

1 International Criminal Court
2 Pre-Trial Chamber II - Courtroom 1
3 Situation: Kenya
4 In the case of The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta
5 and Mohammed Hussein Ali - ICC-01/09-02/11
6 Single Judge Ekaterina Trendafilova
7 Status Conference
8 Monday, 18 April 2011
9 (The hearing starts in open session at 11.30 a.m.)
10 THE COURT USHER: All rise.
11 JUDGE TRENDAFILOVA: Good morning to everyone. Please be seated. The
12 status conference is now in session. I would like to welcome everyone who is in the
13 courtroom today; the team of the Prosecutor, the three Defence teams, the
14 representatives of the Registrar, our legal officers, the interpreters, the court reporters,
15 the security officers and the Court staff.
16 I would like the court officer to please call the case.
17 THE COURT OFFICER: Thank you, Madam President. Situation in the Republic
18 of Kenya, in the case of the Prosecutor versus Francis Kirimi Muthaura, Uhuru
19 Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11.
20 JUDGE TRENDAFILOVA: Thank you, court officer. Now it's time for the record,
21 to introduce everyone who is in the courtroom today starting with the Office of the
22 Prosecutor, please.
23 MS ADEBOYEJO: Thank you, your Honour. My name is Adesola Adeboyejo and
24 with me to represent the Office of the Prosecutor is Ms Cynthia Tai; Akingbolahan
25 Adeniran, trial lawyer; Karen Corrie, associate trial lawyer; Shamiso Mbizvo,

1 associate international cooperation adviser; and Grace Goh, our case manager.

2 Thank you.

3 JUDGE TRENDAFILOVA: Thank you, Ms Adeboyejo. Do I pronounce correctly
4 your name?

5 MS ADEBOYEJO: Excellently, your Honour.

6 JUDGE TRENDAFILOVA: Thank you. Now I turn to the Defence teams, and as
7 we have already decided during the initial appearance in the presentation you're
8 going to follow just the order of the way the Prosecutor has addressed the
9 different -- the three suspects, in the order Mr Muthaura, Mr Kenyatta and Mr Ali.
10 Please go ahead, the Defence team of Mr Muthaura.

11 MR KHAN: Good morning, Madam President. Mr Muthaura, who's waived his
12 right to attend today's status conference, is represented by Mr Kennedy Ogeto,
13 co-counsel, Mr Muriuki Mugambi, legal assistant and myself, Karim Khan.

14 JUDGE TRENDAFILOVA: Thank you, Mr Khan. Now the Defence team of Mr
15 Kenyatta.

16 MR KAY: On behalf of Mr Kenyatta, who's waived his right to appear today, my
17 name is Steven Kay of Queen's Counsel and with Gillian Higgins representing him
18 today.

19 JUDGE TRENDAFILOVA: Thank you. And finally it's Mr Ali's team.

20 MR MONARI: Madam President, my name is Evans Monari, for General Ali, who
21 has waived his right to appear at this status conference. I am accompanied by
22 Mr Gregory Kehoe of the New York Bar, Mr John Philpot of the Quebec Bar, Mr
23 Otachi of the Kenya Bar and our assistant Mr Isiah Urina, who's seated at the back.

24 JUDGE TRENDAFILOVA: Thank you, Mr Monari. The representatives of the
25 Registry, would you please represent yourself, please.

1 MS DAHURON-JACOBY: (Interpretation) Your Honour, for the Registry we are
2 represented by Mr Cyril Laucci, who is a member of the Registrar's office, Mr Pieter
3 Vanaverbeke, who is the legal coordinator at the Court, and myself, Charlotte
4 Dahuron-Jacoby, in charge of the Court Management Services.

5 JUDGE TRENDAFILOVA: Now for the record, my name is Ekaterina Trendafilova,
6 the Presiding Judge of Pre-Trial Chamber II, who has been also designated, I have
7 been designated as a Single Judge in the two Kenya cases, in this case of course as
8 well, of The Prosecutor versus Mr Muthaura, Mr Kenyatta and Mr Ali and I'm going
9 to present to you the legal support staff that is working with the Chamber and with
10 me, as a Single Judge, when it is not necessary for the whole Chamber to handle some
11 issues, as the admissibility challenge, for example.

12 So this is just our team that is working on the two cases. I will start with Mr Bitti,
13 who is the senior legal adviser of the Pre-Trial Division, and the way -- the order in
14 which our legal support staff is sitting, legal officer Eleni Chaitidou; legal officer
15 Mohamed El Zeidy; legal officer Silvestro Stazzone; the legal support staff Mr Simon
16 Grabrovec; Mr Niccolo Pons and the intern to our chamber, Mr Habiba Gani.

17 The purpose of this status conference, as you know it from the oral decision that was
18 issued at the end of the initial appearance hearing, is to receive some information and
19 mainly from the Prosecutor as being the main protagonist, expected to be the main
20 protagonist in this status conference, as the triggering force of the proceedings before
21 the Chamber. Of course the observations from the Defence teams and, as well, if
22 they would like to give us some more information so that after this status conference
23 we can, in a short period of time, we can issue a decision establishing the disclosure
24 calendar, so that the disclosure proceedings are conducted on an ongoing basis,
25 transparently, in a way that we could commence our work related to the confirmation

1 hearing on 21 September, as the Chamber has already set up the date for the
2 commencement of the confirmation hearing.

3 By this, I would like to say that my expectations are, as always, that we are going to
4 deal with the issues that are related directly to the subject matter of this meeting and
5 to the purpose of this status conference, and I would ask very much the parties and
6 the Registrar, when necessary, to intervene to make comments and to give us
7 information that is directly related to the purpose of today's meeting, not to go
8 beyond this purpose, because in addition to the principal approach that we always
9 have to deal exactly with what the Chamber has decided to be the purpose of a
10 specific status conference or hearing.

11 We have another issue, the very limited time allocated for this status conference, up
12 until 1.30 we have to finish because thereafter the Trial Chambers assume their duties
13 with regard to the proceedings in Lubanga, Katanga, Bemba, cases of the Prosecutor.

14 So by this let us now, without further ado, proceed with the work that we have to do
15 today. Of course I have to convey the request of the interpreters, and also to be
16 mindful myself of this, to speak slowly, something that I would like you to excuse me,
17 I do not always adhere to this request to speak slowly, and to make a pause before
18 replying to some question.

19 I have identified four groups of questions, four groups of issues that the Chamber is
20 expecting the Prosecutor and the Defence to give us some information for the
21 purposes of the decision on the disclosure proceedings, the disclosure calendar;
22 namely, that first we are going to address the issue of evidence *stricto sensu*, namely,
23 pursuant to Rule 76 of the Rules of Procedure and Evidence, the intentions of the
24 parties to present during the confirmation hearing live witnesses or just witness
25 statements.

1 The second group of issues is regarding Rule 77, material that are in possession or
2 control of the Prosecutor that should be subject to inspection by the Defence and
3 vice-versa. The same obligations pursuant to Rule 78 of the Defence teams granting
4 the same access to the Prosecutor's team dealing with this case.

5 The third issue will be related to redactions or protective measures that the two
6 parties intend to undertake and the last one is mainly related to the potentially
7 exculpatory evidence pursuant to Article 67(2).

8 So in this order, let us now proceed with the first issue, and I'm turning now to the
9 Prosecutor's team to ask whether the Prosecutor could provide us, of course, given
10 the fact that we are at the initial stages of the disclosure proceedings I'm not expecting
11 you to be very precise but still, to give us useful information as to whether, number 1,
12 you intend to call live witnesses for the purposes of the confirmation hearing.

13 If your answer would be in the positive, then how many prior witness statements
14 related to these witnesses you are going to disclose to the Defence, and if you do not
15 intend to call witnesses, I expect you to give us live witnesses -- I expect you to give
16 us some information about witness statements and whether you're going to
17 submit -- whether you're going to disclose to the Defence, and submit to the Chamber,
18 to communicate to the Chamber, full witness statements or just summaries thereof as
19 provided for in Article 61(5) and Article 68(5) of the Rome Statute.

20 So this is my question to the Prosecutor's office, and it is quite similar -- a similar
21 question that I address to the three Defence teams if, at this early stage, you have
22 some valuable information to convey to the Chamber for the purposes of the decision
23 to take.

24 MS ADEBOYEJO: Thank you, Madam.

25 JUDGE TRENDAFILOVA: You have the floor, Ms Adeboyejo.

1 MS ADEBOYEJO: Thank you, Madam President. Yes, indeed, the Prosecution
2 intends to call 10 live witnesses. The Prosecution will also be relying on these
3 witness statements. The Prosecution intends to provide the full witness statements,
4 subject of course to any redaction measures that would be provided. The
5 Prosecution intends that they would be -- it will rely on a total of 3,100 pages, which
6 is an estimate at this point in time.

7 JUDGE TRENDAFILOVA: Yes. Thank you. Thank you, Ms Adeboyejo. That
8 was what I wanted to ask you about, the approximate number of pages regarding
9 witness statements. So you do not for the moment consider summaries of witness
10 statements but just full witness statements and live witnesses?

11 MS ADEBOYEJO: Yes, your Honour, that is the position.

12 JUDGE TRENDAFILOVA: Thank you very much. Now I turn to the
13 Defence teams. First, to ask you whether you would like to make some observations
14 to the information that was right now disclosed by the representatives of the
15 Prosecutor and whether you, yourself, consider presenting evidence at all because it
16 is the right of the Defence just to remain silent, and if you decide to go ahead with a
17 more active approach during the confirmation hearing whether you intend to call live
18 witnesses or, if you do not, how many witness statements if at all you know?

19 Of course, I'm mindful, and my colleagues are mindful as well, that at this very early
20 stage of the proceedings, in the disclosure proceedings, it's too much demanding; that
21 is why it's not something that is to meet my expectations that you are going to give us
22 an exact number of witnesses or an exact number of pages, and so on, but just if you
23 have an idea, we shall be pleased to incorporate some ideas of the Defence teams as
24 well in the disclosure calendar to be set up.

25 Mr Khan, are you going to proceed first?

1 MR KHAN: Madam President, with your leave, perhaps I can deal with the second
2 question first. It is as well to say at this stage that the Defence for Mr Muthaura will
3 say that not only will these charges not be confirmed, but that it is a travesty of the
4 highest order that he has been summonsed in the first place. And so it is our
5 intention to vigorously contest the charges and to present evidence. However, as
6 your Honour has indicated at the initial hearing, that whilst the Prosecutor is the
7 main protagonist in today's hearing and whilst the Prosecutor is the trigger for all
8 disclosure, the Defence aim to fire back. But in order to fire back, we need to see a
9 target, and that requires disclosure.

10 Your Honour, as far as the invitation to deal with the Prosecution's observations are
11 concerned, my submission will be quite brief. We applaud and take on face value
12 the comments by the learned Prosecutor at the initial hearing that the Prosecution
13 considered that the fullest - full disclosure is a cornerstone of a trial.

14 We also are grateful that it seems the Prosecution has made a decision to call ten viva
15 voce witnesses and certain other identifiable evidence. What we require, with the
16 greatest of respect, is sight of those without delay. Your Honour, what I would ask
17 in setting the time-line that should inform us going forward are the best standards
18 and the best practice, and your Honour herself, very wisely and very properly,
19 referred to international standards that will inform the decisions of this Court. That
20 is exactly as it should be.

21 But, your Honour, a few points need to be borne out that by dint of the Statute,
22 Article 51, it's very clear that the Statute trumps the rules, and the Statute enjoins that
23 the Defence will have adequate time and facilities and also disclosure will be given a
24 reasonable time before the hearing.

25 Now, your Honour, on 30 March, when we filed an application that is being

1 considered by the Trial Chamber to effectively restrain the Prosecutor from making
2 extrajudicial comments, we requested that the Prosecutor have ready by the initial
3 hearing the first batch of disclosure.

4 Now, your Honour, Rule 66(a) of a sister tribunal, a Chapter 7 court, of course, the
5 International Criminal Tribunal for the Former Yugoslavia, may have some
6 persuasive effect because that requires effectively what I requested at the initial
7 hearing, that the Prosecution disclose the evidence that it relied upon in order to get
8 the indictment confirmed.

9 Now, your Honour, the standard practice of the Prosecution that continues
10 today - and the current incumbent, of course, is the Prosecutor's former deputy - the
11 standard practice is not to wait for 30 days, but in every case I've been involved in for
12 the last five years, at the initial hearing the Prosecution, alive to their responsibilities,
13 alive to best practice, present after the hearing a dossier, which is the material they
14 relied upon at confirmation. Your Honour, that best practice should be adopted by
15 the Prosecution. And your Honour, it's been requested before and has not, with the
16 greatest of respect, been given effect to by the Prosecutor.

17 Now, your Honour, the Prosecutor did say on the last hearing that he was ready, and
18 in order to move forward, I think the Bench needs to be alive to the fact that in every
19 single confirmation hearing so far, the date that has been originally set has been
20 vacated. There hasn't, with the greatest of regret, there hasn't been a single case
21 where the confirmation date set has been abided to. And in the overwhelming
22 majority of cases, the record discloses that is for one simple reason: Lack of
23 disclosure, lack of timely disclosure by the Office of the Prosecutor.

24 Now, your Honour, I'm not gazing into a crystal ball, but if we are to avoid the same
25 consequence of a non-effective hearing on the 21st, it is incumbent upon the

1 Prosecutor to do that which he's obligated to do, not to hide behind admissibility
2 challenges, not to hide behind other arguments, but in good faith. And we, of
3 course, expect good faith from my friends opposite, to give disclosure in a timely
4 manner. And your Honour, I would ask that in setting the time-line, given that the
5 witnesses have been identified and witness statements have been identified, the
6 Prosecution be ordered -- I apologise, I think I'm speaking a little fast for the
7 long-suffering interpreters and translators. The Prosecution should be required,
8 without delay, within a very narrow time schedule, to give proper disclosure.
9 Your Honour, that's all I have to say at this point. There are further observations
10 that are linked to this when we deal with the other items on the agenda that Madam
11 President detailed at the outset of today's hearing. I'm most grateful.

12 JUDGE TRENDABILOVA: Thank you, Mr Khan. Well, okay --

13 MR KAY: Your Honour.

14 JUDGE TRENDABILOVA: You have already taken the floor, Mr Kay.

15 MR KAY: Thank you, your Honour. On behalf of Mr Kenyatta, we will be
16 challenging the confirmation hearing; as yet, we have not seen any evidence of any
17 significant or substantial nature, as your Honour knows, so I'm unable to give the
18 Court any idea of the nature and structure of the materials that will be presented by
19 the Defence at the confirmation hearing, nor how long it will take because such
20 decisions are predicated on what is served, and we're not being evasive. We would
21 like, in fact, to be able to tell your Honour today what we would be presenting in
22 September but we simply cannot do that without these materials. And it is a great
23 pity that still after the initial appearance that took place over a week ago, that we are
24 virtually in the same position today as we were then. We've had a few maps
25 disclosed - which we didn't need - as a particular matter and we must see the

1 substance of any case that there is, because at the moment the suspects have not had
2 any substantial case put to them. In those circumstances we really do rely on your
3 Honour to ensure that there is enforcement of disclosure.

4 JUDGE TRENDAFILOVA: Thank you, Mr Kay. Finally, the representatives, the
5 counsels for Mr Ali. Is Mr Monari going to speak?

6 MR MONARI: Yes, your Honour. Likewise, we will vigorously be opposing
7 the -- at the confirmation hearing the charges that have been laid out. However,
8 without full disclosure of any material to date, we, as a team, are unable to indicate to
9 your Honour as to how many witnesses we will call, which types of witnesses and
10 which documentation we will rely upon. So we are beseeching this Court to
11 respectfully order that the Prosecutor do -- at the shortest possible time, give us the
12 documents that they are relying upon, to give us the witness statements and that are
13 unredacted, because I do not understand what the Prosecutor means by saying full
14 statements in redacted form. That, to my mind, is contradictory in terms; that ought
15 to be clarified. The best way we can put up a meaningful defence before this
16 International Criminal Court is if there is full disclosure of all the materials.

17 JUDGE TRENDAFILOVA: Thank you, Counsel Monari.
18 We are going to come to the redactions and to the protective measures as a third issue
19 that we are going to discuss today. Of course, I understand the concerns of the
20 Defence teams, and this is the purpose of today's status conference, so that we receive
21 the information necessary to go ahead with the decision to be taken quite shortly.
22 And you are aware of the fact that the Chamber issued the disclosure decision on the
23 7th, so that in no way it would be the contribution of the Chamber to delay these
24 proceedings because we are seized with two cases and we are very much aware of
25 our responsibilities to respect the principle of expeditiousness and to respect the

1 rights of the Defence.

2 You are right, Mr Khan, that confirmation hearings can be postponed. That's why
3 disclosure should go ahead in a continuous basis, should be conducted, and the law
4 quite clearly says with regard to the Prosecutor, and also with regard to the Defence,
5 15 days but no later than 30 respectively - 15 days - and that is how our decision is
6 going to shape the disclosure proceedings.

7 Now let us go to the second issue, discussing the issue and first receiving information
8 with regard to documents, books, photographs or other tangible objects that are in
9 possession or control of the Prosecutor that should be subject to inspection by the
10 Defence; and this should be either material that are important for the Defence,
11 material that the Prosecutor would like to use for the purposes of the confirmation
12 hearing, or these are some tangible objects that are obtained or belong to the suspects.
13 We made clear our interpretation of Rule 77 that you have to identify location where
14 the Defence could have access to and could identify those tangible objects that it
15 needs to be disclosed for the purposes of appropriately preparing its defence. Thus,
16 what is your reply to this question? And, of course, the amount of such objects, the
17 number of all these pieces of tangible pieces of objects, if you could provide us,
18 Ms Adeboyejo, with this information.

19 MS ADEBOYEJO: Thank you, Madam President. Indeed, the Prosecutor is alive to
20 that responsibility of making sure that this is available to the Defence to be able to
21 conduct whatever inspection they need to do. Pursuant to Rule 77, the Prosecutor is
22 going to make available 219 documents, which will give a total number of 5,046 pages.
23 Thank you, your Honour.

24 JUDGE TRENDABILOVA: So that's all on this issue?

25 MS ADEBOYEJO: Yes, on this issue, that's all.

1 JUDGE TRENDAFILOVA: Thank you. I turn now to the Defence teams, not only
2 to make observations on the information right now presented by the representative of
3 the Prosecutor, but also to remind you of the similar obligation pursuant to Rule 78
4 about some documents, photographs, books, or other tangible objects that you -- that
5 the Defence teams are going to use for the purposes of the confirmation hearing, that
6 they have to grant similar access to a location for inspection by the team of the
7 Prosecutor, and this should be done sufficiently in advance.
8 And also, if the Defence teams would like to raise the issue of the existence of an alibi
9 and also about grounds excluding criminal responsibility pursuant to Rule 79, this
10 should also be made sufficiently in advance to enable the Prosecutor to prepare
11 adequately and to respond.
12 So what is the answer of the Defence teams, if you have any?
13 MR KHAN: Madam President, with your leave, I'll come to that in a moment. I
14 didn't want to interrupt my learned friend but, for the sake of the record, I must state
15 the position of the Muthaura team on a matter of law: It is our strong assertion that
16 a proper interpretation of Rule 121 relates to the disclosure of the DCC, the Document
17 Containing Charges, and the list of evidence, no later than 30 days before the hearing.
18 In our respectful submission, that is the last opportunity, save with the consent and
19 the leave of the Chamber, for the Prosecution to nail its colours to the mast and say
20 this is the discrete body of evidence, the core evidence, that we are relying upon at
21 confirmation.
22 It is not a licence for the Prosecution to ride rough shod over the Defence Article 67
23 rights, and also detailed of course in Article 61. Your Honour, that's why I referred
24 to the importance of Article 51 earlier that the Statute trumps the Rules.
25 Your Honour, these timely disclosure will depend upon the facts of the case, and it

1 must always be seen through the prism of making the confirmation hearing effective
2 and meaningful.

3 Now, there may be a very small discrete case where there's one or two witnesses
4 where the Prosecution, giving disclosure 30 days before the hearing, may be sufficient
5 to allow an effective confirmation hearing. But what I would urge the Prosecution,
6 and the Bench in particular, as the guardians of the rights of the suspects, and giving
7 breath to the provisions of the Statute, what the Bench should be alive to is the
8 proclivity so far in the various cases before this Court that I am familiar with, for the
9 Prosecution to take a very restrictive view; namely, that they are entitled, by dint of
10 Rule 101, to leave disclosure until the last moment, 30 days before the hearing, very
11 often the very most important, the very most meaningful evidence, and what we get
12 earlier are public source material, NGO reports, that have hardly core utility for the
13 preparation of the defence.

14 So as a matter of law, your Honour, the position of the Muthaura team is that your
15 Honours must look at the case in hand, the complexity of case, the nature of the
16 allegations and the types of evidence that the Prosecution wish to rely upon. And
17 you cannot be hamstrung or handcuffed to a rigid rule that, in all cases, 30 days
18 before the hearing is consistent with the obligations or consistent with the rights of
19 the suspect to have adequate time and facilities and also a reasonable time before the
20 hearing to get all the evidence.

21 Your Honours, it's a principle, and I have repeated it in other hearings, and your
22 Honours I would, with the greatest of respect and the greatest of humility, urge your
23 Honour to consider the merits of this application. It's a principle of international
24 human rights law that all rights must be rendered practical and effective, not
25 theoretical and illusionary. Strasbourg has repeated that on numerous occasions

1 and it has, to my respectful submission, become almost a norm of international
2 human rights law.

3 Your Honour, for that to be the case, the Prosecution cannot hide behind 121 so that
4 121, Rule 121, effectively trumps the Statute. That has been the practice of the
5 Prosecution, lamentably, in previous cases. Your Honours, we rely upon you to
6 make sure it is not the case in this present matter.

7 JUDGE TRENDABILOVA: Thank you, Mr Khan. Counsel Kay, just before you
8 take the floor, I'm sorry, your concerns are valid and they have been acknowledged in
9 our disclosure decision where the Chamber made a special point that 30 days does
10 not mean that 30 days before the commencement of the confirmation hearing the
11 Prosecutor should come with a DCC and a list of evidence and with the disclosure of
12 the evidence that it relies upon, it intends to rely upon during the confirmation
13 hearing.

14 So this is a general policy that this Chamber has been following and this is the
15 purpose of establishing a disclosure calendar. So, excuse me, Mr Kay, you have the
16 floor.

17 MR KAY: Thank you, your Honour. Your Honour has reminded the Defence of its
18 obligations for disclosure for the confirmation hearing. Of course, that must be
19 underscored by the fact that we have sufficient time to read, prepare and reply to
20 whatever is disclosed to us. So far we have nothing, and the Prosecutor has had
21 many months, and I ask the Court, in relation to the submissions on these matters, to
22 bear that in mind when we come to dealing with the Defence obligations.

23 May I say the Prosecutor gave a very precise answer to your question concerning
24 documents and advised us of the number of pages and number of documents which
25 indicates to me that those materials are ready for inspection now, and we await the

1 opportunity to be able to review the 5,000 or so pages so that we can see the nature of
2 their case. Thank you.

3 JUDGE TRENDAFILOVA: Thank you, Mr Kay. Now, Counsel Monari.

4 MR MONARI: Madam President, the Prosecution is already aware that they are
5 going to rely on 219 documents, that they have 5,046 pages of evidence, so it's not
6 new evidence that they are going to gather between now and the confirmation
7 hearings. It is our prayer and hope that there will be an order directing them to
8 hand over the documents for our consumption.
9 In an international criminal trial of this magnitude, about the situation in Kenya, in
10 this far-away land, not only is this Court going to preside over matters that deal with
11 Kenya but the people of Kenya are themselves very anxious to know what sort of
12 evidence is facing our clients.

13 So it's therefore important that we ourselves also have enough time, under the
14 principle of equality of arms, to interrogate the evidence that has been gathered by
15 the Prosecution. I therefore beseech you, on behalf of General Ali, that the
16 documentation be made -- be presented to us as soon as practicably possible.

17 JUDGE TRENDAFILOVA: Thank you, Mr Monari. Would the representative of
18 the Prosecutor would like to respond to the concerns of the Defence teams?

19 MS ADEBOYEJO: Just a minor point, your Honour, with regard to the figures that
20 were presented, just to remind my learned friends that as your Honour had indicated
21 this is an estimate, even though it's precise, but it's an estimate and yes, the
22 Prosecution is available and willing to proceed and has always displayed good faith
23 with regards to obeying your orders concerning disclosure.

24 JUDGE TRENDAFILOVA: I thank you, Ms Adeboyejo. I shall get used to your
25 name. Now we resort to the third issue related to redactions and protective

1 measures, if need be. I would first address the Prosecutor's team again, asking you
2 whether you would request some documents to be disclosed to the Defence in a
3 redacted form. The Prosecutor's representatives know very well that you're making
4 proposals for redactions that have to be substantiated and it is the Chamber to
5 approve the redactions.

6 So what are your intentions in this regard, the estimate amount of documents that
7 you consider with regard to this matter, redactions to be approved by the Chamber?

8 And, of course, you have to be very careful and to ask for redactions to the extent
9 necessary to fulfil your responsibility for the protection of victims, witnesses and
10 other persons at risk.

11 MS ADEBOYEJO: That is correct, your Honour, and in that regard the Prosecutor
12 estimates that it would disclose approximately 542 documents in redacted form; of
13 course, as your Honour has rightly pointed out, subject to your approval and this
14 would constitute approximately 9,397 pages.

15 JUDGE TRENDABILOVA: (Microphone not activated) ...

16 MS ADEBOYEJO: 397 pages.

17 JUDGE TRENDABILOVA: Thank you. Do you consider approaching some of the
18 witnesses with protective measures?

19 MS ADEBOYEJO: Yes, ma'am.

20 JUDGE TRENDABILOVA: Of course, bearing in mind that we are in a public
21 session, we have to be very careful but just to give us an idea whether you're working
22 along these lines and whether you have already consulted the Victims and
23 Witnesses Unit as the law provides you to do so.

24 MS ADEBOYEJO: Thank you, your Honour. The short answer to that is in the
25 affirmative, that the Prosecution continues to, has sought and continues to seek

1 protective measures. As far as the Prosecution is concerned, protection of witnesses
2 is cardinal and the Prosecution has taken great care, in consultation with the Victims
3 and Witnesses Unit, to protect all persons with whom it has come into contact during
4 the course of the investigation and this has also included minimising its contact with
5 those remaining in the country. However, it can only be underscored that there is a
6 limited capacity to protect individuals in the country, particularly where the suspects
7 remain in positions of power in an environment where witnesses could run the risk of
8 disappearing or otherwise becoming uncooperative before testifying.

9 So for these reasons, the Prosecution's position is that the disclosure of documents
10 containing sensitive information should take place only after protective measures are
11 in place and a final decision is made on the challenge to admissibility.

12 The Prosecution is, however, willing and able to provide disclosure of other materials
13 before that time, and this is of course respecting the needs of the victims and
14 witnesses whose identities should not be revealed until the case has been found to be
15 admissible.

16 Your Honour, we would also be providing more detailed written submissions in this
17 respect, soonest.

18 JUDGE TRENDABILOVA: Thank you, Ms Adeboyejo. Of course, with regard to
19 the admissibility challenge I wouldn't like to repeat myself, I stated it several times,
20 that the Prosecutor and his team have to be aware of Article 19(8) of the Rome Statute.
21 But anyway, the Chamber is seized with your request and we are going to deal in due
22 course with this request. With regard to the Defence teams, would you like to make
23 some comments on the information provided by the representative of the Prosecutor
24 and, if at this early point in time, you're considering approaching the Chamber with a
25 request for some redactions and some protective measures? Yes, Mr Khan.

1 MR KHAN: Madam President, I'm most grateful. We have no intention at this
2 moment in time in seeking recourse to the Pre-Trial Chamber or Madam President for
3 protective measures. Your Honour, as far as the tenor of the Prosecution's
4 submissions on this issue are concerned, I have two discrete observations, with your
5 leave: The first is, as far as the relevance of the admissibility challenge by the
6 Republic of Kenya is concerned, your Honour set out with her usual alacrity the
7 views of the Pre-Trial Chamber and some guidance at the initial hearing, and I say
8 nothing further in relation to that.

9 The obligations of the Prosecution are well-known. The Prosecution must be in a
10 state of advanced preparation and, as I put it on the last occasion, the applications by
11 any third party cannot be used as a device or a cover to prejudice the rights of the
12 suspect -- the suspects.

13 Your Honour, the other matter is really rather grave. Your Honour, in the
14 application - again, filed by my team on 30 March - I referred to certain extrajudicial
15 comments made by the Prosecutor and I also appended newspaper reports in Kenya.
16 Once again, counsel for the Prosecution has referred in rather oblique, but perhaps
17 loaded, terms about the three suspects. Of course, each suspect occupies a different
18 position and each suspect must be viewed individually, but they refer to the fact that
19 these suspects continue to occupy positions of power. How is that relevant to the
20 application and the matter in consideration for today?

21 Now, your Honour, one consequence of the disposition, it seems, of our -- of the
22 learned Prosecutor to speak to the press in what may be viewed as a cavalier or very
23 free manner is that those protestations and utterances bind him.

24 Your Honours, long ago on 1 April 2010, just after the investigation had been
25 authorised, he came on television on Al Jazeera and he said, and I quote, he had every

1 intention of keeping his record clean when it came to witness protection; and he said,
2 I quote, "We are not going to rely on the Kenyan authorities to protect our witnesses."
3 Now, your Honours, on 15 December 2010 when, as your Honours are very familiar,
4 the Prosecutor decided to publicly name a few days before the Court recess in an
5 Article 58 ex-parte procedure the various suspects, he said, "That our witnesses --"
6 and I quote, "Our witnesses are not in Kenya, so it's difficult to threaten them. They
7 are in different countries, so it's difficult to threaten them. They are under
8 protection, so that no one has attacked them, no one has threatened them but we are
9 trying to investigate attempts to threaten other people. We shall follow upon it."
10 Now, your Honour, at that time various conditions were requested and, of course,
11 summonses were issued. This is not a case by a million miles where it was
12 appropriate, in our respectful submission, to issue a warrant; but for the Prosecutor,
13 in his public protestations that are before the Bench and today again to refer to the
14 public duties that my client holds - the public service he has provided over decades to
15 the Republic of Kenya - and somehow seek to make innuendo that it is somehow
16 sordid or somehow places witnesses in jeopardy is to malign not only an individual
17 that is presumed innocent, but is to put a cloud of innuendo over these proceedings.
18 And, your Honour, that cloud of innuendo and suspicion, gossip and hearsay, has the
19 potential - and I make no bones about it - to severely prejudice defence investigations.
20 And, your Honour, I would ask that the Prosecutor be rather disciplined; either an
21 application can be made for a warrant or, if a summons were issued, the simple
22 question is the world are aware of the positions occupied by these suspects and by
23 my client.
24 If they are complying with the conditions - and my client has complied assiduously
25 with every condition imposed by the Bench, has not spoken to the press and has

1 behaved, in fact, in a manner that would behove the Prosecutor to follow suit - he is
2 an example, in my respectful submission, to Mr Ocampo and the Prosecution. For
3 him to be maligned is intolerable and I would ask that the Prosecution desist from it
4 any further.

5 JUDGE TRENDAFILOVA: Thank you, Mr Khan. I would like just to make a
6 comment that you actually were reasoning in addition to doing this in writing your
7 application of 30 March, and you linked it to protective measures but still let us be
8 confined to the subject matter of this hearing. I'm going to deal with this quite
9 shortly, so could we adhere to the issue of redactions and protective measures?
10 Mr Kay.

11 MR KAY: I'm grateful, your Honour. We learn now that there's disclosure and
12 disclosure; there's "disclosure" meaning you can have many pieces of paper all
13 blacked out and there is "disclosure" that we mean which is being able to read the
14 pieces of paper.

15 When you look at the filings of the Prosecutor so far, and the lack of disclosure of
16 information because we have received blacked out pages, our knowledge of this case
17 and the nature of the allegations asserted are absolutely zero.

18 And when the figure of 9,397 pages is mentioned in terms of redacted documents,
19 I don't want to be photocopying vast pages of blacked-out bundles, because that's not
20 what I mean by "disclosure" and I don't think any court in the world means that by
21 "disclosure."

22 You and your fellow judges are deciding this case and we must see what you're
23 deciding it upon and, at the moment, it seems to me that hiding behind issues of
24 protective measures because there is the element of this in the Statute and the Rules
25 as a way of preventing disclosure to the Defence is not a proper way of ensuring that

1 the case is fairly presented and we have an opportunity to respond.

2 And we are greatly concerned about that, because if we're going to go down now

3 several months of just blacked-out pages being sent to us and then we have to come

4 back to the Court and we get involved in massive litigation for months, weeks, days,

5 we can see how slippage in the Court timetable can easily occur. So we would ask

6 the Court to be mindful of that.

7 It seems that the Prosecutor's ignoring what you've said previously about not linking

8 the admissibility issue to the disclosure issue - we've heard it again this

9 morning - that does put me on alert and concerned as to where the power struggle is

10 lying in relation to this. And I put it like that because I would have thought, with

11 your Honours comments last time, as a Prosecutor I would have been mindful of that

12 and not linked it today; because your Honour was very clear about it, in my view,

13 and we have taken heart by that because we have felt that there's an opportunity here

14 for us not to be delayed in our disclosure.

15 I am concerned about statements being made concerning the suspects being in power

16 and linking that in a very unstructured, unfounded way into this issue. I don't

17 know how -- your Honour's referred to the fact that you've seen media reports.

18 I don't know how your Honour -- the extent of your Honour's knowledge is of the

19 media in Kenya and how it operates and how stories are put into the media that are

20 simply not based on fact or truth.

21 My team have had to deal with one last week, which was complete rubbish, printed

22 by a newspaper and then retracted a week later; and it's very much par for the course

23 and you can read headlines which bear no content to the information.

24 Statements by the Prosecutor publicly and in this courtroom will then be transmitted

25 back to Kenya in a completely unrepresentative way of what the issue is that is being

1 actually dealt with, and we are concerned about that; and I would invite the
2 Prosecution to be very mindful of such public statements when, in fact, they are not
3 linked to the matters that we're dealing with and have no foundation, because they
4 do cause great difficulty for the Defence and, who knows, maybe I'll get back to
5 Nairobi and have another week of trying to deal with false stories that are put into
6 the newspapers. And I ask the Court to be mindful of media manipulation. Thank
7 you.

8 JUDGE TRENDABILOVA: Thank you, Counsel Kay. I shall make two points:
9 With regard -- please be seated. With regard to your concerns related to extensive
10 redactions, of course you know that it is the responsibility finally of the
11 Chamber whether proposed redactions will be accepted. So it's our responsibility.
12 At the same time, we have to acknowledge that there should be a balancing approach
13 between two important values, the respect and the concern and the responsibility of
14 the Chamber regarding the protection of some people who might be at risk and, at the
15 same time, that it doesn't have a negative impact on the proper preparation of the
16 Defence.

17 So, finally, the decision will find a balancing approach and redactions will be
18 accepted only to the extent necessary to protect people's lives.

19 With regard to your statement that there appears to be competing powers, there is a
20 Chamber; as long as the Chamber is seized of a case, it's the power of the Chamber to
21 take a decision and the responsibility to take the proper decisions and to be
22 responsible for the consequences of this decision. With regard to the admissibility
23 challenge, the parties will soon see a decision to be issued on this matter.

24 And, finally, about the media, the aim is just to send some messages in order to avoid
25 some complications; that was all. Finally, Counsel Monari, because you already as if

1 took the lead to make points on behalf of your client Mr Ali -- or maybe some other
2 counsels would like to make some points with regard to protective measures and
3 redactions.

4 MR MONARI: (Microphone not activated) ... One of the issues, your Honour, I wish
5 to raise immediately is that there's a practical difficulty in conducting investigations
6 by the Defence in light of the decision of the Chamber that was set forth during the
7 issuance of the summons. Even though that it is a subject of emotion, at the moment
8 the Defence is not conducting any investigations because of the in-clarity (sic) in that
9 decision. We are aware that we've met -- it is a subject of an application, so we'd like
10 some clarity on that soon.

11 On the redactions, I do not think that the learned Prosecutor is being candid about
12 what they intend to redact and not to redact. In fact, in their motion dated
13 14 April -- and your Honour, this is the motion by the Prosecutor, the Prosecution's
14 application requesting disclosure after a final resolution of the Government of the
15 Republic of Kenya's admissibility challenge.

16 At paragraph 9, and I quote this is what the Prosecutor says, paragraph 9 - I'm sorry,
17 I'm too fast - "Alternatively, the Prosecution will have to redact its evidence heavily to
18 protect against the disclosure of any information that could reveal the identity of
19 witnesses." I emphasise the words "redact its evidence heavily." Now, that is not a
20 Prosecutor who wants to be helpful to the Defence in terms of disclosure.

21 Finally, the learned Prosecutor Ocampo has been saying in the press that he's getting
22 cooperation from the Kenyan government. He cannot, at this stage, then turn
23 around and say because the people that are before this Court are in power he's not
24 getting that cooperation or that some witnesses may be in danger. I think that it
25 is -- it's not being candid enough to this Court.

1 What the Prosecutor wants to do is curtail a Defence investigation, curtail a proper
2 Defence of the case before this Court and ensure that the Defence does not obtain the
3 benefit of the evidence that they ought to have in time enough to bring about a
4 feasible defence before your Chamber. That's all I wish to state at this point.

5 JUDGE TRENDAFILOVA: Thank you, Counsel Monari. There will be quite soon a
6 decision to answer your concerns about one of the conditions.

7 MR MONARI: Much obliged.

8 JUDGE TRENDAFILOVA: And about the admissibility, we already discussed;
9 there's nothing that I can add thereto. Would the Prosecutor's team or someone else
10 from the Defence team like to say something? I'm sorry, Mr Khan, but ladies first
11 and I saw first the representative of the Prosecutor. Ms Adeboyejo, would you make
12 your point?

13 MS ADEBOYEJO: Thank you, your Honour. I would not waste the time of the
14 Court by going over the issues that your Honour has so succinctly and clearly
15 indicated to my learned friends on the other side, except to add with regards to the
16 issue raised by Mr Khan, learned counsel for Muthaura, that we are in the process of
17 filing our response to his application regarding the issue of the extrajudicial
18 statements. I thought that I should also inform your Honour about that and that
19 should be on the record.

20 JUDGE TRENDAFILOVA: Just to remind you that you have 21 days.

21 MS ADEBOYEJO: Yes, your Honour, we are aware of that.

22 JUDGE TRENDAFILOVA: You should be within this time limit --

23 MS ADEBOYEJO: Yes, absolutely, your Honour.

24 JUDGE TRENDAFILOVA: -- for your response; otherwise, this Chamber is not
25 going to take into account your submission.

1 MS ADEBOYEJO: Absolutely, your Honour. We just wanted to put that on the
2 record.

3 JUDGE TRENDAFILOVA: Thank you. Mr Khan, the floor is over to you.

4 MR KHAN: Madam President, with your indulgence, a very brief point as my
5 learned friend touched upon, one of the conditions. Your Honour, in determining
6 that matter, I would just ask that you look at one matter. The Prosecution say in
7 their filing on 15 April, at page 9, that the Prosecution operate -- and I quote, "the
8 Prosecution, subject to similar and more regulated processes with respect to
9 Prosecution witnesses."

10 Your Honour, it is my respectful submission that is completely wrong, completely
11 false, in fact. And your Honour, I will, in due course, as disclosure comes about, be
12 asking the Prosecution to give me the date of the risk assessment by the Victim and
13 Witness Unit and the date of their initial screening interview. If what they say is
14 true, in each and every case first contact should have been by the Victims and
15 Witnesses Unit, not by the Prosecution, because that is what is being required of the
16 Defence. We cannot speak to a witness -- we cannot speak to the witness by dint of
17 the order of Madam President without getting clearance of the Victims and
18 Witnesses unit.

19 Now, your Honour, I don't need to go into all the arguments, but it is of course the
20 case that there is a class of witnesses, the identity of whom we simply do not know.
21 We can't give the name to the Victims and Witnesses Unit because the way it works,
22 whether we are in Kenya or in Sierra Leone or in Liberia, you go to a village and you
23 will ask, "We are the defence. We are speaking about certain issues. Does anybody
24 know anything?" And people will come. And your Honours, what are we to do?
25 According to this rule, we can't even take the name. Or maybe we can take the name

1 and no more.

2 So, your Honour, I would ask you look at the Prosecution's submissions regarding
3 equality of arms and that they're being bound under the same regime as the
4 Defence very carefully because it is my respectful submission, and the Prosecution
5 know it full well and I invite them to stand up now and say I'm wrong, they know
6 full well that when they're in the field, they will go and speak to a witness and have a
7 screening interview, and only if it becomes apparent that that person may be a
8 material witness and if that person requires protective measures do they seek the
9 recourse to the Victims And Witnesses Unit. But whatever the degree of contact, it
10 does not stop them from speaking to a material witness for the Prosecution.

11 It is my respectful submission that in considering the filing by the Defence, your
12 Honour should not put the Defence in a position of lesser rights - a more difficult
13 situation - because practically, the decision does have difficulties for the Defence.
14 These are not mere complaints for the sake of it; they will cause real difficulties in the
15 field.

16 Your Honour, that's my only remark when looking at particularly page 9 and 10 of
17 the Prosecution's response. And I'm most grateful for your indulgence in
18 addressing that matter, as my learned friend touched upon the issue.

19 JUDGE TRENDABILOVA: Thank you, Mr Khan. I will not make further
20 comments on this, just to make a statement that the Chamber wouldn't at all do
21 anything in order to put the Defence teams in a disadvantaged team vis-a-vis the
22 Prosecutor.

23 MS ADEBOYEJO: Your Honour.

24 JUDGE TRENDABILOVA: And this is not the intention of the Chamber. It will
25 come in short time.

1 MS ADEBOYEJO: Your Honour.

2 JUDGE TRENDAFILOVA: We now move to the last -- you wanted to -- I'm sorry,

3 Madam Adeboyejo.

4 MS ADEBOYEJO: Your Honour, I just wanted to make a very quick observation

5 that in view of the very serious allegations that my learned friend has just put

6 forward, that it might be appropriate that he puts it in writing so that we would then

7 be in a position to respond to what he has indicated before this Chamber, because we

8 think that what he has put on the record is something that needs to be maybe further

9 adjudicated upon.

10 JUDGE TRENDAFILOVA: Ms Adeboyejo, I will proceed with the last issue, but just

11 to make one clarification: The Chamber is always - or most of the time - granting

12 opportunity to the parties to make their observations, but no one of the parties should

13 have the wrong impression that the Chamber is helpless to deal without the

14 observations itself with an issue at stake. But we have -- we do this out of respect for

15 the parties and still to take into account the observations. But the Chamber has its

16 firm view on the issues of law.

17 So, by this, I would like to proceed to the last issue on our agenda, and it is related to

18 the potentially exculpatory information that should be disclosed to the

19 Defence pursuant to Article 67(2); namely, pieces of evidence that show, or tend to

20 show, the innocence of the suspects, that mitigate their guilt or that affect the

21 credibility of the Prosecutor's evidence.

22 We have received from -- of course, we asked in our oral decision some information

23 from the Prosecutor with regard to information received pursuant to Article 54(3)(e),

24 with regard to Article 72 and Article 93(8) of the Rome Statute, and we have received

25 a report from the Prosecutor. The deadline was on the 15th; the report was dated on

1 14 April, where it came to our knowledge that the Prosecutor, up until now, has
2 received only one piece of document pursuant to Article 93(8) and he has already
3 undertaken some steps in order to receive the consent of the information provider.
4 Beyond this, you have not received any documents, any piece of evidence pursuant to
5 the other provisions as I have mentioned?

6 MS ADEBOYEJO: Yes, indeed, your Honour, we have not received any other
7 document; however, I wanted to make the observation that the Government of Kenya
8 has, indeed, informed the Prosecution that it has consented to the disclosure of that
9 one document.

10 JUDGE TRENDAFILOVA: So now you're ready to disclose it to the Defence?

11 MS ADEBOYEJO: Yes, your Honour.

12 JUDGE TRENDAFILOVA: And you have no other piece of evidence obtained on
13 the basis of these three provisions --

14 MS ADEBOYEJO: None, your Honour.

15 JUDGE TRENDAFILOVA: -- that could pose some difficulties to the Defence and
16 equally to the Prosecutor.

17 Would someone like to make a comment? Because we are about to end our status
18 conference. Mr Kay.

19 MR KAY: Well, it rather reminds me of those elections that take place where 99 per
20 cent of the electorate turn out for the existing president. To have one document after
21 18 months beggars belief, your Honour, that this case has been investigated properly.
22 There is a duty on the Prosecutor to investigate both sides, inculpatory and
23 exculpatory. I trust that the Court is alert to this issue; we were when we saw it, and
24 it alarmed us that even that single document hadn't been given to us, whatever it is.
25 But it is remarkable. The Court should bear in mind the responsibilities of the

1 Prosecutor in the circumstances in which he has to conduct himself in relation to the
2 bringing of proceedings, the confidence the Court has in the bringing of those
3 proceedings. If what we have is one single document, in my submission, this case
4 has not been conducted in a proper and meaningful manner.

5 JUDGE TRENDAFILOVA: Thank you, Mr Kay. Of course, everyone is aware of
6 the responsibility of the Prosecutor pursuant to Article 54 and our expectations are
7 that the Prosecutor and his office are going to, most professionally, conduct the
8 proceedings on their behalf. Is there something else? Mr Monari. I'm sorry,
9 Mr Khan. Well, it was Mr Monari who wanted to before you.

10 MR MONARI: Your Honour, on the exculpatory evidence, it is our view that the
11 Prosecutor has not taken any steps to collect any exculpatory evidence from the
12 persons that are charged with being -- that are suspects before this Court.

13 At the appropriate time, we shall be raising issues around that aspect, but again on
14 the documentation that -- the issues that we have been dealing with this morning, my
15 learned friend, Mr Gregory Kehoe, has some observations to make and, with your
16 permission, if he could just make those observations very briefly.

17 JUDGE TRENDAFILOVA: Just a short question, Mr Kehoe. Is this related to the
18 subject matter of today's status conference?

19 MR KEHOE: Yes. Yes, your Honour, it's related to the number of documents being
20 disclosed and some area of confusion of the teams. We have had three sets of
21 numbers that the Office of the Prosecutor has disclosed; the first being the ten witness
22 statements and relying on 3100 documents. It's the other numbers that raise a bit of
23 a confusion.

24 On the actual disclosures, the Rule 77 disclosures, your Honour, it was noted there
25 were 219 documents which amounted to 5,046 pages. If we move to the redactions,

1 we're talking about a redaction of 542 documents, amounting to 9,397 pages.

2 My confusion is, is the disclosure of the 5,000 pages, are we going to get another 9,000

3 pages that have been redacted or -- I'm uncertain as to this universe of 9,000 pages

4 that have been redacted. Are those items that we're not going to see at this juncture?

5 Are there items that are partially redacted that fall into the 5,000-plus pages? And

6 an overall concern, frankly, your Honour, and with all due respect, is are these

7 documents in an unredacted form given to the Chamber at some point prior to the

8 issuance of the summons that the Defence is never going to be able to see prior to the

9 confirmation hearing?

10 So those are a series of questions, and I guess the most fundamental one is the math

11 involved of the number of documents, which documents are these, and some

12 clarification in that regard. I apologise, with all due respect, if the confusion is only

13 on my part, but I just didn't follow that sequence.

14 JUDGE TRENDAFILOVA: So I shall turn now to the Prosecutor's office. Although,

15 in my notes, you're referring to 542 documents for which you are going to seek

16 redactions that are -- that amount to 9,397 pages.

17 MS ADEBOYEJO: 542 documents for the redactions, yes, your Honour.

18 JUDGE TRENDAFILOVA: Yes.

19 MS ADEBOYEJO: And there are 9,397 pages.

20 JUDGE TRENDAFILOVA: Yes.

21 MS ADEBOYEJO: And, your Honour, maybe the clarification I can give to my

22 learned friend is that there is an overlap in some of these documents; that's why we

23 have a larger figure with regards to the redaction; in other words, between the Rule

24 77 materials and the total figure that will be provided with regards to redacted

25 documents.

1 JUDGE TRENDAFILOVA: Thank you, Counsel.

2 MR KEHOE: Madam President. May I just --

3 JUDGE TRENDAFILOVA: Yes, please, take the floor.

4 MR KEHOE: One question. So are we talking about a disclosure of a total of 9,000
5 pages and 400-plus of those have been redacted from that and we're being left with
6 the 5,000 remaining; is that correct?

7 JUDGE TRENDAFILOVA: I shall tell you, Mr Kehoe, what I understood. These
8 are so many documents - I shall repeat the number, 542 - amounting to 9,397 pages
9 that will be submitted to the Chamber with proposals for redactions. And the
10 Chamber is going to approve these redactions, but the redactions are within the
11 document itself. So I do not believe that anyone could come deleting the redactions
12 and just leaving nothing there, to be counted as pages where there will be no
13 redactions. So this is my answer to your question. But if the Prosecution's office
14 would like to add something, you have the floor.

15 MR KHAN: Well, Madam President --

16 JUDGE TRENDAFILOVA: Yes. You have waited quite a long time, Mr Khan.

17 MR KHAN: (Microphone not activated) ... Madam President, I would like some
18 clarification because perhaps I've been labouring under a misapprehension. It was
19 my understanding that the report of the Prosecutor dated 14 April was not
20 purporting to show exculpatory evidence in their possession, potential exculpatory or
21 exonerating materiel, but only that category of information that had been obtained
22 under conditions of confidentiality.

23 If that's the case --

24 JUDGE TRENDAFILOVA: That is the case.

25 MR KHAN: -- I do surmise that there is another body of documents within the

1 Prosecution's possession that is quite clearly exonerating or exculpatory which they
2 have to disclose to the Defence pursuant to 67(2) and the other provisions, and that
3 may be a larger body of documents. So if I've got it wrong, perhaps I can be notified
4 but that was my understanding.

5 JUDGE TRENDAFILOVA: Of course, I think that you properly understood the
6 submission of the Prosecutor, the report was relating only to documents that were
7 obtained under confidentiality pursuant to Article 54(3)(e), 72 National Security and
8 93(8) State Cooperation because of the concerns that you know all Chamber's have
9 after the Lubanga case had to be stayed due to this problem as identified by Trial
10 Chamber I.

11 Of course, probably, there should be much more, much more documents of
12 exculpatory nature because the Prosecutor, as a professional and elected official by
13 the Assembly of States Parties, should be investigating both incriminatory and
14 exonerating evidence.

15 So if the Prosecution's office would like to -- but this is the expectation of the
16 Chamber.

17 MR KHAN: Madam President, I'll rise for the last time, I hope. So in relation to
18 that body of information, perhaps a discreet time-line as to when that can be
19 disclosed because, of course, that's would be very helpful to the Defence and assist us
20 jump-start investigations. So in relation, I'd like some detail if possible as to how
21 many documents amount to PEXO.

22 JUDGE TRENDAFILOVA: It's somewhat early, Mr Khan.

23 MR KHAN: I beg your pardon?

24 JUDGE TRENDAFILOVA: I think it's a little bit early in the disclosure even for the
25 Prosecutor; but if they would like, they might give you some more information.

1 MR KHAN: Well, one lives in hope, your Honour.

2 MS ADEBOYEJO: Your Honours, yes, we can give an estimate at this point in time.

3 We are looking at 292 documents, which would amount to 9,929 pages of potentially

4 exonerating materials. And I do thank your Honour for the clarification that

5 formerly we were referring to materials which were of a protected or confidential

6 nature. Thank you, your Honour.

7 JUDGE TRENDABILOVA: And just to make a clarification that if the Chamber does

8 not see a major issue in the redactions as proposed by both the Prosecutor and the

9 Defence teams, the Chamber is not going itself to intervene. So now we have

10 exhausted all the issues.

11 This is something that, at the end of this status conference, I would like just to ask

12 some of the Defence counsels: We try to establish a tradition for the ICC -- although

13 being a young International Court, we have established a tradition related to its

14 dressing code. And I would ask politely, and with a little bit of concern, some of the

15 Defence teams that are wearing wigs this is not the dressing code of our institution

16 and we would like that the dressing code is uniform for everyone who gives the face

17 of the proceedings before the ICC. And in this quite warm weather, maybe it will be

18 more convenient to be without wigs because this does not belong to our dressing

19 code.

20 On this, I will end up the status conference, thanking everyone who is present today;

21 the Prosecution's team; the three Defence teams; the Registry that is always here very,

22 very helpful if need be; the interpreters, with the excuse that I speak too much and

23 sometimes very quickly so; the court reporters, the officers, the courtroom staff and

24 our legal officers, as well.

25 So this status conference is closed.

Status Conference

(Open Session)

ICC-01/09-02/11

- 1 THE COURT USHER: All rise.
- 2 (The hearing ends at 12.50 p.m.)