

1 International Criminal Court
2 Trial Chamber V(a) - Courtroom 1
3 Situation: Republic of Kenya
4 In the case of The Prosecutor v. William Samoei Ruto
5 and Joshua Arap Sang - ICC-01/09-01/11
6 Presiding Judge Chile Eboe-Osuji, Judge Olga Herrera-Carbuccia and Judge Robert Fremr
7 Status Conference
8 Friday, 16 October 2015
9 (The hearing starts in open session at 9.34 a.m.)
10 THE COURT USHER: All rise.
11 The International Criminal Court is now in session.
12 Please be seated.
13 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. Welcome back, everyone.
14 Court officer, please call the case.
15 THE COURT OFFICER: Thank you, Mr President. The situation in the Republic of Kenya,
16 in the case of the Prosecutor versus William Samoei Ruto and Joshua Arap Sang, case
17 reference ICC-01/09-01/11.
18 We are in open session.
19 PRESIDING JUDGE EBOE-OSUJI: Thank you.
20 Appearances.
21 MR STEYNBERG: Good morning, Mr President, your Honours. For the Prosecution this
22 morning Anton Steynberg, and with me, Lucio Garcia, Regina Weiss, Alicia Zago and Jasmina
23 Suljanovic. Thank you.
24 PRESIDING JUDGE EBOE-OSUJI: Thank you.
25 MR NDERITU: Thank you, Mr President, your Honours. William Nderitu, victims' counsel,

1 assisted by Mr Orchlon Narantsetseg and Mr James Mawira. Thanks.

2 MR KIGEN-KATWA: Good morning, your Honours. For Mr Sang is myself, Katwa-Kigen,
3 Caroline Buisman, Cynthia Bondi and Marie-Ange Ukwigize. Mr Sang is absent with the
4 Court's permission. Thank you, your Honours.

5 MR KHAN: Mr President, your Honour, good morning. Mr Ruto is represented by myself,
6 Karim Khan; Mr David Hooper of Queen's Counsel; Dato' Shyamala Alagendra; Clara
7 Rodriguez, our legal assistant; and our pro bono legal assistant Ms Fiona Lau.

8 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. We are convened in a status
9 conference mode to take submissions on a pending matter, the application of the Prosecutor
10 for notice to be given of the possibility of legal recharacterization of the charges against
11 Mr Sang. That is the main business of the day. We will take submissions on that. And
12 after that there are other housekeeping matters that we will also hope to be able to touch
13 upon.

14 First we will begin with the submissions on the Regulation 55 matter. We, in terms
15 of our schedule today, we must vacate the courtroom at about 1.20 or so. We will
16 have to stop the proceedings. So everything that we haven't done at that time we
17 will find an alternative way of doing them. But for now let's start with the
18 submissions on the Regulation 55.

19 Let's begin with 20 minutes of oral arguments. First, the Prosecutor 20 minutes,
20 Mr Sang's Defence 20 minutes. This matter does not concern the Ruto Defence, so
21 they will not have audience on this one. Mr Nderitu, victims' counsel, will have 10
22 minutes to make submissions, and the Prosecutor will have 5 minutes to reply. And
23 if need be, we can also take further rounds of submissions. We also keep our minds
24 open for questions that come in the meantime.

25 Mr Steynberg.

1 MR STEYNBERG: I'm grateful, your Honour.

2 In the 20 minutes accorded to me, your Honour, I will not repeat the submissions

3 made in the Prosecution's written request. I think those are clear and

4 self-explanatory. But at the outset, in light of some of the submissions made in the

5 response of the Defence for Mr Sang, the Prosecution deems it necessary to recall

6 firstly the nature and scope of the current proceedings and the current request, which

7 at this stage is simply a request for the Chamber to give notice of the possibility that

8 the legal characterization of the facts may be subject to change.

9 We are not at this stage dealing with the actual recharacterization, which the

10 jurisprudence makes clear is something which will only happen in the final judgment

11 in fact, and at some time between then and now, should the Chamber deem it

12 necessary to consider actual reconsideration, the Chamber will no doubt in terms of

13 Regulation 55(2) call for full submissions on those aspects as well as any measures

14 that may need to be taken to preserve the rights of the accused.

15 In these circumstances the Prosecution notes, your Honour, that many of the

16 submissions made by the Sang Defence in their response are premature and should

17 rather be addressed at that later stage when the Chamber calls for full submissions on

18 matters such as prejudice and remedial action.

19 Furthermore, the Defence's response in many respects amounts to a generalised attack

20 on the fairness of the Regulation 55(2) procedure, which is largely moot since, your

21 Honours, this matter has been authoritatively decided by the Appeals Chamber, that

22 it is permitted, it's permitted by the rules, it is not inherently unfair and this is

23 supported by other human rights legislation such as judgments of the Court for

24 Human -- the European Court for Human Rights, which is referred to both in your

25 Honours', the Chamber's judgment in the matter relating to Mr Ruto as well as the

1 Appeals Chamber's judgment in the Katanga matter.

2 PRESIDING JUDGE EBOE-OSUJI: But I think it's necessary, moving back a little, are things
3 as straightforward as saying that we will not -- that the questions of fairness are largely beside
4 the point at this stage? Is it that simple?

5 MR STEYNBERG: Your Honours, nothing is ever that simple in litigation. That is the
6 general principle. Of course, the issue of fairness in the Prosecution's submission at this
7 stage should be limited to an examination of the fairness or any unfairness which may arise
8 from the giving of notice, not from the actual recharacterization. And that is the one
9 exception I do intend to address. And there is a possible issue which may arise in relation to
10 the timing of the notice and the pending no case to answer.

11 But that aside, issues relating of fairness relating to preparation of Defence in general,
12 issues of fairness relating to ability to cross-examine witnesses, undue delay, et cetera,
13 those are all matters which may or may not ever arise depending upon how the case
14 unfolds and whether the Chamber even deems it necessary to consider
15 reconsideration having heard all the evidence. It may never arise. And if it does
16 arise, then the Chamber may consider whether and which remedial steps may be
17 taken to mitigate that unfairness.

18 PRESIDING JUDGE EBOE-OSUJI: You mean of course "recharacterization." We understood
19 you. But you've said "reconsideration" twice.

20 MR STEYNBERG: Recharacterization. Thank you, your Honours.

21 Let's turn, your Honours, then immediately to the three main objections raised by the
22 Sang Defence, which I submit can conveniently be grouped into three categories:
23 The first is the timing of the request and alleged prejudice occasioned thereby. I've
24 already touched on that.

25 The second is the assertion that the notice of recharacterization would exceed the facts

1 and circumstances alleged in the charge or described in the charge.

2 And the third is the assertion that the notice of recharacterization would infringe
3 upon other fair trial rights of Mr Sang. And those he has identified as the right to be
4 tried without undue delay and the right to question witnesses.

5 Starting with the timing of the request, the Sang Defence argues that the Prosecution's
6 request to give notice under Regulation 55(2) shortly before the close of the
7 Prosecution case comes far too late in the proceedings and is thus inherently unfair to
8 the accused. The argument in the Prosecution's respectful submission should be
9 rejected for three reasons. Firstly, it is specifically permitted by Regulation 55(2) --

10 THE INTERPRETER: Mr President, from the interpreters --

11 MR STEYNBERG: -- and thus not per se objectionable.

12 THE INTERPRETER: Could counsel be requested to slow down, please?

13 MR STEYNBERG: Secondly, there are good reasons why the Prosecution could not
14 reasonably have given or have requested notice to be given earlier. And, thirdly, as I've
15 mentioned a moment ago, it is largely premature to determine whether any prejudice will
16 arise therefrom.

17 Your Honours, I'm not going to spend too much time dwelling upon the
18 jurisprudence of this Court, save to say that the appellate division has confirmed that
19 the notice may be given at any stage in the proceedings, in the Katanga case even as
20 late as the final deliberation stage.

21 The European Court of Human Rights jurisprudence even permits it as late as the
22 appeal stage or review stage of a process, although it would seem that that would not
23 accord with the legislation of this Court.

24 However, the Prosecution concedes as the Prosecution itself argued in relation to
25 Mr Ruto that notice should be given as early as possible, because the earlier it's given,

1 the less chance there will be of any prejudice ultimately arising and the easier it
2 would be to remedy any such prejudice.

3 In the present circumstances, however, the Prosecution submits that notice or the
4 request for notice to be given could not have taken place reasonably any earlier, could
5 not reasonably have taken place any earlier. And in this regard I'd like to refer to
6 paragraph 24 of this Chamber's decision relating to the recharacterization of charges
7 against Mr Ruto in which the Chamber noted that there are at least two possible
8 triggers for the appearance of possible recharacterization. I take them in reverse
9 order for current purposes. One trigger was the facts and circumstances actually
10 pleaded in the charging documents, which the Chamber found could in and of itself
11 be sufficient to trigger the apparent possibility of an eventual change in legal
12 characterization.

13 But additionally, as the Chamber noted, it may be triggered by the evidence led
14 before the Chamber in the course of the trial. Inherent in this the Prosecution
15 submits is it may also be triggered by the absence of anticipated evidence that was to
16 be led during the course of the trial, but for reasons, one reason or another was not
17 led or turned out differently than was anticipated.

18 In the present matter, it's a matter of record, your Honours, and this was discussed in
19 detail during the Rule 68 litigation, that a number of witnesses, and I won't mention
20 names or numbers in public session obviously who were expected to testify and who
21 were included on the Prosecution's list of witnesses did not testify in the end, a
22 number of other witnesses did testify but recanted their evidence, and the Prosecution
23 was accordingly constrained to request the admission of their prior recorded
24 testimony in terms of Rule 68.

25 Now, the Chamber rendered its decision on the Rule 68 request on 19 September I

1 believe it was. I will check that date. The Prosecution submitted its request under
2 Regulation 55(2) on 8 October. The Court will bear with me though. The dates
3 don't sound quite right to me.

4 PRESIDING JUDGE EBOE-OSUJI: September, 8 September?

5 MR STEYNBERG: It was the 19 August and 8 September. I'm a month behind. I beg your
6 pardon, my lord, your Honour.

7 So approximately three weeks after the decision was rendered, the Prosecution had
8 considered the totality of the evidence, considered the implications of the totality of
9 the evidence on the possible modes of liability that might be supported and analysed
10 the facts and circumstances alleged in the updated DCC to ensure that those facts and
11 circumstances supported the possible alternative modes of liability.

12 Your Honour, the Prosecution submits that only once those exercises had been
13 completed would the Prosecution have been in a position to reach the conclusion that
14 the Chamber may -- it may appear to the Chamber that possible recharacterization is
15 necessary.

16 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, I'm afraid you will have to bring me along
17 in terms of following you. It appears to me you're arguing the third route according to you
18 or, rather, the third leg in which the notice may rest, upon which notice may rest. This third
19 leg is new, and according to you, it is the absence of anticipated evidence. Is that what you
20 are doing? Let me --

21 MR STEYNBERG: Not exactly, your Honour.

22 PRESIDING JUDGE EBOE-OSUJI: Okay. Let me tell you where I am. You took us to
23 paragraph 24 of the decision of the Chamber relating to Mr Ruto's case, the notice to
24 recharacterize, a possibility of recharacterization of the charges against him. And you say
25 the Chamber indicated that the basis of recharacterization could be the pleading, the

1 indictment, the evidence led. And I think you added something, a third element there,
2 which is new, what you said was the absence of anticipated evidence?

3 MR STEYNBERG: Yes, your Honours. Perhaps I can just put this back into the framework.
4 I'm at this stage dealing with the timing of the Prosecution request to give notice and the Sang
5 Defence criticism of that timing.

6 In that context, the point I'm trying to make is that there was a certain trigger which
7 led the Prosecution to make the request at this stage. That trigger related to the
8 evidence that has been led and evidence that has not been led before this Court.

9 The point I'm trying to make is the Prosecution was not reasonably in a position to
10 make the request until it was able to fully assess the evidence on record, including the
11 evidence that was the subject of the Rule 68 request, particularly the evidence of one
12 certain witness, I'm sure that the Court knows who I'm talking about, whose evidence
13 dealt chiefly with Mr Sang.

14 PRESIDING JUDGE EBOE-OSUJI: "Trigger" is a better word than the one I had used. So
15 that would then come under the trigger of the evidence, isn't that the case?

16 MR STEYNBERG: Indeed, your Honours. The point I was trying to make is that evidence,
17 the evidence before the Chamber or the evidence led before the Chamber can trigger the
18 appearance of necessity for recharacterization in one of two ways, either in the positive or in
19 the negative through actual evidence that a person gives, which might indicate a different
20 mode of liability is appropriate, or from the absence of certain evidence which would have
21 supported one particular mode of liability, which may then cause the Chamber to look at
22 other modes of liability that are supported by the facts and circumstances charged. I hope, I
23 hope that is clear.

24 PRESIDING JUDGE EBOE-OSUJI: It is. But what about the first trigger, the pleading?

25 MR STEYNBERG: Your Honours, from the Prosecution's perspective, it did not appear

1 obvious at any stage prior to the situation or the changing situation relating to the evidence
2 and the lack thereof that recharacterization with respect to Mr Sang would be necessary. It
3 was more apparent in relation to Mr Ruto, because Mr Ruto was charged with a principal
4 form of liability, namely, liability under 25(3)(a), and it occurred in the Prosecution fairly early
5 on from, in fact, from long before the trial began that certain other accessory modes of liability
6 were also implicated in the charges themselves.

7 In any case where the facts and circumstances are wide enough to encompass more
8 than one mode of liability, it can be said that one can see in the charges that other
9 modes of liability may also be engaged. But, your Honours, absent some sort of
10 trigger to indicate that it may be necessary to resort to those modes of liability, in the
11 Prosecution's view, it would have been premature to request the Chamber to give
12 notice at that stage.

13 The alternative would be in every trial before the trial starts to request the Chamber to
14 give notice as to all possible modes of liability that are -- that may be covered by the
15 facts and circumstances in relation to the UDCC or in the DCC.

16 PRESIDING JUDGE EBOE-OSUJI: I'm looking -- maybe this is what you are talking about.

17 If you look at paragraph 20 of your motion paper, it says, quote, "As demonstrated above,
18 demonstrated above, some of the factual allegations cited in the UDCC in support of liability
19 under the" -- let's say existing characterization can just as well support liability under the legal
20 characterization you're now seeking, isn't that the case? And the question then arises, if it is
21 the case as demonstrated above, quoting you, that the factual allegations were already there,
22 why wait until the end of the case for the Prosecution to give notice of possibility of
23 recharacterization?

24 MR STEYNBERG: Your Honours, this is tied up unfortunately with the evolving charging
25 and confirmation practise before this Court. From the very first cases before this Court, the

1 Prosecution has in its request for arrest warrants, summonses and in its confirmation charges
2 alleged multiple or alternative modes of liability.

3 The practise of the Pre-Trial Chambers until recently has been that the Pre-Trial
4 Chambers would only confirm what they would regard as the most relevant or the
5 most appropriate mode of liability. This is something which the Prosecution has
6 been fighting with the Pre-Trial Chamber for some time.

7 PRESIDING JUDGE EBOE-OSUJI: Yes, but that didn't stop you applying for notice of
8 possibility of recharacterization to be given in respect of Mr Ruto. And you said when you
9 made that application, I think it was in July 2012, the 3rd I believe July 2012, you urged
10 fervently that the notice be given on or before the commencement of the hearing of the
11 evidence.

12 So the charging practise in the -- especially in relation to whether or not the
13 Prosecutor could plead in the alternative didn't stop you then making that move in
14 respect of Mr Ruto.

15 MR STEYNBERG: That's obviously true, your Honour. But having said that, in the
16 Prosecution's submission there needs to be some sort of trigger or some reason to request the
17 Chamber to give such notice.

18 In respect to Mr Ruto, the reason was that he had been charged with a principal mode
19 of liability. Already in the lead-up to the trial we had issues with certain witnesses,
20 and I'm constrained to mention names and numbers at this stage, one of whom who
21 your Honour will know had already returned to Kenya and broken off contact with
22 the Prosecution. The Prosecution therefore felt it prudent to also ensure that certain
23 accessory modes of liability as well as the principal mode of liability charged under
24 25(3)(a) were brought to the attention of the Ruto Defence team in order that we could
25 avoid any complaint of prejudice at a later stage if it appeared that the Prosecution

1 was not able to sustain the principal mode of liability.

2 At that stage the same considerations did not apply to Mr Sang. The principal

3 witness relating to Mr Sang at that stage was still on board with the Prosecution.

4 And in the Prosecution's assessment there was still ample evidence to support the

5 Prosecution's allegations relating to Mr Sang's contribution to the common plan or the

6 network as described in the UDCC.

7 Throughout the course of this trial, however, many of the witnesses that would have

8 testified to the nature and existence of that network have either not testified or have

9 changed their testimony, which is not to say that the Prosecution believes it cannot no

10 longer support liability under 25(3)(d). We do, and we will argue in the no case to

11 answer that there is still sufficient evidence to support that mode of liability.

12 However, we cannot rule out the possibility that the Chamber might come to a

13 different conclusion. And if the Chamber reaches the conclusion that the existence

14 of the network as charged or Mr Sang's contribution to that network are no longer

15 sufficiently established for the stage of a no case to answer motion, unless notice is

16 given of possible recharacterization, the result would be an acquittal of Mr Sang.

17 Now, the Prosecution is of the view that the Chamber at that stage, regardless of any

18 notice given by or requested by the Prosecution, could, could and should in fact

19 proprio motu examine other possible modes of liability.

20 The failure to do so would be contrary to the express purpose of the Statute to end

21 impunity and to enclose impunity gaps.

22 So, your Honour, what the Prosecution is trying to do at this stage, now that it is

23 apparent to the Prosecution that the issue might arise, is to ensure that Mr Sang or the

24 Sang Defence is given appropriate notice before the no case to answer motion is

25 argued so that they may make submissions on these relevant points rather than either

1 be caught by surprise by a proprio motu examination by the Chamber or by
2 something that the Prosecution says in its response to any arguments raised by them
3 and to give them -- and to in that way preserve or guard against any unfairness that
4 might arise in that regard.

5 And that is the only unfairness, your Honour, that I think the Chamber should be
6 taking into account, is whether or not notice should be given prior to the no case to
7 answer so that the Sang Defence is able to properly inform their motion in a week's
8 time from today.

9 PRESIDING JUDGE EBOE-OSUJI: This would be where your 20 minutes come up, but I
10 know I asked you some questions, would you need more time?

11 MR STEYNBERG: Your Honours, perhaps if I could just have another 5 minutes, there are
12 just one or two issues I should get to. I will leave the timing --

13 PRESIDING JUDGE EBOE-OSUJI: Five minutes.

14 MR STEYNBERG: Thank you, your Honour. I will leave the timing at this stage. But I
15 would like to turn briefly then to the assertions that the notice of recharacterization would
16 exceed the facts and circumstances charged.

17 Your Honours, the Chamber has or the Katanga Chamber has already decided that to
18 give notice of possible recharacterization does not in fact -- sorry -- that giving notice
19 of possible recharacterization does not in fact recharacterize the charges. At this
20 stage all that is necessary is for the Chamber to ensure or to consider whether or not it
21 is immediately apparent ex facie the request that recharacterization would exceed the
22 facts and circumstances of the charges. It's a very low threshold that has been set by
23 the appellate, the Appeals Chamber.

24 And I refer to the Katanga appeals judgment. It's filing 3363, paragraphs 45 to 46. I
25 won't quote them due to the time.

1 In these circumstances, your Honours, the Prosecution submits that annex A to our
2 request clearly sets out the facts and circumstances charged that are sufficient to
3 support the possible recharacterization of the facts, legal recharacterization of the
4 facts. And there is nothing different in this instance than there was in the case of
5 Mr Ruto's request.

6 Your Honour, the Sang Defence we submit has not demonstrated otherwise. Their
7 arguments, with respect, are replete with legal errors.

8 Firstly, the response fails to properly distinguish between the concepts of facts and
9 circumstances on the one hand, evidence led on the other hand, and legal
10 characterization or legal characterization of those facts on the third hand.

11 Secondly, the response either ignores or misconstrues the jurisprudence of this Court,
12 particularly the Katanga case.

13 Thirdly, the response lies on, inappropriately, on decisions of the ad hoc tribunal
14 which are completely inappropriate in these circumstances because they did not have
15 a similar provision and they certainly had very different charging practises from this
16 Court.

17 And, finally, the Defence embarked upon a criticism of the reliability and credibility
18 of the evidence set out in annex A to the Prosecution's request which we say is
19 irrelevant and inappropriate at this stage.

20 Your Honour, as regards whether or not the facts and circumstances are exceeded, the
21 Defence complains that liability under 25(3)(b) and (c) has different legal
22 requirements. This they say leads to a change in narrative which exceeds the facts
23 and circumstances.

24 However, the Appellate Chamber has ruled in the Katanga case that such a
25 recharacterization of facts is not obviously impermissible. It found that a change of

1 the mode of liability, quote, "will always necessarily involve a change in the
2 characterization of the role. Were such changes not to be permissible, it would
3 defeat the purpose of Regulation 55 of the regulations of the Court." And that is at
4 paragraph 57 of the Katanga Appeals Chamber judgment.

5 Furthermore, quote, "The Appeals Chamber does not accept that a change in the
6 narrative exceeds per se the facts and circumstances described in the charges. As
7 pointed out by the Trial Chamber, focusing on certain facts to the exclusion of other
8 facts will necessarily alter the narrative.

9 Indeed, it would appear inevitable that a change in characterization would result in a
10 change of narrative to a certain extent."

11 The Prosecution does not -- is not arguing that Mr Sang did anything new or different.
12 Everything we alleged, all the acts, all the statements we are alleging or relying on in
13 this case are covered in the updated DCC. What we are saying is that the legal
14 characterization of those actions may be different. Instead of arising -- instead of
15 creating liability under 25(3)(d) under the common purpose, for a contribution to a
16 common purpose, they may create liability under aiding and abetting or under
17 ordering and soliciting the perpetrators of the actions.

18 Your Honours, that is the best I can do, I'm afraid, in the time allowed, as the Court
19 pleases.

20 PRESIDING JUDGE EBOE-OSUJI: Yes. Before you sit, there is one matter I'd like you to
21 address. The Defence complained that your application amounts to, quote, "fundamentally
22 altering the scheme," end quote.

23 Now, keep that in mind.

24 Let's go to paragraph 24 of your motion paper. If you can help me please read it out,
25 it might sound better in your voice in addition to mine having been strained from flu.

1 MR STEYNBERG: So paragraph 24 of the Prosecution's request, is that correct?

2 PRESIDING JUDGE EBOE-OSUJI: Yes.

3 MR STEYNBERG: Which reads, "The Prosecution submits that it is appropriate to request
4 notification under Regulation 55(2) at this point since all of the available witnesses it wishes to
5 call have now been heard and the Chamber has rendered its decision on the admission of
6 prior recorded testimonies under Rule 68 of the Rules of Procedure and Evidence. Thus, the
7 parties and the Chamber now have full knowledge of the Prosecution's evidence. The
8 Prosecution considers that the evidence led to date together with the facts and circumstances
9 pleaded in the UDCC provide sufficient basis for notice to be given of a possible
10 recharacterization."

11 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. Now, does that submission
12 validate the complaint of the Defence about fundamentally altering the scheme in the sense
13 that we may now have a new norm whereupon the close of the case for the Prosecution,
14 routinely applications for possibility of legal recharacterization is given on the theory that
15 comes from what you've read there, because all of the evidence is now in and the Chamber is
16 now in a position to have a fuller appreciation of the case for the Prosecution, therefore, it is
17 appropriate to give this kind of notice.

18 MR STEYNBERG: Your Honour, I wouldn't go so far as to say that it would relate in a new
19 legal norm where this would happen on all occasions.

20 PRESIDING JUDGE EBOE-OSUJI: But we worry about precedent with decisions we make,
21 shouldn't we?

22 MR STEYNBERG: Speaking of precedence, this Chamber has set a precedent already in the
23 adoption of the no case to answer protocol.

24 PRESIDING JUDGE EBOE-OSUJI: I am not saying it's a bad idea to set precedent. I'm
25 saying shouldn't we think about the implications of those?

1 MR STEYNBERG: My response, your Honour, would be to refer back to the judgment of the
2 Katanga Appeals Chamber. And what is stated there about the likelihood at the final
3 deliberations stage when the Chamber is considering the evidence, that upon closer analysis
4 of the evidence it may be apparent to the Chamber that possible recharacterization may be
5 necessary. By including at the end of the Prosecution case no case to answer litigation, the
6 Chamber is essentially engaged in a reduced version of the same or a, shall I say, a lesser
7 version of the same exercise. In other words, this would be the first time that the Chamber
8 would be looking at the Prosecution's evidence if such a motion is brought and considering
9 whether or not it meets the standard necessary to proceed to the Defence case.

10 PRESIDING JUDGE EBOE-OSUJI: But if you had made that submission on the contingency
11 of the no case to answer, maybe I may not have asked you my question, and I'm talking about
12 the submission in paragraph 24.

13 MR STEYNBERG: Your Honour, I don't believe that the two can be divorced. If I read the
14 next line after paragraph 24, it's the heading "Notice before the no case to answer motions."
15 The concepts are inextricably linked in my submission.

16 The Prosecution might have brought this application after 5 witnesses or after 10
17 witnesses. If it had been rejected, the Prosecution might have brought it again after
18 15 witnesses. But the point is that at certain stages of the proceedings, matters and
19 issues start to crystallize. One of those stages is at the close of the Prosecution case.
20 It is then that the Chamber would be and the Prosecution and all the parties are for
21 the first time able to see the complete picture of the evidence which has been led
22 against the accused.

23 PRESIDING JUDGE EBOE-OSUJI: Will that not lead to effectively to perhaps glorification of
24 an oversight, if for instance the Prosecutor could have foreseen this from the outset and didn't?
25 And then at the end of the case for the Prosecution, the Prosecution says, yes, it's now fine to

1 do it, because all the evidence is in. That would sweep in oversight where that has occurred,
2 isn't that the case, and make it normal so people shouldn't have to worry too much about
3 being too careful.

4 MR STEYNBERG: Your Honours, my first observation is, as I started earlier in my
5 submissions, this Chamber has specifically pointed out two possible triggers for the
6 appearance of the necessity of recharacterization. One is the charges and the second is the
7 evidence.

8 If any content is to be given to the second, provision must be made for the ability to
9 give notice or to request notice where the evidence requires it. If in every case the
10 request to give notice can be met with the response "Oh, well, but you should have
11 done it earlier because the allegations in your charges supported that
12 recharacterization," then there is no meaning left to that trigger.

13 PRESIDING JUDGE EBOE-OSUJI: But, you see, the dilemma of that argument is, well,
14 where I started.

15 MR STEYNBERG: Your Honour, let me perhaps answer it with a different -- from a different
16 angle. I mentioned earlier that the practice of the Pre-Trial Chamber in this division has been
17 to confirm only one mode of liability, the most appropriate mode. That has been the practice
18 which applied certainly in the Pre-Trial Chamber for this case. More recently a practice
19 manual has been published to guide practice in the Pre-Trial Chamber. That practice manual
20 has now specifically, as a result I would submit of issues that have arisen or problems that
21 have arisen out of the prior practice, specifically now provides that the Prosecution may
22 charge and the Chamber will in appropriate circumstances confirm alternative modes of
23 liability.

24 Now we are in the position to do that from the beginning. Up until now we couldn't.
25 The only alternative would have been in this case or in every case at the beginning of

1 the trial to request recharacterization or notice of recharacterization for each and
2 every possible mode of liability that might be -- that might be disclosed by the facts
3 and circumstances alleged. But, your Honour, that would be pointless.

4 So we say, your Honour, where a trigger -- some trigger arises which trigger might be
5 the evidence, this should be permitted, provided that there is no overarching and
6 overriding unfairness to the trial procedure.

7 PRESIDING JUDGE EBOE-OSUJI: We can leave it there for now. Thank you very much,
8 Mr Steynberg.

9 Mr Kigen-Katwa.

10 MR KIGEN-KATWA: Your Honours, we oppose the Prosecution's request for notice to be
11 issued to Mr Sang to recharacterize the charges. And we confirm that we understand that
12 the motion as it is now is merely to issue notice. It is not necessarily recharacterizing the
13 charges. We also appreciate and understand that this is an issue within the Court's
14 jurisdiction to recharacterize.

15 Our emphasis, we also appreciate in other cases the recharacterization has been done
16 at advanced stages in the proceedings. All we are saying in respect to Mr Sang in
17 this case is that the circumstances of Mr Sang's case do not allow and should
18 not -- and the notice should not be issued, do not allow the issuance of the notice.

19 In our submissions we've argued that in most instances the notice has been issued
20 early and the Prosecution in their submissions this morning confirmed that it should
21 be issued as early as possible.

22 Taking advantage of that proposition, your Honours, we argue that the Prosecution
23 had an opportunity to have sought for the possibility of issuing that notice. They
24 did not and have not given a good reason why they did not, your Honour.

25 And before I go into the details of our objection, your Honour, we have argued in our

1 motion, in our response, paragraph 13 to 16, that ordinarily the Court would apply
2 restrictive approach in issuing the notice; secondly, that it is to be issued within the
3 Statute so that the issuance of that notice does not violate the rights of Mr Sang.

4 Those include the rights under 67 to know the case he's to face; opportunity to have
5 time and facilities to counter the allegations against him; right not to be subject to
6 undue delay; and the right to examine witnesses.

7 All the authorities also, all the precedents that led to this issue have frowned at an
8 approach on the part of the Prosecution whose effect is to mould the case as it
9 proceeds. And we have argued that in fact the attempt by the Prosecution in this
10 case is to mould the case as it goes on with a view to ensuring that Sang is not let go at
11 any cost.

12 And lastly, on that aspect, your Honours, we argue that to the request for the issuance
13 of the notice would be unfair.

14 Now, your Honour, I've already said the first argument I wish to make is on the issue
15 of the delay. As I've already argued, your Honour, the Prosecution had an
16 opportunity to request for the issuance of this notice at the time when they made the
17 request in respect to Mr Ruto.

18 The Prosecution this morning have advanced a semblance of three issues in attempt
19 to say that Mr Sang's circumstances have changed and have warranted the need to
20 issue the notice. The first one is that they have argued that based on your own
21 precedent and anticipated evidence can be a basis, that anticipated evidence can be a
22 basis for the possibility of issuing a notice of recharacterization.

23 They have qualified it by saying a situation of an obtained evidence can fall within the
24 same category.

25 The second argument they have made is that in relation to the circumstances of this

1 case, there are instances when evidence was recanted or witnesses could not be
2 obtained by the Prosecution.

3 And lastly in the same argument they have said that their request for notice of a
4 possibility of recharacterization is informed by a situation where their principal
5 witness -- the circumstances of their principle witness changed in the course of trial.

6 Your Honour, our argument is that looking at all those circumstances, all those
7 situations, it remains that in fact as stated in paragraph 20 and 24 of their motion they
8 always knew the scope and the extent of their case, including the possibility that the
9 facts and the circumstances, the evidence that they were going to adduce and the
10 legal characterization would be such as to allow what variety of characterization of
11 the charges.

12 And so, your Honour, we submit that in fact the Prosecution cannot claim to have
13 encountered new circumstances or new situations that warrant the need to issue a
14 notice of possibility of recharacterization.

15 PRESIDING JUDGE EBOE-OSUJI: What you're effectively saying is that there had been lack
16 of due diligence, isn't it?

17 MR KIGEN-KATWA: Yes, your Honour. We would say there was lack of due diligence.

18 But we are saying in the alternative as much as my learned colleague on the side of the
19 Prosecution has said that the intention is to avoid impunity gaps as used in the Katanga case,
20 we are saying that the determination in this case is that they cannot live with the possibility
21 that Mr Sang is in fact innocent and that they will spread the net as wide as possible so that
22 Mr Sang doesn't get acquitted even at the point of no case to answer. That is our argument,
23 that it is not in good faith.

24 PRESIDING JUDGE EBOE-OSUJI: But what joy does it give you really if there had been lack
25 of due diligence? Because what you are effectively arguing is that the trigger was always

1 there, just the Prosecutor didn't pull it on time. Isn't that what it amounts to?

2 MR KIGEN-KATWA: Yes, your Honour, yes.

3 PRESIDING JUDGE EBOE-OSUJI: If that is the case --

4 MR KIGEN-KATWA: Could I give my second explanation on that issue, because I was
5 anticipating that. And probably if I explain myself on that second aspect, your question may
6 take a different shape.

7 PRESIDING JUDGE EBOE-OSUJI: You read my mind? But go ahead.

8 MR KIGEN-KATWA: The main argument we have on this issue of recharacterization
9 probably, your Honours, is that the effect of changing the count from subparagraph -- from
10 paragraph 25(1)(d) to paragraph 25(1)(b), (c) and (d) as we've argued in our response is that
11 the threshold that the Prosecution was supposed to satisfy is reduced if the notice -- or if the
12 charges are recharacterized.

13 Your Honours, the whole Document Containing Charges is replete with allegation
14 that Mr Sang contributed significantly and substantially to a network and the rhetoric
15 in the whole document is the existence of a network.

16 Now under subparagraph (b) and (c) the situation that Mr Sang would have to face is
17 the situation of an individual action and does not necessarily require that the network
18 exists.

19 Now, in preparing for Mr Sang's --

20 PRESIDING JUDGE EBOE-OSUJI: You did not read my mind, but I'll let you continue with
21 that submission. Go ahead. I was actually going to ask you whether what is required of
22 you in the circumstances where an oversight might happen, what you are seeing in the delay,
23 whether the victims in the case should have to pay the price of that oversight. Can you take
24 that quickly and then continue with your train of reasoning?

25 MR KIGEN-KATWA: Your Honours, if there was -- my understanding is that this Chamber

1 has not come to the position of saying that in their consideration these charges need to be
2 recharacterized. My understanding is that if you come to that point as a Chamber, and we
3 understand this application to be a trigger to you, it is a prompting to you that if that situation
4 arises, then you will invite us to argue on the circumstances that relate to the need for that
5 recharacterization and give us an opportunity to redress any prejudice that would arise.
6 And therefore, I come from the proposition that so far the Chamber has not come to
7 that estimation of the situation in this case. However, if this Chamber were to come
8 to that, your Honours, we have alluded to the issues that would border on prejudice
9 to us if the charges are recharacterized. They include the question of not having
10 given us adequate notice at the outset when there was an opportunity to enable us,
11 take a strategy which encompassed not only fighting off the allegation that
12 Mr Sang served the network, not only that, but also that his personal actions could
13 have served a criminal enterprise which is not necessarily a network. That is one of
14 the prejudices we've said would arise.

15 PRESIDING JUDGE EBOE-OSUJI: But does the Prosecutor's prompting as to the possibility
16 of that notice or rather issuing of the notice of the possibility of recharacterization, does it take
17 the matter beyond paragraph 29 of decision number 5 on the conduct of proceedings, that is
18 the decision relating to the principles and procedure for the no case to answer motions.
19 Paragraph 29 of that decision says, and I quote, "However, it is recalled that pursuant to
20 Regulation 55 of the Regulations, a Chamber may change the legal characterization of facts to
21 accord with the crimes or forms of participation specified in the Statute provided such
22 recharacterization does not exceed the facts and circumstances described in the charges.
23 The Trial Chamber could therefore refuse to grant a no case to answer motion on the
24 basis that it appears to the Chamber at the time of rendering its decision on the no
25 case to answer motion that a legal characterization of the facts may be subject to

1 change in accordance with Regulation 55 of the regulations," unquote.

2 Does the Prosecutor's application take this case beyond that?

3 MR KIGEN-KATWA: Probably our principal position on this issue, our starting point, your
4 Honour, is that it would be unfair, it would be prejudicial to us. But we are not --

5 PRESIDING JUDGE EBOE-OSUJI: But you have to argue that unfairness, not only
6 unfairness, but unfairness that is irreparable.

7 MR KIGEN-KATWA: Yes, your Honour. And my understanding even from what the
8 Prosecution said at the outset of the arguments is that we are discussing now the possibility of
9 issuing a notice of a possibility of recharacterization.

10 And again my understanding is that the Court has not on its own or has not come to
11 the point of saying it was to recharacterize. Now, if the Court were to come to the
12 point of saying we want to recharacterize, then we would have an opportunity then to
13 say if we were given a chance to do this and this and this, there is a possibility of
14 remedying our situation or in the alternative that our situation is irreparable and for
15 that reason it should not be recharacterized.

16 My understanding is that in such a situation then you would decide whether you
17 would want to recharacterize or not. And our argument is not saying that the
18 Chamber's powers to recharacterize is taken away even if this motion is disallowed.
19 We understand that the Court retains that power. But --

20 PRESIDING JUDGE EBOE-OSUJI: Yes, but your argument is that at this stage giving the
21 notice causes you unfairness, and the question is does it, considering that there is this
22 observation in paragraph 29 of decision number 5, conduct of decision number 5, which
23 should put you on notice that where the facts and circumstances are there, you should be
24 prepared for the possibility of legal recharacterization?

25 MR KIGEN-KATWA: Yes, it is unfair, your Honour. Let me just answer it very directly

1 that it is unfair in various instances. The first one is that an opportunity has already been
2 given to the Prosecution, and the Court has applied its mind to the possibility of that
3 recharacterization. We started the trial and after that opportunity was given to all the parties.
4 We, Mr Sang understood the scope and the extent of his case when the case started, and he
5 knew that he had to deal with the existence of a network that he served substantially or
6 significantly.

7 If at the point of a case to answer it were to be said that the scope of what he has to do
8 includes individual acts not necessarily serving a network, the prejudice is partly that he will
9 have lost an opportunity to have asked the witnesses, all Prosecution witnesses who have
10 now been closed, he will lost an opportunity to ask them questions related to the expanded
11 scope and the lesser threshold of the Prosecution's case.

12 There is also the fact of the undue delay. There is also the fact that our submissions
13 on no case to answer would have to be responding to an issue that the Defence had
14 not prepared themselves to have to deal with, the Sang's case having crystallized
15 within the meaning of Article 67(1)(a) that he had understood the scope and the
16 extent of his case.

17 So those would be our contentions, your Honour, that it would be very unfair to him because
18 he has advanced his case throughout the Prosecution's case within a clear understanding of
19 the limits and that there was no likelihood of the scope being changed, your Honour.

20 PRESIDING JUDGE EBOE-OSUJI: And according to you, your clear understanding of the
21 limits was that the focus of the case for the Prosecution was on Mr Sang's contribution to the
22 conduct of all the criminal -- alleged criminal activities of a network?

23 MR KIGEN-KATWA: Exactly, your Honour. Thank you very much.

24 PRESIDING JUDGE EBOE-OSUJI: All right. What would the factual matter of Mr Sang's
25 alleged contributions to that network be, contributions? One has to do something to

1 contribute to another thing, isn't it? What would that be?

2 MR KIGEN-KATWA: In part, your Honour, if he contributed to a network, one of the
3 ingredients is that there was a network, which we've always argued --

4 PRESIDING JUDGE EBOE-OSUJI: Let me rephrase. I'm not asking you now to incriminate
5 yourself. Let me be clear. You talk about network versus individual activity. You're
6 saying the original focus of the Prosecutor's case as you understood it was network. But
7 you're saying that the application now reveals a variation in the facts and circumstances such
8 that focuses on the personal conducts of Mr Sang.

9 So my question is can somebody's contribution to the network be anything other than
10 personal conduct?

11 MR KIGEN-KATWA: Well, it would always remain personal actions, but for purposes of the
12 extent of the case that we knew we needed to encounter, we knew first of all a network
13 needed to be proved to exist on the part of the Prosecution; two, that Mr Sang was part of that
14 network; and, three, that he contributed significantly and substantially.

15 Now, when the existence -- or rather, sorry, when Mr Sang is advancing his defence,
16 those three issues are prime in his mind. And the moment he's satisfied through
17 cross-examination for purpose -- through cross-examination and exhibits for purposes
18 of the defence, the moment he's satisfied that the existence -- the alleged existence of
19 that network is not there, then that -- he can rest his case there.

20 However, if he were -- if he had notice that his personal conduct, not necessarily
21 within a network and not necessarily targeting a network, is not necessary, then he
22 would have gone deeper in his cross-examination and in the strategy adapted for
23 purposes of his defence. I think that is the point I want to make. May I say, your
24 Honour --

25 PRESIDING JUDGE EBOE-OSUJI: But is he entitled as a matter of justice and the law to say

1 yes, though the original focus of the charge against me was on what I did and -- what I did to
2 contribute to a network. Now at the end of the day it turns out that there was no network.
3 Is he entitled to say: But justice do not take into account my personal conduct if it amounts
4 to something else that the law forbids?

5 MR KIGEN-KATWA: I would answer the question from the arguments made by the
6 Prosecution at I think paragraph 13 of their motion, your Honour. Paragraph 13 and 14, they
7 argue that the decree required to satisfy subparagraph (b) and (c) is less than the degree that
8 would be required to satisfy the conduct under subparagraph (d), which all along it was
9 always to encounter.

10 Now, if he had notice that his case includes subparagraph (b) and (c), the approach he
11 would have taken in conducting his defence is different from the conduct he has
12 adapted for purposes of addressing the requirements under subparagraph (d).

13 I think that is as far as I can go in answering your question, your Honour.

14 PRESIDING JUDGE EBOE-OSUJI: All right. Proceed. I've asked you a series of questions.
15 And your time should be up by now, just now. Do you need more time?

16 MR KIGEN-KATWA: Yes, probably 5 minutes, your Honour.

17 PRESIDING JUDGE EBOE-OSUJI: Please proceed.

18 MR KIGEN-KATWA: May I say that it has always been Mr Sang's defence that there did not
19 exist a network. That is their principal position. Their alternative argument is that even if
20 there did exist a network, which we do not admit existed, even if it did, he was not part and
21 he did not contribute to it substantially and significantly.

22 The effect of the application by the Prosecution to -- the effect of the Prosecution's
23 request for notice of a possibility of recharacterization amounts to conceding that it is
24 possible that the Defence were always right, that in fact the network did not exist.

25 However, we still have to catch you, and we will catch you even outside the existence

1 of a network which he had notice as being what he was coming to answer. And for
2 that reason, your Honour, we object and oppose the issuance of the possibility of
3 recharacterization.

4 And probably just to emphasise, your Honour, three-quarters of the basis upon which this
5 recharacterization is sought in the annex is the testimony that was recanted. And I will not
6 go into the details of it. We've argued it at paragraph 28 to 32. And, your Honour, if -- not
7 only is it that it is based on evidence that was recanted, it is also based on evidence that in the
8 course of trial the Prosecution did not attempt to go into. And we want to argue that that is
9 an additional grave prejudice that arises to us. For all those reasons, your Honour, we
10 oppose the issuance of the notice. We rely on the entirety of our arguments.

11 Your Honour, I understand that you will give us another possibility of a response
12 after Mr Steynberg.

13 There is one small point that we would want to argue in terms of the facts and circumstances,
14 evidence and legal character and we would pray that probably you allow us to mention that
15 in response to --

16 PRESIDING JUDGE EBOE-OSUJI: You can take it now. Go ahead.

17 MR KIGEN-KATWA: With your permission, your Honour, I had asked my colleague to
18 prepare to address that issue. She should do that within 5 minutes.

19 PRESIDING JUDGE EBOE-OSUJI: Yes, Ms Buisman.

20 MS BUISMAN: Good morning, Mr President, your Honours. I'll be very brief. It's our
21 submission that the Prosecution's submission does exceed the facts and circumstances
22 significantly. Well, my colleague already pointed out the difference between the network
23 contribution and Mr Sang's individual responsibility.

24 Just to look at the Document Containing the Charges, the corrected version, I will not
25 go into too many details, but starting from 21, it's about the creation of a network. 22,

1 it's about a network meeting. 24, contributions made by Mr Sang to the network.
2 Paragraph 25, Mr Sang encouraged network members. Paragraph 27, network
3 supported by Mr Sang.
4 Paragraphs 36 to 39, it's all about organisational policy of the network. Paragraph 40 to 43 is
5 about the media -- media's role in this network.
6 And then paragraphs 44 and further, and I'll just read out paragraph 44, "Sang in his role as a
7 broadcaster on Kass FM furthered the network's organisational policy prior to and during the
8 attacks."
9 Then paragraph 98 and further, the title is "Ruto and key members of the network, Sang and
10 others agreed to and had a common plan between themselves and others."
11 And then paragraph 121 to 131 is Sang's role in this network.
12 And then I look at the Prosecution's submission and their annex. They merely site
13 four paragraphs in support of this submission. Well, one of them is paragraph 126
14 which refers to Kass FM. It doesn't even refer to Mr Sang.
15 And then paragraphs 127 to 129 is again about Mr Sang's contribution to the network.
16 And for instance paragraph 129, "Mr Sang's broadcasts encouraged network
17 perpetrators to continue their participation and was one method of coordinating the
18 redeployment of resources."
19 Mr President, if now we delete the network, the narrative of the document that was
20 confirmed by the Pre-Trial Chamber will be significantly different.
21 And I've heard Mr Steynberg say the principle that we cited in our submission basically that
22 the Prosecution should not mould the case depending on how the evidence unfolds is only
23 applicable in the ICTY and the ICTR.
24 With respect, we thoroughly disagree because the only difference is that in this Court it's for
25 you, the judges, to decide whether or not to requalify the charges. It's not for the Prosecution.

1 It's much harder to amend the Document Containing the Charges in this Court than it is in the
2 ad hoc tribunals.

3 But this principle is a general principle that applies here because it's based on fair trial
4 rights. And we have the same fair trial rights in this Court, namely,
5 paragraph -- Article 67 of the Statute as they have in these tribunals.

6 So on that basis, one more thing --

7 PRESIDING JUDGE EBOE-OSUJI: But isn't the language of moulding the case as the
8 evidence unfolds a language that came into the jurisprudence in a certain context, being the
9 context of vagueness in pleadings of indictment, in other words, where the facts and
10 circumstances in the indictment, if we may cross transplant the terminology, did not exist at
11 all in the indictment, and then at the end of the day an accused person is convicted as
12 happened in Kupreškic case, which is the origin of that language of moulding the case?
13 Isn't it the case in Kupreškic the complaint was that the material fact upon which the accused
14 persons were convicted were not pleaded to begin with, and throughout the case the Trial
15 Chamber kept asking the Prosecution in that case: What are we going to do with this thing?
16 And the Prosecution didn't even know what to do with it. And at the end of the day the
17 accused persons, two of them, got convicted on the basis of those facts. Is that the same
18 situation as we have here?

19 MS BUISMAN: Mr President, I thoroughly agree with your submissions just now. The
20 facts and circumstances are not exactly the same as they never are. But that was actually the
21 last point I was going to make, the Prosecution thoroughly relies on the evidence that has
22 been brought. If you look at the annex, it's all -- it's very, very limited what the document
23 says about Mr Sang's personal contribution. It only refers to him using the radio, but there is
24 no detail whatsoever, Mr President, as to how he would have instigated anyone. There is no
25 link, specific link made, there's been no specific messages that he's broadcasted, there's

1 absolutely no detail in this Document Containing the Charges, and that is why we are today
2 in this situation.

3 And it's all -- paragraph 126, "Prior to the attacks Kass FM broadcast propaganda
4 against PNU supporters." What does that mean? As I said, there is not even a
5 mention here of Mr Sang. But what sort of broadcast propaganda -- I mean what
6 sort of propaganda are we talking about? There are no dates. There are no details.
7 There is nothing. So it's very, very broad. And this was in the context of his
8 contribution to a network. It wasn't just the radio in this document, it was also his
9 alleged participation in meetings. And that of course is all falling away. So all we
10 have is paragraph 126 Kass FM.

11 Then 127, "By virtue of his position within Kass FM as a key broadcaster, Sang
12 intentionally contributed to the commission of the crimes against humanity referred
13 to above and then by fanning the violence through the spread of hate messages
14 explicitly revealing desire to expel the Kikuyu."

15 We don't have a date. We don't have any specific period. We don't have the group -- I
16 mean the group he's supposed to have addressed is the network members, but then these
17 network members are falling away. So who is he addressing and in what way?

18 So we submit that we are somewhat in a Kupreškic situation. We do not have
19 sufficient details in a document. We have now a request of the Prosecutor for you to
20 recharacterize, and there is like eight pages and it's all based on evidence. And the
21 method, we won't go into that, a lot of them are of course recanted statements.

22 But it's not really based on the document. It is really based on the evidence. So
23 then we are in the situation where the situation has -- the Prosecution, you know, may
24 mould the case on the basis of the evidence that has turned out differently than they
25 expected, as Mr Steynberg himself pointed out at the start.

1 PRESIDING JUDGE EBOE-OSUJI: Do you remember how the Appeals Chamber in
2 Kupreškic said corrections could be made?

3 MS BUISMAN: In the pre-trial brief, there is some, there is pre-trial brief, you can
4 make -- yes. And also there is certain -- for instance if you have from the start, from the
5 outset you have a very clear references to witness statements, which we haven't because for us
6 the whole case has been different, Mr President, after the confirmation decision, all the
7 evidence that has been relied upon is from witnesses that were found after. So yes, I cannot
8 exactly remember, but I do know that there are ways to not correct, but to, yeah, support an
9 indictment that is in itself defective.

10 PRESIDING JUDGE EBOE-OSUJI: Including amendment?

11 MS BUISMAN: But not at such a late stage, Mr President.

12 PRESIDING JUDGE EBOE-OSUJI: I'm not sure Kupreškic excluded that, especially if you
13 considered the famous Akayesu rape as genocide jurisprudence, how it resulted, amendment
14 of the indictment at the case of the -- at the close of the case for the Prosecution, where
15 evidence came in in the close of the trial on rape and midway the application was made to
16 amend the Akayesu indictment and that was done.

17 MS BUISMAN: Was that at the end of the Prosecution case? I believe it was earlier --

18 PRESIDING JUDGE EBOE-OSUJI: Yes.

19 MS BUISMAN: -- than that. Well --

20 PRESIDING JUDGE EBOE-OSUJI: Then opened and allowed further evidence to be led by
21 both sides. All right.

22 MS BUISMAN: Well, I take your word for it. I don't have it exactly in mind. I thought it
23 was earlier. But the fact that it has happened before doesn't necessarily mean you have to do
24 it again, because we also have -- we also have here we have the jurisprudence in this Court.
25 You are free to decide what is fair in these circumstances. And it's a bit difficult for me to

1 argue now the case of Akayesu because I don't have all the details here at hand.

2 But we are now at the end of the Prosecution case. And this is on the basis of a

3 Prosecution request. And it's you to decide whether or not you think there is a case

4 and requalify. And we know, we know there is Regulation 55. It's not entirely

5 excluded. We cannot argue that. But given the context and given the entire

6 circumstance of this case, we submit this is not the moment to proceed as the

7 Prosecution suggests.

8 PRESIDING JUDGE EBOE-OSUJI: Not to belabour the point, by the way, what happened in

9 the Akayesu case as we just discussed is not at all unusual. In common law jurisdictions that

10 kind of amendment is specifically allowed in a lot of statutes. I know that section 601(2), (3)

11 and (4) of the Canadian Criminal Code permits that kind of amendment to be made. So do

12 the provisions of the -- I believe the Criminal Procedure Act of New South Wales in Australia,

13 there is a provision there that also to a similar effect allows an indictment to be amended at

14 any stage of the case in order to conform the indictment to the evidence led in the case.

15 So these things are not unusual. But to some people they may seem so until you read the

16 statute books of other places and the jurisprudence that come from there. We'll leave it at

17 that for now.

18 And Mr Nderitu.

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

20 I would like to start by saying that my understanding all along was that the Sang

21 Defence took the position that there did not exist a network. And I think that has

22 been reiterated by my colleague Mr Katwa-Kigen.

23 Given that scenario, it is our submission that then there would not be prima facie

24 there would be no prejudice if the notice of the possibility of legal recharacterization

25 is such as not to -- not to suggest that there is a network. What I'm saying is that the

1 notice of the possibility of legal recharacterization is consistent with the Sang Defence
2 position.

3 But more importantly, Mr President, your Honours, we submit that the parties and
4 participants as was said in the Lubanga case are on notice that the issue of the
5 possibility of legal recharacterization can happen and that they should therefore
6 prepare their cases on that basis. And in fact, Mr President, as you pointed out in
7 the decision number 5, that was brought to the attention of the parties and
8 participants.

9 In addition to that, that was also brought to the attention of the parties and
10 participants in the pre-trial -- by the Pre-Trial Chamber.

11 Having said that, Mr President, your Honours, I would want to look at a scenario
12 where, for example Mr Sang had been indicted under Article 25(3)(a), (b) or (c).

13 That's the hypothetical that I'm bringing to the Chamber. And then the facts in the
14 course of the trial bring in the issue of a network. In such a situation there would be
15 inherent unfairness I would say. But the converse position cannot be. And the
16 reason that it cannot be is that first and foremost for there to be criminal responsibility,
17 there has to be the question of individual commission, whether with a common
18 purpose or without a common purpose.

19 So we're saying that the removal of the common purpose which is now removal of
20 Article 25(3)(d) then would not be prejudicial -- or rather, let me rephrase that, that
21 the possibility of charging under Article 25(3)(a), (b) or (c) would not be prejudicial to
22 the fact that now the individual criminal responsibility is without common purpose.

23 Now, that leaves me with the question -- I think I have tackled the question of
24 possible unfairness and the question of the notice, but that leaves me now with the
25 question of the timing. And I think it has been very correctly stated in I believe it

1 was in the Lubanga appeal, that legal recharacterization of facts can be undertaken at
2 any time even at the time of delivery of judgment. And it is my submission that in
3 fact it is consistent with fairness that the notice of possible legal recharacterization is
4 undertaken after evidence has been received of the charges against an accused person.
5 So in short then we take the position that there is merit in the application by the
6 Prosecution for possible legal recharacterization. And just to emphasise again I
7 think it's important that it be understood that this is about notice of the possibility of
8 legal recharacterization rather than the legal recharacterization at this stage itself.
9 And just one last point, that in the Sang Defence response, it had been suggested that there
10 could be an issue regarding the fairness of the proceedings, and I think under Regulation 55,
11 there are various ways in which any possible unfairness can be addressed, and we submit that
12 there is no exceeding of the facts and circumstances and therefore we pray that the request be
13 granted, the Prosecution's request. Thank you.

14 PRESIDING JUDGE EBOE-OSUJI: Thank you.

15 By the way, Ms Buisman, what I was discussing with you earlier, I mentioned New South
16 Wales. I should have said Western Australia Criminal Procedure code, I think it's section 132,
17 equivalent to the Canadian provision I indicated. But then Western Australia has its own
18 provisions on amending indictment at an early stage. So does Victoria, New Zealand,
19 Nigeria, even UK Indictment Act 1915 I believe all have provisions that allow amending
20 indictment at any stage as long as there is no unfairness of course.

21 We will leave it there for now and take our morning break and come back in 30
22 minutes.

23 The Court will rise.

24 THE COURT USHER: All rise.

25 (Recess taken at 10.59 a.m.)

1 (Upon resuming in open session at 11.33 a.m.)

2 THE COURT USHER: All rise.

3 Please be seated.

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

5 Mr Steynberg, any reply?

6 MR STEYNBERG: Yes, thank you, your Honours. I have one aspect to reply to Mr Sang's
7 submissions and two or three in respect to Ms Buisman's submissions, if I may.

8 And the first, just to come back to the point that the Chamber made regarding
9 paragraph 29 of the conduct of proceedings, decision number 5, and again to put this
10 request in this proper context we submit.

11 The Prosecution says that Regulation 55(2) is a discretion, possibly even a duty that is
12 conferred or entrusted in the first instance to the Chamber. However sometimes, not
13 always, but sometimes, the Prosecution may be in a position to foresee issues on the
14 horizon that might not yet be visible to the Chamber, and it is in those situations
15 where the Prosecution deems it necessary and appropriate to bring those issues to the
16 attention of the Chamber so that they may consider whether or not it would be
17 appropriate or necessary to invoke the procedures of Regulation 55(2). And we say
18 that is precisely what has happened in this case.

19 Now, paragraph 29 of the conduct of proceedings provisions has already placed the
20 parties on notice that the Chamber may seek to -- or, may decide to invoke those
21 procedures in considering the no case to answer submissions and motions.

22 If the Chamber were to do so at that stage, either the Chamber would make that
23 decision without the input of the parties, or the Chamber might then have to embark
24 upon another round of submissions in order to get the views of the parties
25 before -- before deciding what to do, and it is precisely that sort of inefficiency which

1 prompted the Prosecution to raise this issue pertinently at this stage so that Mr Sang
2 when making his submissions in the no case to answer process would be able to
3 pertinently address those points in his submissions.

4 Now, as to any prejudice that may arise out of that, the Prosecution notes that
5 Regulation 55(2) specifically permits the Chamber to, I think they say, suspend the
6 proceedings in order to give parties adequate opportunity to respond.

7 PRESIDING JUDGE EBOE-OSUJI: If need be.

8 MR STEYNBERG: If need be. The Chamber also has an inherent discretion to adjust its
9 own schedules. However, in present circumstances, the Prosecution submits that neither is
10 necessary, and that is because the Sang Defence, or both Defence teams have already been
11 given a generous extension of time limits to prepare their no case to answer submissions.
12 They've been given a generous extension of page limits, up to a hundred pages, to respond,
13 and their response is not yet due for another week.

14 Now, I realise that this doesn't allow for time taken, or the Chamber might take to
15 come to its decision in this case if it were to grant the Prosecution's request, however
16 the Prosecution submits that the Chamber ought to proceed as it did with Mr Ruto
17 and advise Mr Sang and his Defence team that in making their submission they
18 should take into account, as foreshadowed in paragraph 29, of decision number 5,
19 should take into account in making their submissions the possibility that other modes
20 of liabilities might be engaged, and there should be sufficient time and sufficient
21 pages in order to accomplish that. And that's all I want to say really on that issue.

22 Turning then to Ms Buisman's arguments.

23 Her complaint about the change of legal requirements and the shift of emphasis in the
24 charges from a charge relating to a network common purpose towards more -- a more
25 direct effect on the perpetrators, through either aiding and abetting, or soliciting, or

1 inducing, or ordering, is almost identical to an argument raised before the Katanga

2 Appeals Chamber on behalf of Mr Katanga.

3 And I refer your Honours to paragraph 39 of that -- of that decision, the Appeals Chamber
4 decision. I won't quote it, but essentially Mr Katanga raised the inverse argument. He was
5 complaining that he was charged in his personal capacity --

6 PRESIDING JUDGE EBOE-OSUJI: Is it long?

7 MR STEYNBERG: It is quite long, so -- well, it is about half a page.

8 PRESIDING JUDGE EBOE-OSUJI: The part you're interested in maybe you should quote --

9 MR STEYNBERG: Very well.

10 PRESIDING JUDGE EBOE-OSUJI: -- because we don't have that judgment on hand.

11 MR STEYNBERG: I will do that.

12 "Mr Katanga submits that there is sufficient information in the Impugned Decision to
13 demonstrate that the facts and circumstances underlying the charges would be exceeded. He
14 argues that his alleged role" - his newly alleged role - "as a coordinator and his contribution to
15 the plan to attack Bogoro by permitting Aveba to be used for the transmission of weapons and
16 troops 'are clearly secondary to his alleged joint planning with Ngudjolo of this attack and his
17 direct responsibility for its implementation'. He argues that these are significantly different
18 roles, with 'the latter being the material role for the purposes of the existing charges'.

19 Mr Katanga further argues that those who executed the crimes are now to be viewed as
20 individuals who harboured a common plan to wipe out Bogoro, to which he contributed by
21 facilitating preparations for the attack, as opposed to individuals who automatically complied
22 with his orders and through whom he acted ..."

23 So it is rather the inverse. He was charged in a more personal capacity and now is
24 being charged as -- for his contribution to a common plan.

25 That was the inverse, but very similar to the argument which my learned friend, Ms Buisman,

1 is bringing in this case. And that argument was found -- was rejected by the Appeals
2 Chamber who found that it did not, and I refer to - it's over several paragraphs - 54 to 58 of
3 that judgment, found that this did not make it "... immediately apparent that the proposed
4 change in the legal characterization would exceed the facts and circumstances described ..."
5 And then it went on, and I've already quoted these portions, to observe that any changes in
6 legal recharacterization will necessarily, to some exchange, change the narrative. And that is
7 contemplated within -- within the Regulation 55(2) procedure as long as the facts and
8 circumstances are not exceeded.

9 So to turning to a related complaint, the fact that in the new or in the possible
10 recharacterization there's no reference to the network is not in and of itself objectionable.
11 The facts and circumstances can change as long as they are not exceeded; so in other words,
12 if -- if one or other fact and circumstances pleaded is not established, but the remaining facts
13 and circumstances are sufficient to found liability under the recharacterized mode of liability,
14 that is not in itself objectionable. As long as there's no new action, new facts, new statements,
15 or anything of that nature, which is being injected into the narrative, which is not part of the
16 charges. And we say annex A to the statement demonstrates that this is not the case.
17 As regards the issue of the -- I don't want to get into the details of the case because I'm
18 not as familiar with the facts as Ms Buisman is, the Kupreškic case, but as a -- as a
19 proposition that the Prosecution should not be entitled to mould its --

20 PRESIDING JUDGE EBOE-OSUJI: Kupreškic.

21 MR STEYNBERG: Kupreškic. Thank you, your Honour. Should not be entitled to mould
22 its case as the case progresses. As a general proposition, the Prosecution has no argument
23 with that in this Court. However, there is a very important difference between the IC -- well,
24 the ad hoc tribunals and this Court, and that is 55(2).

25 55(2) does allow for cases to be adjusted as the case unfolds, as the evidence progresses in a

1 limited manner, a manner which is limited to changing or recharacterizing the legal
2 consequences of the facts and circumstances as they are pled.
3 That is not objectionable in this Court. And to the extent that this may be regarded as
4 moulding the case, that is permitted specifically by Regulation 55(2) and by the -- and by the
5 Appeals Chamber in Katanga. And this is not something again that the Prosecution does,
6 this is something which is ultimately entrusted to the Court and the Court's discretion. The
7 Prosecution are highlighting what it believes are signs on the horizon that this might be an
8 issue the Chamber may encounter in due course, down the line, possibly even only at the end
9 of the case, and that is why we bring it to the Court's attention now so that whatever steps
10 need to be taken can be taken at least from this point onwards.

11 Your Honours, unless there's any other questions you would like me to address, those
12 are my submissions.

13 PRESIDING JUDGE EBOE-OSUJI: Thank you.

14 Ms Buisman, you don't like Katanga, do you, the case law I mean, on 55?

15 MS BUISMAN: I feel very strongly about Mr Katanga, especially because I was part of that
16 case as you may be aware of.

17 But, yes, obviously we cannot -- it has been done in this Court, we do not even have
18 to look at other courts or other jurisdictions. It has been done. But the fact that it
19 can be done doesn't mean that you should do it. And that is the argument.

20 And in this -- because in the Katanga case, at the end of the day, there's not been a full
21 assessment by the Appeals Chamber based on all circumstances because the Katanga Defence
22 withdrew the appeal. So it is still open for argument, Mr President. Nothing has been
23 decided finally, it's been on a preliminary basis, the Appeals Chamber said "Provided the
24 proceedings are still fair, Regulation 55 can be applied at any time of the proceedings." And
25 we are not -- we are not -- I mean, I might like it or not, this is now something that has been

1 decided by the Appeals Chamber, we cannot argue against it. But it doesn't mean --

2 PRESIDING JUDGE EBOE-OSUJI: But you do make that argument in your paper about,
3 what was that again? Was it Regulation 55 should not be seen as a licence to look for a stick
4 with which to hit the accused at all costs.

5 MS BUISMAN: That was the dissenting Judge in our -- in the Katanga case. And, indeed,
6 we share that view because we are still bound by the Statute and the Statute includes fair trial
7 rights. Fair trial rights should not be defeat of any purpose because they are there for a
8 reason. A Regulation doesn't have the same status as provision of fair trial rights, and fair
9 trial rights are not only in the Statute, they are also in all the conventions -- human rights
10 conventions. I mean, there is a reason why the accused has the right to have sufficient notice.
11 And if we can -- I mean, otherwise we can as well --

12 PRESIDING JUDGE EBOE-OSUJI: But is it on that theme of getting a -- looking for a stick to
13 hit, is it not the case, from what I -- Mr Steynberg read out that what happened was that -- was
14 during the case of the Defence that evidence emerged that then prompted the need or the
15 impetus, so to speak, to recharacterize? Was that what happened?

16 MS BUISMAN: Indeed, Mr President. And that is also where we can distinguish this case
17 because there's a reason why the Chamber waited so long in that case because it was on the
18 basis of Defence evidence that they've decided to requalify the charges. In this case --

19 PRESIDING JUDGE EBOE-OSUJI: And you think that's unfair or wrong?

20 MS BUISMAN: Well, we're here to argue this case and not the Katanga case. I think we
21 made our submissions before the Appeals Chamber in that case, so let us stick to this case.

22 PRESIDING JUDGE EBOE-OSUJI: But then you do say that the case was not really
23 concluded, the point was not -- it remains open. Don't you make that argument?

24 MS BUISMAN: Mr President, but we have decided to withdraw the appeal, so I cannot now
25 argue the appeal in Katanga. That would be, in effect, unfair.

1 Let me instead argue the case of Mr Sang. And in this case, unlike the Katanga case, the
2 Prosecution has been on notice that they had difficulties with their witnesses from the start.
3 They knew for a long time that many of these witnesses were not willing to cooperate. And
4 there was no reason for the Prosecution to wait so late, until so late in the day. And in fact,
5 we're a week from our submission of no case to answer, a week from now. We're not even
6 on notice, Mr President. This is only a request for notice. It is for you to give us notice.
7 And then, it's only then -- only now arguing the possibility of even putting us on notice.
8 And Mr President there is no way at this stage that cannot delay the procedure. We do not
9 want that. We want to continue with these proceedings, but if we have a week to go and we
10 have to include all these new arguments, that's a lot, Mr President, in a week, and we don't
11 have -- that's only until -- I mean, until you've given us notice, we're still on the assumption
12 that our case is as pled in the Document Containing the Charges.
13 I've heard Mr Steynberg about the initial decision on the proceedings, but that is not
14 notice under Regulation 55, Mr President.
15 We have until now -- the notice we have is that Mr Sang is charged under 25(3)(d). And if
16 you, the Judges, decide to include other modes of liability, then we need adequate time after
17 that to respond. So it will inevitably lead to undue delay. That is our main submission,
18 Mr President.
19 And whether or not -- I mean, I take your point that it can be done in many jurisdictions, as it
20 can be done in this jurisdiction, but we request you, the President, and the Judges not to use
21 that power because it's just -- just too late. Thank you.
22 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
23 We will leave it at that on the main item for today's proceedings.
24 And the Chamber will communicate our decision to you -- we will reserve our ruling and
25 communicate to you in due course, keeping in mind of course the timelines you have on your

1 motion of no case to answer.

2 Moving to the second item on the agenda, it is the understanding that the Defence
3 have withdrawn their request to speak to a certain matter; is that the case?

4 MR KHAN: It is, your Honour. I'm grateful.

5 PRESIDING JUDGE EBOE-OSUJI: And that's the case as well Mr Kigen-Katwa?

6 MR KIGEN-KATWA: Yes, Mr President, we confirm.

7 PRESIDING JUDGE EBOE-OSUJI: Thank you. And so we will not speak to that.
8 Nevertheless, the Chamber will want to make certain observations.

9 Now, our attention -- before I say this, I want to note that from the beginning of this
10 case, this Chamber has given the parties, the counsel in this case to refrain from media
11 commentary about this case and, to a large extent, the counsel have respected that
12 directive.

13 Nevertheless, our attention has been drawn to the unending stream of * clamour in the Kenya
14 media about the proceedings in this case.

15 This is an old conduct that has been observed, even before the commencement of
16 evidential hearing in the case, implicating divided sentiments on either side of the
17 case, one part favouring conviction of the accused, while the other favours acquittal.

18 Some elements on either side of these divided sentiments have not always shown
19 restraint in their commentary. Even abusive commentaries have been directed at the
20 Court and the Judges when judicial decisions have been issued that has not been, or
21 have not been to the liking of those making those commentaries, of course in an
22 apparent hope of bullying the Judges into the groove of these sentiments.

23 It is of course an astonishing behaviour to observe in the context of an active criminal trial, but
24 we are not impressed, not in the least. We must hope that this sort of conduct could never

25 * mark the norm of the context in which justice is administered in any place. * And certainly in

1 this Court, this case in particular, what controls and will continue to control
2 the outcome of the decisions of the Chamber on any matter will continue to be
3 the evidence and the law in their best appreciation by the
4 Judges and the Judges alone.

5 * Clamour in the media will remain wholly without effect in the outcome of the case,
6 so we must encourage those concerned in the conduct to save themselves the trouble,
7 for the only thing they achieve in the * clamour is to shore up the imperviousness of
8 the Chamber to them.

9 We will leave it at that for now and hope that people will leave this case alone and let the
10 Judges and the lawyers in the case do their work.

11 We will leave it at that and I adjourn the proceedings. Thank you very much.

12 THE COURT USHER: All rise.

13 (The hearing ends in open session at 11.54 a.m.)

14 CORRECTIONS REPORT

15 The Trial Chamber V(a) has brought the following corrections into the transcript:

16 * Page 42 line 13, page 43 lines 5,7:

17 “glamour” is corrected by “clamour”

18 *Page 42 line 25 –Page 43 line 1

19 “, and certainly in this Court, this case in particular. What” is replaced by

20 . And certainly in this Court, this case in particular, what