formula
23 which was negotiated with the colonial power which was imposed on KANU at the
24 time. That's how they felt it at least. So this federal form, this was not appreciated
25 by KANU, and so they obtained a majority. When they obtained a majority, they

1 got rid of this constitutional formula which had been imposed by the colonial power,
2 and they put into place their own vision of the constitutional system as they
3 understood it.

4 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, you said it was an imposed
5 arrangement, imposed by the colonials as they were leaving, and it did not find
6 favour with KANU. Could you also explain whether there were other citizens of
7 Kenya, maybe KADU, who also did not find the arrangement of federalism a happy
8 one that was imposed. Can you account for how all Kenyans felt at the time of the
9 "imposition," quote and unquote, of that formula of federalism? How did Kenyans
10 in general feel about it at the time?

11 MR HOOPER:

12 Q. If you can perhaps?

13 A. Actually, the issue is basically what is the vision that the population had of
14 the constitutional system as they would have wished it to be.

15 PRESIDING JUDGE EBOE-OSUJI: In relation to federalism, the federalism of it at
16 the time, which you said was imposed, yes.

17 MR HOOPER: I'm wondering if I could just ask a few more questions, because in
18 fact I was coming to that, but in a particular way?

19 PRESIDING JUDGE EBOE-OSUJI: If he can just do this. Yes.

20 Witness, can you respond now, and then counsel will pick it up later, perhaps some
21 including questions arising from your answer.

22 THE WITNESS: (Interpretation) So you have to explain that decolonialisation was
23 done in very particular circumstances in Kenya following a war, a very violent war,
24 a horrific war. So the negotiation of the constitutional formula is done under
25 circumstances which are particular, under pressure. So the British tried to develop

1 a formula which would satisfy their interests, the interests of certain groups in
2 society. And it's true, it wasn't the vision that an elite had; Kikuyu-Luo elite had.
3 They saw or they hoped for a formula which would make it possible to have a lot
4 more power than the federal system.

5 In a federal system, this would divide up the power, and that would make it possible
6 for there to be a multitude of different areas of power. That's it. The elite or a
7 certain elite from KANU thought that you had to develop a formula with a State, an
8 executive State, which really was a magnet of power and could develop its policies
9 and politics, because the federal form wouldn't allow that.

10 And it's true that a federal system was firstly to serve the small groups, first of all.

11 So it wasn't the Kalenjin. It was people from the coast as well. It was pretty much
12 all, a whole series of communities. They feared being marginalised by what they
13 were experiencing in the great wider community.

14 PRESIDING JUDGE EBOE-OSUJI: What I'm trying to understand is if you are able
15 to -- I'm sorry, I see you have been coughing. At this point I need to indicate it on
16 the record in view of some comments made about that. And I'm sorry about that.
17 If you need more time, let us know.

18 What I'm trying to understand is how, if you can help me at this stage understand it,
19 how Kenyans in general to the extent that you can assist felt about the federalist
20 aspect of the 1963 constitution that Mr Hooper introduced in his testimony -- in his
21 questions to you. How did the Kenyans in general feel about it? You have
22 mentioned Kikuyus, you've mentioned Luos, you've mentioned elite. I also want to
23 understand how Kalenjins and the general population quite apart from the elite felt
24 about federalism in the constitution of 1963.

25 THE WITNESS: (Interpretation) We don't have precise sources with regards to the

1 opinions of the people. You can estimate them with regards to the position taken of
2 their elite who are meant to represent them, and through that what can be said is
3 that the Kalenjin were very firmly behind the idea of a federal organisation, and the
4 issue at stake was very clearly for them to try and get customary rights on their
5 lands, and it was through the federal formula, they would they hoped.

6 PRESIDING JUDGE EBOE-OSUJI: You also said "people of the coast." How did
7 they feel about it?

8 THE WITNESS: (Interpretation) The coast too, they were in favour of a federal
9 solution.

10 PRESIDING JUDGE EBOE-OSUJI: Thank you.

11 Mr Hooper, please.

12 MR HOOPER:

13 Q. Now, perhaps I can tempt you to a Strepfen for coughs and colds, which may
14 help.

15 A. No, no, don't worry.

16 Q. It probably wouldn't go down with a French taste, I dare say.

17 PRESIDING JUDGE EBOE-OSUJI: All right, Mr Hooper. He's graciously said he
18 can proceed.

19 MR HOOPER:

20 Q. If you change your mind, do let us know. We have quite a supply on this
21 side. But coming back right to the constitution, the Mau-Mau war had led to
22 terrible depredations being inflicted on the Kikuyu people, is that right?

23 A. Oui.

24 Q. And estimates of Kikuyus killed -- you nodded. Can we just have a "yes" or
25 "no." Your answer was "Yes." Can you just say "yes" or "no"?

1 A. Yes. As an estimate, estimation goes around the figure of 10,000 people who
2 were killed.

3 Q. Though I've seen estimates as high as 50,000, but whatever, it's still a large
4 number of people. As you described in your evidence yesterday or the day before,
5 it was a war of liberation, but had an ambiguity about it inasmuch as it was also a
6 civil war amongst the Kikuyu, is that right?

7 A. Indeed.

8 Q. Indeed, the figures I've seen are that only about 60 whites were killed in the
9 Mau-Mau uprising, to give you some idea, give us some idea of the imbalance there.
10 But with independence it would be right to say that the Kikuyus felt a degree of
11 entitlement to as it were having the larger share of the cake. Would that be a rough
12 but fair reflection of their position?

13 A. Well, that's -- well, there was a certain legitimacy, they considered that they
14 had a certain degree of legitimacy due to their fight against colonialism. But at the
15 same time the fact that they were so numerous, their demographic force, the fact that
16 the way they were in the economic system, their position, there were multiple factors
17 that meant that the Kikuyu were at the heart of the process in the negotiations for
18 independence.

19 Q. Indeed, by the time of liberation and independence, it was probably the
20 Kikuyus, despite that war, who had perhaps benefited the most from education and
21 other facilities under the previous colonial government, would that be right?

22 A. Yes, the fact that they were close to the capital, that's true. They also suffered
23 a lot from colonialism, the fact that there were lots of different lands taken from
24 them. So they adapted to the new structure, the new contingency more quickly
25 than other communities.

1 Q. Now, KANU, the Kenyan African National Union has developed over the 10
2 or 20 years prior to independence, I don't want to go into that or their history,
3 became primarily a Kikuyu organisation, is that right?

4 A. Well, there were an elite that came from different ethnic groups, but it's true
5 that there was a Kikuyu preponderance. Everything depends on the roots that you
6 have in KANU. Well, yes, it could be said that there was a strong hegemony of
7 Kikuyu.

8 Q. And going ahead over the next 50 years until 2002, KANU became the
9 primary political vehicle in Kenya and indeed became the one party at the time
10 when Kenya developed a one-party State constitution, is that right?

11 A. Yes. Well, you have to make a distinction between different periods.
12 Kenyatta, the first president, he distrusted the partisan structures, party structures.
13 He tried to avoid using these parties, and he managed the country from provincial
14 administration. And the parties were hardly institutionalized. It was almost an
15 empty structure. And it was basically Moi who restructured the parties and used
16 them as a political machine from the '80s onwards.

17 Q. Now, going back to this newly formed Kenya with its federal constitution and
18 KADU, the Kenyan Africa Democratic Union, David Anderson in his book describes
19 the formation of KADU as born out of fear, that is, born out of fear of a Kikuyu-Luo
20 dominance; is that right?

21 A. Yes.

22 Q. And in the negotiations, the constitutional negotiations, they and the other,
23 the KADU grouping, a very diverse grouping of people other than Kikuyus and
24 Luos wanted and struggled to have a federal constitution that they perceived would
25 protect their individual interests and protect them from essentially a Kikuyu-Luo

1 power. Would that be right?

2 A. You can see it like that.

3 Q. And one of the first things that Kenyatta did once Kenya was independent --

4 PRESIDING JUDGE EBOE-OSUJI: One second. My French is not very good, but I
5 do understand a bit of it. When the witness said "au revoir comme ça," does it mean
6 you can say it like that or we can see it like that?

7 THE INTERPRETER: One can see it like that.

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

9 THE WITNESS: (Interpretation) I would put it like that. It's acceptable. Yes, it's
10 a way of summarising things, yes. To see what is coming afterwards, put it like
11 that.

12 MR HOOPER:

13 Q. All right. It's a very southern French attitude, if I may say so.

14 Now, so one of the first things that Kenyatta did in the newly formed Republic of
15 Kenya was to work at dismantling that agreed constitution and replacing it with
16 another constitution, is that right?

17 A. Yes.

18 Q. And he achieved that in 1969 when he replaced it with, instead of a federal, a
19 unitary system. I'll go through the list briefly. Is that right?

20 A. Yes, that was even done before. To my knowledge it was in '64 that people
21 went to a unitary State.

22 Q. He moved from a bicameral legislature to a unitary one; is that right?

23 A. Yes, yes.

24 Q. He moved from a parliamentary to a presidential system; is that right?

25 A. Yes.

1 Q. And he also reduced the rights contained in the bill of rights?

2 A. Yes.

3 Q. Under Kenyatta, he took considerable presidential powers operating as
4 you've just said really without a political party structure and centralising power very
5 much in the hands of a Kikuyu elite. Do you agree?

6 A. I cannot say power was in the hands of the Kikuyu elite. There was a
7 Kikuyu-isation of the administration. But at the civil -- at the senior level of the
8 administration, there were many people from other ethnic groups. There was a
9 certain degree of Kikuyu domination, but this took account of a sort of distribution
10 of departments. That was more or less how the system worked.

11 Q. But is it right to say that, for example, the key ministers were Kikuyu?

12 A. Most of the key ministry during certain periods were occupied by Kikuyu.

13 Q. Half, almost half the permanent secretaries in the civil service were Kikuyu?

14 A. It depends on the periods, but I can say yes.

15 Q. Daniel Branch produces a figure of half of the top salaried civil servants, 222,
16 half of them were Kikuyu. Do you accept that figure?

17 A. Yes. But you can also ask what the date -- the period was. There was a
18 period when that phenomenon was very strong. It is true it was the end of the
19 Kenyatta reign the Kikuyus had a stronghold on the regime.

20 Q. Oh, yes, indeed. It was a progression of taking power by an elite. The
21 army, for example, had always been Kamba run, but that became Kikuyu run. The
22 GSU was established and became Kikuyu run. That's right, isn't it?

23 A. Yes.

24 Q. Now, you've talked about land distribution and significant migration from
25 Central Province, out of Central Province into areas that had previously been seen as

1 traditional land of the Maasai or various Kalenjin groups. You spoke about that
2 yesterday. And indeed by 1970 I think it's again Daniel Branch who describes it as
3 becoming a flood. Indeed, your figures yesterday supported that view; is that
4 right? This was massive, massive emigration out of largely Central Province into
5 these other areas?

6 A. I would like to point out that the figures I gave yesterday, for example, the
7 500,000 people who migrated to the Rift Valley Province (indiscernible). In 1970,
8 estimated a number of people who migrated from '62 to '70, this is 500,000 people,
9 but it was not only Kikuyu. We do not have precise figures here that gives us the
10 distribution between the Luos, Luhyas and Kikuyus. We know that there was a
11 dominance of Kikuyus in the distribution of land within the settlement schemes and
12 land buying companies, but we do not have any precise figures.

13 Q. Indeed. And as far as land buying companies are concerned, basically for
14 example there would be perhaps a Kikuyu society that -- perhaps if you would just
15 explain what we mean by that so that we better understand?

16 A. The land buying companies were more Kikuyu, because in order to set them
17 up you needed to have contacts at the summit of the State so as to use seven --
18 certain bank services and so on. For political reason, the fact is that most of the --
19 many of the land buying companies were quite frequently Kikuyu in the '70s.

20 Q. And indeed, again a Daniel Branch figure, he provides a figure in terms of
21 loans - industrial loans -- to -- of all industrial loans in 1964 to 66. 64 per cent of
22 those industrial loans were to Kikuyus and 44 per cent of commercial loans were to
23 Kikuyus. So in order to buy land you need the money, but the tax as it were -- well,
24 what they were.

25 So obviously this history as you --

1 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, has he -- he needs to react to the
2 evidence, as it were, you've given --

3 MR HOOPER: Yes.

4 PRESIDING JUDGE EBOE-OSUJI: -- from somebody else.

5 MR HOOPER: Yes.

6 Q. The 64 per cent, 44 per cent figures of loans, you seem to be agreeing?

7 A. Yes, I agree with your sources. It is obvious that the sources brought
8 together by Daniel Branch are quite judicious and reliable.

9 Q. And as against all the other provinces or areas of Kenya, Central Province --
10 perhaps because of course Nairobi is there as well, but Central Province had
11 superior education and health facilities, strikingly superior indeed to many areas of
12 Kenya; is that right?

13 A. Yes.

14 Q. And so, as you were in fact saying yesterday, all this really conspired to bring
15 about a high level of resentment really amongst groups who weren't benefited --
16 benefiting and who were -- well, who weren't benefiting. That would be right,
17 wouldn't it?

18 A. Well, one can think so, but that was not expressed at that time through
19 demonstrations and other means. One can deduce that, but it was not expressed
20 through political actions, or very clear political discourses. Is it because maybe the
21 power, the authorities, dominated the opposition? Well, one can say that some of
22 the opposition and even some Kikuyus were confined to certain areas by a regime
23 that was an authoritarian one.

24 Q. So we move on from independence in 1963 through the Kenyatta years and
25 this assuming of greater and greater power by a particular group, and eventually

1 after a degree of illness Kenyatta dies in August of 1978; is that right?

2 A. Yes.

3 Q. And perhaps to everyone's surprise it's Daniel Moi who becomes the new
4 president succeeding him; is that right?

5 A. Yes, it was provided for in the constitution. He was the vice-president, so
6 quite logically he took over power as the conventional constitutional rules that were
7 followed.

8 Q. But there is some evidence that there at that time was a plan to take over
9 power by force. With the Sabaot land army and the like, there was certainly a
10 Kikuyu interest, was there not, to --

11 A. Apparently you are alluding to the fact that there was a faction close to the
12 regime that would have wanted to prevent the passing over of power to Daniel Arap
13 Moi. So there was a series of people close to the Kiambu elite who made a failed
14 attempt to prevent the presidency being passed on to Daniel Arap Moi.

15 Q. Well, Moi takes over power and by degrees he takes over more and more
16 power essentially, and eventually until he retires just prior to the 2002 election; is
17 that right?

18 A. Yes.

19 Q. And for many people his regime was -- had the hallmarks of corruption and
20 the imposition of fear in Kenya?

21 A. Yes. Yes, in fact particularly in the '80s Daniel Arap Moi had put in place a
22 strong authoritarian regime, a Police State which persecuted the opposition which
23 was really diminished. Yes, indeed he reigned through fear.

24 Q. As you were saying yesterday, his authoritarianism extended in fact to the
25 Kalenjin people as well? You nod and that's a "yes" as we heard yesterday.

1 A. Yes, of course it was crucial for him to ensure that the elite of his community
2 should follow him, that there should be no dissidents.

3 Q. And when we talk of his community, we might in fact be mistaken to use the
4 identifier of Kalenjin to describe them, identifier being your language I think,
5 political science language, Kalenjin as an identifier, but as you pointed out in your
6 evidence it includes subgroups within it who are actually mutually antagonistic and
7 they don't necessarily all get on. That's right, isn't it?

8 A. Yes, the Kalenjin is a recent identity that brings together a diverse group of
9 people. It functions a little bit like Russian dolls, because in each identity you have
10 other sub-identities, and so at any one point a political elite would mobilise some of
11 those identities.

12 In Mount Elgon you had a conflict between two subgroups, so you have overlapping
13 identities, imbricated identities, and the Kalenjin is made up of all these multiple
14 identities.

15 Q. I think we may have had the subgrouping provided earlier, but maybe not
16 and so let me just - again for the sake of the transcript in our case - just go through
17 with you.

18 PRESIDING JUDGE EBOE-OSUJI: What do they have in common, Mr Hooper, that
19 would make it possible for all these subgroups to come together? Maybe you can
20 explore that.

21 MR HOOPER: I will. Can I just nominate the subgroups.

22 Q. I'll just read them out and you can tell me if that's correct at the end. The
23 Nandi, the Kipsigi, the Tugen, the Keiyo, the Marakwet, the Sabaoat, the Pokot and
24 the Tere.

25 A. Pokot.

1 Q. Pokot?

2 A. Yes.

3 Q. And the Tere. And I'll provide the spelling for the transcribers during the
4 break, if they need it. So there's eight groups there.

5 Now, most of them are pastoralists, that's something they have in common, but not
6 all of them; is that right?

7 A. I would say agro-pastoralists.

8 Q. Right. And they made their way into the area that they inhabited 6 or 700
9 years ago as separate tribal groups. Each of those groups is broken into clans.
10 They have a similar but not the same language between them, but it has strong
11 similarities. Some groups find it harder to understand others. And what brought
12 them together was I suppose that background, is that right, and particularly under
13 Moi as a young man, seeking a political platform perhaps, a grouping of people that
14 were given the name Kalenjin? Kalenjin in fact stands for --

15 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, one at a time. There are so many
16 propositions there.

17 Witness, you can now -- can you let him --

18 MR HOOPER: Yes.

19 PRESIDING JUDGE EBOE-OSUJI: Okay. Can you begin? Mr Hooper has
20 indicated certain characteristics which he says might have brought the groups
21 together. Can you react? Do you agree with him on all that, or do you have
22 disagreement or comments?

23 THE WITNESS: (Interpretation) Yes, I agree with you to the extent that this was a
24 federation of groups that came together with a political objective; the political
25 objective of becoming a force that would be influential. They understood that

1 separately they wouldn't have any great capacity, any great influence, and in fact
2 there were certain political leaders, including Daniel Moi, but he was not the only
3 one. They understood that there would be a possibility to bring these communities
4 together. It is true that they had a common interest, that is to reacquire their land
5 rights, and this was the original source of their understanding which later on was
6 frittered away.

7 PRESIDING JUDGE EBOE-OSUJI: But quite apart from the political consideration
8 that may have brought them together, what about the ethno-cultural elements that
9 Mr Hooper indicated, similarity in the language, way of life and all that? Can you
10 comment whether there was enough of that to explain that confederation of different
11 ethnic or sub-ethnic groups?

12 THE WITNESS: (Interpretation) Yes. These communities that shared common
13 land ownership, they were both in competition and co-operation. Depending on
14 the periods, people moved from one identity to another. So they had common
15 practices, particularly relating to land use, so it was easy to work together, but
16 progressively there was an evolution of the way of living of the various communities
17 which created differences between the various subgroups. So progressively their
18 ways of life became slightly different, which undermined that common identity and
19 undermined as well all the hard work that had been done to make them understand
20 that it was in their interest to work together.

21 MR HOOPER:

22 Q. There were also powerful warrior people, particularly I understand the Nandi
23 and the Kipsigi, particularly the Nandi. We hear about the Maasai a lot, but in fact
24 the warrior group par excellence in that area was in fact the Nandi traditionally; is
25 that right?

1 A. The Nandis became very well-known at the time the territory was conquered
2 by the British. They were the most violent, the most active, in trying to prevent the
3 British from acquiring those areas. So they have been known to be great warriors in
4 the past, and this was revived - this notion was revived - from the years 1990 to 2000.

5 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, are the Maasais -- do they come in
6 within this larger umbrella group "Kalenjin," or are they out of it?

7 MR HOOPER: No. No.

8 PRESIDING JUDGE EBOE-OSUJI: All right.

9 MR HOOPER: No, they're out of it.

10 Q. And you agree with that? Indeed, for example, Mueller, or was it Klopp?
11 Mueller. I mean, she studied -- you gave that example yesterday. She studies the
12 Maasai around Naivasha, that area there.

13 A. Oui. Oui. Oui.

14 Q. So the Maasai come -- the Maasai basically inhabited that part of Kenya that
15 we see between Central Province and the highlands above Nakuru; would that be
16 right?

17 A. Yes, the various Maasai clans occupied that entire area. This was their
18 natural area of influence. It is of course an identity that is totally different from the
19 Kalenjins, but politically Daniel Arap Moi understood that there were common
20 interests to be developed. So he tried to develop that identity of Kamatusa,
21 Kalenjin, Maasai and Samburu and another group.

22 Q. I'll come back to this particular area. Of course, the Kalenjin's area, the
23 Nandi and Kipsigis area in particular, very much came into focus when the British
24 colonialists built their railway from Mombasa up into Uganda and it passes through
25 Nandi and Kipsigi territory. That's when there were four or five years of war, I

1 think?

2 A. That is correct.

3 Q. And in fact the Nandi put up the greatest opposition to colonialism of any
4 group I think within -- within Kenya, more so than any other group, in terms of how
5 long they fought and resisted the colonialists?

6 A. That is to the colonial power during the conquest at the beginning of the 20th
7 century. In any case, the population could not have any strong opposition because
8 these people were coming out of a terrible period of famine and epidemics and so all
9 the communities of these regions were very weakened. So the British arrived in this
10 territory, which had been ravaged by natural catastrophes. This meant that
11 resistance to the conquest was relatively weak, but it is true that the Nandis
12 succeeded in putting up a great deal of opposition.

13 Q. And I'll come back to the Moi years, but after Moi amongst many of the
14 Kalenjin people there was a sense of great shame at what Moi had done; is that
15 right?

16 A. That is what Gabrielle Lynch appears to state.

17 Q. They were appalled at, as it were, the reputation that he had sort of given
18 them, and as a reaction to that, as Gabrielle Lynch points out, there was an effort on
19 the part of Kalenjins to invest in cultural entrepreneurship, as you would put it,
20 through developing a greater sense of community amongst the Kalenjin as you told
21 us in fact yesterday; is that right?

22 A. Yes.

23 Q. Just as we come up to the break and a bit of relief for you, I'll just go through
24 some of the things that she and others have identified. There were student
25 associations, there was the Kalenjin language classes, a reaching out to expats, a

Trial Hearing
Witness: KEN-OTP-P-0464

(Open Session)

ICC-01/09-01/11

1 diaspora group, website, the EMO Foundation, and you'll agree that these all
2 features that you've read about or are familiar with; is that right?

3 A. Yes.

4 MR HOOPER: And these were all occurring in the years 2000 leading up to 2007,
5 this emphasis on a sense of community, and I see the time.

6 PRESIDING JUDGE EBOE-OSUJI: Witness, before we rise, there was a question
7 that Mr Hooper had asked you and the question was that Kalenjins were -- he put
8 the proposition that Kalenjins were rather embarrassed about Mr Moi's regime and
9 what it had done and you said, "That's what Gabrielle Lynch says." What about
10 your own views on the matter? Do you share Gabrielle Lynch's views on it, or
11 would you rather defer it to Gabrielle Lynch whom Mr Hooper had cited?

12 THE WITNESS: (Interpretation) In fact, Gabrielle Lynch sort of qualifies that
13 assertion by explaining that in the '90s there was already preparation for the
14 after-Moi era. So you had a lot of elites from the various Kalenjin groups preparing
15 that succession and trying to envisage their own situation after Moi would have left.
16 So there was a sort of cultural renaissance, but there was a lot of work also at the
17 social and economic levels. You had all these elites trying to work together based
18 on what she describes to us. So there was a lot of dynamism within the civil society,
19 particularly in the two most popular subgroup -- popular subgroups, the Nandis
20 and Kipsigis.

21 PRESIDING JUDGE EBOE-OSUJI: We'll leave it there for now and take our
22 morning break.

23 MR HOOPER: Thank you, Doctor.

24 PRESIDING JUDGE EBOE-OSUJI: We will come back at 11.30. Court will rise.

25 THE COURT USHER: All rise.

1 (Recess taken at 11.01 a.m.)

2 (Upon resuming in open session at 11.35 a.m.)

3 THE COURT USHER: All rise.

4 Please be seated.

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

6 Mr Hooper, please.

7 MR HOOPER: Yes, thank you.

8 PRESIDING JUDGE EBOE-OSUJI: Are you move -- you were onto a subject before
9 we left, before we adjourned. Are you done with it? Are you moving on to a new
10 area?

11 MR HOOPER: Not quite.

12 Q. That's the subject of the regeneration, as it were, of Kalenjin cultural interest,
13 if I can put it like that. Again, just for the record, the word Kalenjin I'm told means
14 "I say to you." And as I understand it, Kalenjin, meaning "I say to you," would be
15 understood by all the groups who make up the Kalenjin identifier. Again, do
16 you -- do you accept that?

17 A. Yes.

18 Q. Thank you. Amongst the cultural entrepreneurs, if we like, there's the Emo
19 Foundation, E-M-O, which Gabrielle Lynch refers to too as being a Christian based
20 foundation. Do you know anything about it?

21 A. There is no indicator that that is the one given by Gabrielle Lynch, but indeed
22 this foundation comes up constantly in the discussions on this cultural renewal of
23 the Kalenjin outside the Moi regime.

24 Q. And one of the steps in this seeking to regenerate Kalenjin

25

1 society that was done was the formation of a council of elders, a council of elders
2 which hadn't pre-existed and which again Gabrielle Lynch states was -- came into
3 being in 2009. Again, do you -- do you accept that?

4 A. Yes. With regards to the dates, you have to know that in all the communities
5 in Kenya there were council of elders that were set up. They appeared as
6 assemblies of prominent people aiming to say what perhaps good representation of
7 the community could be. Not just Kalenjins, but that's found in other communities
8 as well.

9 Q. Yes, indeed. But, in particular, that it was founded, as she says, in 2009.
10 That is, of course, after the -- after the events. Would you accept that?

11 A. Yes. I trust Gabrielle Lynch completely, and I can't say the contrary.

12 Q. Now, you mentioned yesterday Koitalel, that's K-O-I-T-A-L-E-L, Koitalel
13 Arap, A-R-A-P, Samoei, S-A-M-O-E-I, who was a prominent Nandi figure during the
14 Nandi resistance against the British. And indeed you say he was a prophet or a
15 seer, a seer. I don't know how that will translate into French. Sort of a get a fix, I
16 suppose. Someone who might indicate when to plant crops or when to go against
17 the British, things like that, and wasn't, as you say, he wasn't a royal figure. We
18 thoroughly agree with that.

19 In fact, one of the features of these groups is their egalitarianism in a way and with a
20 distinguishing feature being that of the age group and age. That's often how many
21 of these systems -- anthropologically systems have developed, particularly amongst,
22 is this right, the pastoral communities?

23 A. Yes. There were divisions by age, generational system and other such
24 divisions.

25 Q. And indeed Arap Samoei was shot and killed by a British officer in the late

1 1890s. British officer was called Colonel Meinertzhagen,
2 M-E-I-N-N-E-R-T-Z-E-R-G-H-E-N (sic), which doesn't, I must say, sound very
3 English to me, but there we are. And so he is obviously a revered figure in the
4 history of resisting oppression among -- well, among all Kenyans, actually; is that
5 right?

6 A. You have to know that there are different communities -- different
7 communities in Kenya. They've got their own figures of resistance since the
8 colonial occupation. The Kikuyu as well, they have equivalence of
9 figures -- resistance figures who resisted this power, and their memory -- and that
10 memory of them is reactivated.
11 Of these national figures, I wouldn't be able to say that, but certainly with regards to
12 each community, each tries to find figures like that, strong figures who make it
13 possible to incarnate a fight against an external power.

14 Q. Indeed. Now, if we go back to the Moi years -- and we've said about him as
15 being an oppressive regime. In December 1991, as occurred in many parts of Africa,
16 multipartyism came about often imposed by outside powers and interests; is that
17 right?

18 A. Well, there was a happy meeting of a demand from certain sectors of the
19 population in Kenya and also international factors as well, such as the fall of the
20 Berlin Wall, change of international politics of the western countries, which meant
21 that the multiparty claims were progressively imposed throughout the countries in
22 sub-Saharan Africa.

23 Q. And you spoke yesterday of violence in the Rift Valley, and in particular in
24 and around Nakuru and up to Molo, that sort of area; is that right?

25 A. Yes.

1 Q. And the general theory is that this was, in fact, ethnic violence being used by
2 the State?

3 A. Yes.

4 Q. And again, as I think Mueller states, "Little is known about the Kalenjin youth
5 who participated in the violence and the extent to which they responded to pressure
6 or payment or their own prejudices and resentments."

7 It's again an area that's -- as you said in your own evidence, was little -- little known.

8 A. Yes, indeed. We know relatively little with regard to the militia at the start of
9 the '90s and the micro-local factors which made certain places have greater violence,
10 where violence took place to a greater extent than elsewhere.

11 Q. Well, in the 1992 election Moi is re-elected; is that right?

12 A. Yes.

13 Q. Five years on, the next general election 1997, and you spoke a little about that
14 yesterday. Just pausing there, is it right to say that the worst violence in '97 was in
15 fact in Coast, in Coast Province?

16 A. Yes, it was in '97. You had, well, the most media coverage of this tension
17 because it was the Coast, and the Coast -- the media were there as well, and there
18 were around a hundred deaths, a 100,000 displaced persons. I don't know if we can
19 compare the different tensions that there were in the country and make a
20 competition with regards to the number of dead, but at the same time, in Marsabit
21 you had 200 deaths. So it's not the only place by any means where there were
22 tensions, but it was the tensions that received the most media attention certainly.
23 That's undeniable.

24 Q. And Moi retires in 2002; is that right?

25 A. Yes.

1 Q. That's after what, 23 years or so as president?

2 A. Yes.

3 Q. He was -- fell within the Kalenjin grouping, but he was himself a Tugen; is
4 that right? T-U-G-E-N.

5 A. Yes.

6 Q. And again, as you touched on, in your evidence yesterday, the Kalenjin as a
7 whole, many of the groups felt that they hadn't benefitted as much as they fairly
8 should have done during the Moi years; is that right?

9 A. Yes. Undeniably there was a frustration on the part of a lot of Kalenjin
10 subcommunities. It was expressed through -- or by certain political leaders, but
11 during the Moi regime all these dissident voices were quashed by different means.

12 Q. And essentially the Moi inner circle was a Tugen/Keiyo, that's K-E-I-Y-O, a
13 Tugen/Keiyo grouping; is that right?

14 A. That's it, yes.

15 Q. And the 1990s generally within Kenya witnessed -- and in particular in the
16 North Rift experienced a degree of economic collapse. His was not an economic
17 success, the Moi regime, was it?

18 A. Well, in North Rift is the cereal zone, and it's true that in the '80s the Moi
19 regime tried to do the equivalent to what Kenyatta would try and do with coffee,
20 namely, to massively support the co-operative structures and other structures.
21 And, therefore, through different means, particularly by artificial price support, they
22 tried to favour all the cereal sector, apart from the fact that it didn't work as well as
23 they wished. And the '90s, it is true that all these structures of organisation of this
24 agricultural sector were collapsing, and so there is an agricultural economy which is
25 suffering in that region.

1 Q. And again figures drawn from Daniel Branch, his book, in Uasin Gishu,
2 Nandi and Bomet absolute poverty levels in those places. Uasin Gishu, Nandi,
3 Bomet, absolute poverty levels all increased from 40 to 60 per cent as a measure of
4 that economic collapse. Do you again either familiar or accept that, those figures?

5 A. Yes.

6 Q. Apart from oppression -- and again, I think Branch refers to there being in
7 1986 over a thousand political prisoners under the Moi regime. Is that a figure that
8 again you would accept?

9 A. Yes.

10 Q. And Nyayo House of course in Nairobi with its dungeons and torture
11 chambers. Again, that's now well known, isn't it?

12 A. It is well known. It's very well documented.

13 Q. And in the meantime, in terms of corruption, we know from the Kroll
14 International Report the extent of that corruption, or to a large extent we know the
15 extent of that corruption, do we not?

16 A. Yes.

17 Q. And the Kroll International Report was only, in fact, published after the 2002
18 election; is that right?

19 A. Yes.

20 Q. Kroll International, a known -- well, a respected accounting investigatory
21 organisation that was called in, demonstrated that the economy had been looted by
22 him, that is Moi, and his relatives to the extent of just over two billion dollars.
23 Again, are those figures that you have become familiar with?

24 A. Yes. There's clearly a criminalisation of the State during this period with
25 major scandals, Goldenberg and other scandals.

1 Q. To the extent that -- and again, I think this is -- in fact, it is referred to in
2 Gabrielle Lynch's article that Gideon Moi is reputed to have benefitted to the extent
3 of 530 million pounds, which is about a billion dollars and -- perhaps a bit less than
4 that -- and Philip by 384 million pounds. Again, those are figures that you would
5 have seen and I dare say don't disagree with from what you've learnt?

6 A. Yes. These are figures that circulate. It's difficult to demonstrate if it's more
7 or less. Whatever the case, it's too much, clearly too much.

8 Q. Yes, well -- after Moi retired, we have the 2002 election, which was -- or so I
9 understood from reading was relatively peaceful. I don't know whether we want to
10 revisit that figure of 350 killed that you mentioned yesterday. Can you help us as to
11 that?

12 A. These are figures that are given, in particular, in an article on violence.
13 There's one or two articles about 2002 violence. These are figures that come up
14 constantly. These are the figures that must have been given by monitoring
15 organisations or observer organisations with regard -- that were observing elections.
16 And if you have peaceful elections -- well, at the time I was in Kenya, and these were
17 elections where there weren't major fears. They basically happened in a
18 way -- well, there was a good atmosphere, hope, a lot of hope.

19 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, would this be a good
20 time -- perhaps you can do it yourself -- to revisit whether or not the witness was
21 able to do that homework of yesterday of some --

22 MR HOOPER: Yes.

23 Q. While we're on elections and the '90s and into 2002, you may recall that the
24 Bench invited you to see if we can come to a practical figure, as it were, that we can
25 use or adopt.

1 A. So for the '90s, according to the figures that I have, around 400 deaths, but I
2 really have to look at my archives. I only have handwritten sources. I don't have
3 all my documents here, of course, but according to the sums that I've been able to
4 make, it's around 400, 500 deaths, around that figure, but it's really unsatisfactory. I
5 really have to go and check in the different reports that I have at home.

6 PRESIDING JUDGE EBOE-OSUJI: When you say in the '90s, we mean what?

7 THE WITNESS: (Interpretation) '97. The elections of 1997.

8 PRESIDING JUDGE EBOE-OSUJI: And did you also -- your notes indicate
9 displaced -- the figure for displaced persons, if any were displaced?

10 THE WITNESS: (Interpretation) I don't have the -- well, I only have the displaced
11 figures for Mombasa. Mombasa it's around 100,000. I know that there were
12 displaced people in Transmara and other places, but I really have to see that in my
13 other document.

14 MR HOOPER:

15 Q. With Moi gone, the National Rainbow Coalition won a stunning victory, and
16 with it everyone's hopes in Kenya, as indeed you've just said, were -- their
17 expectations were very high; is that right?

18 A. Absolutely.

19 Q. Though the Kibaki government did some good things, it didn't meet
20 everyone's expectations; is that right?

21 A. Of course. Yes, of course not.

22 Q. It pledged itself, for example, to fight corruption and to eliminate it. You've
23 mentioned the Anglo-Leasing case of July 2004. And that, as I understand it,
24 uncovered theft on the part of the -- that regime of about 750 million dollars in
25 contracts; is that right?

1 A. Yes.

2 Q. And there was, as many have said, a feeling nothing had changed under
3 Kibaki; is that right?

4 A. You can't really say that. It wasn't the change that was expected in that
5 Kibaki went back to the same methods that previous governments had used, but
6 there was a change, a major change compared to the Moi period.

7 Q. That indeed was the case, but there were certain changes that created a sense
8 of increased alienation, particularly amongst the Kalenjin people but others also, as a
9 result of various things that that government did, some of which of course you
10 touched upon in your evidence yesterday. First of all, there was extensive sacking,
11 was there not, of Kalenjin civilian servants? I understand about 100 top civil
12 servants were sacked, Kalenjin civil servants; is that right?

13 A. Yes. There was a de-Kalenjinisation at the higher levels of the government,
14 of the State, just as Moi had Kikuyucised the public administration when he came to
15 power.

16 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, before you stray too far away from
17 the area, since you talked about the Anglo-Leasing scandal and you've now put it on
18 record as to what it means, the witness had also in his report, and I believe in the
19 course of the testimony, also mentioned the Goldenberg. What is that?

20 MR HOOPER:

21 Q. The Goldenberg, was that largely the issues that were looked at in the Kroll
22 report, Goldenberg?

23 A. The Goldenberg scandal was a financial scandal which was meant to finance
24 the 1992 elections. It was a huge means of emptying the coffers of the State and use
25 that money, basically, for the electoral campaign. That's basically what you can

1 draw from the various reports. It had major macroeconomic effects, fuelling
2 inflation, and it was a horrific scandal for Kenyan finances. This took place in the
3 early 1990s.

4 Q. And it was after Moi had gone that the Kroll International investigation went
5 into that and other similar thefts from the treasury. That was the subject of that
6 Anglo -- sorry, the Kroll report and the Goldenberg, as it's commonly known, and
7 well known in Kenya.

8 During the Kibaki first term, 2002, 2007, we've spoken of this sacking of Kalenjin, a
9 process of de-Kalenjinisation, but it was also accompanied by a Kikuyuisation; is
10 that right?

11 A. Yes.

12 Q. And there were then, of course, allegations of biased recruiting and
13 appointments within government, the old partisanship of one ethnic group
14 favouring its own?

15 A. Yes.

16 Q. And you spoke yesterday of particular incidents, the eviction of Kalenjin
17 people from the Mau Forest, which was the subject of an Amnesty International
18 report, was it not?

19 A. Yes. You're referring to the Mau Forest. The Mau Forest is one of the
20 largest forests in Kenya, and there is several areas, several zones that were given to
21 groups that needed land. And during the Kibaki regime, the first regime, the illegal
22 occupants were expelled from the forest, in particular the Kipsigis and -- not only the
23 Kipsigis, but mainly the Kipsigis.

24 And some of this land was also given to well-known people. Not just producers or
25 farmers who benefitted from this land, but there were Kalenjin leaders -- community

1 leaders who benefitted from this land, and others were expelled. And of course this
2 led to hard feelings on their part.

3 Q. And a particular item of expected change, of agreed change, as agreed
4 between the National Rainbow Coalition party members was an expectation that the
5 constitution would be changed; is that right?

6 A. Yes, yes.

7 Q. And the system, as developed by Kenyatta and continued under Moi, would
8 to some extent revert back to the original federal constitution that had been
9 dismantled by Kenyatta; is that right?

10 A. Yes.

11 Q. And so when Daniel Branch, for example, says that this constitutional issue,
12 this majimbo issue permeates Kenyan politics from the very beginnings as a State, an
13 independent State right through to very recently, that's a very fair comment, isn't it?

14 MR GARCIA: Just one comment, your Honour. Could we have the specific
15 reference of these statements that Mr Hooper is putting to the witness? In all
16 fairness, I know we've gone through a couple of these already on other subjects, but
17 on important relevant topics I'd like to have those references, obviously, so we can
18 check and verify the information that's being put to the witness.

19 And for the witness as well, it might be useful to have an excerpt of what's being put
20 to him because in certain cases there's certain nuances or ambiguities, and if the
21 witness is going to think obviously that it's something that comes directly from an
22 author, then it should be exactly repeated to him as stated in the article or in the -- in
23 the book.

24 PRESIDING JUDGE EBOE-OSUJI: Mr Garcia, the technicality of the objection is
25 noted, but this is an expert witness and professor. Do we have a danger that he

1 would agree to a proposition that's put to him if he can agree with it? And the
2 reason is, if Mr Hooper phrases his question, as he does, of course, there are some
3 consequences which perhaps you may explore at another time, when he splices
4 references into his question, but what's more important, I take it, would be the
5 proposition that is being put to the witness regardless of the source of it in the
6 question and then the witness can agree or disagree.

7 MR GARCIA: Indeed, your Honour. I'm just -- the reason for my objection was
8 basically I want the proposition that's put to the witness to be as clear as possible.
9 In certain cases, on two cases there's been certain nuances, ambiguities that the
10 witness has come back on. That's the extent of my objection.

11 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, you can proceed, but you may also,
12 if you want to assist. I think it's -- you should be able to read out the references if
13 that's not too unwieldy for you so that --

14 MR HOOPER: It would be a bit --

15 PRESIDING JUDGE EBOE-OSUJI: -- for the benefit of record.

16 MR HOOPER: -- a bit unwieldy. I mean these are opinions, as your Honour says,
17 and we have an expert here.

18 Q. Here's an opinion that we have a seam, a majimbo seam that runs through
19 Kenyan politics. Whoever's opinion that is, you would agree with that?

20 A. Well, I would say that the issue of majimbo was discussed and was a major
21 one up until '64 and then receded from politics until the early '90s. It was dormant,
22 if you will, throughout the Kenyatta regime and the first part of Arap Moi's regime.
23 It was something that came back in favour at the beginning of the multiparty system
24 by Kalenjin officials in order to save the situation, if you will, if they were to lose the
25 general elections.

1 Q. Well, under the National Rainbow Coalition there was a draft constitutional
2 review committee, was there not, that in fact, proposed a constitution that reverted
3 in many of its elements back to the original constitutional format, cutting down
4 presidential centrism and providing more power to the provinces. Is that right?

5 A. That's correct.

6 Q. But those proposals were chopped down by it's said, in particular, the work of
7 the then attorney general, Amos Wako. Nothing to do with Waki, of course.
8 Wako, another personality, attorney general. And he -- that's right, he cut out a lot
9 of the amending aspects of those proposals? Is that right?

10 A. Yes. The text of the constitution that resulted from the meeting was not
11 actually submitted to referendum. It was modified by Wako, the attorney general,
12 and it was worked on by the government in order to limit the federalism aspects. In
13 other words, the text was completely denatured compared to what the original
14 drafters of the constitution had intended. Many of the politicians involved during
15 the 2005 referendum were against that text because it did not correspond to the
16 original drafter's intentions.

17 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, you will need to spell the name of
18 Amos Wako for the record.

19 MR HOOPER: Certainly. Amos, A-M-O-S. Wako, W-A-K-O. And those are two
20 words, of course. First and second name.

21 Q. Who I think had been the attorney general from 1991 right through until I
22 think just two or three years ago. Is that right?

23 A. Yes.

24 Q. Well, with this denatured constitution that was now going to the people by
25 way of a referendum for their agreement because of the cut-down, out of this came

1 of course the Orange Democratic Movement; is that right?

2 A. Yes, could you make that more precise, please. I'm not sure I understood
3 your question.

4 Q. Certainly. The denatured, I think was the word I used which I had
5 translated, the watered-down, as it were, draft constitution was subjected to a
6 referendum. And as we know, the Orange Democratic Movement was born, is this
7 right, out of the opposition to that proposed watered-down constitution?

8 A. Yes.

9 Q. And as you told us yesterday, all of Kenya essentially, all the provinces, voted
10 against the constitution, and only Central Province voted for it; is that right?

11 A. Yes.

12 Q. And the Central Province we are talking almost synonymously with Kikuyu;
13 is that right?

14 A. Yes.

15 Q. And so out of 42 tribes, 41 voted for -- or, rather, against that constitution, one
16 voted for it?

17 A. Well, to present it that way is a bit limited. What you can say is that the
18 majority of the population voted against because 58 per cent voted against. To
19 say -- well, you know, within the communities there were people who voted for.
20 Perhaps we can agree on that. 58 per cent of the population voted against, which
21 means the vast majority of the Kenyan people were against that constitution.

22 Q. Very well. And after that referendum, Kibaki was left with mainly a Kikuyu,
23 Embu, Meru grouping supporting him; is that right?

24 A. Well, that's what the opposition thought, but in fact, the polls indicated that
25 his personal popularity was in fact higher than that, larger than that. The results of

1 the election have shown that in spite of everything, he had wider support than what
2 appeared from the results of the constitutional referendum. Therefore, perhaps the
3 people distinguished clearly between the issue relating to a constitutional
4 referendum and the issue of a general election that was yet to come.

5 Q. But as a political scientist you'll be doubtless that first agree that it's people's
6 perceptions that often matter the most?

7 A. Well, it depends. I'm afraid I'm not really sure what you're trying to get at.
8 People's perception, what do you mean? You mean in terms of the legitimacy of the
9 government in power or what?

10 Q. Let me give you an example. Perceptions, for example, that there was what
11 was called the Mount Kenya mafia, which you referred to. That was a perception.
12 To what extent was it true?

13 A. Well, the fact is Kibaki governed with a group of men around him just as
14 Arap Moi also had a group of followers. Well, these camarilla, these groups that
15 influenced the Head of State, you could refer to a mafia perhaps, but this term of the
16 Mount Kenya mafia was an expression developed by the opposition in order to
17 denounce the fact that it was a very small group of men governing around Mwai
18 Kibaki. Did the people see it that way over and beyond what was stated in political
19 circles? I really don't know and I wouldn't really have anything to say about that.

20 Q. Thank you. We mentioned Anglo-Leasing as a token of corruption. You
21 also mentioned Artur brothers. What was that? That's A-R-T-U-R.

22 A. Well, the saga of the Artur brothers, well, it was a strange scandal. There
23 were two Armenians I seem to remember who were very close with a person who
24 had the reputation of being part of the president of republic's family. And thanks to
25 that family link, they benefitted from a series of advantages, facilities. And their

1 name was connected with various types of trafficking.

2 It was a scandal that was very much in the media for months, for several months.

3 And it was typical, it was systematic of a regime that was more and more
4 criminalised as people said at the time. And so, yes, it was one of the scandals at
5 the end of the first term of Kibaki.

6 Q. And again, from what you say, it would be fair to say there were those who
7 took the view that that regime is now a profoundly criminal regime in its nature?

8 A. Well, when I refer to the criminalisation of politics, I mean in terms of the
9 politics. We're referring here to practices whereby those who are governing do so
10 outside of what is legal, and they do not respect the rule of law.

11 Q. As far as State -- I'm sorry. As far as State investment at the time was
12 concerned, was that along regional lines? Was there again a favouring of certain
13 areas over others, particularly Central?

14 A. Well, we'd have to take a look at the numbers. As far as I know, things were
15 monitored fairly closely. I don't think there were very obvious excesses, if you will.
16 One of the characteristics of that regime was that they did invest in infrastructure.
17 A lot of the infrastructure was situated in the capital city and near Central Province,
18 but I don't recall the exact numbers. Given that you read Daniel Branch's book
19 recently, I believe they're in that book, but I'm afraid I don't remember them myself.
20 But there's a lot of publications about that.

21 Q. So as we come towards the election -- well, into 2007, the ODM as a political
22 party is structured. You've been through the various leading personalities
23 concerned with ODM. Raila Odinga, representing the Luos you told us. Musalia
24 Mudavadi, Luhya. William Ruto is a Kalenjin. Najib Balala -- just pausing there, is
25 he associated with a group or with -- it seems a place rather than a group. Is that

1 right, with Coast? What's his position?

2 A. Your question is who is Najib Balala?

3 Q. Yes. I mean what sector does --

4 A. Najib Balala was the mayor of Mombasa. He was elected in a district of
5 Mombasa, and he represents an urban area in the Coast Province. And he hoped to
6 be the representative of the entire Coast area, which is, in fact, divided into various
7 different groups and communities. And it's a region that finds it very difficult to
8 choose an uncontested leader. In ODM, Najib Balala, well, his role was to bring in
9 the votes from the Coast.

10 Q. And Joseph Nyagah, N-Y-A-G-A-H. What sector did he represent?

11 A. He represented the Embu. But inasmuch as Uhuru Kenyatta was not part of
12 this arrangement, he was supposed to bring in the votes from the GEMA, in other
13 words, people from the Central Province, the Kikuyu and others, at least that was
14 the hope of the ODM technocrats.

15 Q. And Charity Ngilu?

16 A. Charity Ngilu was a Kamba, and she came in later into this alliance. The
17 problem with the Kambas is that they had a major candidate in the presidential
18 elections, Musyoka.

19 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, it is now 12.30 on the clock. You
20 had indicated you would be done by lunchtime. I hope we're still --

21 MR HOOPER: I said today. Yesterday I said I'd finish today and this morning I
22 said I hoped to finish by lunchtime.

23 PRESIDING JUDGE EBOE-OSUJI: Yes, that's what I remember.

24 MR HOOPER: So it remains a hope.

25 PRESIDING JUDGE EBOE-OSUJI: We have a witness tomorrow that we need to

1 start.

2 MR HOOPER: Indeed.

3 PRESIDING JUDGE EBOE-OSUJI: Yes. And Mr Kigen-Katwa will also be going
4 as well.

5 MR HOOPER: Yes. I'm -- I'm fairly confident that the Chamber nor the witness
6 would be greatly inconvenienced by the further length, such as it be, of my
7 discussion here.

8 PRESIDING JUDGE EBOE-OSUJI: You didn't account for Mr Kigen-Katwa's own
9 predicament in it. We wouldn't want to squeeze him.

10 MR HOOPER: No, there's -- you don't squeeze Nandi.

11 PRESIDING JUDGE EBOE-OSUJI: All right. What is your indication? Can you
12 give us now --

13 MR HOOPER: I'm pretty on -- on track.

14 PRESIDING JUDGE EBOE-OSUJI: For lunchtime?

15 MR HOOPER: Well it may go a little bit over lunch, but not much, and I'm very
16 aware of the relative discomfort to the witness with his cough as well. So I'll press
17 on.

18 Q. We were talking about the composition of the ODM, and I think you can
19 confirm that in no way did the ODM seek to exclude Kikuyu. It had Kikuyu
20 activists also working in and for it. That's right, isn't it?

21 A. Yes. But when Uhuru Kenyatta was no longer part of this alliance, that
22 reduced their -- their contribution significantly.

23 Q. Indeed, but that wasn't by way of policy, as it were, of the ODM. They
24 would have preferred Kenyatta to have remained within their fold. And though
25 Kenyatta went, it's right to say others remained?

1 A. Yes. You can't say that ODM had to just be read in ethnic terms. It did raise
2 ideological questions, constitutional and other questions which were quite deep, in
3 order to go beyond a whole series of ethnic divides in certain social milieu.

4 Q. Musalia Mudavadi was essentially the Luhya flag bearer. Can you just help
5 us a little bit about the Luhya. Let me put it like this: The largest single
6 block -- ethnic block is -- is the Kikuyu, is it not?

7 A. Yes.

8 Q. And the next one, can you just -- if you know the order approximately.

9 A. I don't remember the latest figures because it has changed. I don't want
10 to -- well, let's say it's said that there are series of groups that are numerically
11 important who, therefore, have political force, strength, clear political force: Luhya,
12 Luo, Kalenjin, Kisii, Kamba and the Luhya.

13 Now, the Luhya, you're asking me what they were. Well, it's a bit like the Kalenjin,
14 a relatively recent identity. You have very diverse communities drawn together.

15 And contrary to Kalenjin, it's relatively divided up in its voting strategy.

16 So you have a swing community which is essential to obtain an electoral majority.

17 So they try and get their vote, but they do have an elite which is very disunited.

18 And it's particularly complex to try and get a large number of voters from that
19 community to vote for you. But they are a key demographic, politically and
20 economically.

21 Q. All right. And of course William Ruto, and you mentioned him yesterday.

22 And you mentioned the Eldama Ravine declaration. And if we can just perhaps
23 deal with that very briefly.

24 Is it right that the Eldama Ravine declaration was essentially a political statement by
25 Ruto -- Mr Ruto whereby he was saying "I'm going to put myself forward as a

1 presidential candidate in the forthcoming election"? Is that right?

2 A. Yes.

3 Q. And at -- and at Eldama he also received the support of several other MPs.

4 A. Yes.

5 Q. And later, and quite separate and distinct, there was also a public show

6 whereby he was appointed or said to be appointed as a Kalenjin elder; is that right?

7 Took place in Eldoret I think in June of 2006. So both events, quite distinct events in
8 2006. Do you agree?

9 A. Yes.

10 Q. And, in fact, he didn't do very well in terms of the presidential nominations

11 for ODM; is that right? I understand he picked up from all the

12 nominations -- nominating members, there's a large number, he picked up only 368

13 votes. Not a very large amount at all. And the outright winner was Raila Odinga,

14 who of course then became the presidential candidate in those elections?

15 PRESIDING JUDGE EBOE-OSUJI: How many votes?

16 MR HOOPER: I don't know. We can get that perhaps in due course. I don't have
17 those figures. We might have them after lunch.

18 Q. But is it right that the Kalenjin people thought, and many MPs thought it was

19 too early to vote for Ruto because they didn't want to vote for one of their own.

20 They thought after Moi it was too early and they instead put their support behind

21 Raila Odinga; is that right?

22 A. It's your interpretation, but it is coherent. It's acceptable.

23 Q. And so the Kalenjin are voting in 2007 for Raila Odinga, and in the same way

24 as in 2002, persuaded by William Ruto, they threw their support behind Jomo

25 Kenyatta?

1 PRESIDING JUDGE EBOE-OSUJI: Uhuru Kenyatta.

2 MR HOOPER: Oh, I'm sorry. Uhuru Kenyatta. Very well.

3 Q. In fact in November of 2007, Raila Odinga was made a Kalenjin elder --

4 PRESIDING JUDGE EBOE-OSUJI: We don't have the witness's answer to the
5 question.

6 MR HOOPER: To the last question?

7 PRESIDING JUDGE EBOE-OSUJI: Yes.

8 MR HOOPER: Well, it was --

9 THE WITNESS: (Interpretation) Yes.

10 MR HOOPER:

11 Q. And in November 2007 Raila Odinga also went through one of these public
12 occasions when he dressed up and was a -- said to be an elder of the Kalenjin
13 people? Very well.

14 A. Yes. Yes.

15 Q. Now, in terms of demographic pressures, one figure that I'd ask you to -- to
16 confirm, to give us -- and you may have mentioned I think in your evidence. I'm
17 just making sure we've got it in. In 1950 the population of Kenya was four million,
18 and today it's about 40 million. And that is, I understand -- is that right, first of all?

19 A. Yes.

20 Q. I understand that is the fastest population growth ever recorded anywhere.
21 Would you agree with that?

22 A. In terms of demography it is very significant, demographics.

23 Q. So going into the 2007 election for all the various things that we've -- and
24 you've touched on in your evidence, as far as the ODM party was concerned, it's
25 right, as you said, there were very high hopes and expectations as a result of its very

1 youthful and positive and energetic campaign. Would you agree with that?

2 A. Yes.

3 Q. It included free secondary education as a promise; is that right?

4 A. Yes.

5 Q. Minimum social security for people, as I think you mentioned; is that right?

6 A. Yes.

7 Q. A more equitable distribution of resources; is that right?

8 A. Yes.

9 Q. A call by Raila Odinga for reversion to regionalisation, majimbo, federalism;
10 is that right?

11 A. Yes.

12 Q. It offered a generational change as well; is that right?

13 A. Yes.

14 Q. And I suppose like many politicians, but it placed a big emphasis, is this right,
15 on increased employment and, in particular, addressing the huge problem of youth
16 unemployment, which is just enormous in Kenya, huge problem; is that right?

17 A. Yes.

18 Q. And there was obviously, particularly amongst its supporters, a belief, a
19 credible belief that they were going to win that election; is that right?

20 A. Yes. The -- well, what we have to explain, given the referendum, there was a
21 wave of confidence in the opposition which grew, and it's true that this opposition
22 was persuaded that it was going to win. And according to the polls, progressively
23 they confirmed this drive, even if according to the polls it did indicate that it was
24 going to be one of the most highly challenged elections or the results would be -- on
25 both sides it would be very close.

1 But despite these polls which called upon people to really be careful, ODM were
2 persuaded nevertheless that they were going to win. They had -- they were very
3 confident that they were going to win.

4 Q. Now, I'd like to concentrate or discuss just a very little bit the final matter I
5 wanted to raise with you, and that's to do with the elections -- the elections
6 themselves. 27 December we know Kenya goes to the polls, big turnout, and as I
7 understand it, fairly -- as we understand it, I think, from what we've heard, fairly
8 early on, by the 28th, the constituency results have come in, that is, the
9 parliamentary or national assembly results; is that right? And for whatever reason,
10 whether it was bad organisation on the part of the PNU or whatever, ODM won by a
11 landslide as far as the parliament was concerned. Is that right?

12 A. Well, it's complex to the extent that, yes, PNU directly is only going to win a
13 few constituency, 43 ODM -- well, if you add all the different seats of the different
14 parties, the ones under PNU, you come to a figure which is much higher. If you
15 add to that ODM Kenya, which very quickly joined the Kibaki camp, you come to a
16 figure -- well, a situation which is more or less egalitarian.

17 Now, here we are talking about an election which is very close, extremely close.

18 Now, with regards to the presidential or parliamentary elections, well, both
19 sides -- both sides rigged it, and the question is who rigged it more and who had the
20 means to rig it the most?

21 PRESIDING JUDGE EBOE-OSUJI: Can we clarify what was meant by "egalitarian"
22 in there, in the answer.

23 Witness, what we heard was that if you added the figure, the parliamentary results
24 figure for ODM Kenya, which had joined Kibaki, the transcript had you saying the
25 results became more or less egalitarian. Do you mean to say more or less equal?

1 THE WITNESS: (Interpretation) Well, what I would say is that -- well, there wasn't
2 a clear majority that came out of it, but the two camps are 50/50. Let's put it like
3 that. And with the arrival of the ODM Kenya, then Kibaki, he had a small majority.

4 MR HOOPER:

5 Q. Just going back to parliamentary seats, you're a Kenyan sitting in a -- your
6 home in Eldoret or in a bar in Eldoret, you're watching this on television because this
7 was all followed, wasn't it? Keen interest by the people in Kenya. You nod.
8 And of course we have identified Raila Odinga with ODM as the presidential
9 candidate and Kibaki of course with the PNU candidacy.
10 Now, the PNU, in fact, more or less collapsed, did it not? They had about 40 -- how
11 many seats? Can you remember approximately, as opposed to --

12 A. Forty-three. Forty-three, but you have to explain 43 seats of members at
13 parliament. But PNU is an alliance which is for the presidential elections, so all the
14 parties --

15 Q. Quite agree. So that's why we're taking it in stages. So we're talking about
16 the parliamentary results that come in first. So 43 PNU. What about ODM?

17 A. Ninety-nine.

18 Q. People in Kenya thought those elections were rigged, didn't they, rigged by
19 Kibaki? And I'm talking now about the presidential elections. That was the
20 perception?

21 A. Well, there was a perception which was quite common that there had been
22 manifest rigging of it. This presidential election had been stolen according to the
23 polls, and they're very precise. And I think you have to go back to the polls, but
24 they indicated that about 60 per cent of Kenyans considered that the presidential
25 elections had been stolen.

Trial Hearing
Witness: KEN-OTP-P-0464

(Open Session)

ICC-01/09-01/11

1 Well, the figures aren't absolutely reliable. Well, you really have to go back to the
2 polls, but it was measured in a very precise way.

3 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, can we get a figure for how many
4 seats ODM Kenya had won?

5 THE WITNESS: (Interpretation) Ninety-nine.

6 MR HOOPER: That's ODM.

7 PRESIDING JUDGE EBOE-OSUJI: ODM Kenya.

8 THE WITNESS: (Interpretation) Ninety-nine.

9 MR HOOPER:

10 Q. There's ODM and then there's the sub-party, the divided ODM Kenya party?

11 PRESIDING JUDGE EBOE-OSUJI: The party that joined Kibaki, ODM Kenya.

12 THE WITNESS: (Interpretation) It's 99, but ODM Kenya would join the Kibaki
13 camp, join the PNU camp. So you have to take off ODM Kenya, you have to
14 discount that with the number of seats from PNU, from KANU -- well, from all the
15 different parties that were members of the alliance, the PNU alliance.

16 PRESIDING JUDGE EBOE-OSUJI: All right.

17 MR HOOPER: It's about 16. I might finish my --

18 PRESIDING JUDGE EBOE-OSUJI: About 16.

19 THE WITNESS: Oui, c'est ça. Oui.

20 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, there is some other -- sorry, there's
21 (inaudible). I think before you rest you need to hear my question to see if you have
22 some --

23 MR HOOPER: Yeah.

24 PRESIDING JUDGE EBOE-OSUJI: -- follow-up, not on this, but on something else.

25 MR HOOPER: All right.

1 PRESIDING JUDGE EBOE-OSUJI: What we're trying to understand, Witness, is
2 you had said that the PNU, you said that earlier, if you took the figure for PNU
3 alone, it seemed that there was a great disparity. But I thought you said that if you
4 added the seats won by ODM Kenya, which had joined Kibaki, one would see that,
5 in fact, Kibaki's side had the preponderant number of seats.
6 Now we're looking at a figure that shows ODM with 99 seats and PNU, 43 seats.
7 We're trying to make the math work according to your earlier thesis.
8 THE WITNESS: (Interpretation) Well, the PNU properly said is the -- well, the
9 PNU at presidential level, this is an alliance, which is firstly made for the
10 presidential elections, and it groups together seven parties as well as other parties
11 for the presidential elections.
12 Now, with regards to the legislative elections, each of these seven parties is separate,
13 and this is where it becomes a bit complicated.
14 Now, certain members of parliament were elected under the PNU banner, but most
15 of the other party members of PNU presented their candidacy and this gave us a
16 number of members of parliament. And so you have to discount or take away.
17 When you look at the number of members of parliament who are in the same camp,
18 you have to take away the members of PNU, the KANU members, Ford-People, the
19 members of parliament from Ford-Kenya, New Ford-Kenya, Shirikisho and so forth.
20 And when you add up all that, these disparate parties which de facto are on Kibaki's
21 side, you see that there is a very small, very slight majority in the parliament
22 accorded to Kibaki's camp, which given that he was elected president, so there was a
23 pressure to be able to convince members of parliament, and this means that ODM
24 Kenya joined him, this was a strategy linked to the fact that ODM Kenya wanted to
25 be alongside the person who held the executive.

1 I don't know if I've been very clear with regards to this sort of parliamentary horse
2 trading that was going on there.

3 MR HOOPER:

4 Q. Indeed. And that's the point, it was horse trading. It's post-election horse
5 trading. And we're dealing with the actual election itself and perceptions. And all
6 I want to bring out, and I think you agree, is that looking at ODM, their frontrunner
7 Raila Odinga, looking at PNU, frontrunner Kabila, the man in the armchair watching
8 this on 28 December sees a landslide going towards -- towards the Raila Odinga
9 ODM and what appears to be a collapse on the part of PNU Kibaki.
10 That's the perception that fuels this view at the time that it's a one-horse race on 28
11 December. 29 December, delays in the votes coming in. This is accompanied, of
12 course, by the comments of, for example, the European Union's election observers
13 and the Kenyan Human Rights Commission observers, and KEDOF, the other
14 official observers, all voicing concern as to the Kibaki presidential count. That's
15 right, isn't it? Is that right?

16 A. Well, it's not clear on Kibaki's side, and it's not clear on the other side as well.
17 But if you want to go back to the idea that yes, in the results there was a massive
18 degree of frustration on the part of a lot of people. And the explosions of violence
19 would -- which would immediately start after the results, that's based, yes, on the
20 fact that there was a massive feeling of injustice in a lot of areas of Kenya.

21 Q. Yes. Sorry. And in particular, I referred to, as I said, the European Union's
22 election observers and the Kenyan Human Rights Commission and many other
23 commentators contemporaneous with these events expressing concern, a
24 manipulation of the Kibaki result. That's right, isn't it?

25 A. Yes. It was known that there were problems in several different areas, but in

1 particular on that side, yes.

2 MR HOOPER: And I think I can, if given just a few more minutes, conclude
3 my -- my questions.

4 Q. The overseeing body, of course, at these elections also was the Election
5 Commission of Kenya, the ECK. It has 22 members, 19 of them were appointed by
6 Kibaki in 2007. Is that right?

7 A. Yes, without consulting the opposition parties, which should have been done.
8 And that weakened the legitimacy of this commission. And you have the ICG
9 report on that. It explains it in great detail.

10 Q. Indeed and very critically, of course. And Kivuitu, who was the president of
11 that commission, he described nine of those appointees as, quote, "riggers,"
12 R-I-G-G-E-R-S, riggers, vote riggers; is that right?

13 A. I didn't know that he had made this statement.

14 Q. In addition, just two days before the election -- two days before the election,
15 Kibaki appointed five high court judges. That was known, of course, at the time
16 too; is that right?

17 A. Yes.

18 Q. On the night of the election, I don't know if you heard of this, the tallying
19 centre in Nairobi where the votes were being counted was broken into, a burglary or
20 something took place, even though it was, of course, cordoned off by the police.
21 That again was news that came out at the time. Someone had broken into the
22 counting -- counting house in some way despite the police presence. It's again
23 something you heard or know about; is that right?

24 A. Well, there were serious problems, yes.

25 Q. And all these things conspire together. And when eventually Kibaki is taken

1 off to a darkening garden to be sworn in as the president for the second time on the
2 night of the 30th, would it be fair to say, using Ms Mueller's words that Kenya was
3 on the edge of a precipice?

4 A. Yes.

5 Q. The depth of that precipice, the extent of it, no one saw at the time there? We
6 all look back now with the benefit of hindsight, don't we? But people at the time
7 didn't realise the extent of what was about to happen, and it was a surprise and a
8 shock, not just in Kenya, but all over. That's right, isn't it?

9 A. Yes. It has to be said that the way in which it was organised -- well, this gave
10 rise to a lot of mistrust in the results. Well, a lot of people considered that the
11 official results were illegitimate, the way in which the tally was done. So when
12 comes to this tallying, it had a really bad effect. It gave the impression that votes
13 had been stolen.

14 Now, afterwards there was a commission. Well, how did it effectively take place?
15 There was an official commission which was organised. There were investigations
16 that were carried out. And what came out of the work, which wanted to be as
17 neutral and objective as possible, explained that there had been manifest rigging and
18 it was done on both sides.

19 Now, the official report carried out within the framework of the post-crisis situation
20 said you couldn't say who had actually won. We can't know. But what has to be
21 seen is that at the time, at the end of the year, there was such a scenario at the time
22 with regards to the tallying that there was this feeling that, yes, there had been
23 rigging. They had been ripped off somehow.

24 And in the major cities, young people who were revolting. They reacted very
25 strongly against these results. And they judged these results, that election to have

1 been stolen.

2 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, one second.

3 MR HOOPER:

4 Q. And that --

5 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, may I please, before you move on.

6 Witness, in all of that, today you had testified to the point when counsel was
7 cross-examining you as to whether there was a change between the regime before
8 Mr Kibaki's on his own, and you said it's not a very simple matter. And you did
9 say that there were some infrastructural developments under him and that he'd
10 also -- he maintained a high popularity amongst the population. Was that your
11 testimony? If that was the case, would it have anything to do with the analysis or
12 the outcome of the result in your view?

13 THE WITNESS: (Interpretation) Well, there is no doubt that the Kibaki regime did
14 a number of things. There was economic growth, he developed infrastructure, and
15 it's true that he organised free primary education. And according to the polls, he as
16 a person had a very high level of popularity.

17 So in spite of the cheating and the rigging in the elections, it is known that, in fact,
18 this election was the closest ever in the history of Kenyan elections up until then.
19 And that was the problem. It was a new phenomenon, that it be so close and that it
20 be so unclear. In 2002, 61 per cent of the population voted for Kibaki. There was
21 no question about the results. Whereas here it was extremely close, 50/50. And
22 that's why the whole issue of rigging was an important one to see which side things
23 were going to go, and that's -- that was the important role of the administration.

24 PRESIDING JUDGE EBOE-OSUJI: Let's leave it there and take it up --

25 MR HOOPER: Just one more question.

Trial Hearing
Witness: KEN-OTP-P-0464

(Open Session)

ICC-01/09-01/11

- 1 PRESIDING JUDGE EBOE-OSUJI: Can we --
- 2 MR HOOPER: Only one more question.
- 3 PRESIDING JUDGE EBOE-OSUJI: And that will be the end --
- 4 MR HOOPER: Yes.
- 5 PRESIDING JUDGE EBOE-OSUJI: -- for you? Okay.
- 6 MR HOOPER:
- 7 Q. And it's really (inaudible). Of course there's been another election since 2013.
- 8 As one understands it, there was little or no violence associated with that; is that
- 9 right?
- 10 A. Yes, very little violence. It was organised very peacefully. And the stakes
- 11 involved in this very court was one of the factors contributing to the pacification of
- 12 politics.
- 13 Q. Yes. Though Ms Lynch opines that it may also be a dysfunctional factor in
- 14 Kenyan politics; isn't that right?
- 15 A. What exactly do you mean? Could you perhaps make that a bit clearer,
- 16 please?
- 17 Q. That this -- that this process will increase at least a sense, for example, of
- 18 amongst the Kalenjin group of persecution, for example?
- 19 A. What process are you talking about? What are you talking about?
- 20 Q. ICC trials.
- 21 A. Well, that's the opinion of Madam Lynch.
- 22 Q. Indeed.
- 23 PRESIDING JUDGE EBOE-OSUJI: We will leave it there and come back at --
- 24 MR HOOPER: Yes, thank you. Can I say this --
- 25 PRESIDING JUDGE EBOE-OSUJI: -- 2.30.

- 1 MR HOOPER: I have no other questions, at least at the moment, Dr Maupeu.
2 Thank you very much for answering my questions and the courtesy you've extended
3 to me in doing so. Thank you very much.
4 PRESIDING JUDGE EBOE-OSUJI: We will rise and come back at 2.30.
5 THE COURT USHER: All rise.
6 (Recess taken at 1.07 p.m.)
7 (Upon resuming in open session at 2.33 p.m.)
8 THE COURT USHER: All rise.
9 Please be seated.
10 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
11 Mr Hooper, you said you were done with your --
12 MR HOOPER: I am, your Honour, yes. Thank you.
13 PRESIDING JUDGE EBOE-OSUJI: All right. Mr Kigen-Katwa, if you can put on
14 record your position.
15 MR KIGEN-KATWA: Mr President, your Honours, I do not intend to
16 cross-examine the witness, and I sent an e-mail a short while ago to explain that that
17 is the position.
18 PRESIDING JUDGE EBOE-OSUJI: That is why I said you needed to put it on the
19 record instead of an e-mail.
20 MR KIGEN-KATWA: I am obliged, Mr President.
21 PRESIDING JUDGE EBOE-OSUJI: Thank you, but I will --
22 MR KIGEN-KATWA: Mr President, may I explain the reason why I sent the mail?
23 I think it is already in the mail. It was just a matter of courtesy just in case
24 arrangements need to be made for our next witness. It was not meant to
25 communicate by way of mail what I ought to come and say in court.

1 PRESIDING JUDGE EBOE-OSUJI: And now where does that leave us, Prosecutor?

2 We are not discharging the witness. I have some questions. And after asking the
3 questions, Mr Kigen-Katwa, you still will be free if you feel that there are some
4 questions arising from mine, you are welcome to follow up when I ask them.

5 MR KIGEN-KATWA: Right.

6 MR GARCIA: Your Honour, in regards to this witness, it leaves us simply with the
7 submissions in regards to the admissibility of the expert evidence and the two
8 documents that I had initially spoken about this morning.

9 As for the next witness, the team that's going to be examining that witness is present
10 in court, so we'll be able to change in short time, if there is indeed some time left for
11 that to start out at least with the other witness.

12 PRESIDING JUDGE EBOE-OSUJI: Is the other witness around to be put on the
13 stand?

14 All right. It looks like because of the lack of certainty --

15 MR GARCIA: We may have jumped the gun. But the team is here in court should
16 the witness find his way here at some point or should we have some time; if not,
17 we'll be happy to start out with the witness tomorrow morning.

18 PRESIDING JUDGE EBOE-OSUJI: That's fine. We also have work to do if we're
19 not sitting in court. So there is no time wasted involved.

20 But I do have questions. Mr Khan, yes?

21 MR KHAN: Of course, Mr President. I'm not intending to delay matters. Just in
22 relation to the next witness, as it's been mentioned, we haven't received yet the
23 VWU's assessment and recommendations regarding protective measures, and, of
24 course, we'd like to see that before the witness is brought into the courtroom. And
25 I'm grateful.

1 PRESIDING JUDGE EBOE-OSUJI: In light of the litigation on --

2 MR KHAN: Indeed.

3 PRESIDING JUDGE EBOE-OSUJI: Yes, okay, usual litigation. All right.

4 Witness, I have some questions for you. Yesterday you testified to the question of,
5 we were talking about the Rift Valley being reserved as the white highlands as you
6 put it during the colonial period, and eventually even when independence came,
7 there was still some issues with redistribution of land in the area. And your
8 explanation or rather part of your testimony -- again, please correct me if I get it
9 wrong -- was about preponderance of the redistribution resulting in Kikuyus
10 owning quite a bit of land in that area.

11 Now, today in the testimony you also said that Kikuyus also had lost land in the
12 central region, is that correct?

13 THE WITNESS: (Interpretation) Yes, indeed. During the colonial period, the
14 Kikuyus also lost a lot of land given that near Nairobi a lot of land was given to
15 white colonialists during that period, and so there was land pressure put on the
16 Kikuyus, very strong pressure, which led them to find -- to looking for land
17 elsewhere. They pioneered other areas. And the Rift Valley was considered very
18 early on as a potential area where they could expand in one way or another.
19 During the colonial period it was they would go and work on the white farms, but
20 later on it took on different forms. That's basically the answer.

21 PRESIDING JUDGE EBOE-OSUJI: Was the loss of land that the Kikuyus suffered in
22 the central region, was it all explained by expropriation of their land and giving it to
23 white settlers, or did it also have to do with building a capital territory, that is,
24 Nairobi?

25 THE WITNESS: (Interpretation) There are a number of factors. The two elements

1 indeed were true. On the one hand, the white settlers took a lot of land near
2 Nairobi. And there was also pressure in terms of land ownership, because the
3 social stratification, the class differences became very clear very rapidly amongst the
4 Kikuyu.

5 The more wealthy Kikuyus for one reason or another grabbed land, a lot of land so
6 that a lot of other Kikuyus didn't have any land. So there was on the one hand
7 social differentiation, the fact that the white settlers took land, and that Nairobi was
8 expanding, all of those factors led to the fact that many Kikuyus needed land,
9 wanted land, and very early on in fact.

10 PRESIDING JUDGE EBOE-OSUJI: What about the factor of as I said building
11 capital territory, which perhaps again, you are the expert, correct me if I get it
12 wrong, might have involved needing land for government purposes, public
13 purposes, public parks, public buildings where actual government need for
14 legitimate running of the country could be explained, did that also happen, taking
15 land for public use in Nairobi?

16 THE WITNESS: (Interpretation) Yes, but it was not the major aspect. The major
17 aspect that put pressure on the land ownership was that Nairobi was expanding,
18 and, therefore, the value of the land near Nairobi went up in particular for vegetable
19 growing and other products, other farming products that could be sold rapidly in
20 Nairobi. So the cost of land went up, and, therefore, the richer groups took over
21 those areas, and many poor people ended up landless.

22 In the history of land ownership in this area, the Mau-Mau crisis also made it
23 possible for certain social categories to grab land and meant that a number of social
24 categories were left out in the cold.

25 The Kikuyus were in need of land. Their need was the most intense. And this was

1 seen as a major political issue that the first government needed to solve very quickly.

2 PRESIDING JUDGE EBOE-OSUJI: So as far as you know, the incidence of the

3 State's exercise of the right of eminent domain as it were was minimal? Do you

4 understand what I mean by "the right of eminent domain"? I can explain it.

5 THE WITNESS: (Interpretation) Yes. It was minimal in Central Province, but in

6 the Rift Valley, yes, indeed, the State played a very important role. The land

7 ownership system, the State-owned land system, if you will, existed first of all in the

8 Rift Valley and not at all, virtually not at all in the rest of the country, just a wee bit

9 in the coastal province.

10 Of course, there were public lands elsewhere, but it didn't have a major influence on

11 the population. It really played an important role in the Rift Valley, because the

12 State controlled a lot of territory.

13 The settlement schemes developed because of the relationship between the

14 occupants of the land and the State, the direct relationship. And that's why the

15 land, land became a political issue. And in a period with multiple parties, you go to

16 the State. And there were during electoral periods, this was a very sensitive issue.

17 PRESIDING JUDGE EBOE-OSUJI: What I mean by "eminent domain" is that there

18 is this notion in international law in particular that the sovereign is entitled to

19 expropriate land or property for public use and ideally -- for public use, not to give

20 to friends and family, but for public use. Ideally there should be compensation, but

21 if compensation, if a State cannot pay compensation, then everybody should chip in

22 and bear the burdens of, you know, living together, we're all in it together as it were;

23 whether that might have had any role to play in the sense that the Kikuyus being

24 dispossessed of their land in the centre for public purposes, therefore, the State said:

25 Well, we have -- these are Kenyans as well, we have to find them land somewhere,

1 that was in the Rift Valley. Was that it, or are you saying it had very little to do
2 with it?

3 THE WITNESS: (Interpretation) It's difficult for me to answer that question,
4 because I don't think that the reasoning, if you will, was in those legal terms. In the
5 Rift Valley, the idea was more national citizenship. We have to find land for people
6 who don't have land. And there wasn't this idea of eminent domain. It was a
7 political issue, in the idea of national citizenship, we must find land for all of those
8 people who are landless in the country. It's part of the social contract that was set
9 up at independence, and, therefore, everyone should benefit from such a policy.
10 That was the reasoning, that was the political discourse, but over and beyond that
11 there was a concept which was unequal, if you will, in terms of land distribution.
12 The fact is land was distributed unequally. Officially that was not the case.

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

14 JUDGE FREMR: Mr Witness, just one question. You said that the land issue
15 became part of campaign before 2007 elections. I suppose that political parties
16 when referring to this issue came with promise to solve this issue by legal use, I
17 mean by some amendment of legislation, but have you also observed any hidden or
18 maybe even public tendencies to indicate that there are also some alternative
19 measures how to achieve this goal, I mean some indication that even violence could
20 be used in order to achieve this goal, I mean by some political parties or by some
21 political leaders?

22 THE WITNESS: (Interpretation) Well, in 2007, ODM was very careful to be
23 reassuring in their discourse. The PNU had been threatening the risk of ethnic
24 cleansing, in particular vis-à-vis the Kikuyu people in the Rift Valley who were
25 going to vote for the PNU anyway. And so this led to a communication policy on

1 the part of ODM that was very cautious. And they were saying, "Let's not confuse
2 the majimbo in the year 2000 and the majimbo in the '90s." So they did try to
3 reassure the various communities that lived in the Rift Valley in particular.
4 Now, did it work? The problem is at the very same time, everyone knew that the
5 local officials in the entire Rift Valley were spreading hate speech and hate messages
6 vis-à-vis the population. And so there was a dual discourse, if you will, and that
7 fear remained. So depending on the level or, rather, depending on the level of
8 political communication, the message was not the same. And the risk, this fear of
9 violence in 2007, was quite clearly present. It wasn't a surprise. It was all the more
10 not a surprise given that the pre-election period was very agitated. There were
11 many people killed, in particular in regions where there had been traditional ethnic
12 conflict, in Kuresoi and other regions. In Mount Elgon, it was very violent.
13 So the situation was such that it was like it was ready to burst, if you will, and there
14 was agitation on both sides. And it was known that violence could be used, not
15 that it was definitely going to be used, but that it could occur. It wasn't excluded.
16 And that's why that electoral campaign was extremely tense, very tense.

17 JUDGE FREMR: Thank you very much.

18 PRESIDING JUDGE EBOE-OSUJI: Counsel, any questions arising from those put
19 by the Judges?

20 MR HOOPER: No, thanks, your Honour.

21 MR KIGEN-KATWA: None on my part, Mr President.

22 MR GARCIA: No, your Honour.

23 PRESIDING JUDGE EBOE-OSUJI: We will excuse the witness and then we can
24 discuss your matter.

25 Witness, thank you very much for coming to answer questions from us. And we

1 particularly have noticed that you did this under some special strain. We heard
2 your coughing quite a bit this morning and we thank you very much for bearing
3 with us. Safe journey back. You're now excused. Thank you.

4 THE WITNESS: Thank you, your Honour.

5 (The witness is excused)

6 PRESIDING JUDGE EBOE-OSUJI: So we're now left with the matter of, you said
7 you wanted to make submissions as to what you tendered?

8 MR GARCIA: Indeed, your Honour. I'll be quite brief. This morning I indicated
9 that we would like to introduce several items of information of evidence that the
10 witness commented on and referred to into evidence. And those would be
11 obviously the expert report, first point. The English transcript number is 0093-1308,
12 French is 0093-0871. So I'll deal with those items of evidence first.

13 Obviously afterwards I'd also -- I'm also going to be making submissions on the
14 admission of two documents that I already indicated this morning earlier on. I'll
15 give the ERN numbers later on.

16 So first and foremost in regards to the evidence, expert report of the witness, I'm
17 guided obviously by the Chamber's decision, decision 844 at paragraph 14 where the
18 Chamber indicated already to the parties, participants the criterias which it felt were
19 necessary in determining the admissibility of the expert report. And basically the
20 Chamber relies upon a decision in Lubanga, decision 1399. And the criterias are
21 quite simple. It's a question of relevance, the question of probative value
22 afterwards of the document. And, third and finally, the most important question is
23 the question of whether the prejudice would override the probative value of these
24 documents.

25 Our submissions, your Honour, is that this expert report is highly relevant to the

1 issues at hand. First, the first question that one should ask itself is obviously if this
2 report has been -- is important or instrumental for the Chamber in understanding
3 the evidence that has been given and evidence that will be given in the future. We
4 submit that that's the case.

5 The expert report has been referred to by the witness during his testimony. It deals
6 with 12 questions that are highly relevant. Six of them deal with the PNU and the
7 ODM. I'm not going to go through every individual question obviously. The
8 questions that were addressed in the expert report were the PNU, its roots, how was
9 the voting for the PNU during the elections, if it was cut under -- on ethnic lines.

10 For the ODM, the same questions were put to the witness.

11 Other questions of highly -- that are highly relevant for this issue and for the case are
12 the root causes of the post-election violence. Now, that was question number 1 in
13 the expert report. The witness obviously as an expert as he has been deemed by the
14 Chamber gave highly relevant information as to what he determined and what
15 others experts had cited as the possible root causes.

16 The final questions of the expert report deal with obviously the ethnic tension and
17 how the voting was done under ethnic divisions, ethnic lines. And most
18 importantly, the last two questions, questions 10 and 11, which dealt with obviously
19 how the violence in the Rift Valley differentiated or distinguished itself from the
20 violence elsewhere in Kenya during the post-election violence, which once again is
21 highly relevant information; and, finally, if this cyclical violence had occurred in the
22 past and the reasons why.

23 So the witness has been with us for approximately two days, and he's given evidence
24 on all of these topics. And actually on this point, the expert report and his
25 testimony in certain cases are inseparable. The witness has either been referred to

1 the expert report for clarifications on certain things that he would have -- certain
2 allegations, statements that he makes in the expert report. I've cross -- I've
3 examined him on those specific subjects. And during the cross-examination of Mr
4 Hooper, obviously, he's also referred to certain allegations.
5 So already even in this case in the first criteria of relevance, the report and the
6 testimony of the witness are inseparable, indissociable in certain regards. So that's a
7 criteria that the Chamber must take into consideration.
8 I don't think that the relevance will be in dispute, but those are my submissions
9 regarding the relevance.
10 Now, there is obviously the question of the probative value. Some of what I've
11 stated for the relevance obviously applies in that regard. But even more
12 importantly, when you look at the expert report, and I went through it with the
13 expert, one can see that these are not simply conclusions or unsubstantiated
14 allegations that the witness has made. In response to the 12 questions, the witness
15 has provided for each question the citations or the sources which he feels were the
16 most relevant for each question, and also he's provided a lengthy bibliography.
17 I've questioned him on certain of those sources to see exactly what the reliability of
18 these sources was. For example, I questioned him on the articles of Gabrielle Lynch,
19 amongst others. And I understand that as well Mr Hooper during his questioning
20 also referred to documents or authors that were in the bibliography to test obviously
21 the reliability of what the witness was saying in regards to certain -- in regards to
22 Moi, in regards to the elections in 1992, elections in 1997, elections in 2002, and
23 finally the elections in 2007.
24 So all of these elements, all of these -- all of this information that the expert has
25 provided is extremely relevant. In fact, it's always been the Prosecution's pleading

1 and submissions that what happened in the past, 1992 and in the previous elections
2 is highly relevant in understanding what happened in 2007. So the expert has
3 explained that to us.

4 It's obvious from the way he's expressed himself that some of the conclusions which
5 he arrived on are conclusions that derive from his own research, and other
6 conclusions are those that he's arrived at from his understanding and his reading of
7 academic material and articles.

8 I understand that at one point Defence counsel mentioned that this might be an issue
9 in regards to admissibility. Our submission is that this only goes to weight and not
10 to the admissibility.

11 The final criteria that the Chamber has indicated for the expert report, and it's
12 paragraph 14, is the question of whether the probative value of the expert report is,
13 whether there is obviously a probative value and what prejudice there may be.

14 In my opinion, my humble opinion, the most important factor in this regard is that
15 nowhere, whether it be in the testimony of the expert or in his expert report, is there
16 any indication or any information or evidence that goes to the acts and conducts of
17 the accused, either of the accused in regards to the charges that are put to them.

18 The expert witness has been quite careful in his report to simply give information as
19 to -- and even obviously when he's asked questions as to who are the people
20 involved, he gives out simply descriptions as in opinion leaders, Kalenjin youth.

21 He's never mentioned any type of evidence or any type of conclusion as to the
22 criminal responsibility of either of the accused or anyone in the network that the
23 Prosecution would have mentioned in its pre-trial brief. So that's an important
24 consideration. There is nothing that could be prejudicial to the accused in terms of
25 a fair trial.

1 As for the probative value, your Honour, I've already indicated that the relevance,
2 the document, the expert report is highly relevant. It explains in detail indicating
3 the sources --

4 PRESIDING JUDGE EBOE-OSUJI: I thought that was the criterion of probative
5 value. I noticed that whenever you were addressing the criterion of probative
6 value, you also start talking about relevance.

7 MR GARCIA: For probative value, your Honour, I think that the fact which is most
8 important is the fact that obviously all the sources, the bibliography is indicated. If
9 the Defence wants to challenge or needed to challenge the witness on any of the
10 material or any of the conclusions that he arrives on, it was, the sources were readily
11 available. So that's the most important factor for the reliability of the expert report.
12 One last thing that I'd like to mention in regards to the expert report, probably one of
13 the most important things is that according to the conduct of proceedings decision of
14 the Chamber, decision 844, if my memory serves me well, paragraph 26, if we wish
15 to introduce an item of evidence through a witness, there has to be a connection
16 between the testimony of the witness and the document.

17 In this case, obviously, the witness has referred to it on many occasions, and
18 questions have been led using the expert report.

19 So those are basically my submissions in regard to the expert report. One last thing
20 I wanted to say in that regard, just to sum up, is that I don't see why for any valid
21 reason that the Chamber should be deprived of all the information that we do find in
22 the expert report, because obviously the expert witness has given us the information
23 which he found the most important while testifying. But there is a more in-depth
24 study on certain points that is in the expert report. The Chamber is here for
25 determining the truth in the matter. And I think that it can rely on the rest of his

1 evidence in light of the fact that he is an expert witness in the matter.

2 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, on the report.

3 MR HOOPER: Yes.

4 PRESIDING JUDGE EBOE-OSUJI: Mr Garcia has not yet spoken to the other, two
5 of the documents he had in mind, he had broached earlier. Now we're dealing just
6 with the report.

7 MR HOOPER: Our position is to really tread with some care. There is no ICC
8 jurisprudence that's of very much assistance to the Chamber. This is a matter, this
9 area of expertise, expert reports that hasn't received much -- barely any attention
10 from any Chamber. And so the consequence of that is that the parties, particularly
11 the Defence, are unclear as to the parameters within which a report for example such
12 as this, the one submitted, the parameters within which the contents of that report
13 subsequently can be used or employed.

14 We're also aware that we're dealing with what I submitted in fact at the outset on
15 Monday was a unique area of evidence, unique in the sense of being unique to these
16 kinds of courts, ICTY, ICTR. The Courts are familiar with reports that go to the
17 backgrounds of the case, the history of the genocide in Rwanda, for example, and its
18 previous colonial history from Alison Des Forge or Lekshons (phon) and the others
19 is well-known, and to a lesser extent or so the Yugoslav tribunal, there were experts
20 who spoke in some general terms about, though generally about more specific
21 subjects such as lines of command and political and military structures.

22 Particularly in terms of what I'd call the quasi-historical reports or experts, these are
23 not expert reports in the sense that we would be familiar with in our own domestic
24 jurisdictions in any way. There, of course, one would tend to have particular
25 subjects addressed of a technical nature. The person who would come to court to

1 help on a whole diverse range of issues, whether it might be metal fatigue in a plane
2 or perhaps physiological evidence emanating from a radiologist, for example, as to
3 whether child injuries were deliberate or not, DNA evidence, a whole range of
4 material such as that comes within an area where basic facts are established upon
5 which the expert assists the Court by presenting his opinion often on a fairly discrete
6 area. And that opinion is generally I'd say science based and, therefore, subject to
7 peer review. And that, I submit, can be distinguished from the generality of the
8 kind of historical expertise that a witness such as Dr Maupeu demonstrates where
9 he's expressing an opinion in this case based upon the opinions of others, and that's
10 the trail that gives rise to some difficulties.

11 Now, coming to this report, there is no automatic admission of this kind of report in
12 our submission. Certainly that would reflect the jurisprudence of the tribunals and
13 would be consistent with the discretion in respect of evidence that obviously arises
14 in Article 64 and Article 69.

15 The report, therefore, would not be admitted automatically and so there must
16 parameters that it must satisfy in order to be admitted.

17 And one of the first questions that we're concerned with and perhaps the principal
18 question is this: For what purpose is the Prosecution seeking the admission of this
19 report? Is it to be viewed as additional, containing additional evidence to be relied
20 on in the course of your Honours' considerations later? Is it, as it were,
21 supplemental to the evidence that's being given?

22 Now, as far as the evidence that's being given, we know that this is a Court that has
23 exercised the principle of orality in having witnesses testify and this witness is really
24 no exception to that. He's been giving evidence not for two, but really for three
25 days. The Prosecution have their report, which is a guide to them and informative

1 to us of the parameters of the witness's potential evidence.

2 The Prosecution have had every opportunity to extract from the witness all the
3 salient aspects that they seek to rely upon and adduce, and in doing that they put the
4 Defence on notice of those areas that the Defence have to address.

5 Now, what therefore is left? Not all the matters in the report have been adduced
6 necessarily by the Prosecution, and consequently and naturally not all the points in
7 the report have been addressed by the Defence and nor should they be expected to
8 respond to matters which have not been laid before the Court directly through the
9 oral evidence.

10 So we would submit that if -- if this report is admitted, then it should, if admitted at
11 all, be admitted within reasonable parameters, admitted indeed in order perhaps
12 solely to illustrate the reliance that is placed by the witness in coming to certain
13 opinions on the opinions of others; in other words as a reflection of his methodology.
14 What we strongly submit is that parts of the report that have not been laid before the
15 Court could not become substantive evidence in this case.

16 So those are my submissions in respect of that report.

17 PRESIDING JUDGE EBOE-OSUJI: What did you say happens in national
18 jurisdictions with regards to admissibility or admission of expert witnesses' reports?

19 MR HOOPER: Well, first of all, what I submit is that I can think of no case that's
20 ever come before a court in my jurisdiction where this kind of report - this kind of
21 evidence - is given of this kind of generality.

22 PRESIDING JUDGE EBOE-OSUJI: Not of this kind. I'm talking about where an
23 expert of any sort has been called. What happens to the report by way of
24 admissibility?

25 MR HOOPER: Well, it's not -- the report wouldn't be admitted. Well, not in a

1 criminal case. The report obviously goes into the filing bundle in terms of a civil
2 proceeding. In terms of a criminal case, it wouldn't. That's a reflection in part
3 obviously of the nature of the system. You wouldn't be providing juries, for
4 example, with that kind of report.

5 And what I'd submit would obviously be the case, and that is that the evidence - the
6 oral evidence - is the evidence that matters, what's given in court, and the expert can
7 express his opinion and the expert can demonstrate the facts upon which that
8 opinion is based.

9 But one of the difficulties here is that there are facts that may be relied upon by the
10 expert, as we explored this morning, that are untrue. They cannot be viewed as
11 facts in the case at all and they don't come into the case as facts that have now been
12 proved, because they have been referred to perhaps by an expert, or even more the
13 case facts that have been relied upon by someone else to express an opinion upon
14 which this expert has gleaned a summary.

15 And you may recall the opening - almost the opening - words of this expert's
16 testimony, when he said as far as this report is concerned -- and I haven't got the
17 direct quote, but I have got it in my papers if you want it. You may recall it. He
18 said, "This report is not my view of the violence, but the view of others." And you
19 may remember that this is not an expert who's done any primary research even to
20 rely upon, so there is no facts that he attests to in the course of this report that are
21 primary, not even secondary.

22 What one has here in effect from time to time, and this is our concern, is a tertiary
23 hearsay of complaints made perhaps to tribunals, to NGOs, unsourced - unsourced -
24 in the reports that he read, whether they're by a Gabrielle Lynch, or by a Mueller, or
25 Klopp, or whoever.

1 PRESIDING JUDGE EBOE-OSUJI: I'm merely trying to establish what is done in
2 other places. I've asked you the question about national jurisdictions. You've
3 answered it. We will have an opinion on that.

4 But what about in the other tribunals, the ad hoc tribunals? You had mentioned
5 reports there, including Alison Des Forges and others. What happens there as well?

6 MR HOOPER: I must say in terms of my knowledge from direct experience are
7 rather limited and probably far less than the Chamber's, but the principle as I
8 understand it remains the same and that is that that which is adduced as opinion,
9 founded on proven facts, is of course evidence in the case.

10 But matters that are not expressly accepted, which lie somewhere within perhaps a
11 long report, can't be used surely and logically as substantive evidence in the case
12 later to find their way into a Prosecution closing brief without further ado. That
13 wouldn't be a right process to allow, and in particular when you have this kind of
14 wide-ranging opinion-centred material which we've been dealing with in this case.
15 So we're dealing, and I come back to the beginning, to a very special and exceptional
16 form of expert evidence, wide-ranging, not specific, not rooted in specific facts and
17 very subjective and for those reasons requiring in our submission a very cautious
18 approach and the best cautious approach is to rely solely on the evidence that's
19 given orally.

20 The Prosecution had every opportunity in this case to extract all they wished to do to
21 obtain from this particular witness. It's not like, for example, the ICTY, where the
22 statement can go in as a preliminary document and then cross-examination takes
23 place under Article 92 -- 94. In this case, the Prosecution have had their time with
24 the witness.

25 What is it that the Prosecution want this report to do that they haven't got their

1 expert to do? There is our concern. It's unstated, isn't it, and we're right to be
2 suspicious about it.

3 PRESIDING JUDGE EBOE-OSUJI: All right.

4 Mr Kigen-Katwa?

5 MR KIGEN-KATWA: With your permission, your Honours, my colleague Caroline
6 will take up the objection.

7 PRESIDING JUDGE EBOE-OSUJI: Ms Buisman, please.

8 MS BUISMAN: Good afternoon, Mr President, your Honours. On behalf of the
9 Sang Defence, we also object to the admission of this report. We see in particular no
10 added value to admitting this report. We've heard from this expert for three days,
11 and any relevant part of the report will have been addressed either by the
12 Prosecution, or by ourselves, or by you, the Judges.

13 Any other parts in this report are basically opinions - untested opinions - based on
14 other untested opinions, and we know from this witness himself that his expertise in
15 relation to the Kalenjin culture and the Kalenjin customs is only based on what other
16 people have said about it. He has no personal information about it. That's what he
17 said himself. So in that sense and to the extent that this has been tested we have no
18 objection, but to admit the report in addition to that would be a problem.

19 So in the sense of relevance, if you go through the three criteria, relevance, we see no
20 relevance, because as I said you have heard from this expert, anything that anyone
21 wanted to ask this was the time and we cannot now read anything that wasn't
22 addressed and assume that this is as it is as a matter of fact.

23 In terms of probative value we have particular difficulties, because this expert has
24 relied on various -- various reports from Human Rights Watch, from the Kenyan
25 National Commission for Human Rights, also the Human Rights Commission in

1 Kenya and the International Crisis Group and so on and so forth. And these are all
2 documents that are still pending. They're subject to a pending application of the
3 Prosecution to admit Bar table evidence and that's 1121. We've already given our
4 comments as well as the Ruto Defence in the Annex A to that application, and the
5 Sang Defence we also submitted a response on 24 December 2013 and that is number
6 1130. So I won't dwell on all the arguments we set out there.

7 But we have particular problems with these reports, because these reports again rely
8 on other opinions as well as anonymous witnesses and these anonymous witnesses
9 we cannot test at all. So not only do we have a report that relies on hearsay to the
10 fourth degree sometimes, because it's opinion based on opinion based on
11 anonymous witnesses, or other opinions based on anonymous witnesses that cannot
12 be tested.

13 Mr President, in the Katanga case these were factors that weighed very heavily
14 against admission of reports, and on that basis the further remote the hearsay
15 evidence was the less likely the Chamber was willing to admit it. And the same for
16 anonymity. Anonymity makes it even more difficult for a Chamber to accept its
17 reliability. And I can go through all the jurisprudence, but you can also find it in our
18 Bar table motion at paragraph 22.

19 PRESIDING JUDGE EBOE-OSUJI: What was done in Katanga? You mentioned
20 Katanga.

21 MS BUISMAN: This was a Bar table submission and we admit --

22 PRESIDING JUDGE EBOE-OSUJI: Not expert witness report?

23 MS BUISMAN: No, Mr President.

24 PRESIDING JUDGE EBOE-OSUJI: All right.

25 MS BUISMAN: But my argument is that, to the extent to which his opinion has not

1 been tested here in court with you today or yesterday, the day before, it is like
2 submitting it through the Bar. So the same criteria in terms of testing the reliability,
3 which is very linked to probative value, is also applicable to an expert opinion when
4 it's not tested in court before you, your Honours, and so in that sense I submit it's
5 relevant.

6 And it's not just the Katanga and Ngudjolo Trial Chamber that has looked at all Bar
7 table documents. Quite a number of United Nations documents, as well as Human
8 Rights Watch, documents were not admitted on that basis. It's also -- I mean, I can
9 go through it, but I'm not sure that I want to waste your time, but it's because also in
10 the ICTY and the ICTR similar opinions have been expressed.

11 And maybe I'll just give you the reference to our filing, which is 1130, starting at
12 paragraph 22, going on to at least paragraph 32, and in particular like paragraph 30
13 we cite the Katanga Chamber saying that information when it's twice or third
14 removed from its source, that's a factor weighing against admissibility. We also
15 have the International Court of Justice that did not want to admit MONUC reports
16 because of its second-hand hearsay in it.

17 And in particular when I say it's -- when it's anonymous sources in addition, and this
18 is something that we have also highlighted in the annex attached to the Prosecution
19 application, we have particular difficulties with some of these anonymous sources
20 because it's our submission that some of them are concocted. This is something I
21 can dwell on, or I can leave it there and again I can just refer to our filings.

22 So we have a problem with the probative value of this particular document. We
23 already said it's not relevant.

24 And prejudice, while we concede there is no direct problem at least to Mr Sang and
25 to Mr Ruto, but there are -- there are theories about organisational violence, about

1 patterns of violence, and all of this is of course relevant because otherwise -- or at
2 least that's why the Prosecution has brought him in. So it is prejudicial to the
3 Defence and especially when this has not been tested properly.
4 So on that basis we request the Chamber to not admit this report. Thank you very
5 much.

6 PRESIDING JUDGE EBOE-OSUJI: Mr Garcia, reply, and keep in mind the matter
7 raised. Well, there was a lot raised by the opposing counsel, but one matter I need
8 you to address would be the question what else in the report? Why else do you
9 want the report admitted? Mr Hooper said they're quite suspicious of the use to be
10 made of it beyond what the witness had already testified to. Can you speak to that
11 and the rest of the matters raised, or the objections raised?

12 MR GARCIA: Certainly, your Honour. Just to start, obviously this is the first time
13 that the Defence counsel objected to the matters that are included in the report, and
14 what the detail is is that the report obviously -- the witness explains the themes, the
15 questions that have been asked of him, and the answers are much more in-depth.

16 That's obviously the primary answer to the question of the Court.

17 When the witness comes here and testifies obviously the questions that have been
18 put to him are the ones which we feel were the most relevant and cover all of the
19 questions that he dealt with in his expert report, but it's obvious that the expert
20 report -- the witness had more time to explain his answers and explain exactly why
21 he arrived at certain conclusions.

22 And my basic submission is I don't understand, or what is the valid reason that's
23 being put forth by the Defence to deprive -- that we should be depriving the
24 Chamber, professional Judges, of evidence or information which is highly relevant
25 and which can explain the post-election violence and the events that occurred prior

1 to that?

2 The Chamber has asked Mr Hooper and to a certain degree Ms Buisman as to what
3 is the practice in other Chambers in other jurisdictions. I can say that in our case, in
4 the Canadian jurisprudence, normally in Canadian courts when an expert witness
5 comes and testifies, usually the expert report will come in with his testimony and it
6 will be a question afterwards for the Chamber to determine what is the weight to be
7 given to the expert report, but it's obvious that the expert witness testifying will not
8 go into the exact -- all the details that he's enumerated in his expert report, because
9 most of the time, as Mr Hooper has indicated to us, the expert reports in a criminal
10 trial in a national jurisdiction will hinge on opinion evidence on scientific methods
11 and sources.

12 In this case we have a witness that is very similar to the type of witness that we had
13 in the case - that the Prosecution had in the case and proposed in the case Nahimana
14 of the ICTR. This was a historical witness. The Chamber in the end accepted the
15 testimony and the expert report of Alison Des Forge, and obviously I'm looking at
16 the judgment in the Appeals Chamber of 28 November 2007. This is a decision that
17 was cited by the Defence counsel for Mr Sang.

18 So I can see that the practice has been at the ICTY also to include and admit expert
19 reports, so that when the witness is obviously testifying he can testify or she can
20 testify to the conclusions that are the most important, and then afterwards obviously
21 the Chamber has all the sources and all the background, the method or the
22 information that the expert witness relied upon.

23 The most basic factor and the most basic principle that protects the Defence in this
24 case is that they have all this information beforehand. So when the expert witness
25 has testified already in-chief, Defence counsel can, as has been done by Mr Hooper

1 in this case Mr Sang's counsel chose not to prevail himself of that right, but can
2 cross-examine the witness as to all the sources that are indicated in the expert report.
3 And that's why in decisions such as Popovic of the ICTY, the Trial Chamber, the
4 Chamber and the Appeals Chamber in that case has rehearsed and reiterated that
5 there are certain criterias in terming whether an expert report should be admitted or
6 not. It's not something that's outstanding, or exceptional. Quite the contrary, it's
7 normal and very much normal in cases where you have an expert witness. You
8 don't necessarily have them testify in every one of the background material or
9 sources. If not, the testimony would be endless. What's important is his
10 conclusion.

11 And I refer the Chamber to - and the parties and participants to - a decision of 30
12 January 2008 in the decision of Popovic, et al. That would be page 11 of that
13 decision, paragraph 21, and it states, "As properly pointed out ..." --

14 MR HOOPER: Excuse me, do you have a copy for us and for the Chamber?

15 MR GARCIA: I do have one copy, your Honour, but I can state the principle if --

16 PRESIDING JUDGE EBOE-OSUJI: Later you can, yes.

17 MR GARCIA: And I'm sure that Mr Hooper is well aware of this decision.

18 PRESIDING JUDGE EBOE-OSUJI: You can read the passage.

19 MR GARCIA: Certainly. The decision states, and it's paragraph 21, "As properly
20 pointed out by the Trial Chamber, Rule 94bis of the Rules does not provide specific
21 guidelines on the admissibility of testimony given by expert witnesses or criteria for
22 the admission of their report. Trial Chambers had established the following
23 requirements for the admissibility of expert statements or reports: (1) The
24 proposed witness is classified as an expert."

25 I submit we've already had that debate in this Court and the Chamber has already

1 made a finding in that regard.

2 MR HOOPER: Excuse me. This goes to general expertise, the criterion for
3 expertise, this decision.

4 MR GARCIA: I've just actually read out and it's, "... criteria for the admission of
5 their report." So that's quite explicit in the decision.

6 First is, "The proposed witness is classified as an expert. Second, the expert's
7 statements or reports meet the minimum standards of reliability." Once again, I've
8 pled to that in my submissions. "(3) The expert's statements or reports are relevant
9 and of probative value." Once again, we've submitted on that, quite similar to the
10 Lubanga decision.

11 "And (4) the content of the expert's statements or reports fall within the accepted
12 expertise of the expert witness."

13 So these have been essentially the submissions that I covered when dealing with the
14 Lubanga decision, which is very similar in nature. The Lubanga decision speaks
15 about relevance, probative value and obviously the last factor, which is probative
16 value and prejudice. So, once again, when Defence counsel states that this is
17 outstanding and exceptional, that simply is quite not true when you look at the
18 jurisprudence that I've just cited for the Chamber.

19 PRESIDING JUDGE EBOE-OSUJI: All right. In response to my question, there are
20 two matters there. Are you saying that you are tendering the report so that it may
21 be relied upon at large, or are you saying you are tendering the report so that the
22 aspects of the testimony of the witness for which you find the corresponding
23 elements in the report, we're then better able to see that aspect of the testimony or
24 those aspects of the testimony in their greater depth, as opposed to even using the
25 reports for other purposes than the testimony we heard from the witness?

1 MR GARCIA: Your Honour, I'm tendering the report substantively and obviously
2 the Chamber can also rely on it to determine what the witness has stated and to
3 verify that. In my analysis of the jurisprudence before the ICTY, there has not been
4 a distinction in that regard. There has been distinction in that regard when it comes
5 to underlying source material and sources, bibliography, et cetera, but not for the
6 expert report. I have not seen anywhere in the jurisprudence - and I can be
7 corrected by Defence counsel if need be - where that is explicitly stated.

8 An expert report is the witness's account or explanation of his conclusions in-depth,
9 and I don't see why we would deprive a Chamber of professional Judges of that
10 information. The Defence had ample opportunity to cross-examine on all of the
11 elements that are in the expert report. They chose to concentrate on certain
12 elements.

13 PRESIDING JUDGE EBOE-OSUJI: All right. You are done with the submission
14 then?

15 MR GARCIA: In regards to the expert report, yes, your Honour.

16 PRESIDING JUDGE EBOE-OSUJI: Thank you.

17 (Trial Chamber confers)

18 PRESIDING JUDGE EBOE-OSUJI: The Chamber will admit the report, so it will be
19 marked as the next -- as a Prosecution exhibit.

20 THE COURT OFFICER: Thank you, Mr President. The expert report

21 KEN-OTP-0093-0871 will bear the following number, EVD-T-0TP-00043, and will
22 also be referenced as Prosecution exhibit number 43.

23 The English translation of the expert report, KEN-OTP-0093-1308, will bear the
24 following number, EVD-T-OTP-00044, and will also be known as Prosecution exhibit
25 number 44.

1 PRESIDING JUDGE EBOE-OSUJI: Thank you.

2 Your next items?

3 MR GARCIA: Two items, your Honour, and they're documents. It's the article
4 from Gabrielle Lynch, KEN-OTP-0046-0014, "Courting the Kalenjin." It's an article
5 that was referred to during the examination-in-chief and during the
6 cross-examination by Mr Hooper.

7 PRESIDING JUDGE EBOE-OSUJI: What is the tab again?

8 MR GARCIA: It's tab 7, your Honour, I believe.

9 PRESIDING JUDGE EBOE-OSUJI: Please proceed. Yes, it is at tab 7.

10 MR GARCIA: And obviously the document of -- there is an article of Jacqueline
11 Klopp, and that's "Ethnic Clashes and Winning Elections: The Case of Kenya's
12 Electoral Despotism." That's KEN-OTP-0088-0672 and I believe that's tab 6.

13 Now I'm going to be dealing with both of those documents together in one
14 submission, because I believe obviously that the same principles apply for both
15 documents.

16 Now, once again, your Honour, your Honours, first of all the connection with the
17 witness and these documents, the conduct of proceedings, decisions of the Chamber,
18 the first step is obviously to demonstrate that there is a connection between the
19 testimony, and that's paragraph 27 -- paragraph 26 of the decision 847. There is a
20 link between or a connection between the testimony of the witness and these
21 documents.

22 The witness referred to these documents on various occasions. They're referred to
23 substantially in the expert report as well. I've noticed that Mr Hooper in his
24 cross-examination came back on the articles of -- the article of Gabrielle Lynch on
25 various occasions, seeking clarifications and additional information in regards to

1 what Mr Maupeu had stated in his examination-in-chief, so we feel that that hurdle
2 obviously is -- that criteria is satisfied.

3 Now, there is the whole question of obviously what other criterias that we should
4 consider in determining whether these articles' underlying information should be
5 admitted. Our submission, your Honour, is that these articles should be submitted
6 for the truth of their content and not simply to demonstrate that, when the witness
7 was testifying on the subjects that were touched upon by these authors, that -- and to
8 obviously provide the Chamber with background information to which -- with
9 which it could use to assess the credibility of the witness on that matter.

10 Now, I understand that Defence counsel gave me a heads-up on the fact that he will
11 be using a jurisprudence from the ICTY, and that's the decision in Karadzic, a
12 decision from July 2010 from a Trial Chamber in ICTY regarding the limited usage of
13 underlying information or underlying material. And I think that the point at which
14 Defence counsel will be arriving at is in paragraph 7 -- paragraph 10 actually. The
15 Trial Chamber seems to indicate that --

16 PRESIDING JUDGE EBOE-OSUJI: Before you address that, just so I'm sure I heard
17 you well, did you say you were seeking the admission of these two documents for
18 the truth of their content?

19 MR GARCIA: That's correct, your Honour, yes.

20 PRESIDING JUDGE EBOE-OSUJI: All right. Proceed.

21 MR GARCIA: Now, your Honour, the ICTY decision, paragraph 10 of that decision
22 - I'm sure Mr Hooper will be getting into that in more depth - seems to indicate, and
23 I'm not sure if there is unanimity in the ICTY in this regard, that underlying
24 material, if at all, should be admitted simply for the fact of supplying or providing
25 the Chamber with the underlying information on which the expert witness has

1 testified on, or made his conclusions, so that the Chamber, participants, parties can
2 challenge the reliability of the expert witness's testimony.

3 My submissions, your Honour, in this regard is that we don't -- obviously the Trial
4 Chamber at the ICC is not bound by this decision, and that the Trial Chamber should
5 once again refer itself to the decision in Lubanga which we believe is binding -- it's
6 not binding, but it is a precedent that the Chamber has already referred to in its
7 decision, in its last decision, paragraph 14 in the preliminary decision regarding the
8 expert witness, and that the criterias that should be determined or used by the
9 Chamber in determining whether these two documents are admissible are the same
10 ones that obviously I spoke about when I was speaking about the expert report:

11 The question of the relevance of these documents, the question of the probative
12 value and the question of the weight of the probative value versus the prejudice.

13 There is no reason, in our submission, to depart from this decision. It's a decision
14 which is encompassing. And actually when you read the decision, decision 1399 in
15 Lubanga, paragraph 26 clearly indicates that, "When the admissibility of evidence
16 other than direct oral testimony is challenged, the approach should be as follows ...",
17 and obviously they rehearsed the test that I've just spoken about, the relevance,
18 probative value and the weight, the fact of whether the prejudice outweighs the
19 probative value. So our submission is that there is no need to depart from that.

20 And in this case we've selected two documents. There are two articles that we've
21 selected amongst the numerous articles that are referred to by Mr Maupeu either
22 during his testimony in-chief, or in his expert testimony.

23 Now, we were very precise in selecting these two documents, because Mr Maupeu
24 obviously was able to comment on the reliability of these. That's why at a certain
25 point in time during the examination-in-chief of Mr Maupeu, I asked him questions

1 regarding both Ms Gabrielle Lynch and Ms Jacqueline Klopp.

2 And actually when the witness explained the importance of Gabrielle Lynch, and
3 that's at transcript 89, page 12, he speaks about the fact that it's one of the best
4 articles regarding the 2007 elections and he also speaks very highly of Ms Gabrielle
5 Lynch as someone who knows about or obviously has an extensive knowledge in
6 regards to Kalenjin politics. So that's quite relevant for the question of the reliability
7 of these articles.

8 Actually, also when questions were put to the witness, Mr Maupeu, regarding
9 Jacqueline Klopp, the witness also confirmed that this was an author who was
10 renowned in regards to her knowledge or extensive knowledge in Kalenjin politics.
11 So those are the two things that the witness had to say regarding these two people,
12 and he also obviously made comments regarding the sources and the reliability of
13 these sources. In both cases when I questioned Mr Maupeu in this regard, he gave a
14 certain description to the Chamber as to what the sources were used by either of
15 these authors, who are recognised as being experts in these matters and high
16 consideration for them that the author -- that the witness had, so those -- that
17 information basically goes to the reliability of these articles.

18 As for the relevance, you have the document, the article of Gabrielle Lynch,
19 "Courting the Kalenjin," and this document, this article actually, touches upon -- I'm
20 going to let the Chamber obviously retrieve that document. It's "Courting the
21 Kalenjin" by Gabrielle Lynch.

22 Now, it's highly relevant, because obviously one of the indicators of its relevancy is
23 that Mr Maupeu, our expert witness in this case, refers to Ms Gabrielle Lynch on
24 many occasions, obviously explaining and citing the fact that she is an expert in the
25 fact -- in the matter.

1 Ms Gabrielle Lynch in that article deals with the election campaigns in 2007. She
2 deals with the voting patterns, the brief political history of Mr Ruto, explains the
3 Eldama Ravine Declaration, also speaks about the post-election violence, the
4 aftermath, the contested elections, also speaks about Moi, Moi's entrance into power,
5 the fact of how he was in KANU obviously, what happened afterwards, et cetera,
6 and explains the attacks on the Kikuyu communities. So Mr Maupeu has obviously
7 been able to give us a slice, a bit of information that he's obtained from Gabrielle
8 Lynch in his testimony and in his report.

9 But here the Chamber has the primary source, and I understand there is much
10 concern on the part of Defence counsel - especially Defence counsel for Mr Sang - on
11 the reliability of the information. We have here the article of Ms Gabrielle Lynch,
12 and I don't see why we should be depriving the Chamber of this information in
13 regards to elements and evidence which are highly relevant to this case, Mr Moi and
14 Mr Ruto's political career and all other elements which are concerned with the
15 post-election violence.

16 In regards to the prejudice or potential prejudice of admitting either one of these
17 articles, actually the first one, this one regarding Gabrielle Lynch, once again I've
18 looked over the article and Ms Gabrielle Lynch doesn't go into the acts or conduct of
19 the accused, doesn't pronounce herself on the criminal responsibility of the accused
20 in regards to the charges that are before this Chamber, doesn't speak about any of
21 the members of the network.

22 That's one of the reasons, your Honour, that the Prosecution selected these two
23 articles. They don't necessarily go into -- they don't deal with these matters, which
24 we would feel would be unacceptable and we wouldn't have asked to have these
25 tendered. That's why specifically we've asked for this article to be admitted into

1 evidence along with the report.

2 Then obviously you have the article of Jacqueline Klopp and her article is an article
3 that was published -- what I see is 2007. Her main area of expertise is what Mr
4 Maupeu was speaking about yesterday and today on different occasions, this whole
5 ethnic cleansing going on from 1991 to 1993 which is actually quite relevant. There
6 have been many questions that were posed to Mr Maupeu in that regard. Mr
7 Maupeu I think at one point even referred to his expert report and the fact that he
8 had cited information in that regard. So, once again, for Defence counsel this is
9 information from where Mr Maupeu obtained his conclusion or arrived at his
10 conclusions.

11 Ms Klopp, Jacqueline Klopp, deals with the 1991, 1993 elections. She deals with the
12 ethnic clashes during that period. She also deals with the usage of the term
13 "madoadoa." There has been evidence in this regard in this case already. I refer to
14 the Chamber that she's also -- she's also dealt with the electoral despotism that Mr
15 Maupeu talked about; majimbo-ism she's dealt with, which was also a subject matter
16 that has garnered a lot of attention during these proceedings. There were questions
17 by the Chamber on that, lengthy questions, questions by the Defence. Prosecution
18 as well has endeavoured to find out more about majimbo-ism through the years.
19 Ms Klopp has done certain investigations. He cites her sources, her bibliography.
20 This could be of aid to the Chamber in determining the truth in this case, or at the
21 very least having at its disposal information, specialised knowledge, which could
22 help it assess evidence; evidence that has already come into the file or evidence that
23 is yet to come.

24 So for both of these issues, as for both of these articles, even for the one of Ms
25 Jacqueline Klopp, once again she does not -- it's an article obviously from 2001, so

1 she does not deal with the criminal responsibility of any of the accused that are
2 charged here before the Court, or any of the members of the network. She deals
3 with the Moi regime and everything preceding 2001.

4 For those reasons, your Honour, for the highly relevant nature of these articles, for
5 the fact that there is no prejudice at all to the Defence to a fair trial in admitting these
6 articles and also in light of the fact that they're highly, highly -- and the fact that
7 they're highly relevant, I submit that both these articles should be admitted by the
8 Chamber for the truth of their contents.

9 We are -- the Prosecution is well aware that it is sitting before a Chamber of
10 professional Judges. If there is any information in these articles that the Defence
11 objects to, it's obvious that the Chamber can simply put them aside and not consider
12 them for any ultimate decision in this case.

13 Those are my submissions for the two articles, your Honour.

14 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper?

15 MR HOOPER: Well, a trial by bibliography is an unusual proposition to hear come
16 from a Prosecutor. I can't think of any case where subsidiary source articles of this
17 kind have been admitted in any case and I don't know if the Prosecution can, but I
18 for my part can't think of a case where any court has gone that far, nor would it or
19 should it do so. It would be a breach of the Article 67 rights to confront witnesses.
20 The Prosecution, I understand, contacted Ms Gabrielle Lynch and we had a Rule 77
21 disclosure relating to the meeting at least between the OTP and her. Have they
22 called her? Have they chosen to call her? Am I in fact not cross-examining Mr
23 Maupeu, but also Gabrielle Lynch and Ms Klopp and the various people who have
24 appeared on the various committees and crisis groups and what have we that have
25 been -- that have been referred to?

1 Now, originally we got a list of documents that the Prosecution I understand wanted
2 to seek to exhibit, which would number 10, including at least 6 as Ms Buisman has
3 already mentioned that appear on the Bar table motion. Now we're down to two.
4 We're down to the Ms Lynch article, paper, and the Ms Klopp paper.
5 Surprisingly, the Prosecution want to adduce these for the truth of their content.
6 Just pause there. What does that mean? Both of these papers, about 25/30 pages
7 long, replete with footnotes and references of various sorts and quality, 40, perhaps
8 50 pages between them, the two articles, so are all the statements of fact contained in
9 those articles written by people that we've never set eyes on, never appeared before
10 the Court? Are they going to be now admitted at the Prosecution's request for the
11 truth of their content? How would any accused in fact be in a position to address
12 that kind of situation? Why not put in Ms Gabrielle Lynch's book? Where does it
13 stop? So there are -- we can tell, our reactions are the same, that there must be some
14 kind of restraint.

15 If we look at the -- can I take the Klopp article first? In fact, in the course of Mr
16 Maupeu's written report, that is referred to just once and it's referred to in the
17 context of ethnic despotism. In her own article she states that, while this has yet to
18 be systematically explored, a number of scholars have drawn attention to this thesis,
19 political science theory, and she also makes reference herself to page 475 to quote,
20 "The lack of careful local level studies of this violence."

21 Now, in respect --

22 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, watch the clock --

23 MR HOOPER: Certainly.

24 PRESIDING JUDGE EBOE-OSUJI: -- so you can yield some time --

25 MR HOOPER: Certainly.

1 PRESIDING JUDGE EBOE-OSUJI: -- to your colleagues to also --

2 MR HOOPER: Certainly. In respect of Gabrielle Lynch's article, again it's a long
3 and substantial article, and certainly neither Mr Maupeu has referred to it, nor has
4 the Defence, and there are matters here that would be potentially in breach of the
5 restrictions of the parameters of evidence and matters here that are plainly wrong.
6 So, for example, in Ruto at one point it states he became the treasurer of Youth for
7 KANU 92. No, he didn't. He was never treasurer of KANU 92. Take that as an
8 example. Are we meant to now accept this as a statement of truth, unproven,
9 unstated by the witness?

10 And we also come back to the matters that were raised and touched upon in respect
11 to this kind of material by Ms Buisman, and that relates of course to the general kind
12 of material that we're dealing with and where the prejudice in fact would naturally
13 arise. And that is, apart from the fact that the Defence -- the accused cannot
14 confront his accuser if there are facts of accusation, and one assumes that the only
15 probative value that these have are probative values in terms of the charges against
16 the accused, otherwise there is no probative value, and the Defence would be
17 deprived of an opportunity of confronting either Gabrielle Lynch or Ms Klopp in
18 respect of concepts, in respect of opinions, which are based on material which is
19 uncertain or unsourced, generally and commonly unsourced.

20 The decision of the Prosecutor's Bar table motions in the Katanga case, decision 2635,
21 considered for example - and I'll just take it briefly as an example - the Prosecution's
22 request in that case to have reports by United Nation's agencies admitted.

23 The Court had no difficulty in terms of the genuineness and authenticity issues, but
24 it said, "Insofar as such reports emanate from independent observers who were
25 direct observers of their facts being reported, the Chamber considers them to be

1 prima facie reliable. However, if the author's identity and the sources of the
2 information provided are not revealed with sufficient detail, the Chamber is unable
3 to determine whether the contents of the report have been imparted by an
4 eyewitness, or some other reliable source." This is all at paragraph 29.
5 "If such particulars are not available either from the reports themselves or from their
6 authors, the Chamber cannot assess the reliability of the content of the report. It's
7 therefore unable to qualify these documents as sufficiently reliable to be admitted
8 into evidence. Moreover, where such reports are based for the most part on hearsay
9 information, especially if their information is twice or further removed from its
10 source, the reliability of their conduct is seriously impugned."
11 It went on to then consider reports of independent NGOs and basically applied same
12 or similar criteria, and throughout these reports we have an academic approach, an
13 academic approach to issues, statements of fact often unreferenced, upon which
14 conclusions are based which have helped mould our witness's opinion.
15 Now, if I can come just very briefly and finally to the case which I referred to and
16 which I provided my friend with, and I think the Court has got a Karadzic decision?
17 Thank you. This is a decision of 9 July 2010, Prosecutor Radovan Karadzic before
18 the Trial Chamber, decision on the Prosecution's submission on the relevancy of
19 certain documents relating to the testimony of Richard Phillips, who is the expert
20 evidence.
21 And it reads at paragraph 5 -- and just pausing there, one must recall that at the
22 ICTY there is a particular regime which we do not have at the ICC in relation to, first
23 of all, experts' reports, the way notice is given to the other side, time for objection, et
24 cetera, et cetera, and secondly we have a different regime there also in respect of
25 reliance on pre-trial written statements being admitted into evidence, so that those

1 are very different - very different - circumstances to the one that we're in in any
2 event.

3 But it does state at paragraph 5 what might be considered a general and practicable
4 viewpoint, and it reads -- is there a copy? I've provided copies for you, the Judges,
5 "Expert reports generally should be complete and understandable in themselves,
6 such there is no need to tender for admission into evidence the sources used by the
7 expert. However, should the presenting party wish to tender certain sources used
8 by an expert in compiling his or her report, it can apply to the Chamber for their
9 admission orally or in writing."

10 Now, just pausing there, we're dealing with a very different kind of expert and very,
11 very different kinds of source material. If you've got an expert at the ICTY who
12 comes before the Court to explain, for example, the trajectory of ammunition, a
13 military expert, he will come in and he will have the documents provided to him of
14 the army's use of certain calibre shells, whatever it might be, positionings,
15 trigonometry positions, all primary evidence.

16 Yes.

17 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, that was a reminder that --

18 MR HOOPER: Yes.

19 PRESIDING JUDGE EBOE-OSUJI: -- we've now passed the 4 o'clock threshold.

20 Can you wrap it up, please?

21 MR HOOPER: Yes, certainly. I was just saying that we're looking here at a
22 different kind of source material. We're talking about primary material that's
23 provided to an expert in respect of particular technical matters.

24 PRESIDING JUDGE EBOE-OSUJI: And they could be actual evidence? That's
25 what you are saying?

1 MR HOOPER: Yes, they could be actual evidence. We're not talking about
2 opinion evidence. "But even so expert reports ...", at paragraph 10 say the
3 Chamber, "... provide the ..." -- "... provide the Chamber with synthesis and
4 analysis of voluminous and often complex technical material by a suitably qualified
5 expert, thus ensuring that the Chamber is not required to undertake the same task.
6 As such, documents and other items that are source material are not admitted for
7 their substantive content, rather the purpose of admitting source material is to
8 enable the Chamber to verify, if necessary, the basis upon which the expert reached
9 his or her conclusions, as well as how the relevant analysis was conducted. These
10 documents are only therefore of assistance to the Chamber in determining the
11 weight to be ascribed to the expert report."

12 And in our submission if -- if these reports by Ms Klopp or Ms Lynch were to be
13 admitted, they would and should necessarily have a great restraint exercised over
14 them, out of fairness for the accused and the fairness of the trial, and they should
15 certainly not be admitted for their substantive content and certainly not admitted as
16 my friend suggested for the truth of their contents.

17 Those are our submissions.

18 PRESIDING JUDGE EBOE-OSUJI: Is that you, Ms Buisman? Yes?

19 MS BUISMAN: Thank you, Mr President. I will be very brief.

20 I fully share the observations just made by Mr Hooper. Just one thing I'd like to
21 add. Especially we heard Mr Garcia say that she was the primary source, so we
22 also express our surprise that she wasn't called here to testify before you if she's such
23 a great -- if she has such a great knowledge of the Kalenjin culture.

24 But, in fact, we know very little about her. We only know that we heard his opinion
25 - Dr Maupeu's opinion - on her research, as well as on Klopp's research, and seen

1 more that he had a preference for her approach over Klopp's approach and it has
2 more to do with European versus American style.

3 And actually if we look at his absence of real knowledge on Kalenjin culture, I'm not
4 sure that his opinion on Ms Lynch as a source is so relevant because she is actually
5 his source. She's his main source on Kalenjin culture. And the only thing he
6 cannot -- we have not heard anything about her methodology. We haven't heard
7 anything about her sources. I can only look at her sources, and some of them are
8 newspapers, others are Human Rights Watch, and it's the "Ballots to Bullets" again,
9 the one that is also part of the application, and there is International Crisis Group
10 and there is other academics who then rely on other academics. I won't dwell on
11 the point, because I think they're made by Mr Hooper.

12 Just one thing, we only know one thing and that is that she doesn't fully understand
13 the local language and she had to rely on people around her to interpret what was
14 being said. This is something we know from the Prosecution in their contact with
15 her. So we don't know how much time she spent there. We do not know how
16 fully -- she's not been an expert before you. She has not been qualified as such. So
17 at the moment it is an opinion that was relied upon by someone who was qualified
18 as an expert, and that's the extent to which we accept that phrases in hers or in
19 Klopp's document can be used and it has been used in his testimony. There is no
20 added value to also admit these academic papers.

21 Thank you.

22 PRESIDING JUDGE EBOE-OSUJI: To our colleagues in the interpretation and court
23 reporting booths, if you can bear with us for another five minutes so we can wrap
24 this thing up?

25 Mr Garcia, two minutes to respond if you need to, or reply rather?

1 MR GARCIA: Simply, your Honour, even in this decision, Karadzic, when you
2 read the last portion of paragraph 10 I think the Chamber even notes that there
3 might be situations -- it says, "The Chamber notes, however, that if at a later date a
4 witness discusses the content of a document previously admitted as a source
5 document in such a way that renders that document admissible for its content, the
6 status can be changed to reflect its admission for all purposes."
7 Obviously it's at the end of the paragraph that Mr Hooper cited, so it's not clearly
8 closing the doors on any issue of possibly having a source document be admitted for
9 the truth of its content and I think that's important to note as well.

10 PRESIDING JUDGE EBOE-OSUJI: Thank you.

11 (Trial Chamber confers)

12 PRESIDING JUDGE EBOE-OSUJI: The Chamber will not admit the documents.

13 The Chamber is sympathetic with the view expressed in the Karadzic case that
14 expert reports generally should be complete and understandable in themselves such
15 that there is no need to tender for admission into evidence the sources used by the
16 expert, but we're not making a ruling on that now. As I said, it's just the question of
17 sympathy we have for that view. It is enough to say that the proposition of the
18 Prosecution that the document should be admitted for the truth of their content is
19 certainly not one that we will be agreeable to.

20 That is the ruling of the Chamber. Thank you.

21 Now, we will be rising now and we'll start again -- we'll start back here at 9.30
22 tomorrow.

23 THE COURT USHER: All rise.

24 (The hearing ends in open session at 4.07 p.m.)