

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 Status Conference
9 Monday, 19 August 2013
10 (The status conference starts in open session at 10.10 a.m.)
11 THE COURT USHER: All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
15 Court officer, could you please call the case.
16 THE COURT OFFICER: Yes, your Honour.
17 Situation in the Republic of Kenya, in the case of The Prosecutor versus William
18 Samoei Ruto and Joshua Arap Sang, case number ICC-01/09-01/11, and for the record
19 we are in open session.
20 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
21 We will take appearances now, beginning with the Prosecution team. Thanks.
22 MR STEYNBERG: Thank you, Mr President, your Honours. I appear for the
23 Prosecution in this case. My name is Anton Steynberg, senior trial lawyer. With
24 me Cynthia Tai, Lucio Garcia, Lorenzo Pugliatti and Jasmina Suljanovic.
25 PRESIDING JUDGE EBOE-OSUJI: And the Defence?

1 MR KHAN: Mr President, your Honours, good morning. Mr William Ruto is
2 represented by David Hooper of Queen's Counsel, Shyamala Alagendra of counsel,
3 and then our legal assistants and case managers Judy Mionki, Shalini Jayaraj and Jaya
4 Anil Kumar. Your Honours, my name is Karim Khan, also of Queen's Counsel.

5 MR KIGEN-KATWA: Your Honour, my name is Katwa Kigen, counsel for Joshua
6 Sang. I appear together with Logan Hambrick, our legal assistant. Thank you.

7 PRESIDING JUDGE EBOE-OSUJI: And counsel for the victims?

8 MR NARANTSETSEG: Mr President, your Honours, my name is
9 Orchlon Narantsetseg. I am a legal officer at the OPCV. Today I am appearing on
10 behalf of Mr Wilfred Nderitu, the Common Legal Representative of the victims.
11 Thank you.

12 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. Do we have anybody
13 from the Registry? I see no one. So we will proceed.

14 The status conference today is part of the preparatory work we need to do for
15 purposes of opening the trial on 10 September. In the agenda of the status
16 conference indicated there were a number issues we will need to take. Some of them
17 have been explicitly indicated in earlier orders from the Chamber. We will be
18 taking -- and some have not. Some have been listed under other matters. I will
19 specify all of them now.

20 We will be hearing submissions on the matter of the Prosecution's outstanding
21 request to give notice of possibility of recharacterisation, legal recharacterisation
22 pursuant to Regulation 55(2) of the Court's Regulations. We will take that as the first
23 item on the agenda. I know it had been listed as the second item in an earlier
24 published order from the Court -- from the Chamber. And the second item we will
25 take down to the end will mostly deal with administrative, legal administrative

1 matters; in particular, we will take submissions on the length of the Prosecution case
2 and the average time per witness.

3 We will also, under "other matters," we will take submissions on one late filing by the
4 Prosecutor indicated in the further filing on the conduct of proceedings, the matter of
5 whether there will be rebuttal allowed and whether specific items need to be put to a
6 witness on the stand. We will take submissions on that.

7 There are also some pending motions that we will deal with. Some of them are in
8 closed session, so we will take those in closed session, but the ones which we will take
9 in public session will include the Defence request on the order of

10 witnesses - Prosecution witnesses - the first eight witnesses. We may not be taking

11 submissions on that. We will be issuing a ruling, and I will tell you why when we

12 get to it. And when we get into closed session, then it will be better to announce the

13 items we deal with in closed session then, considering that some of these filings were

14 made confidentially. So while we get straight to the first order on the agenda, the

15 first item on the agenda, that will be the matter of the Prosecution's request for

16 Regulation 55(2) notice, I will be requiring -- there will be time constraints in this

17 business. We will be expecting or, rather, requiring parties to make their best points

18 in ten minutes and that will be fair, especially considering that filings have been made

19 in this matter. So you will know your best points and you make them in ten minutes.

20 We will be keeping time, so you know.

21 So why don't we begin with that? Prosecution, if we can have your submissions

22 perhaps updates, and especially in light of the Appeals Chamber's decision in the

23 Katanga Regulation 55 matter.

24 You have ten minutes, Mr Steynberg.

25 MR STEYNBERG: Thank you, Mr President.

1 As you rightly point out, your Honour, we have already submitted detailed filing in
2 this respect, and that is filing number 433, as long ago as 3 July 2012, and we stand by
3 those submissions, your Honours.

4 At the outset I should make clear that this is not a request for an amendment of
5 charges. It is not even a request for the immediate recharacterisation of the facts. It
6 is simply a request that notice be given to the Defence formally by the Chamber that
7 there is a possibility of the recharacterisation of facts and we do this -- we make this
8 request, your Honours, specifically to avoid the situation such as that that has arisen
9 in the Katanga case, where at a late stage in the proceedings this issue has arisen
10 pertinently and the Defence call foul, saying, "We had no idea this was coming, we're
11 not prepared, we've conducted our Defence on a specific line and we are terribly
12 prejudiced by the fact that the facts are now being recharacterised."

13 The Prosecution does not necessarily believe that such an argument should hold
14 water. In fact, we believe that in the case where accused are represented by
15 experienced and senior counsel, these counsel should be taken to be aware of the
16 Statute and Rules and aware of the possibility of recharacterisation and to conduct
17 their defences accordingly, taking steps to minimise any prejudice which might arise
18 should there be such a recharacterisation at a later stage.

19 However, the Prosecution submits that if it is possible to avoid such a circumstance it
20 would indeed be prudent to do so, and the Prosecution submits that this sort of case,
21 this sort of circumstance, can be avoided by timely and formal notice being given to
22 the Chamber -- by the Chamber, I beg your pardon, to the Defence as we request.

23 Now, the Prosecution submits that if the case goes according to plan, if all the
24 Prosecution witnesses arrive at trial, if all Prosecution witnesses come up to proof,
25 then recharacterisation may not be necessary. It may be so that the Chamber

1 considers that the mode of liability charged in the DCC, that is 25(3)(a) in respect of
2 accused number 1, has been proven and there is no need to consider alternative forms
3 of liability.

4 However, given the history of this case, given the difficulties with management of
5 witnesses, security concerns, one cannot take that for granted and my submission,
6 your Honours, is that it would be prudent to take the necessary steps at the
7 appropriate time to avoid claims of prejudice by the Defence later in the case.

8 The Regulation 55(2) distinguishes or caters for notice to be given and then it caters
9 for a request for submissions, so we are not asking at this stage for a request for
10 submissions on the recharacterisation. Simply that, given the particular facts of this
11 case, the Defence should be put on notice that this is a possibility, and we've referred
12 in details to the effects of this case and the allegations that have been confirmed by the
13 Pre-Trial Chamber and we had pointed out in our filing how these might support
14 alternative or different modes of liability.

15 And even though it might not be -- it may be argued that it is not specifically required
16 to give notice at this stage - when I say "at this stage" I am referring to the outset, the
17 first day of the trial - the Prosecution submits this would nevertheless be prudent and
18 that the Chamber should rather err on the side of caution in this respect.

19 Yes, and as pointed out in our previous filing, we submit that all the following forms
20 of liabilities are engaged by the allegations confirmed by the Pre-Trial Chamber, that
21 is in terms of 25(3)(a), (b), (c) and (d), all four forms of liability, and the Prosecution
22 accordingly requests that the Defence be so notified.

23 Those are my submissions on this point, your Honours.

24 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. You have five minutes
25 left on your time. That was very, very efficiently done. Thank you.

1 We will go now to the Defence counsel.

2 MR KHAN: I am grateful, Mr President, your Honours.

3 In our submission, this is a thoroughly misconceived and vacuous submission by the
4 Prosecution. It serves no purpose, it achieves no end, and it should be summarily
5 rejected.

6 The Defence of course can read the regulations, we know the terms of Regulation 55.

7 No practical legal purpose is served by simply saying that there is this residual power
8 of a Trial Chamber, but what the Prosecution instead are doing is for months talking
9 about recharacterising the facts, recharacterising whether it is article -- which
10 provision, which subparagraph of Article 25 should apply in this case.

11 Your Honours, in our respectful submission, this is indicative of a prosecutor that
12 knows before the trial commences that the case is crumbling, that knows before the
13 trial commences that the mode of liability cannot be proved on the facts and instead,
14 we say, of doing the honourable and proper thing, which is withdrawing the case,
15 they stubbornly wish to march forward and keep some kind of safety net in advance
16 of the trial.

17 Your Honours, looking at the provisions of Regulation 55, one cannot, in our
18 respectful submission, make any meaningful submissions in a vacuum, because the
19 Prosecutor has said today that it is necessary - I think I quote correctly - it is necessary
20 to do the necessary steps at the appropriate time. Well, it begs at least two obvious
21 and glaring questions: What are the necessary steps and what is the appropriate
22 time?

23 Your Honour, I do recall that, Mr President, you yourself, on 11 June 2012, made the
24 very insightful comment, if I may so, to, and I quote page 27 of the transcript of that
25 day, addressing the Prosecutor who was then on her feet, you said, "Madam

1 Prosecutor, you say that "...", that's the request to recharacterise, "... that's very
2 different from -- the legal recharacterisation is very different from the charges, but the
3 fact you can see a need for the legal recharacterisation so far ahead of the
4 commencement of trial, doesn't that tell you that maybe you might take another look
5 at the charges?"

6 Your Honour, it is my respectful submission with experience that counsel on both
7 sides should always be alert to little glimpses and advice and some promptings of the
8 Bench, and in my respectful submission, that's exactly what the Prosecution should
9 have done. They could have withdrawn the charges, or they could put an
10 application, properly based on the facts, showing why now they seek to do something
11 which they didn't even seek to do when the summons was issued, because now they
12 are looking at all four limbs of Article 24, a massive safety net, catch-all, so desperate
13 are they to march blithely onwards, whereas at the summons stage, of course, they
14 only put two different theories of responsibility. One was -- a summons was issued
15 in relation to one of them and now they wish to give notice.

16 Your Honours, what purpose is achieved by all of this? We have put written
17 submissions in. We rest upon those. But the Prosecution's insistence when those
18 filings are sub judice to again hammer on the judges' door so to speak and say "Give
19 the Defence notice" is really troublesome, for a number of reasons, because it is not
20 notice.

21 We have said already, your Honours, and the Court have determined it, that we had
22 required until November even on the charges as were currently framed. We have
23 every right to focus on that which is charged, the way it is charged. We have an
24 onerous responsibility as Defence counsel to focus our resources in the most effective
25 manner, which doesn't give us the luxury. We haven't had years investigating like the

1 Prosecution to get this case together to focus our resources on what actually is
2 charged and the way it is charged. And, your Honours, I am absolutely and I say for
3 the record today not on notice until the Court decides to recharacterise the facts.
4 And, your Honours, in my respectful submission, that cannot be done in the abstract.
5 It is not an advisory opinion. It must be done upon factual averments rather than
6 just saying "Well, your Honours, the law may change." Well, your Honour, that
7 applies to every single matter, because stare decisis does not apply in-between Trial
8 Chambers or Pre-Trial Chambers, as we see even with the proofing decision. So that
9 rationale that the Prosecution put forward that, you know, maybe there will be
10 ambiguity, maybe things are not clarified, would apply to every single decision.
11 Your Honours, I don't know really what much more I can say on the matter that is not
12 stated in our written submissions. The application is premature. The trial hasn't
13 started. No evidential basis is put for it and it has no legal purpose, apart from the
14 Prosecution saying -- keeping some kind of ace or joker, I would say, in their back
15 pocket that they can bring out later on and say, "Well, the Defence, you know, once
16 they realise that Article 25(a) is -- 25, the current form of liability is doomed," to say,
17 "Well, Defence somehow are not prejudiced because we have been bleating on about
18 the possibility of changing all four other modes of responsibility under the Rome
19 Statute."
20 Your Honours, we say it is -- any way you look at it, it is a motion without merit, it
21 distracts from trial preparation, and in our respectful submission, we've would urged
22 the Bench to give it short shrift. Your Honours, unless I can assist further, those
23 really are our submissions on this issue and we rest upon the filings that have been
24 put in that your Honours will consider in due course. I'm grateful.
25 PRESIDING JUDGE EBOE-OSUJI: Mr Katwa, before you speak, Mr Khan, just

1 maybe one or two questions for you. You say that unless characterisation itself is
2 made, you are not on notice. What then is the difference, in your view, between
3 Regulation 55(1) and Regulation 55(2)?

4 MR KHAN: Your Honour, of course the drafting is different. The question is how
5 does it operate? Because in any event, even under Regulation 55 (1), when the
6 Chamber wishes to change the legal recharacterisation, or change the legal
7 characterisation, one would expect that submissions will be heard on the merits. It
8 will not be simply in the abstract. Here of course it is quite different, that the
9 Prosecutor for -- of their own volition, of their own motion, have simply said in
10 general terms that this provision applies and it may be used. Well, that can't, in our
11 respectful submission, amount to proper notice. If they wish to move the
12 Court -- and that's why it's premature. The proper course is if the Prosecution are so
13 adamant and now this is, you know, we have engaged our resources since June, it's
14 been raised in June of last year in the status conference, there's been briefings by the
15 Prosecution, Defence and victims unit on this issue. Yet again the Prosecution put
16 another filing in. Again, court time expenditure all round, particularly on a
17 privately funded case, and then today.

18 If they are so adamant that that's the right thing to do, why don't they do it? And
19 that's a question, in our respectful submission, to which there is no answer.

20 They are not willing to concede they've got it wrong and that mode of liability is
21 doomed and yet they want to kind of keep, as I said, a joker in the back pocket, a card
22 up their sleeve, and say, "Well, if we don't succeed there, please bear in mind you've
23 got these other residual provisions that may come into play." Well, your Honours, if
24 in good conscience that's what they think, why is the application to amend not made?
25 And that's why it's premature. It can't be ruled upon in this manner. It must be - it

1 must be - dismissed.

2 Until such time as the Prosecutor is willing, in a properly grounded application, law
3 and facts together, makes the requisite application to the Court that will allow the
4 Defence, faced with clear parameters of a Prosecution argument, to respond to
5 whether or not that is appropriate at that stage of proceedings.

6 Your Honours, indeed, to the extent that I can agree at all with my learned friend for
7 the Prosecution, it is a matter indeed where necessary steps need to be taken at the
8 appropriate time. These are not the necessary steps and this patently is the
9 inappropriate point of proceedings in which to do it.

10 If they wish to do -- make an application, your Honours should invite them, and your
11 Honours of course may invite them should you wish, to make the applications that
12 they are entitled to under the Statute and it can be argued and decided upon on the
13 merits. And that's why I said, your Honours, any way you look at it, I view this as a
14 wholly misconceived motion, not only on the facts but a fundamental
15 misunderstanding of the law and how these provisions should operate.

16 It really is to put somehow an attempt not so much as to wrong foot the Defence, but
17 to disorientate the Defence, to make the Defence feel that -- to consider that whilst we
18 have a target, the facts, the allegations, and the way it has been pled by the
19 Prosecution, there is lurking behind it a hazy mist from which can emerge other
20 theories of responsibility. And, your Honours, that's not what we are here to do.

21 We are here to actually, for the Prosecution, bearing the burden of proof, to set their
22 case the way that they want to do it and allowing the Defence then to make
23 submissions and so the Court can dispose of the applications in the proper manner
24 and after hearing helpful submissions, rather than asking the Bench to burden the
25 responsibilities of the party opposite.

1 PRESIDING JUDGE EBOE-OSUJI: It seems to me that what they are saying, and I
2 may have misunderstood the purpose of the application, but it seems to me that
3 saying in light of the Katanga Appeals Chamber's decision, which says that
4 recharacterisation may be done as late as during the course of deliberations - I notice
5 Mr Hooper sitting there with us today, who was counsel also in Katanga - it appears
6 to me the Prosecution is saying if that can be done so late, it's only fair to the Defence
7 to give them advance notice as early as possible that that may happen so it doesn't
8 happen so late as at the stage of deliberations.

9 By the way, the Appeals Chamber did say, the qualifier is as long as the legal
10 recharacterisation is not unfair to the accused, it can be done that late. The question
11 then would be, it seems to me, the argument of unfairness that the Defence must
12 make to say that to give the notice of recharacterisation so early as now or on the
13 commencement of the trial in this case would result in unfairness to the Defence.
14 Can you make that argument?

15 MR KHAN: I'm grateful, your Honour. In our respectful submission, and of
16 course the Appeals Chamber decision speaks for itself, but it's just as unfair, or it
17 would be unfair for somehow a hazy assertion of notice to be made at this stage as it
18 would be to recharacterise right at the end.

19 The fundamental difference, if I could say so, between the current situation and the
20 Katanga trial decision and Appeals Chamber determination of the matter is that in
21 that case the Trial Chamber made an informed decision after hearing evidence and
22 yet in this case the Prosecution would have the Bench make a hazy finding of notice,
23 make a very weak argument that the Defence is on notice, without leading any
24 evidence in support of that proposition, and that's why we say, your Honours, if there
25 is an analogy between the two cases, what a diligent and professional and fair - and

1 fair - Prosecutor should do, in our respectful submission, is to tell us now, say "These
2 are the arguments, this is why," and make an application, not to us. It's almost as if
3 it is a conversation with the Defence to be used later on through the medium of the
4 Trial Chamber by saying, "We filed something to the Trial Chamber. Therefore you
5 are on notice." And that's not the purpose. We address the Bench and the
6 Prosecution should be required to do the same, and in our respectful submission
7 Regulation 55 is there. It's there for a purpose. I have no fears of it, as long as it is
8 fair.

9 What does that require? It requires the Prosecutor either to drop this, what we say is
10 nonsense, or to make a grounded application based upon law and facts to the Bench
11 that will allow us to respond on the law and on the facts as to whether or not now the
12 Prosecution should be allowed to plead effectively all four theories of responsibility,
13 all four characterisations under Article 25, when we face only one at present. And,
14 your Honours, they haven't even attempted to make that argument.

15 The question is why not? One would hope that it is not hubris, that something how
16 it is embarrassment, it's a climb down to somehow say, you know, Article 25(3)(a) is
17 weak and we are going to be in evidential difficulties in the course of trial, and that's
18 why I think the fair approach from our point of view, your Honours, with the greatest
19 of respect, is for the Prosecution either to withdraw the counts, to withdraw the case
20 in totality against William Ruto if they believe that they have weaknesses or if they
21 feel that they're in trouble with Article 25(3)(a), they should make the application for
22 the other modes the other theories listed in that article, and that could be determined.
23 But the question is, and it is a deafening question, as I said there is a question without
24 a response: Why have they chosen not to do that and instead engage court time and
25 resources with a very abstract, unprecise and ungrounded application? And I think

1 that's the question, your Honours, with the greatest of respect that the Prosecution
2 perhaps should be asked to answer. But unless I can assist further -- your Honours,
3 just bear with me one moment, please.

4 Yes, your Honours, unless I can assist further, those are my attempts to answer your
5 Honour's question?

6 PRESIDING JUDGE EBOE-OSUJI: I think you can assist further. One more
7 question to you in that light, and the Prosecution, I will refer to them in a minute, but
8 you do make the argument that at this stage there is no evidence on the record upon
9 which the legal recharacterisation could be founded, and if one looks at 55(2), one
10 could see the basis for that argument from you, but the question is, is it unfair to you
11 as Defence counsel if what the Prosecution is saying is, "Yes, we may not have
12 evidence on the record now." Let's forget about the purposes of -- for present
13 purposes the confirmation proceedings and whatever evidence may have been led in
14 it. Let's assume for purposes of argument that 55(2) is limited only to evidence led in
15 the trial before the Trial Chamber.

16 Now, if the Prosecution's position is, "Yes, we know we have not led evidence so far
17 on the record, but we are telling you that we will be leading evidence in that direction,
18 so we put you on notice upfront so that you are not caught by surprise at the end of
19 the day," is that unfair?

20 MR KHAN: Your Honour, it is even worse, because it is not cloak and dagger.

21 I mean, the reason why we say in this Court but also in Strasbourg there's constant
22 admonitions to prosecuting authorities to have a cards on the table approach. It is
23 not cloak and dagger and stab you in the dark kind of fun and games that one expects
24 from the prosecuting authority in whichever State. It is transparency. It's
25 transparency.

1 Now, your Honours, what the Prosecutor should do of course is to give notice and
2 lead evidence that's relevant to the charges, but your Honours, it would be absolutely
3 a perversion in fact, we say, a distortion, of Article 25(3)(a) if that's the target that we
4 have to face in court. We focus our investigations -- I mean, there is a difference,
5 obviously. It has evidential and investigative consequences, the Prosecution's theory
6 of the case, and in a very practical manner how we focus and what we focus on, but if
7 the Prosecution are allowed to lead evidence, for example, on 25(3)(b), (c) and (d),
8 actually that is hiding their hand. It is proceeding on a false basis. And we would
9 actually seek -- I would actually say to the extent that there is prejudice, that they
10 should actually not be entitled to do that because they would be seeking to lead
11 evidence on a different basis to that which is alleged and has been confirmed by the
12 Pre-Trial Chamber.

13 PRESIDING JUDGE EBOE-OSUJI: If I may stop you there. What if they have
14 indeed pleaded those facts in the Document Containing the Charges, what we call
15 "indictment" in other places? What if the pleadings have been sufficiently done as to
16 the facts, but what is missing is characterisation of those facts in a particular manner?
17 Is that not enough to sustain notice of possibility of recharacterisation further to
18 Article -- Regulation 55(2)?

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

20 Stepping back for a moment, looking at the architecture of this Court, the Pre-Trial
21 Chamber has some critical functions. Experienced Judges, they make decisions.
22 Whether you agree with them or not, their decisions mean something. And the
23 Pre-Trial Chamber expressly did not confirm. They only issued a summons in
24 relation to William Ruto under Article 25(3)(a). The alternate theory was rejected.
25 One can't just gloss over that or say that finding, because it is inconvenient to the

1 Prosecutor, is of no consequence. It has immense consequence. And so to respect
2 the division of responsibilities that the drafters of the Rome Statute engineered when
3 creating this Court, we say there is massive prejudice because if that had been
4 supported by the facts at that stage, the Pre-Trial Chamber could have issued a
5 summons on both theories of responsibilities. The Prosecution could have put it as
6 alternate charges and many other applications could have been made. Even today,
7 of course, an application could even be made arguably to the Pre-Trial Chamber.
8 Your Honours, they haven't done that. And so what I think is really a matter that I
9 lament is the prosecuting authority to think that they can march onwards on one basis
10 and simply by, in very imprecise terms, saying, "Well, please be aware we're going to
11 trump you at the end and wrong foot you at the end," is something that should be
12 frowned upon. It should be disallowed.

13 And that is why I do come back, your Honours, that if at this stage they are so
14 insistent that there is another provision of Article 25 that should apply that does not
15 currently apply, what would be the harm in adjudging the balance of convenience?
16 What would be the harm in assessing fairness, to say to the Prosecution, "Okay, that
17 motion can be determined. We're not fettering you. We are not handcuffing you,
18 but make an application and we'll decide it on the facts, bearing in mind submissions
19 from the Defence and bearing in mind our overall responsibility, which is to ensure a
20 fair trial." And that, your Honour, that is brought into ever acuter relief, we say,
21 when the Defence is trying to chase late disclosure and is trying to manage its
22 resources at a very, very concertinaed time frame, due to no fault of ours.

23 Your Honours, it is for a reason that even the Pre-Trial Judge, Judge Trendafilova,
24 said recently, she lamented the lack of diligence, organisation and efficiency on the
25 part of the Prosecution. In her words, "It has become clear." Your Honour, that is

1 the pre-trial Judge of the Pre-Trial Chamber that presided over this case being
2 confirmed.

3 Your Honours, if one puts that together with the decision in the Kenya case, the
4 dissents of Her Honour Judge Christine Van den Wyngaert, the Prosecution's
5 disclosure regime, all of these are not irrelevant to the assessment of fairness, because
6 one cannot pretend with the greatest of regret that everything is working as it should
7 in the Prosecution office. The question is, should the Defence pay a cost for that?

8 Should the Defence be prejudiced by that, or not? We say, your Honours, no, and
9 that is why the notice -- the application masquerading as a notice application put

10 forward by the Prosecution, now twice, really has no merit whatsoever. I'm grateful.

11 PRESIDING JUDGE EBOE-OSUJI: Mr Katwa, we will still come to you, but the
12 Prosecution, from the discussions conducted so far, responses from you, or reply
13 rather?

14 MR STEYNBERG: Thank you, Mr President. I am grateful for the opportunity to
15 reply to my learned friend's arguments. I must thank my learned friend to an extent
16 for really making the Prosecution's argument by his concession that he refuses to take
17 notice from the Prosecution as to the possibility of recharacterisation, and unless and
18 until he is formally instructed by the Chamber, he will not change the manner he
19 conducts his defence, and that is precisely what we are concerned would be the
20 attitude of the Defence and indeed that has now been confirmed.

21 Let me make it very clear, Mr President, your Honours, this is not -- this application is
22 not founded upon a belief that the Prosecution case is in some way crumbling. This
23 is a matter which arose from the very first submission of the request to issue a
24 summons in this case.

25 My learned friend is wrong when he says that the alternative mode of liability was

1 rejected by the Pre-Trial Chamber. In fact, as set out in paragraph 4 of our filing 433,
2 the Prosecution did plead in the alternative 25(3)(a) and 25(3)(d). The response of
3 the Pre-Trial Chamber in that case was that they did not address the alternative mode
4 of liability, saying that the possibility for the Prosecution to charge in the alternative
5 does not necessarily mean that the Chamber has to respond in the same manner. So,
6 therefore, they found 25(3)(a) had been established and they did not go any further to
7 make a decision on what they regarded as irrelevant at that time.

8 Now, personally I agree with my learned friend that charging in the alternative
9 would be a more satisfactory way of dealing with this matter. That is a way which I
10 deal with it in my home jurisdiction, but unfortunately that is not necessarily the way
11 in which it has been approached by the Pre-Trial Chambers in this Court, and the
12 objection we get from the Pre-Trial Chambers when we try to charge in the alternative
13 is that that is precisely the function of Regulation 55(2), that it is not necessary to
14 charge in the alternative because should the facts and circumstances so demand, the
15 Chamber has the authority and discretion to recharacterise a charge during the course
16 of the case.

17 I should also confirm here we are not talking about a change of the charges. The
18 charges remain unchanged. We are only dealing here with modes of liability.

19 My learned friend is correct that we do not specifically ask in the summons or we do
20 not specifically allege the modes of liability of 25(3)(b), ordering, and 25(3)(c), aiding
21 and abetting, but in the facts of this case those may be viewed as lesser included
22 modes of liability, if I can use that phrase.

23 And perhaps to take it a little bit out of the abstract and to ground it in fact, as my
24 learned friend has suggested we should, I should point out in our application we
25 specifically refer to allegations of fact in the charges confirmed by the Pre-Trial

1 Chamber which would found specifically those forms of -- those modes of liability.

2 And by way of example, if I may refer your Honours, if the Chamber will bear with

3 me for one moment, to, for instance, paragraph 30, where we talk about the mode of

4 liability of ordering. "The evidence relied upon by the Pre-Trial Chamber in

5 confirming the decision demonstrates, amongst other things, that the network was

6 under the responsible command and had been established hierarchy, with Mr Ruto as

7 the designated leader. Mr Ruto gave instructions to the perpetrators as to who they

8 had to kill and displace and as to whose property they had to destroy. Mr Ruto was

9 in charge of appointing commanders and divisional commanders, assigning to them

10 specific areas and locations. Mr Ruto had full control to decide when and where and

11 how weapons should be distributed," and I could go on and on, but it is all in the

12 document containing the charges for the Chamber and the Defence to review at their

13 leisure.

14 So, in my submission, the argument that the request is hypothetical and not grounded

15 in fact is, quite frankly, incorrect.

16 If the Court will bear with me, please? Yes. So the Defence is alleged there is a

17 question without response as to why have we not requested the charges to be

18 amended. It is because nothing has changed. The allegations we made in our

19 summons, the allegations that we made at confirmation and the allegations that we

20 continue to make and which the accused is expected to face at trial have remained

21 unchanged. All that we seek to do is to give the Defence notice that there is a

22 possibility that those very facts relied on since the beginning of the case may found

23 more than one mode of liability, as is anticipated by the Statute and the Regulations.

24 And, this in my respectful submission, aids rather than detracts from the

25 transparency which is required by our Statute.

1 If the Court - the Chamber - will bear with me, please? Yes.

2 The Defence has decried the additional burdens that such notice will place on it as far
3 as its limited resources are concerned. The Prosecution points out that the
4 recharacterisation may not exceed the facts and circumstances alleged in the charge.
5 Indeed, the Prosecution does not need to seek to lead any new evidence which it
6 would not in any event have led under the existing modes of liability.

7 Those allegations presumably have already been adequately investigated by the
8 Defence and, in my respectful submission, giving notice at this stage would only
9 facilitate the fairness of the proceedings and would not give rise to any unfair
10 prejudice on the part of the Defence.

11 Thank you, your Honours.

12 PRESIDING JUDGE EBOE-OSUJI: One question for you. First of all, I should have
13 announced earlier that there is that five-seconds rule that must be observed. I am
14 breaching it. That's why I remember it. I shouldn't have. But one question for
15 you is this. It arises from written submissions of the Defence in this matter, as well
16 as from what you have just said a moment ago.

17 Facts and circumstances supporting the request for notice of recharacterisation. We
18 know that the Appeals Chamber again in the Katanga decision - I believe it would be
19 at paragraph 101, I think - did give a direction that the certain notice needs to be
20 specifically supported by facts and circumstances that will justify or warrant the legal
21 recharacterisation.

22 Have you done that? And that's a question for you, Mr Prosecutor. And I ask that,
23 again keeping in mind what some may think you've done in, I believe, paragraphs 30
24 to 32, thereabouts, of your written matter, what you did there in those passages,
25 would they be mere examples of facts and circumstances that would warrant the

1 notice of possibility of recharacterisation, or are they exhaustive in the sense that the
2 Katanga Appeals decision suggests in paragraph 101?

3 MR STEYNBERG: Your Honour, they were intended to be indicative and examples
4 rather than an exhaustive list, I beg your pardon.

5 PRESIDING JUDGE EBOE-OSUJI: Can we do that?

6 MR STEYNBERG: I beg your pardon?

7 PRESIDING JUDGE EBOE-OSUJI: Can we operate on the basis of mere examples in
8 light of paragraph 101 of Katanga Appeals Chamber decision?

9 MR STEYNBERG: Yes, my submission in that regard, your Honours, is that the
10 Katanga decision is distinguishable on the basis that at that stage the Chamber was
11 seized with the actual decision to recharacterise and they were given notice and
12 requested submissions on that submission. We are not yet at that stage, but the
13 charges and the facts confirmed by the Pre-Trial Chamber which preface the evidence
14 the Prosecution intends to lead in this case point us down a road which may
15 inevitably lead to that point.

16 Now, all at this stage the Prosecution is requesting is that the Chamber give notice to
17 the Defence of the possibility that we may at a certain stage reach that point and that
18 they should take the appropriate safeguards so they are not surprised, if and when
19 we do reach that point.

20 At that stage, once the -- and it will probably not before the end of the Prosecution
21 case, when all the available witnesses have testified and been tested through
22 cross-examination, that the Chamber will be able to make that determination.

23 All we are saying is that it is prudent at this stage, especially given the attitude my
24 learned friend has espoused today that they should be put on notice that they cannot
25 simply sit back in wilful blindness to the possibility that may eventuate down the line

1 and then claim at a later stage that they have been prejudiced because they failed to
2 take action to mitigate their circumstances.

3 That is the Prosecution's position.

4 PRESIDING JUDGE EBOE-OSUJI: On Katanga, you say that -- it seems to me you
5 took a specific reading of the Katanga judgment or decision on this matter as
6 pertaining only to that case, but if you look at what the Appeals Chamber said, and I
7 quote paragraph 101, quote, "As to the argument that the impugned decision does not
8 clearly inform Mr Katanga of the facts upon which the Trial Chamber intends to rely,
9 the Appeals Chamber notes that if" - this is the relevant passage - "if a Trial Chamber
10 give notice under Regulation 55(2) of the Regulations of the Court, the Trial Chamber
11 may also need to indicate upon which specific facts within the facts and
12 circumstances described in the charges it intends to rely." I will stop the quote there.
13 So are you taking the view that this is not a general direction to all Trial Chambers
14 intending to give a notice?

15 MR STEYNBERG: Mr President, my response would be to direct the Chamber's
16 attention to the word "may," "may also indicate." So my submission is that this is not
17 intended to be a hard and fast rule, and in the circumstances of that case evidence had
18 been led and it was possible to refer to that. In this case, at an earlier stage we
19 obviously can't refer to evidence that's been led, but what we can refer to are the facts
20 and circumstances alleged in the Prosecution charges. In my submission, at this
21 stage that should suffice. If at a later stage the Chamber reaches a point where in its
22 discretion it decides that action is now necessary and we're looking at a concrete
23 recharacterisation in terms of one or other of the specific modes of liability, then at
24 that stage it would obviously be prudent to refer to the relevant evidence engaged.
25 Those are my submissions.

1 PRESIDING JUDGE EBOE-OSUJI: Yes, but the "may" means it may be discretionary
2 for the Trial Chamber, but it will not be necessarily discretionary to you as a matter of
3 prudence, would it?

4 MR STEYNBERG: I'm not sure I follow.

5 PRESIDING JUDGE EBOE-OSUJI: What I mean is, isn't it in the best interests of the
6 person applying for recharacterisation to make sure that all the possibilities are
7 covered so that the discretion of the Chamber is necessarily limited because you have
8 pleaded specifically the facts and circumstances and it will no longer be up to the
9 Trial Chamber to disregard that?

10 MR STEYNBERG: Yes. Well, the first -- obviously, the problem that we are faced
11 with is that there is no evidence on record in the trial. There's obviously a wealth of
12 evidence on the record in the confirmation hearing.

13 My submission -- well, clearly, the more detailed the factual basis for the application,
14 the better the chance of success. As things stand at the moment, my submission is
15 that we have made sufficient references to the factual circumstances to warrant a
16 notice at this stage.

17 It may be that we could strengthen our application by going into greater detail, but in
18 my submission it is not necessary. I submit we have made out our case.

19 PRESIDING JUDGE EBOE-OSUJI: Fair enough.

20 Mr Khan, can you make your point in three minutes?

21 MR KHAN: Yes, your Honour. I am grateful.

22 Your Honour, my learned friend, Mr Hooper, turned to me and characterised the
23 Prosecution's application as akin to showing -- a football referee showing a yellow
24 card to the players before kick-off. I mean, it is simply not necessary. It is simply
25 not necessary and for that reason it should be rejected.

1 But, your Honours, my learned friend states that an alternative theory of
2 responsibility, alternative charges, would be his preferred way of proceeding. Well,
3 your Honours, once the summons was issued, the Prosecution could have sought
4 leave to appeal. They could have made a renewed application to consider a further
5 amendment to the charges so that an alternative theory of liability could be pitched.
6 They chose not to do so for the last so many years until June of last year, when they
7 raised this for the first time in court.

8 Your Honours, when one looks at Regulation 55, a number of features are apparent.
9 Your Honours, in answer to your earlier question regarding the distinction between
10 55(1) and 55(2), perhaps this can be best encapsulated by stating that Regulation 55(1)
11 details a power and subparagraph (2) details how that power is to be exercised. But
12 one of the key features of Regulation 55, to give it purpose, is right at the end, that the
13 Chamber will decide and order a hearing to consider all matters relevant to the
14 proposed change. Well, your Honours, what actually has changed? What actually
15 has changed? And the Prosecution are silent on that, other than they want a large
16 residual safety net, for no good reason, because they think, in our submission, that
17 they know that they're going to be in difficulties under Article 25(3)(a) and they think
18 somehow other modes of liability may assist them.

19 Your Honours, leaving aside that what we say is a forlorn hope, it is very clear that
20 under Regulation 55(3) there is the potential of real prejudice. It is not good enough
21 for the Prosecution to sit there and say, well, senior counsel, diligent counsel, should
22 be expected to investigate every aspect of this case. We are not. We are not even
23 expected to investigate every allegation every witness states, because more than 60
24 planning meetings alone are alleged. It is not possible. We are -- we have a
25 professional duty to test the evidence, especially within the parameters of the charges

1 that Judges of this Court have issued, and that includes the mode of liability. Your
2 Honours, under Regulation 55(3), it's very clear that different approaches to
3 investigations and to questions can lead to actual prejudice to the Defence, because if
4 that was not the case, the requirement under Regulation 55(3)(a) and 25(3)(b) would
5 be unnecessary. The drafters have realised that if the mode of liability changes, the
6 whole approach to questioning witnesses may also change.

7 Your Honours, there is practical reason as well, and this is my last point. If the
8 Prosecution today drop 25(3)(a) and prefer -- you know, went with their preferred
9 option of other modes of liability, or if not their preferred option, the other provisions
10 of 25, it would save time because the Defence would not have to somehow
11 find - never mind fight - this phantom network that they've alleged that becomes an
12 issue under 25(3)(a). So rather than my learned friend alluded to being pointed
13 down the road, well, your Honours, we say what the Prosecution are pointing you to
14 a dead end that will actually -- if not a dead end, a massive detour that will cause an
15 awful lot of wasted Court time because the Defence, without reason, would have to
16 somehow at the last minute look at all the theories of responsibility, investigate all
17 investigations under each theory of responsibility that's not even charged. And how
18 does that fit in with Article 55 and the rights to be promptly notified of the nature of
19 the charge?

20 Your Honours, every way I look at it, with the greatest of respect, I say the application
21 simply cannot succeed and it is --

22 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, your time is up.

23 MR KHAN: Your Honour, I am most grateful.

24 PRESIDING JUDGE EBOE-OSUJI: A minute ago.

25 MR KHAN: I'm grateful.

1 PRESIDING JUDGE EBOE-OSUJI: Mr Katwa?

2 MR KIGEN-KATWA: Your Honour, Mr President, I do not wish to say anything on
3 this issue as it doesn't affect my client.

4 Thank you.

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

6 Okay, we now will move to the second item on the agenda. That will be the matter
7 of the -- I'm sorry. That was a big omission. I'm sorry about that. We are not
8 moving to the second item on the agenda. We will take submissions from the
9 victims' counsel on this matter. Sorry.

10 MR NARANTSETSEG: Thank you, Mr President.

11 We victims would like to make the following submissions on this agenda item.

12 From the outset, Mr President, your Honours, legal representative submits that under
13 Regulation 55, Regulations of the Court, Trial Chamber may seek to change the legal
14 characterisation of facts, I quote, "at any time during the trial," unquote. Therefore,
15 legal representative agrees essentially with the Prosecutor that Trial Chamber V
16 should give prior notice to or at the commencement of the trial that it may change
17 legal characterisation of the form of individual criminal responsibility of the accused
18 pursuant to Regulation 55 of the Regulations of the Court. This is in order to
19 minimise any prejudice to accused's rights to an adequate opportunity to respond to
20 and prepare for possible recharacterisation.

21 In addition to the Appeals Chamber's jurisprudence that your Honours have wisely
22 recalled, the victims would like to also recall what Pre-Trial Chamber I said in similar
23 situation. I quote, "So long as facts and circumstances as described in the charge is
24 not exceeded pursuant to Regulation 55, it is possible to give those facts and
25 circumstances a different characterisation so long as no unfairness results," unquote.

1 In conclusion, your Honours, the victims urge the Trial Chamber to adopt the
2 procedure provided under Regulation 55 and give the accused the prior notice the
3 Prosecution requested.

4 Your Honours, this concludes our submission. Thank you.

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

6 We may now move to the next item on the agenda and this will be the question of the
7 length of the Prosecution case and the average time per witness.

8 Prosecution, in the Chamber's decision, the general directions on the conduct of the
9 proceedings, it is indicated that the figure the Prosecution proposes is excessive.

10 Have you given any thought to that and are you in a position now to submit on the
11 matter?

12 MR STEYNBERG: I am, Mr President, and we have indeed given thought to that.

13 PRESIDING JUDGE EBOE-OSUJI: Ten minutes.

14 MR STEYNBERG: Thank you. I doubt whether I will need that, although let me try
15 and speak a bit more slowly.

16 At the outset perhaps I should just clarify, your Honours, that the Prosecution's
17 estimates of time were intended to be maximum times that would be required for
18 these witnesses and these were calculated assuming that all aspects of their evidence
19 other than matters formally stipulated to by the Defence would be in issue.

20 It was also calculated anticipating that witnesses would be required to give their
21 evidence in full, even in the case of witnesses who might be testifying on the same
22 incidents.

23 Obviously, however, the Prosecution hopes that that will not be the case, and
24 especially bearing in mind the necessity of judicial economy, the Prosecution will do
25 its utmost to focus the evidence it leads and direct it towards issues that appear to be

1 the most in dispute and to avoid duplications of evidence wherever possible.

2 However, the Prosecution does point out, and I do point out that we are somewhat

3 hampered in this regard because, as presently advised, we simply don't know what

4 the Prosecution -- what the Defence's case is, there's been no disclosure to us, and we

5 can only speculate as to which areas of the case will in fact be the most in dispute.

6 And if pre-trial proceedings are to go by, it seems to us that everything is going to be

7 in dispute, but that may hopefully be resolved as the case goes on.

8 Notwithstanding this, your Honours, in light of the comments of the Chambers in the

9 aforementioned filing, or decision - I beg your pardon - we have indeed revisited our

10 estimates and, where feasible, we have reduced the estimated times and in the result

11 the current estimation has been reduced from a figure of 413 hours to a figure, an

12 estimate, of between 294 and 300 hours for the remaining 40 witnesses.

13 Now, it may well be that it will be possible to reduce that further, as I've said. Once

14 the trial is underway, once we have a better sense of what the issues are and where

15 the rub is, so to speak, we will do our best to focus the evidence to reduce it even

16 further than that. It may also be that through judicious use of requests in terms of

17 Article 68 proving prior statements we might be able to reduce that time further, but

18 it's a little early for us to make that promise at this stage.

19 Your Honours, I would remind the Chamber of course that the touchstone of these

20 proceedings should be the establishment of truth and, in my respectful submission,

21 predetermined and somewhat artificial limits on the evidence in-chief or the time

22 allocated for the evidence in-chief of witnesses may not assist the Chamber in the

23 execution of its function, and where witnesses have relevant and important evidence

24 to give, they should not be limited in this respect merely because of somewhat

25 arbitrary time periods.

1 So all that I'm saying is that my plea is for one of flexibility and I may suggest
2 respectfully that the judicial economy may be preserved more efficiently by limiting
3 irrelevant evidence, whether led by the Prosecution or the Defence, rather than
4 insisting on rigid time frames.

5 If the Chamber will bear with me, please?

6 Lest there be a suggestion that our initial estimates were wildly inaccurate, I should
7 point out that the reduction in time is also largely due to the fact that we have lost six
8 witnesses in the interim. That accounts for a large percentage of the somewhat
9 100 hours that we have said.

10 Unless there are any questions by the Bench, perhaps I can save my remaining time
11 for any reply that may be necessary?

12 PRESIDING JUDGE EBOE-OSUJI: Yes, I do have a question for you. You said
13 294 hours for 40 witnesses?

14 MR STEYNBERG: Yes.

15 PRESIDING JUDGE EBOE-OSUJI: On the average, what does this give us per
16 witness? Something like seven-and-a-half hours per witness; is that right?

17 MR STEYNBERG: Something like that, your Honour.

18 PRESIDING JUDGE EBOE-OSUJI: The reason I ask that question is because, as we
19 indicated in that decision that I referred to earlier, in the -- in earlier cases lesser
20 averages are indicated.

21 MR STEYNBERG: Yes.

22 PRESIDING JUDGE EBOE-OSUJI: You know that in the Lubanga we calculated that
23 the time span per witness was the average of 4.9 hours, in Katanga the average was
24 4.5 hours and in the Bemba the average appears to be 5.7 hours per witness.

25 MR STEYNBERG: Yes.

1 PRESIDING JUDGE EBOE-OSUJI: But yours exceeds all of that by 7.3 hours.

2 MR STEYNBERG: Yes. Well, my submission, your Honours, in this respect is that
3 one should be cautious in drawing parallels between cases which obviously each have
4 their own merits. We are dealing here with two accused, we are dealing here with a
5 number of different incidents, whereas in Katanga for instance there was mainly one
6 incident that they were dealing with, and we are dealing with as far as the mode of
7 liability is concerned with -- not with an organised, well-defined rebel army in which
8 matters such as hierarchy, orders, et cetera are relatively more easy to establish, but
9 we are dealing with something which might be described in the American
10 jurisprudence for instance as "an association in fact network, entity, enterprise," which
11 will all require significantly more effort to establish. We have to give evidence of a
12 number of meetings, a number of rallies, what was said, in a lot more detail than
13 might otherwise be required.

14 The bottom line is my submission is this case is somewhat more complex than the
15 cases to which you were being -- you have referred.

16 My second observation is that if I'm not mistaken the references to Katanga and
17 Lubanga were actual hours, rather than necessarily the estimated hours. It may well
18 be that the actual hours - and I would certainly hope that the actual hours - would be
19 significantly less, but what I would care to avoid, what I would like to avoid, your
20 Honours, is that the witnesses are restricted to a number of hours which does not
21 allow them to adequately ventilate the relevant evidence that they have to give.

22 PRESIDING JUDGE EBOE-OSUJI: That may or may not be the case. Yes, of course,
23 witnesses in any lengthy case involving more than ten witnesses, not all of them will
24 require the same amount of time on the stand and not all of them would testify to
25 everything. Some may take longer to tell their story, because they have a longer

1 story to tell, and others not as much. So that's how come we have to use the
2 averaging idea to arrive at what's fair, and then with that the party is given a block of
3 time within which to do their case. Yes, these are complex cases, but they must be
4 litigated within the constraints of efficiency and knowing that there are other things
5 that must also be done in life. So that's what is borne in mind.

6 And one question to put to you in that regard is that there is something also new in
7 this case and that is the decision on -- that allows you to prepare witnesses and with a
8 view to having a more focused presentation of the case. Are you still saying, in spite
9 of that and in spite of any lessons that must have been learned from the earlier cases
10 in which we are now talking about actual hours per witness, that the OTP would not
11 have has some lessons learned so that we would not be having averages that are more
12 in latter cases than they should be, especially in this case, than was the case in earlier
13 cases?

14 MR STEYNBERG: Your Honours, we do certainly hope that the witness preparation
15 decision will assist in the efficient presentation of evidence. However, at this stage it
16 is just a decision on paper. It's not yet been put into practice. I am reluctant to
17 commit to a saving of time in the abstract in advance of any experience as to how in
18 fact this is going to assist us. I would hope that it would assist us, but that is just a
19 hope at this stage I suppose.

20 Unless there is anything else? Will the Chamber just bear with me one second, your
21 Honours?

22 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, or Mr Hooper?

23 MR KHAN: Your Honour, of course this is a matter for the Prosecution and from
24 our point of view the guiding principle should be one of relevance and your Honours
25 we are sure will be able to move counsel on from both sides when we are taking too

1 long, or focusing on a point that may be peripheral rather than central.

2 So, your Honours, I don't have any submissions to make, other than of course it may

3 be that in due course the proofing decision that has been touched upon by your

4 Honour is a matter of concern to the Defence not in general, not seeking

5 reconsideration, but in relation to certain core witnesses and particularly those eight

6 witnesses. Without setting aside the principle that was detailed by the Trial

7 Chamber allowing proofing, it may be that your Honours will be seized of an

8 application to reconsider that because of the facts of this case in relation to those eight

9 witnesses that we say are part of an organised scam to deceive this Court, but your

10 Honours will seize that in due course.

11 Your Honour, indeed our submission is the case will reveal that that actually is the

12 network in this case and none other.

13 PRESIDING JUDGE EBOE-OSUJI: Mr Katwa?

14 MR KIGEN-KATWA: Your Honour, President, on our part we leave the issue to the

15 Prosecution. We trust that the Prosecution has taken on board the concerns as

16 expressed by the Chamber.

17 We only need on our part to indicate that we are also concerned by the proofing

18 protocol and we will be joining in in the concerns that will be expressed by the Ruto

19 team.

20 Thank you, your Honour.

21 MR NARANTSETSEG: Mr President, your Honours, we are grateful that you have

22 given us this opportunity to make submissions on this matter.

23 Victims plead that at least at this moment the Common Legal Representative is under

24 a difficulty to make a fair estimate of the time required for the Prosecution to present

25 its case. Since this is the case the legal representative is himself unable to estimate

1 the amount of time that he needs in order to examine witnesses called by the
2 Prosecution, but nonetheless the victims we request the Chamber to take into
3 consideration interest of our victims, our clients, when determining the fair amount of
4 time necessary for the presentation of the Prosecution's case.

5 In any case we victims request that, in instances where the Common Legal
6 Representative is granted leave to examine Prosecution witnesses, he should be given
7 approximately one quarter of the time initially allocated for the Prosecution in
8 examination -- in examination-in-chief of its witnesses.

9 This concludes our submission, your Honours. Thank you.

10 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg?

11 MR STEYNBERG: Your Honours, if I may, just one point that I actually omitted to
12 inform the Chamber of.

13 I've given a total revised estimate of hours, but we do in fact have a detailed
14 breakdown per witness. My suggestion was going to be that that would be supplied
15 when we submit the amended witness summaries and witness list as directed in the
16 Chamber's decision on the conduct of proceedings, but if the Chamber would like to
17 have this sooner we could probably have this by tomorrow if necessary?

18 PRESIDING JUDGE EBOE-OSUJI: It would be helpful to have it sooner, so if you
19 have it ready.

20 MR STEYNBERG: As the Chamber pleases. I'll ensure that's done.

21 PRESIDING JUDGE EBOE-OSUJI: While you're on your feet, it seems to us that you
22 use a certain factor in calculating the time for the case for the Prosecution in total, not
23 just the amount of time the Prosecution will need to conduct examinations-in-chief,
24 but you took that time and then you multiplied it by two only. Is that a fair way of
25 calculating it, unless I'm wrong?

1 MR STEYNBERG: I'm going to have to take instructions on that. I didn't apply my
2 mind to that specific issue. If the Chamber will bear with me for one second?
3 I apologise. I'm caught somewhat by surprise here, but my understanding is that the
4 estimates that we have provided are simply for the evidence-in-chief. I am not
5 personally aware of any estimates that may have been provided as far as the total
6 length of the case is concerned. This all happened before my involvement, but if
7 specific submissions are required we can submit them in writing as soon as
8 necessary?

9 PRESIDING JUDGE EBOE-OSUJI: Fair enough. We don't need to belabour the
10 point at this stage.

11 MR STEYNBERG: As the Chamber pleases.

12 PRESIDING JUDGE EBOE-OSUJI: Moving on, we do have 30 minutes before our
13 break time and so we let's still do some work within that time.

14 There is one item that I think we should deal with immediately. One of the Defence,
15 I believe it was the Sang Defence, had requested a schedule of the Court's sitting for
16 the remainder of the year. That we can deal with at the moment -- immediately
17 rather.

18 The position is this: At the moment, as you know, there is a question of constraints
19 on the use of the courtroom in light of all the cases now pending that are in trial and
20 that will be in trial.

21 What we're -- we can tell you at the moment is that the -- this case, the Ruto and Sang
22 case, will definitely be sitting until the end of September, once we commence trial on
23 10 September, and we will -- during that period while trial is in progress we will
24 continue to liaise with the other Chambers as to what possibilities exist to update the
25 information to you and as we have that information in a more realistic manner we

1 will convey it, but for now we cannot give you an indication that we'll be sitting tied
2 in this courtroom until the end of the year. We can only do that for September - the
3 period of September - and then we will let you know as things change.

4 Any -- I see Mr Khan is on his feet.

5 MR KHAN: Your Honour, what would be very helpful -- we are grateful for that on
6 behalf of both accused. What would be useful is would the Court be intending to sit
7 every day Monday to Friday, or alternate days, and would the Court be sitting whole
8 days, or mornings, or afternoons? That would also be quite helpful so we can
9 organise ourselves internally, and so some guidance on that would be very gratefully
10 received, your Honour.

11 PRESIDING JUDGE EBOE-OSUJI: Mr Katwa?

12 MR KIGEN-KATWA: Your Honour, I just wanted to express gratitude on that
13 direction.

14 Thank you, my Lord.

15 PRESIDING JUDGE EBOE-OSUJI: It looks like we've satisfied Mr Katwa's request.
16 We will now deal with Mr Khan's. We will get back to you on that in the course of
17 the day, all right? Thank you.

18 Let's now deal with another matter that is pending before us and that is the question
19 of the Prosecutor's filing on further submissions on the conduct of proceedings in
20 which the Prosecutor raised the question about the possibility of a case in rebuttal for
21 the Prosecution. That was one matter raised.

22 The second matter raised in that filing was whether witnesses on the stand, cases of
23 the questioner or cross-examiner should be put to that witness while the witness is on
24 the stand.

25 The first matter we can deal with by saying the question of rebuttal, we don't need to

1 deal with now. It's a long way before we get to that point. That will be after the
2 case of the Defence that the issue will arise, if at all. So that we don't need to rule
3 upon at the moment, but we can get further submissions from the parties on the
4 second sub-issue, that is the putting the questioner's case to the witness on the stand.
5 Mr Steynberg, I will give you the floor to explain what you are really saying, but
6 while you deal with that, I want you to keep in mind a certain clarification that I seek.
7 Are we talking about a witness who is testifying, the need to put questions to that
8 witness that would impact on the credibility of that witness himself or herself, so that
9 while the witness is on the stand, it is fair to put the questions to him or her rather
10 than attack him or her out of sight later on, or are we talking about the need to put
11 other matters to the witness, although the witness may not have testified in-chief on
12 that so that the questioner uses the opportunity to make a larger case or get a larger
13 case out of this witness? Keep that question in mind while you submit.

14 MR STEYNBERG: Thank you, Mr President. The short answer to both is yes. In
15 respect to the first, we submit that it is in the interests of fairness to a particular
16 witness that any matters which will later be used to attack the credibility of that
17 witness should first be addressed to that witness in cross-examination. It is a matter
18 of fairness and a well recognised principle that a person should have the opportunity
19 to confront his accusers and, apart from anything else, the common sense result of not
20 doing that is that the response from the Prosecution's going to be, "Well, you never
21 put it to the witness, so how can the Chamber taken that into account now?"
22 In respect to the second matter, the Prosecution can only lead a witness on its own
23 case, on matters relevant to its own case and relevant to those aspects of the Defence
24 case which are known to the Prosecution. As the Chamber is well aware, there is no
25 duty on the Prosecution to set out in full in advance of the trial its defence, so the

1 Prosecution is operating blind in that respect as it were.

2 If, however, there are factual assertions which the Defence knows it will make in the
3 Defence case on which a particular witness may be anticipated to be able to comment
4 or to give evidence, our submission is that, not only in the interests of fairness but
5 only also in the interests of judicial economy, those matters should specifically be
6 raised in cross-examination with the witness. And perhaps the best way to illustrate
7 this is to examine what will happen if that is not the case. Your Honours say that
8 there is no need to deal with the issue of rebuttal, but it actually comes into this issue
9 too.

10 If, for instance, taking a hypothetical example, we are dealing with a murder case and
11 a witness says that he saw the accused shoot the deceased, if the Defence case is that
12 in fact there was a second person present at the scene and it was the second person
13 that shot the deceased and not the accused, one would expect that that fact would be
14 pertinently put to the accused in cross-examination. If the Defence rather
15 cross-examines the witness only as to opportunity to observe, daylight, prior
16 recognition of the accused and all of the other normal matters which would be put,
17 but omit to put to him that in fact there was a second person there, what will be the
18 result when the accused takes the stand and says, "In fact, it was person Y and not
19 myself that did the shooting"? The response will be that the Prosecution will have to
20 apply to reopen its case to lead evidence in rebuttal because it is caught by surprise.
21 And it is to avoid exactly this sort of surprise that this is an efficient way, in the
22 Prosecution's submission, of dealing with the challenge to witness evidence.
23 The Prosecution also observes that putting relevant facts to witnesses may indeed
24 assist the accused himself, because if such facts are not put and the Prosecution hears
25 about a version which comes out only in the Defence case, it may well be our

1 argument will be that the accused is tethering his version to fit the evidence, this is a
2 recent fabrication. By exposing the relevant portions of the Defence case to the
3 relevant witnesses, this sort of argument and this sort of debate can also be avoided.
4 So, in the Prosecution's submission, on the basis of fairness to witnesses, on the basis
5 of expeditious proceedings and on the basis of establishing the truth, all of these
6 should require that the Defence should -- well, both parties but mainly the Defence
7 because by the time the Prosecution is cross-examining, the case should be fairly clear,
8 plus obviously the DCC sets out in full what our allegations are. But that these sort
9 of relevant factual matters on which a witness may be expected to comment should be
10 addressed with those witnesses at the relevant time.

11 What we want to avoid is a situation of having to recall witnesses many months or
12 possibly many years down the line, when memories have faded, people might have
13 died or be sick or whatever. That, in my submission, is not in the interests of justice
14 or judicial economy.

15 Bear with me, please. We don't suggest that this would necessarily be a hard and
16 fast rule that counsel be castigated for not doing it. That is a matter of professional
17 conduct, et cetera. It is simply in our submission a common sense approach to the
18 evidence, and that if the Defence do not observe this, there may be repercussions,
19 evidential repercussions, down the line which may be unpleasant for them. So we
20 submit that this is a sensible way to approach the evidence.

21 I don't suggest that the counsel needs to at the end of every witness stand up and say,
22 "The Defence case is that ..." and repeat the whole defence. Simply relevant factual
23 matters on which that witness would be expected to comment should be addressed
24 with that witness.

25 Those are my submissions. Thank you, your Honours.

1 PRESIDING JUDGE EBOE-OSUJI: Mr Khan?

2 MR KHAN: Your Honours, I am grateful. We have no problem in confronting the
3 Prosecution witnesses and testing their credibility, and there's going to be no attempt
4 to play any clever tricks. So we're quite happy to put our case. But there is an issue
5 regarding what that means.

6 Your Honours, we are faced with a difficulty in this case - we say it's a difficulty - in
7 that, and it's one in fact to varying degrees that emerges in almost every filing that we
8 are putting in at the moment, that it's not that we have any difficulty in sharing some
9 information with the Prosecution. It's the use that they would make of it, because for
10 example when I put a case to a witness, of course, I can confront a witness and in the
11 course of cross-examination challenge the witness' account and the veracity, but your
12 Honour, in this case, where we say there is a network of Prosecution criminal
13 witnesses engaged in criminal conduct, if the Prosecution then can take the case that
14 we put and as the proofing decision currently stands they can then prepare the next
15 witness that we say is part of that criminal network as to how they will respond to the
16 case we are putting, your Honours are going to be incrementally in difficulties in
17 actually ascertaining the veracity of the witness sitting before you.

18 Your Honours, this is not of general application, but there is this group of witnesses
19 that we say there are going to be consequences. So there's two options at least. Of
20 course, we can put proofing in general terms, point number 1.

21 Point number 2, or option 2, is that your Honours may consider an order that the
22 Prosecution not proof subsequent witnesses to the extent that the Defence have put
23 their case, so that will prevent a witness that we say may come with an organised
24 plan to deceive the Court being put on further notice regarding lines of Defence
25 cross-examination, because that's what the Prosecution propose at the moment and

1 which permission has been granted them to go over not only what they've told the
2 Prosecution, but get them ready to what they can expect from the Defence.

3 So, your Honours, there are implications in putting our case when it comes to the
4 responsibility of the Prosecution and actually whether or not witnesses will be
5 prepared, not in a good sense, not in a positive sense for their well-being that we
6 support, or their willingness to tell the truth, which we of course support, but the
7 converse, that they are prepared in the sense of knowing how their what we say are
8 lies are going to be uncovered so they can come up with a new story. So, your
9 Honour, that is not for all witnesses but there is this hard group we say where that is
10 a difficulty.

11 Your Honour, that's one of the difficulties - and I know it's going to be ruled
12 upon - that led us to put forward the proposal, to mitigate this prejudice that we face,
13 for your Honours to consider putting the eight witnesses that we've named first
14 because it will reduce the risk of this contamination spreading in this case, if they
15 could be brought in, arrangements can be made and they can give evidence and your
16 Honours then subject to -- after my friends have put their question, after we have
17 cross-examined, can make a decision as to whether or not your Honours believe those
18 witnesses, or not.

19 Your Honour, the second matter - I don't want to digress too much, but I do submit it
20 flows - is whether or not, particularly so close to trial, the Prosecution should be
21 entitled to continue to interview these core witnesses, these eight witnesses, in
22 addition to the proofing.

23 These are not just theoretical issues, in our submission. They actually have the
24 potential to infect the justice process in a very real way when one is not dealing with
25 witnesses we say with these -- in relation to these eight that are going to come here

1 with the intention of helping justice and helping narrate a truthful account, and that is
2 why some safeguards may be necessary, but your Honours, in relation to putting the
3 basic thrust of the case, your Honours, I am very happy to do it, but there will be
4 some ambits where perhaps we cannot go beyond without some provision to mitigate
5 the risk that would be faced with subsequent witnesses being put on notice and
6 coming up with a story as to how they are going to counter various allegations and
7 contentions and evidence that we confront them with.

8 So, your Honours, I hope that's of assistance. It's the most transparent way I can
9 present it in the terms that I've put it.

10 PRESIDING JUDGE EBOE-OSUJI: But as a general matter -- I'll take that back.

11 Are you done then with your submissions?

12 MR KHAN: Your Honour, just one other option, I suppose. If your Honours - and
13 we'll file on it - but if your Honours would be minded the Prosecution are entitled to
14 proof these witnesses, particularly these eight anyway, the other option is for your
15 Honours to allow proofing but in advance of the first of those witnesses testifying so
16 that they can't subsequently put various versions or Defence challenges to those
17 witnesses, to give them an opportunity. If the purposes of proofing is as the
18 Prosecution assert, I don't see the prejudice for them, after all the interviews they have
19 conducted, to proof before we confront the first of these witnesses that we say have
20 cooked evidence.

21 PRESIDING JUDGE EBOE-OSUJI: That sounds like a fresh application. You said
22 you will be making some applications down the line on this matter of witness
23 preparation. You may. You didn't say you will.

24 MR KHAN: Your Honours, we will, in fact.

25 PRESIDING JUDGE EBOE-OSUJI: Are you not proceeding it?

1 MR KHAN: It is food for thought before lunch.

2 PRESIDING JUDGE EBOE-OSUJI: Fair enough.

3 Mr Katwa?

4 MR KIGEN-KATWA: Your Honour, on our part we are very categorical that we are
5 opposed to that motion.

6 The first reason why we oppose it, your Honour, is that the Chamber is aware that the
7 Prosecution have made allegations against the Defence, the Defence on their part
8 have indicated that their position is that the witnesses are lying in their story and we
9 fear that, if that approach is adopted, the window given in the proofing protocol will
10 be used by the Prosecution to prepare the subsequent witnesses in reaction to the
11 questions put to the witnesses. So that will be our first objection, that there is every
12 likelihood that the witnesses - subsequent witnesses - will be in the course of proofing
13 adjusted to conform with what our case -- what case we have made in the course of
14 cross-examination.

15 The second basis of our objection, your Honours, is the provisions of Article 54,
16 subsection (1)(a), which expects the Prosecution to be fully aware and acquainted
17 with their case both in terms of what is exonerating and what is incriminating, and to
18 place a burden on the Defence that they should give an indicator of where they intend
19 to go in their defence, your Honours, we submit is an unfair burden on the part of the
20 Defence and for that second reason that Article 54 expects the Prosecution to be fully
21 aware of their case we would oppose that motion.

22 The third reason why we would oppose that motion, your Honours, is that that
23 approach places a burden on the Defence. As my learned friend has indicated for
24 the Prosecution, it requires us to make an assessment of what we consider those
25 witnesses can comment on and, your Honours, we are not prepared to carry that

1 burden that in our assessment this witness should be able to comment on this issue
2 which I intend to take up in the defence.

3 Secondly, on the same point, we have so much latitude as provided for in the manner
4 of cross-examining, and to place this additional burden on our part that, "Your
5 cross-examination should be shaped and limited and conform to a certain protocol, or
6 a certain rule," your Honours, we feel is unfair to us.

7 For all those reasons, your Honours, we oppose this attempt.

8 Considering the gravity with which we take these requests on the part of the
9 Prosecution, we would pray your Honours that if the Prosecution feel very strongly
10 minded about it they should make a formal application and we should be given an
11 opportunity to respond elaborately, as opposed to the manner in which they have
12 made in their motion which is casual and general. It is an issue which we feel very
13 strongly about, your Honour.

14 PRESIDING JUDGE EBOE-OSUJI: I was going to put a certain question to Mr Khan
15 and then I stopped until I heard from you, and now that you have spoken I think the
16 question is now appropriate to ask.

17 As a matter of -- a general matter, the question is if a witness is on the stand and you
18 have more you could have asked of that witness and you hold back and the witness
19 departs, at a subsequent time is it fair to the process in general for you to now say,
20 "Recall that witness. There are some more questions that I want to ask him"?

21 MR KIGEN-KATWA: On my part, and speaking on behalf of my client limitedly, I
22 would not expect myself to seek the recall of a witness if I did not put the question to
23 him. However, in the same situation I would pray that the way I would want to
24 adduce my defence case should not be challenged on the ground that certain
25 questions were not put to the Prosecution witness when the Prosecution witness was

1 in the dock.

2 PRESIDING JUDGE EBOE-OSUJI: My second question to you is from the run of
3 submissions you made it seems that you are -- your objection to the Prosecution's
4 request, correct me if I'm wrong, relates only to the part of it that deals with putting
5 the larger question to a witness, as opposed to putting questions to the witness as a
6 matter of fairness while the witness is on there, you ask them questions about their
7 credibility for instance so they deal with it in order that you are not burdened later on
8 or restricted from arguing that the witness had lied or whatever on a point you had
9 not particularly asked them a question about?

10 MR KIGEN-KATWA: Your Honours, probably I need to clarify this. My position
11 is that we are agreeable that questions on credibility can be put to the witness. That
12 needs to be clarified.

13 It is in respect to the other issues that we are opposed, which I think your Honour,
14 President, had already identified the two categories, being issues of credibility and
15 the other issues. We would be concerned in respect to the other issues, but on
16 credibility we are in agreement that the question should be put to the witness.

17 MR NARANTSETSEG: Mr President, your Honours, we the victims essentially
18 agree with the Prosecution. Therefore, the Common Legal Representative shares the
19 Prosecution's view that non-calling parties should put the material facts of its case to
20 any witness who may comment upon.

21 According to the Prosecution, this will expedite the proceedings. It will also ensure
22 that victims are treated fairly and, at the end, it will also help us avoid recalling
23 witnesses at later date.

24 However, the Common Legal Representative would like to add that, even if you, your
25 Honours' Chamber, agrees with the Prosecution and approves the Prosecution's

1 proposal, we would like to add that this should not prevent also the non-calling party
2 to recall the witnesses at later date in order to deal with substantive matters of the
3 case.

4 This is because we believe that the prime -- the ultimate objective of these proceedings
5 is to ascertain the truth and achieve justice. Therefore, even when parties are
6 allowed to put -- to let's say go along with the Prosecution's proposal, this shouldn't
7 prevent them at later date to recall witnesses whenever it's necessary.

8 Therefore, we conclude that the Prosecution's proposal should be approved. At the
9 same time, the Chamber should still allow the non-calling parties to recall the
10 witnesses at a later date.

11 This concludes our submission, your Honour. Thank you.

12 PRESIDING JUDGE EBOE-OSUJI: Thank you.

13 I see Mr Steynberg was getting on his feet.

14 MR STEYNBERG: Thank you, Mr President. I'd just like to respond to the issue of
15 the impact of the suggested format of have putting a case to the witnesses on the issue
16 of witness preparation.

17 What my learned friend seems to suggest is not so much witness preparation as
18 witness coaching and, if the fear is that as a result of what the Prosecution's heard one
19 witness say we are going to now tell the next witness how to reply, well, that's clearly
20 not the case. That -- and if the Defence do not trust the Prosecution to do that, there
21 are also adequate safeguards as the Chamber well knows. For instance, there is a
22 protocol to be followed which would expressly forbid that sort of behaviour. There
23 is also the safeguard of the videotaping of the witness preparation so that, should
24 questions later arise, the Chamber may review that video and determine whether or
25 not the Prosecution has acted inappropriately.

1 However, if the concern is simply that facts which are put to one witnesses -- to one
2 witness will not be discussed with another witness, well, that rather flies in the face of
3 the very reason, or one of the very reasons, for witness preparation.

4 In the example I gave earlier, if there are two witnesses to a murder and it's put to the
5 one witness that it wasn't the accused that shot the deceased, it was somebody else,
6 clearly in those circumstances the Prosecution is going to ask the next witness, "Well,
7 was there anybody else present? Could you have missed somebody? Could there
8 have been somebody hiding on the grassy knoll?", or this sort of line of questioning,
9 because that is a matter which is -- a new matter which has arisen which must be
10 investigated and examined. But what the Prosecution may not do is specifically give
11 details of what the previous witness said, what his responses were, and assist the next
12 witness to tailor their responses accordingly.

13 Now, the witness preparation decision has been given. The Chamber is not seized
14 now with a reconsideration of that decision. If and when my learned friends put in
15 their specific requests about the first eight witnesses we will obviously respond, but I
16 prefer not to respond hypothetically on the basis of something which has not yet been
17 submitted, but in my submission the broad terms is that the witness preparation
18 protocol provides adequate safeguards to prevent against any improper coaching of
19 witnesses, regardless of whether or not the Chamber adopts the protocol suggested
20 by the Defence.

21 Just on the issue of the Common Legal Representative's submission that this should
22 not prevent the recalling of witnesses, where necessary - I stress the words "where
23 necessary" - the Prosecution would not object to this, but this would not be in the
24 situation as Mr President has pointed out where the deliberate decision not to put a
25 question is subsequently revisited by counsel and they decide then that they wish to

1 retread this area.

2 There has to be -- there would have to be something new and unanticipated which
3 would give rise to the recalling of that witness in the Prosecution's submission, but
4 we will deal with that if and when it arises.

5 Thank you, your Honours.

6 PRESIDING JUDGE EBOE-OSUJI: We have less than five minutes to the break
7 period. Before -- I wanted to ask you before we get to the break point, when you
8 started speaking in the morning, Mr Steynberg, you said that, yes, the matter of
9 rebuttal -- a case in rebuttal is still implicated, what about -- to what extent is it the
10 case that if there is a ruling on the ability of a party to ask a broader question to a
11 witness on the stand, say a witness for the Prosecution the Defence wants to ask
12 further questions to the witness while on the stand, if that dispensation is granted to
13 what extent would you still need a case in rebuttal at the end of the day?

14 MR STEYNBERG: To a lesser extent, your Honours, but I don't believe that that will
15 entirely exclude the possibility of a rebuttal case. For instance, going back to my
16 well-worn example about the shooting --

17 PRESIDING JUDGE EBOE-OSUJI: Well, let me help you. Would it then be the case
18 that it is still more prudent to wait on the rebuttal issue until the end of the
19 Prosecution -- the case for the Defence?

20 MR STEYNBERG: Yes, it probably would be, but if I can just make one submission?
21 The rebuttal case would then be limited to additional witnesses that might be
22 necessary, or additional evidence, over and above those witnesses who had already
23 been confronted. For instance, if person Y who is alleged to have been on the scene
24 after the Prosecution investigate we find that he was in fact in Toronto on that day
25 and we have his flight tickets, et cetera, et cetera, that's exactly the sort of evidence we

1 would seek to lead in rebuttal that Witness Y was fabricating this whole version, but I
2 do believe that it would be more appropriately dealt with at a later stage.

3 PRESIDING JUDGE EBOE-OSUJI: It is 12 o'clock on the stroke and we can adjourn
4 now for the lunch-break.

5 Thank you.

6 THE COURT USHER: All rise.

7 (Recess taken at 11.59 a.m.)

8 (Upon resuming in open session at 1.33 p.m.)

9 THE COURT USHER: All rise.

10 The International Criminal Court is now in session.

11 Please be seated.

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

13 We will this afternoon be going into closed session to take up some remaining matters,
14 but before we do that there are a few new -- there's one new matter we will take up in
15 public session, as well as resolve some remaining ones that we need to resolve in
16 public session.

17 Let me announce the new matter that we thought we should take up in public session.
18 It was not originally on the agenda, but the Judges thought it is something that needs
19 to be raised.

20 In the Prosecution's further submissions on the conduct of proceedings, it is indicated
21 that the Prosecution intends to use photographs, maps and videos in their opening
22 statement. This is a matter on which we think we need to ask whether there's any
23 issue on that. If there is any such issue, it needs to be resolved ahead of the
24 commencement of the trial.

25 I suppose the question should go to the Defence. If you're in a position to exhaust

1 your discussion on the matter we can do that today and then resolve it in a written
2 decision later on, but if not you can say what you can and if you need to file
3 something else in writing let us know and we will take it then, but we are down to
4 a -- sorry.

5 MR KHAN: Mr President, your Honours, I'm grateful, and good afternoon.

6 In relation to this matter, I hope we can have a constructive and reasonable position
7 that can be agreed by the Prosecution -- with the Prosecution. Of course, it's difficult
8 to comment specifically until we know what documents, what videos and what
9 material the Prosecution seek to put in.

10 Perhaps the easiest way round it would be for the Prosecution in the next seven days,
11 or subject to your Honour's order, detail the audio and video material that they seek
12 to show and we can indicate whether or not objection is taken.

13 My -- without binding myself my inclination is, even to the extent that there may be
14 concerns about admissibility of those documents, two approaches could be adopted.
15 The first is to argue admissibility at the outset. The second is to allow the
16 Prosecution to use that material, but with a clear edict that that material has not been
17 rendered admissible in these proceedings and that will be to be determined at a later
18 stage.

19 But in totality I think my preference would be the Prosecution should detail what
20 documents they wish to put in, and your Honours can stipulate the time that the
21 Defence should respond as to whether or not there's an objection to the showing of
22 that at the opening of the trial and a ruling can be given after hearing both parties.
23 I hope that's a constructive and reasonable way forward.

24 PRESIDING JUDGE EBOE-OSUJI: Very helpful. Very helpful submission.

25 Now, Mr Katwa, do you --

1 MR KIGEN-KATWA: On our part, your Honours, we have no objection, subject to
2 disclosure, and we would pray that the Prosecution's summaries of witnesses should
3 probably give an indicator of which of the items they intend to use in either the
4 photos, or the maps, or the videos. We would also pray that, regardless of the
5 approach adopted, our right to challenge admissibility should not be taken away.

6 PRESIDING JUDGE EBOE-OSUJI: Mr Katwa, what we are trying to avoid if
7 possible -- though Mr Khan has suggested a default position way out if the matter
8 cannot be resolved ahead of time, what we are trying to avoid is a situation where on
9 the day objections are being made when they could have been indicated earlier on
10 and if possible resolved to the extent possible. So to the extent that you do see an
11 issue, or you possibly see an issue, it is best to raise it upfront so we can deal with it.

12 MR KIGEN-KATWA: Your Honours, I think if we got receipt of the items they
13 intend to use in good time, then we will be in a position to make a better comment on
14 that.

15 PRESIDING JUDGE EBOE-OSUJI: Very well.

16 Well, Mr Steynberg, that's now over to you.

17 MR STEYNBERG: Thank you, Mr President, your Honours.

18 Perhaps I can clarify that the purpose of the photographs and video material is simply
19 as an aid to the Prosecution's opening statement; explanatory aid, aide-mémoire, et
20 cetera. It is not intended to be submitted as evidence. Our understanding of the
21 general rule is matters do not become evidence unless they are either properly
22 submitted through a witness, or submitted through a Bar table motion, or some other
23 means that the Statute may provide. So I'm prepared to stipulate that the material
24 used will not be considered evidence unless its properly proved later. I hope that
25 will assuage Mr Khan's concerns.

1 As far as notice is concerned, I note that the Chamber has already ordered us to
2 disclose by no later than 5 September any materials we intend to rely on. I submit
3 that that's a reasonable time for the Prosecution to view the material and make any
4 objections that they might have prior to the opening.

5 I can indicate that I don't expect this to be a large number of photographs, or
6 audio/visual material. I don't expect that our opening will even take the full two
7 hours allotted. So I don't think there's going to be a huge burden in reviewing the
8 material and submitting any objections prior to the start of trial.

9 PRESIDING JUDGE EBOE-OSUJI: Specifically on the first option indicated by
10 Mr Khan, is it possible to give him or the Defence or the Chamber a list of those items
11 that you intend to use for purposes of opening statement, or would you prefer that
12 we -- it's more efficient to deal with it on the default, that's option B that he indicated,
13 which you dealt with in your opening, so that we can once and for all know where we
14 stand on this matter?

15 MR STEYNBERG: I'm happy to deal with it, your Honours, on the default position
16 that nothing we produce will be admissible as evidence. We're not dealing here with
17 a situation of a lay jury who may be unduly influenced by something which they see.
18 Your Honours are all experienced judges. You know very well that you cannot rely
19 on anything which is not properly admitted as evidence, so I don't see any prejudice
20 here, and so if it can be dealt with on that basis I submit that's fine.

21 As far as providing a list is concerned that can be done, bearing in mind that we are at
22 this late stage still being peppered with filings and other things that require our
23 attention and so the finalising of video presentation and photographs is not
24 necessarily the highest thing on our priorities at the moment. So I would request,
25 your Honours, that the dead-line in the decision recently handed down by the

1 Chamber of 5 September should be maintained and not brought forward.

2 PRESIDING JUDGE EBOE-OSUJI: You see where the concern is. The concern is
3 not at all that the Chamber would be influenced by material introduced that is not
4 evidence in the case. What we are seeking to avoid is a situation where right on the
5 day you are on your feet making opening statement and something is up on the
6 screen and somebody gets up and objects and then there is a requirement, or an
7 expectation, that a ruling be made on that before we proceed. You can see how
8 disruptive that can be, so it is for that reason that it is best to see if that can be avoided
9 upfront before we get to that position. It is not about prejudice.

10 MR STEYNBERG: Thank you, your Honours. I would obviously prefer not to be
11 interrupted while I'm on my feet, but I submit that the order that the Chamber has
12 already handed down should adequately deal with that issue.

13 PRESIDING JUDGE EBOE-OSUJI: Sorry, what was that? What was the last?

14 MR STEYNBERG: The dead-line that we submit the materials, or disclose to the
15 Chamber, the parties and the legal representatives by no later than 5 September
16 copies of the material we intend to use, unless the material is on the Prosecution's list
17 of evidence.

18 PRESIDING JUDGE EBOE-OSUJI: All right. I thought I heard you say "orally
19 handed down." You meant already handed down.

20 MR STEYNBERG: Already handed down, yes. I beg your pardon.

21 PRESIDING JUDGE EBOE-OSUJI: Okay, thank you very much. Okay. We will
22 be making a ruling in that regard later on.

23 Now we move on to the next matter we intend to take up in the public session and we
24 want to return to the question of the schedule; the sitting schedule. We notice that
25 during the break some communication was relayed from the Sang Defence team on

1 this matter. If you can put it on the record, please, we can take it.

2 MR KIGEN-KATWA: Sorry. Your Honours, we noted from the Court's website
3 that the schedule for hearing was such that in the approximate month of November
4 the hearing of this Case I would be conducted simultaneously with the Case II, and
5 we were requesting that in that event we would be -- the trial of Case I and Case II
6 would be conducted alternatively. That was the request we made in the
7 communication we made, and that communication we made was subsequent to our
8 noticing the schedule as indicated in the website which we had not noticed earlier.

9 PRESIDING JUDGE EBOE-OSUJI: And your preference is that -- in your view, your
10 preference would be to have -- devote a chunk of time to The Prosecutor versus the
11 Ruto and Sang case, say three or four weeks, or six weeks, and then rest and give the
12 courtroom to the other case, The Prosecutor versus Kenyatta, for an equivalent
13 amount of time and to alternate in that way?

14 MR KIGEN-KATWA: President and your Honours, we would very much pray that
15 that happens. We would pray that we probably take chunks of three weeks and take
16 a break alternately. Thank you.

17 PRESIDING JUDGE EBOE-OSUJI: The request is noted. I don't expect that the
18 Prosecution has much to -- if you do, please?

19 MR STEYNBERG: We have no objection, your Honours.

20 PRESIDING JUDGE EBOE-OSUJI: Of course that is a matter which this particular
21 Chamber cannot resolve on its own, considering that it touches on a case - another
22 case - before another Chamber, although two Judges of this Chamber are also in the
23 other case, but it is a matter that is best resolved in consultation with the full
24 Chambers of both cases and we will relay to you the outcome of that consultation
25 when it happens. It will of course be reflected in the scheduling, naturally.

1 MR KIGEN-KATWA: Thank you very much, President and your Honours. We
2 really appreciate it.

3 MR KHAN: And Mr President, your Honours, just for the record, that's the position
4 of the Ruto Defence as well. We'd very strongly advocate and support the proposal
5 put forward by my learned friend, Mr Katwa-Kigen.

6 PRESIDING JUDGE EBOE-OSUJI: To complete the submissions, I take it the victims'
7 counsel would have no objection if things are resolved in that way?

8 MR NARANTSETSEG: (Microphone not activated)

9 PRESIDING JUDGE EBOE-OSUJI: All right. So that we will -- the resolution of
10 that matter will be communicated in due course, either by way of a dedicated ruling
11 on it or order on the matter, or the publication of the Court's calendar will reflect that
12 reality if that is the case.

13 But on a promise made earlier that we will come back to deal with the request made
14 by Mr Khan earlier in the morning on this matter of court schedule, asking the times
15 and days of sitting, it is indeed the case that the Chamber will be sitting from 9.30 to 4
16 p.m. on a daily basis, Monday to Friday.

17 May I also use this opportunity to revise the information, or indication, given earlier
18 in the morning that we are expecting to do this until the end of September. I revise
19 that to say we expect to do this until 4 October 2013. I hope that resolves that.
20 Okay.

21 One item remains to be dealt with in public session before we go into closed session
22 and that is the matter of the Defence request in filing number 818. Allusions have
23 been made to it in the course of the morning, the request pertaining to requiring the
24 Prosecution to present eight witnesses first according to the request of the Defence.
25 We will be making a ruling on that immediately.

1 There is a sub-request to that and the sub-request was the Defence's request for leave
2 to file or submit in reply to the Prosecution's response indicating that the Defence's
3 request was incomplete by way of omission of material information upon which that
4 request is based. We will rule on that first.

5 We reject the request for leave to reply. We do not see it as necessary at this stage.

6 We move on to ruling on the merits, which we are also giving now. We are also
7 rejecting the request on the merit. For the reason that this is necessarily an
8 adversarial litigation, the Prosecution will have as a general rule the right to order its
9 case as it sees fit.

10 Of course the Chamber is mindful of the fact that in exceptional circumstances the
11 Chamber may intervene to make specific directions that may override that right that
12 the Prosecution has, but we do not consider that the case has been made sufficiently
13 for that extraordinary power of the Chamber to be invoked.

14 We are mindful of the concerns that the Defence have indicated that motivated their
15 request, and it is the Chamber's view that it is a matter which ordinarily will happen
16 in cases and that counsel should be able to take up this matter in their
17 cross-examination as the issues arise to be taken up then.

18 So that will be the ruling of the Chamber on this, and we are mindful also that the
19 Chamber -- sorry, the Defence counsel did make allusions to the possibility of filing
20 further requests that touch on this matter, perhaps reconsideration of the decision on
21 preparation of witnesses. When we get to that point we will take it up, but we do
22 not want to presage it or link it at this stage.

23 So that's the ruling of the Chamber on this.

24 MR KHAN: Mr President, your Honours, I'm most grateful for that ruling. If it
25 assists the Chamber I think the submissions can be quite short on the issue of

1 amending or varying the proofing decision of the Trial Chamber, and if your Honours
2 think, given the constrained time limits in which we're operating, that submissions be
3 taken now, I can address your Honours really with the broad thrust of those
4 submissions immediately if your Honours wish?

5 It's quite a straightforward matter, and it may actually of course allow a decision to be
6 rendered sooner rather than later and also mitigate any prejudice to the Defence in
7 the event that the Prosecution either reinterview those eight witnesses, or seek to
8 proof them in any way before a decision is rendered.

9 So, your Honours, if you wish to receive submissions today, I can do that
10 immediately. It's up to your Honours, of course.

11 PRESIDING JUDGE EBOE-OSUJI: If you're ready to make submissions on that now,
12 it means you should also be in a position to file written matter on it in the next day or
13 two. Is that the case?

14 MR KHAN: Your Honour, actually it's always easier -- I'm a huge fan of
15 extemporaneous decisions and oral advocacy, because actually it makes less work in
16 many ways than elaborate written filings and then 21-day responses, or even
17 expedited responses, and then a ruling.

18 If your Honours are not minded to hear submissions now perhaps we can put
19 submissions in in the next seven days, but I'll try to do it as soon as we can. If I can
20 do it in the next couple of days, rest assured I will do it straightaway.

21 PRESIDING JUDGE EBOE-OSUJI: It would be preferable for us. It's not because
22 we -- we, this particular Bench, like to have matters raised and ruled upon on the spot,
23 if need be, but there are those occasions on which constraints of time may not allow
24 for that to be done and this is one of those. If we spill over this proceeding of today
25 into another day we will have difficulty with a courtroom and other logistical

1 difficulties, so it would be more efficient if you could file that motion quickly in
2 writing --

3 MR KHAN: We will act accordingly.

4 PRESIDING JUDGE EBOE-OSUJI: -- and the Prosecution will deal with it. Thank
5 you.

6 With that, we come to the end of the public part of the proceedings. We can now go
7 into closed session for the rest of the matters on today's agenda items. Thank you.

8 (Closed session at 1.56 p.m.)

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23 (Redacted).^{*} Open session.

24 MR NARANTSETSEG: If I may, your Honour. If I understand correctly, you were

25 about to close the hearing, so just briefly a few, if I may; the Common Legal

1 Representative wishes to make two requests briefly. It would not take more than
2 two minutes.

3 PRESIDING JUDGE EBOE-OSUJI: Please proceed.

4 MR NARANTSETSEG: Thank you, your Honour. The Common Legal

5 Representative wishes to make two requests. The first relates to the meaning of
6 terminology you have used in your decision, which is critical junctures where the
7 Common Legal Representative would be able to intervene in person.

8 The second one relates to the Prosecution's witnesses who have also victim status, the
9 dual status witnesses, and they are ordered to be present during the trial.

10 Let me go directly to the point, request number one. Your Honours, the victims, we
11 are aware of your decision on victims' representation and participation where your
12 Honours have ruled that the Common Legal Representative will be able to intervene
13 in person during critical junctures of the trial, which would include instances such as
14 making opening and closing statements, but at the same time we would like to
15 observe that the decision doesn't exhaustively define the instances where the
16 Common Legal Representative would be able to be present in the courtroom.

17 Therefore, we would like to request the further guidance from the Honourable
18 Chamber because this is necessary for us to facilitate the timely intervention on the
19 part of the legal representative in situations where victims consider it necessary to
20 examine -- for example, through their common legal representative, to examine
21 certain witnesses in person. Moreover, we would like to submit that such critical
22 junctures should also include hearings where Court hears evidence from expert
23 witnesses, the accused, or witnesses whose evidence will directly impact on the
24 personal interest of victims.

25 We would also like to add that some status conferences go beyond mere discussion of

1 routine procedural issues. Therefore, the Common Legal Representative would
2 respectfully request the Trial Chamber to determine on a case-by-case basis which of
3 those status conferences may also constitute critical junctures where the Common
4 Legal Representative's presence, his physical presence, will be required or be
5 desirable. This concludes our first request, your Honours.

6 Secondly, our next request relates to dual status witnesses. The Common Legal
7 Representative requests the Trial Chamber also give a clear indication as to when
8 those dual status witnesses be required to testify. Since Mr Wilfred Nderitu, the
9 Common Legal Representative, is not based at The Hague, at the seat of the Court, he
10 would appreciate if the Honourable Chamber directs firstly the Prosecution to call
11 those dual status witnesses in a sequential order, in other words, in a single row
12 where the Common Legal Representative would be able to be present in the
13 courtroom and, if necessary, question and examine those witnesses in one go, let's say,
14 in one trip, if possible, since he would be travelling from Kenya and going back to
15 Kenya for that purpose.

16 Or if we would also appreciate if your Honourable Chamber directed the Prosecution
17 to give the legal representative's team sufficient notice of their intention to call those
18 dual status witnesses so that Mr Nderitu, the Common Legal Representative, would
19 be able to make travel arrangements in advance such as visa applications, et cetera,
20 which would take usually a long time for us to resolve or get.

21 These conclude our requests. We are grateful, your Honours. Thank you.

22 PRESIDING JUDGE EBOE-OSUJI: Since we have enough time to take in these
23 submissions and the reactions that can be done, so I will be calling for submissions of
24 course mindful of the ruling we made earlier relating to the Defence's own request
25 that a certain line-up of witnesses be called first.

1 Do you see any difference between the principle in the Chamber's ruling on that; that
2 is what you are requesting to be done in the second one? You don't need to respond
3 now. Mr Steynberg is here and he will be responding in due course, but if you want
4 to answer my question now that's okay. You can proceed.

5 Sorry, I was speaking to victims' counsel. I cross-wired my communication. Do
6 you see a difference between that? We ruled earlier against the Defence request that
7 requested the Chamber to direct the Prosecution to call eight witnesses in a particular
8 order first and we rejected that request. Isn't it the same thing you are requiring us
9 to do, or requesting us to do, when you say because Mr Nderitu is in Kenya the dual
10 status of witnesses should be bunched up together and taken in one go?

11 MR NARANTSETSEG: Your Honours, we believe that these witnesses are unique in
12 a way that they are also victims who are also represented by Mr Wilfred Nderitu.
13 Therefore, we believe that the presence of the Common Legal Representative in the
14 courtroom is essential when those witnesses are called.

15 We also believe that in order to make their participation effective, as well as taking
16 into account those practical arrangements we would have to make, it is best if the
17 legal representative is present when all those dual status witnesses are called in a
18 row.

19 That is the submission I would like to make but, if you require further submissions
20 from the legal representative, I will convey your message and he will make a formal
21 submission in writing.

22 Thank you.

23 PRESIDING JUDGE EBOE-OSUJI: Fair enough.

24 Mr Prosecutor, I think, will need to go first.

25 MR STEYNBERG: Thank you, your Honours. I concur with the view which with

1 respect, Mr President, you've expressed that this is of the same nature. As a matter
2 of principle, the Prosecution should be free to present its case in the most efficient and
3 effective way following its own strategies.

4 I invite the Common Legal Representative to communicate with us and if possible we
5 will accommodate him, but if it means doing violence to the case we intend to present
6 then I'm afraid that, in my submission, these practical arrangements will have to be
7 made to ensure that either he or a substitute can be present.

8 As far as visas are concerned, I'm sure that a properly grounded request would be
9 able to get a long-term visa, you don't have to apply only for three months at a time,
10 but the Common Legal Representative will also have in advance of the trial a list of
11 the order of witnesses we propose to call and hopefully that will assist them in
12 making their practical arrangements.

13 PRESIDING JUDGE EBOE-OSUJI: The note that Mr Grzybowski passed on to me
14 was that this is probably proceedings that should be in the public session and he's
15 correct, but since we are almost done we might as well complete it without stopping
16 to reconfigure the matter.

17 MR STEYNBERG: Yes.

18 PRESIDING JUDGE EBOE-OSUJI: But I noticed, Mr Steynberg, in your response
19 that you invited the victims' counsel to liaise with you to see if you can accommodate
20 him. Without prejudice to the earlier ruling we made in respect of a similar
21 application from the Defence, I take it you -- both counsel can also liaise with one
22 another to see the extent to which that can be done? I'm not -- this is not a direction
23 from the Chamber, but just --

24 MR STEYNBERG: Of course, your Honour. I can assure your Honours that we do
25 not intend to be deliberately obstructive when we respond to Defence's requests.

1 In this case I see less of an issue, because the common witnesses are largely
2 crime-base witnesses who we have in any event largely intended to group together.
3 So it would be easier for us to accommodate this request than a request of the nature
4 of the Prosecution -- of the Defence, I beg your pardon, which entirely turned our
5 order of witnesses on its head, but of course I've stated in my letter to Mr Khan - and I
6 state it for the Court - that we will do our best to accommodate reasonable and
7 well-founded requests from the Defence.

8 PRESIDING JUDGE EBOE-OSUJI: Mr Khan?

9 MR KHAN: Your Honour, can I just say that from our perspective of course a trial is
10 organic. Flexibility is needed and there's always difficulties with rearranging
11 witnesses, but on behalf of the Defence of William Ruto we would support and have
12 no difficulty at all with the proposal put forward by the legal representative of the
13 victims.

14 Perhaps -- and, your Honour, we are not seeking to seek leave to appeal the decision
15 on the eight, that stands on its own, but to the extent that discussion can take place
16 between the Prosecution and my learned friend representing the victims, to
17 accommodate the concerns of the party or the legal representatives to the victims, we
18 would very much advocate in favour of that approach and have no difficulties that, if
19 it doesn't cause insurmountable difficulties to the Prosecution, I don't think witness
20 orders really should, we would support the submissions put forward by my learned
21 friend.

22 PRESIDING JUDGE EBOE-OSUJI: Mr Katwa?

23 MR KIGEN-KATWA: We have no objection on our part to the request made by the
24 victims.

25 PRESIDING JUDGE EBOE-OSUJI: With that, we come to the end of today's

1 proceedings and I will thank everybody for the co-operation and the spirit in which
2 this has been done.

3 That brings our sitting to an end. Court is adjourned.

4 THE COURT OFFICER: All rise.

5 (The status conference ends at 3.23 p.m.)

6 RECLASSIFICATION REPORT

7 Pursuant to Trial Chamber V(A)'s email instruction dated 27 August 2013, the excerpt
8 of the transcript page 87 line 23 to page 93 line 5 (*) is reclassified from closed session
9 to open session.