

Status Conference

(Open Session)

ICC-01/09-01/11

1 International Criminal Court  
2 Pre-Trial Chamber II - Courtroom 1  
3 Situation: Kenya  
4 In the case of The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and  
5 Joshua Arap Sang - ICC-01/09-01/11  
6 Single Judge Ekaterina Trendafilova  
7 Status Conference  
8 Monday, 18 April 2011  
9 (The hearing starts in open session at 9.01 a.m.)  
10 THE COURT USHER: All rise.  
11 JUDGE TRENDAFILOVA: Good morning. Please be seated.  
12 THE COURT OFFICER: Good morning, Madam President. We are in open  
13 session.  
14 JUDGE TRENDAFILOVA: Good morning to everyone. This status conference is  
15 now in session. I welcome everyone who is here in the courtroom; the team of the  
16 Prosecutor, the Defence teams, the representatives of the Registrar. Is there someone  
17 from the Registrar? Over there, I'm sorry, because during the initial appearance you  
18 were over there.  
19 So, court officer, would you call the case, please.  
20 THE COURT OFFICER: Yes, Madam President. Situation in the Republic of Kenya,  
21 in the case of the Prosecutor versus William Samoei Ruto, Henry Kiprono Kosgey and  
22 Joshua Arap Sang, case reference ICC-01/09-01/11.  
23 JUDGE TRENDAFILOVA: (Microphone not activated) ...  
24 MS TAI: Good morning, Madam President. The Prosecution team today is  
25 represented by Adesola Adeboyejo; Aingbolahan Adeniran, trial lawyer; Karen

1 Corrie, associate trial lawyer; Grace Goh, case manager; and, lastly myself Cynthia  
2 Tai.

3 JUDGE TRENDAFILOVA: (Microphone not activated) ...

4 MR HOOPER: Yes. Well, equality of arms is not necessarily reflected here as I am  
5 the sole representative this morning on behalf of Mr Samoei Ruto.

6 Now, my two colleagues, that's Mr Kigen-Katwa, Mr Kioko Kilukumi arrived from  
7 Nairobi yesterday, an, 8,500 thousand kilometre journey, and they're staying in the  
8 hotel not very far from the Court. Clearly, something's gone amiss this morning and  
9 they found the last few metres to the courtroom, it would seem, more problematic  
10 than the many thousands of kilometres to get here for yesterday, and I noticed you  
11 were outside the Court when I tried to intervene with the Court Registrar to try and,  
12 if possible, delay the proceedings by some minutes in order that I can discover what  
13 the reason is for that omission, for their not being here.

14 Essentially in this case Mr Katwa is, as I understand it, the counsel both in respect of  
15 Mr Ruto and Mr Sang at the moment, but as far as the rest of the Ruto team are  
16 concerned this morning, it's me and Mr Kilukumi, but Mr Sang would remain  
17 unrepresented, I think, and -- unless Mr Katwa is here. So it's a rather complicated  
18 start, I'm sorry for that.

19 JUDGE TRENDAFILOVA: Thank you, Mr Hooper. I would like to say that I am  
20 not satisfied with the way the Defence teams are trying to arrange a very, very  
21 diligent representation of the interests of their clients because even if they are not  
22 very much aware of The Hague, the Movenpick is quite close to the Court and they  
23 could have, in a way, tried yesterday evening to find their way to the ICC. So --

24 MR HOOPER: Well, it's not the problem. They know where the ICC is. This is  
25 clearly a problem that's arisen because these are early days and it's not

1 straightforward. I can remember my first few days here, or weeks even, and even  
2 now occasionally I can stumble about this building trying to find particular rooms.  
3 So this isn't, I suspect, that kind of omission. I suspect they're engaged in every  
4 effort to be here and to be here on time, but something's gone wrong. And I  
5 hope the Court -- I noticed earlier this week we were roundly and properly castigated,  
6 for example, for a filing that was 10-pic rather than 12-pic, and I appreciate the  
7 Court's reasons for that but, on the other hand, this was a difficulty that arose because  
8 in fact it was essentially, I think, the first filing because in fact there was the wrong  
9 template used at some point and not noticed until after, after the document was filed.  
10 So there is inevitably going to be a, I suppose, a bit of a bedding down time, and I  
11 hope the Court can demonstrate some tolerance towards these very unfortunate  
12 lapses but they are not aimed, as it were, at the Court or in disrespect; these are  
13 matters that have arisen because of just general basic difficulties. I don't know  
14 where those two colleagues are. As I said, I wished I'd been granted a few more  
15 minutes in order to try and find where they are because I am quite sure they are lost  
16 somewhere in this building.

17 JUDGE TRENDAFILOVA: Thank you, Mr Hooper. I do believe that the parties  
18 and the participants realise that I'm not claiming any special respect for myself but for  
19 the institution that I am representing. So, but still, apart from this, I think that we  
20 can grant a little bit of time, being mindful of the fact that Courtroom 1 will be used  
21 for the second status conference regarding the second case of The Prosecutor versus  
22 Mr Muthaura, Kenyatta and Ali, and thereafter, it's going to be used by Trial  
23 Chambers. So I didn't want that we lose a lot of time waiting for the counsels to  
24 come and properly represent their clients because, for me, it was crucial that we have  
25 enough time and it is not much, two hours, to have a meaningful and a very, very

1 professional discussion on the different issues related to establishing a proper  
2 disclosure calendar. But anyway, I will give up until 9.30, and thereafter we shall  
3 proceed.

4 MR HOOPER: Yes, I'm thankful. I hope we can resolve this sooner than that.

5 JUDGE TRENDAFILOVA: So we make a pause up until 9.30 and thereafter, I shall  
6 ask the parties to be very concise, very much to the point so that we, for the rest of the  
7 time allocated to us, that we do a really good job. So I -- you would like to  
8 intervene?

9 MR ORARO: Sorry, Madam President. I just wanted it recorded before Madam  
10 President adjourns that we are present for the Henry Kosgey team.

11 JUDGE TRENDAFILOVA: Yes, I've seen this, Counsel. Thank you very much.

12 So we are going to reconvene the status conference at 9.30 sharp.

13 THE COURT USHER: All rise.

14 (Recess taken at 9.09 a.m.)

15 (Upon resuming in open session at 9.30 a.m.)

16 THE COURT USHER: All rise.

17 JUDGE TRENDAFILOVA: (Single Judge?) We reconvene our session. Now,  
18 what about the Defence teams, could they find their way?

19 MR HOOPER: Yes. Can I start again?

20 JUDGE TRENDAFILOVA: Please do.

21 MR HOOPER: And can I introduce on behalf of Mr Samoei Ruto, myself, David  
22 Hooper, and Mr Kioko Kilukumi, who sits next to me, both counsel representing  
23 Mr Ruto. And before I sit down, can I just indicate both in respect of him and  
24 Mr Katwa as well, who as you can see has joined us and will in a moment introduce  
25 himself, that what happened was that they went to the back entrance and were

1 denied entry and couldn't convince the people at the door that they were due to come  
2 this way, into this court, rather than go into the public gallery and this is what caused  
3 the delay. So they then had to go -- well, you know the geography of the court and  
4 the difficulties that that must have led to. So may I apologise on both their behalves;  
5 they were both distraught to find themselves here and not in court and delaying the  
6 Chamber.

7 JUDGE TRENDAFILOVA: Thank you, Mr Hooper. If the Defence teams would  
8 have next time difficulties, I shall ask the Registrar that some people from her staff  
9 would help the Defence counsel so that we are very strict about the timing and that  
10 we do a proper job in the interest of everyone.

11 So, after the Defence team of Mr Ruto, could we proceed with the Defence team of  
12 Mr Kosgey.

13 MR ORARO: Madam President, may I on behalf of the Defence team of Mr Kosgey  
14 introduce myself, George Oraro, and my assistant counsel, Allan Kosgey.

15 JUDGE TRENDAFILOVA: Thank you, Mr Oraro. And, finally, the Defence team  
16 of Mr Sang.

17 MR KATWA: May it please your Honour, my name is Katwa. I am the lead  
18 counsel for Mr Sang. I am present alone today. Your Honour, may I apologise for  
19 the delay that caused us not to have been here on time. The reason is because we  
20 were denied access from the back entry and, your Honour, we very kindly request  
21 that you accept our apology.

22 JUDGE TRENDAFILOVA: Thank you, Mr Katwa. Next time you will be assisted  
23 so that the job is done properly.

24 Finally, the representatives of the Registrar.

25 MS DAHURON-JACOBY: Good morning, Judge. The Registry is represented

1 today by Mr Ian Blacker, who is responsible for IT services and communications  
2 services within the Court, and we also have Mr Pieter Vanaverbeke, who is legal  
3 coordinator within the Court Services Division, and we have Cyril Laucci, Registry  
4 liaison officer and officer of the Registrar, and Sam Shoamanesh, head counsel,  
5 assistant unit, Counsel Support Section, and myself, Charlotte Dahuron-Jacoby, Chief  
6 of Court Management Section.

7 JUDGE TRENDAFILOVA: Thank you.

8 Finally, I have, for the record, to present myself. I am Judge Ekaterina Trendafilova,  
9 the JUDGE of Pre-Trial Chamber II, who has been designated to be a Single Judge for  
10 the case of The Prosecutor versus Mr Ruto, Mr Kosgey and Mr Sang, and of course  
11 I'm in charge for the proper conduct of the disclosure proceedings.

12 With me are the legal officers and legal support staff that are working with the Judges  
13 of this Chamber: The senior legal adviser, Mr Gilbert Bitti, the senior legal adviser  
14 of the Pre-Trial Division, legal officer Eleni Chaitidou; legal support staff Mr Simon  
15 Grabrovec; my legal officer Mr Mohamed El Zeidy; the legal officer Silvestro  
16 Stazzone; we have over there also Mr Niccolo Pons; and Habiba, who is our intern to  
17 the Chamber.

18 So, as we know, the purpose of today's status conference is to discuss a number of  
19 issues that would give us the necessary information to establish a working judicial  
20 calendar regarding the disclosure proceedings and I'm expecting that I receive  
21 information, mainly of course from the Prosecutor and his team, because the  
22 Prosecutor is the triggering force in these proceedings.

23 So, now, most of the information is expected to come from the left, from Ms Tai and  
24 her team. Of course, the Defence will also be expected to make a contribution so  
25 that the Chamber entertains all the important points to be made with regard to the

1 disclosure calendar to be established, with the decision to be taken in due course. Of  
2 course, the Registry will intervene where necessary, because the Registry is the  
3 channel of communication. All the disclosed pieces of evidence will be  
4 communicated, as Rule 121 obliges us to follow this provision of the law that it be  
5 communicated to the Registry.

6 As I said, we have limited time that is allocated to us. We have to finish up until  
7 11 o'clock, that is why I would ask very much the parties and the Registrar - the team  
8 of the Registrar - to be very -- to confine their participation to the subject matter of  
9 today's status conference, to be concise, to be to the point, and utmost expeditious,  
10 professional and cooperative.

11 Of course, I would ask everyone on behalf of the interpreters and the court  
12 officers -- the court reporters, that everyone, including myself, speak slowly, and  
13 before you answer a question, to make a pause.

14 So without further ado, I would like to proceed with the four groups of questions to  
15 be discussed. You remember that there was an oral decision that was issued at the  
16 end of the initial appearance hearing ten days ago and there, in this decision, I have  
17 identified the number of questions that the Single Judge will need some answers  
18 thereto and, of course, the observations from the Defence teams, I have grouped them  
19 into the same questions, into four sets of questions.

20 With regard first to the witnesses as the so-called evidence *stricto sensu*, I would like  
21 that the team of the Prosecutor would give us the following information, whether you,  
22 Ms Tai and your team, intend to call live witnesses at the confirmation hearing. If  
23 your answer will be in the positive - in the affirmative - then how many, if you can at  
24 this early point in time of the disclosure proceedings, if you could give us some, not  
25 final number of witnesses live if you would like to bring; and, of course, pursuant to

1 Rule 76, the prior witness statements that you have, how many prior witness  
2 statements you envisage to present to the Defence and thereafter to be communicated  
3 to the Chamber, and the approximate number of pages.

4 If you do not intend to bring live witnesses, still how many witness statements you  
5 intend to present to the Defence, to disclose to the Defence and to use them for the  
6 purposes of the confirmation hearing; and how many prior statements, if you can  
7 give us an overall number of these prior witness statements and the approximate  
8 number of pages you are going to disclose; and finally, do you intend to disclose, for  
9 the purposes of the confirmation hearing, full witness statements, or summaries  
10 thereof, as provided for in Article 61(5) and Article 68(5).

11 At this point, I give you the floor to answer these questions. Thank you, Ms Tai.

12 MS TAI: With respect to your first question whether or not the Prosecution intends  
13 to call any live witnesses, the Prosecution would state that at this time, yes, it does  
14 intend to call live witnesses for the confirmation hearing.

15 We can only provide an estimate at this time; we can provide the Court with no more  
16 than ten live witnesses. That would be our approximation at this time.

17 JUDGE TRENDAFILOVA: Further on, with regard to the witness statements of  
18 these live witnesses --

19 MS TAI: Yes.

20 JUDGE TRENDAFILOVA: -- that have been presented to your office by the  
21 investigative teams, prior witness statements?

22 MS TAI: Were they investigated, your Honour, is that the question?

23 JUDGE TRENDAFILOVA: You said that at this point in time your intention is to  
24 bring ten live witnesses.

25 MS TAI: Yes, no more than.



1 JUDGE TRENDAFILOVA: No more than that. And what about their prior  
2 statements?

3 MS TAI: Yes, ma'am. Their prior --

4 JUDGE TRENDAFILOVA: Approximate number of pages, and so on.

5 MS TAI: The approximate number of pages is approximately 2500.

6 JUDGE TRENDAFILOVA: And do you intend to present the full witness statements,  
7 or summaries thereof?

8 MS TAI: Madam President, at this time, we believe we would be presenting full  
9 statements. Of course, that is subject to change, given the early stage.

10 JUDGE TRENDAFILOVA: Of course, I understand. Do you have something else  
11 to add to this first set of questions?

12 MS TAI: No, Madam President.

13 JUDGE TRENDAFILOVA: Thank you very much.

14 Now I turn to the Defence, of course, reminding the Defence of their obligation  
15 pursuant to Rule 121(6), that if the Defence intends to present evidence for the  
16 purposes of the confirmation hearing, the Defence has to provide a list of that  
17 evidence no later than 15 days before the commencement of the confirmation hearing.  
18 If, of course, the Defence teams would like at this early point in time in the disclosure  
19 proceedings to give us some information about their intention to present at all  
20 evidence, because it's up to the Defence - you might refrain from presenting any  
21 evidence on your behalf - but if you would like to present evidence, the same  
22 questions that I posed to the Prosecution's team go to the Defence teams: Whether  
23 you intend to present live witnesses, number 1, whether you intend to present prior  
24 witness statements and, finally, whether you intend to present full witness statements  
25 or just summaries thereof.

1 The floor is over to you, Mr Hooper, if you would like to make a point.

2 MR HOOPER: Yes. Thank you, on behalf of the Ruto team, as it were. The  
3 confirmation process will be contested. It will be strongly contested. And so, as a  
4 product of that, the Chamber can expect that there will be live witnesses. We are,  
5 despite as I think the Chamber knows, various efforts that have been made over the  
6 past months, still very much in the dark as to the nature of the evidence against us,  
7 and until we have disclosure, we're really not in a position to know which parts of the  
8 Prosecution case are parts that we would contest, and contest through oral testimony.  
9 We know that right from the outset this Court has been very concerned to stress to  
10 the Prosecutor that the 30-day minimum is a minimum and that the Court has every  
11 expectation, as we, the Defence has, that disclosure will be made very, very much  
12 earlier than that.

13 So we are really -- our reaction is going to be a product of disclosure. There are  
14 inevitably difficulties in a country such as Kenya in making investigations. I'm  
15 talking here as from the Defence point of view. So unless there is good cause, if the  
16 Prosecution are presently armed with material which we anticipate they must be, as  
17 they sought a summons and obtained a summons, then we would hope that we  
18 would see disclosure starting now and being finalised well before the expected date  
19 of confirmation which, in terms of this part of the case, is of course 1 September.

20 So going on to the other questions you've raised, we're not really in a position today  
21 to indicate numbers, numbers of witnesses, but there are a number of substantial  
22 points inevitably that we can anticipate are going to be raised by the Prosecution that  
23 need to be answered or may need to be answered, and our preference is to answer it  
24 by way of oral testimony.

25 So we would think that, at the moment, a minimum of about - and this is just an

1 indication for the Chamber - of about 15 oral witnesses seems in respect of this part of  
2 the case likely and I speak, of course, just in respect of Mr Ruto at this stage. So  
3 that's the position. I can't indicate now whether any of those witnesses could,  
4 perhaps, be used by way of written testimony, nor can I indicate at this stage really  
5 whether such witnesses would be providing statements or summaries at this stage.

6 JUDGE TRENDAFILOVA: Thank you, Mr Hooper. We all understand that the  
7 Defence strategic approach and preparation for the confirmation hearing depends on  
8 the Prosecutor, and we are going to do everything necessary respecting the principle  
9 of expeditiousness and the rights of the Defence, that we establish disclosure calendar  
10 that is going to make a contribution to the smooth and -- to the smooth and  
11 transparent, and disclosure that wouldn't be only 30 days before the confirmation  
12 hearing.

13 And I'm only referring to the operative part of the disclosure decision, paragraph  
14 letter (d), according to which the Chamber orders the parties to submit the evidence  
15 in due time, preferably much earlier than the deadlines envisaged in Rule 121(3) to  
16 (6).

17 So this is going -- this is the purpose of the judicial calendar. So the Chamber is  
18 aware of this problem and is going to take appropriate measures in establishing a  
19 calendar that is going to properly handle the disclosure so that the Defence is not  
20 flooded the enormous amount of information just 30 days before the commencement.

21 MR HOOPER: Exactly.

22 JUDGE TRENDAFILOVA: Because the Chamber is very much motivated to  
23 commence the confirmation hearing as we have decided, 1 September. Thank you.  
24 What about the Defence team of Mr Kosgey, Counsel Oraro? Would you like to  
25 make some comments, observations, or make some statements?

1 MR ORARO: Madam President, yes, I would wish to make a couple of comments.  
2 First and foremost, as the Chamber is well aware, the application for summons was  
3 based on evidence which was very heavily redacted. So as we are, we are not  
4 conversant with the evidence which will be led against the suspect, and once we have  
5 the evidence we shall be compelled to investigate, test, to consider and see how many  
6 witnesses we can summon.  
7 The only proposition we can make for the moment is that as the Prosecution have  
8 indicated that they intend to call witnesses, we shall definitely call witnesses in  
9 rebuttal to the extent that any evidence by those witnesses implicate our client.  
10 That's the comment I would wish to make for the moment.  
11 JUDGE TRENDAFILOVA: Thank you. Thank you, Counsel Oraro. I now turn to  
12 the counsel of Mr Sang, counsel Mr Katwa.  
13 MR KATWA: Madam President, we propose to call live witnesses in rebuttal to  
14 what the Prosecution evidence will have brought out. Tentatively, we may call 15  
15 witnesses. We propose in every likelihood to produce our witness statements in full,  
16 not redacted. We are not in a position to comment on how many pages our bundle  
17 of response would be, because that would depend on what the Prosecution will say.  
18 Madam President, that will all depend on three issues: The first one is the extent of  
19 the disclosure the Prosecution will give; the second issue, Madam President, is that  
20 we will pray that as the Court sets up the calendar it takes into account its ruling on  
21 our access to Defence witnesses in its ruling as to access to witnesses. And we  
22 would wish to point out at this point that the 15 days prior to hearing, considering  
23 that ruling, may not be adequate and we pray that that accommodation be taken into  
24 account.  
25 That's all we wish to say, Madam President.

1 JUDGE TRENDAFILOVA: Thank you, Mr Katwa. Would you like to make some  
2 comments, Ms Tai, or members of your team, to the observations made by the  
3 Defence?

4 MS TAI: No, your Honour, I have none. (Microphone not activated) ... excuse me.  
5 I have no observations with respect to the comments of the Defence. However, I do  
6 wish to correct one previous statement or a figure that I gave Madam President at the  
7 beginning. I believe the question was, "What is the total number of pages of these  
8 statements?" And my response was 2,500.

9 JUDGE TRENDAFILOVA: Yes, correct.

10 MS TAI: I wish to correct that to 4,700 and that is my error. I have nothing further.

11 JUDGE TRENDAFILOVA: Thank you. Thank you very much, Ms Tai. If we are  
12 finished with Rule 76, actually identifying the responsibilities of the two parties,  
13 mainly of the Prosecutor with regard to the witnesses, we are going now to move to  
14 Rule 77, which are material in possession or control of the Prosecutor that is subject to  
15 inspection pursuant to Rule 77. This provision is referring to documents, books,  
16 photographs and other tangible objects that are either material for the Defence or are  
17 intended to be used by the Prosecutor for the purposes of the confirmation hearing,  
18 or were obtained from or belong to the suspects.

19 I would ask the Prosecutor first, and thereafter the Defence, how, first of all whether  
20 the Prosecutor intends to grant free access in a location to be decided by the  
21 Prosecution's office, access to the Defence teams to such books, documents,  
22 photographs and other tangible objects that, after having been inspected by the  
23 Defence teams, they will decide which pieces of these tangible objects they need for  
24 the purposes of the defence.

25 So not to be done vice-versa, because I remember in the Bemba case there were some

1 initial practices that actually were not in conformity with the proper interpretation of  
2 Rule 77 and, if you have some overall assessment of the number of such objects, the  
3 Chamber will be grateful to have some initial information on this point.

4 MS TAI: Thank you, Madam President. Yes, we do have some information on the  
5 point of Rule 77. Our approximation is approximately 185 items, including  
6 documents that fall within the scope of Rule 77.

7 JUDGE TRENDAFILOVA: Thank you, Ms Tai. I turn now to the Defence teams,  
8 reminding them the provision of Rule 78 and 79; Rule 78 providing the same  
9 obligations of the Defence as we have a minute ago discussed with the Prosecutor's  
10 office, that some tangible objects, photographs, books, documents that you intend to  
11 use for the purposes of the confirmation hearing at a location that the Defence teams  
12 find appropriate to grant access of the Prosecutor to inspect them.

13 And, of course, I refer to Rule 79, if the Defence teams would like to raise the issue of  
14 alibi, or some reasons for excluding the individual criminal responsibility of your  
15 clients, that these be done sufficiently in advance to enable the Prosecutor to prepare  
16 adequately and to respond. So shall we start again with you, Mr Hooper?

17 MR HOOPER: Well, those rules obviously will almost certainly all apply but we're  
18 not, in terms of items, in a position to identify them at the moment, and in terms of  
19 clear Defence issues under Rule 79, we are not yet in a position to know exactly which  
20 areas they are going to apply to, but I anticipate that those -- that situation will arise  
21 in this case.

22 JUDGE TRENDAFILOVA: Thank you. I turn to counsel, Mr Oraro, if you would  
23 like to make a comment on this.

24 MR ORARO: Madam President, we will comply with the obligation imposed on our  
25 client as far as Rule 77 and 79 are concerned when the time comes, yes.

1 JUDGE TRENDAFILOVA: Thank you. And finally, Mr Katwa.

2 MR KATWA: Madam President, in all likelihood we will have alibi and we will be  
3 able to supply items as required by the said Rule but that would really depend on  
4 what disclosure we receive from the Prosecution.

5 JUDGE TRENDAFILOVA: Thank you very much, Mr Katwa. Now I turn, if there  
6 are no observations on behalf of the Prosecutor's team --

7 MS TAI: (Microphone not activated) ...

8 JUDGE TRENDAFILOVA: Thank you. I turn to the third set of issues that I would  
9 like to hear from the two parties and it is related to whether some redactions and  
10 protective measures to be taken with regard to some witnesses, victims, other people  
11 at risk.

12 I would ask the Prosecutor whether the Prosecutor intends to request that certain  
13 documents be disclosed to the Defence in a redacted form pursuant to Rule 81 and  
14 would you provide us with an estimate of the amount of such documents and  
15 whether you intend to request the protective measures, some protective measures to  
16 be put in place in order to protect witnesses, victims or other persons at risk, prior to  
17 disclosing the names of the witnesses or disclosing certain documents.

18 Of course I ask the parties to be mindful that we are in public session, so just limit  
19 your answer to some very common comments without going into details whether  
20 you have identified some witnesses, victims, other people at risk that you would like  
21 to approach the Chamber with regard to some protective measures, whether you  
22 have already contacted the Victims and Witnesses Unit and if you would like to  
23 approach the Chamber with a request for redactions of some documents whether you  
24 could give us some information about an overall number of pages of these documents.  
25 You have the floor, Ms Tai.

1 MS TAI: Thank you, Madam President. With respect to your first question, which  
2 I understand to be documents that fall under Rule 81, we do have an estimate of  
3 materials that would be disclosed in redacted form or that we wish to disclose in  
4 redacted form.

5 JUDGE TRENDAFILOVA: You remember that you make proposals to the  
6 Chamber and, of course, substantiating your proposals and finally it is the Chamber's  
7 responsibility to approve these redactions.

8 MS TAI: That's correct, Madam President. We understand.

9 JUDGE TRENDAFILOVA: And the approximate amount?

10 MS TAI: 606 documents, and we have calculated the pages at this time to be  
11 approximately 11,000 pages.

12 JUDGE TRENDAFILOVA: About some protective measures?

13 MS TAI: Yes, ma'am. With respect to protective measures, the Prosecution has  
14 been working with VWU and will continue to cooperate with them for the purposes  
15 of ensuring protective measures are in place prior to disclosure.

16 Your Honour, protection of witnesses is the essence, or the issue, in our particular  
17 case. Thus far with our relationship with VWU and the processes that the Office of  
18 the Prosecutor has employed, we have taken great care in protecting those  
19 individuals that we come into contact with. This has included minimising contact  
20 with individuals who reside within the country; for example, refraining from  
21 interviewing witnesses in country.

22 However, we wish to bring to Madam President's attention that there's a limited  
23 capacity to protect individuals under the circumstances that we are operating under.  
24 What the Prosecution means by that statement is we are operating in a situation  
25 where the suspects remain in positions of power, where an environment where



1 witnesses frequently disappear or otherwise become uncooperative during domestic  
2 prosecutions and, lastly, that we, the Prosecution, will be presenting a detailed filing  
3 on this issue later this week.

4 JUDGE TRENDAFILOVA: Thank you very much, Ms Tai. Is this all that you  
5 would like to share with the Chamber on this point?

6 MS TAI: Just finally, your Honour, the Prosecution wishes to make it very clear that  
7 we are able, the process is ongoing - the disclosure process - and we wish to provide  
8 information that does not contain this sensitive information. So I would really like  
9 to underscore that we are more than happy to do that.

10 JUDGE TRENDAFILOVA: Thank you, Ms Tai.

11 I would ask the Defence counsels if you would like to make comments on this. I  
12 understand that it's quite premature to ask the Defence teams whether you are  
13 considering approaching the Chamber with requests for redactions regarding some  
14 witness statements or whether you are considering any protective measures. So,  
15 Mr Hooper.

16 MR HOOPER: As far as I know, there will be no applications for redactions or  
17 protective measures for witnesses. In terms, if I may just pass a few comments in  
18 respect of what my friend has said, Ms Tai has said, in respect of the Prosecution's  
19 view. They mention, is it right, 11,000 pages of redactions? I don't know what  
20 proportion of the 4,700 pages of statements that they are going to rely on, which I  
21 assume are mainly transcripts, fall within the 11,000. It is a very high number.  
22 We are very aware of the great efforts that Pre-Trial Chambers, and Chambers  
23 generally, in this Court make to ensure that redactions are kept to a minimum, but  
24 even so it's been certainly my observation that when eventually redactions are lifted,  
25 one is often puzzled by the reason or what the reason was for particular redactions to

1 have taken place, and that's even despite very careful supervision by the Chamber of  
2 the Prosecution's requests.

3 So what we'd ask and exhort, as I know I think is probably reflected in the Chamber 's  
4 own view, is that the Prosecution approach this issue of redactions with very great  
5 care and that they only redact what, in the long term, is going to be properly  
6 justifiable in hindsight as a redaction made, as I understand it, solely for the  
7 protection of particular witnesses.

8 Secondly, in respect of protective measures that the Prosecution are seeking for their  
9 witnesses, our only concern is that, of course, we recognise that in an appropriate case  
10 a witness may be subject to protective measures, but we don't lose sight of the fact  
11 that particularly, for example, within the African context, a protective measure that,  
12 for example, provides resettlement or other opportunities, is a huge inducement to  
13 give evidence. And when you have a huge inducement to give evidence, you have  
14 an inducement, if necessary, to give false evidence; and we hope that the Prosecution  
15 are very alert to that.

16 We notice that in the past it's our view that the Prosecution, from time to time, have  
17 brought pressure to bear on the Witness and Victim Unit to bring people within the  
18 protective measures scheme when the VWU, who have a huge contribution and make  
19 the criteria in respect of that, or apply the criteria in respect of that, really have  
20 dissented from the Prosecution views. And, again, we hope that the Prosecution  
21 don't, in fact, pursue anything like that in the present case. Thank you.

22 JUDGE TRENDAFILOVA: Thank you, Mr Hooper. The only observation that  
23 I can make is that with regard to the pages, 11,000 pages, I do not believe that the  
24 Defence -- team of the Prosecutor would ask that the 11,000 pages be intensively  
25 redacted. So this is the number of pages, and maybe there could be minimum

1 proposals for redactions, and the Chamber is going to scrutinise very carefully the  
2 approach of the Prosecutor and we are going to take the appropriate decisions so that  
3 we safeguard the rights of the Defence to properly prepare for trial.

4 Mr Oraro.

5 MR ORARO: Madam President, I would first wish to make a few factual  
6 observations. As a matter of fact, the Prosecution, from the commencement, has  
7 contended that it had taken protective witnesses and flown most of the witnesses  
8 outside the country, and that was repeated as late as last week by the Chief  
9 Prosecutor. So, in looking at application for protective measures and redaction, I do  
10 think that that is an issue which ought to be taken into account and clearly brought  
11 by the Prosecution to the attention of the Chamber .

12 In addition thereto, I hope that, going forward, the Prosecution will only go for such  
13 protective measures and redaction that does not erode the rights of a client of ours  
14 who, unlike the persons the Prosecutor is talking about, is not in power. Our client  
15 is not in power and really has no means of interfering with witnesses, and that ought  
16 to be taken into account.

17 And, finally, I do think that there is cooperation between the ICC and the Kenya  
18 government and that ought to be taken into account in applying for protection  
19 measures and looking at the issue of redactions.

20 JUDGE TRENDAFILOVA: Thank you, Mr Oraro. Finally, it's the decision of the  
21 Chamber related to all these issues, so --

22 MR ORARO: I do appreciate that, Madam President.

23 JUDGE TRENDAFILOVA: Yes.

24 MR ORARO: But the Prosecution has made promises to the Kenyan public severally  
25 that they need not worry, they have made sufficient -- sufficient steps to ensure that

1 witnesses are fully protected and they are not in the country. So it is important to  
2 draw that to the attention of the Prosecutor.

3 JUDGE TRENDAFILOVA: Thank you. Then I will proceed with Mr Katwa.

4 MR KATWA: Madam President, we tentatively confirm that we may have some  
5 requests for protective measures of some of the witnesses, but we can't say that for a  
6 fact now depending on what becomes of the disclosure. It is unlikely that we will  
7 seek any redactions of any of the documents.

8 Madam President, it has been contended by the Prosecution that their concerns in  
9 terms of the influence some of the suspects have and, related to that, the security of  
10 some of the witnesses. Madam President, it is the contention of my client that he has  
11 never been asked to cooperate one way or the other, and that issue does not apply to  
12 him in any form or shape. And he confirms, which I do now, that he's willing to  
13 cooperate with the Prosecution, within reason.

14 Madam President, we pray that when the motion for protective measures is brought,  
15 the Court do take regard of what Mr Hooper has said and which we share, being the  
16 extent to which those protective measures may be in themselves an inducement to  
17 make representations that are not necessarily accurate, and this is an issue which we  
18 will take up in the course of time.

19 Lastly, we will pray that when the motion to do redaction of the 11,000 pages is made  
20 by the Prosecution, we will pray that the Court do apply its mind and consciously  
21 and deliberately decide whether or not it is justified, so as not to prejudice the  
22 Defence. That's all we wish to say, Madam President.

23 JUDGE TRENDAFILOVA: Thank you, Counsel Katwa. As I said, the Chamber is  
24 in charge with all these issues and we are going to very, very carefully, diligently and  
25 with respect for the rights of the accused and respect for the lives and security of

1 victims, witnesses as well and other persons at risk, to finally take our decision.  
2 If there are no comments on this third set of questions to be discussed, I shall pass on  
3 to the last one.  
4 Ms Tai, you don't want to intervene?  
5 MS TAI: (Microphone not activated)  
6 THE INTERPRETER: Microphone, please.  
7 MS TAI: My apologies. Just to reiterate, it is the Prosecution's position, of course,  
8 that the disclosure of these documents should only occur after protection measures  
9 are in place and after a final decision is made on the challenge to admissibility which  
10 is pending before the Chamber presently.  
11 JUDGE TRENDAFILOVA: The Chamber is going to deal with this issue because the  
12 Prosecutor raised it twice during the two cases. There were explanations based on  
13 the law; namely, Article 19(8) of the Rome Statute. Still, we have received from the  
14 Prosecutor, in writing, an application to this effect and the Chamber is going to take a  
15 decision quite soon on this issue.  
16 MS TAI: Very well.  
17 JUDGE TRENDAFILOVA: And is going to guide the Prosecutor's team in this case  
18 how to proceed with disclosure.  
19 MS TAI: Thank you.  
20 JUDGE TRENDAFILOVA: Finally -- did you want to say something, Mr Hooper?  
21 MR HOOPER: Just on that comment, it's been our understanding, in any event, that  
22 in the course of the initial appearance this Chamber made a decision in respect of  
23 disclosure in relation to whether it would be contemporaneous with or follow the  
24 admissibility challenge arguments.  
25 That's not been appealed. That decision was not appealed. And then later, and

1 obviously out of time in respect of any appeal, we see this application by the  
2 Prosecution for a review. So we're rather puzzled as to the position. And I  
3 mention that now because, of course, we are in due course meant to respond in  
4 respect of the request that the Prosecution has put in when, in fact, as far as we can  
5 see, there's an ab initio problem for the Prosecution not having appealed the original  
6 order in time and they then have to justify why that was the case. So that's just a  
7 problem.

8 And the other matter is - and I just voice it and I know it's very much in the  
9 Chamber's mind, that in terms of delaying disclosure, or disclosure being a product  
10 of the success of protective measures for particular witnesses, that's a sure break on  
11 the Prosecution's disclosure and we know that the Court will be looking very  
12 carefully at ways of taking that into account, if I can put it like that, through perhaps  
13 these 11,000 pages of redactions, for example, that we've heard about. There's  
14 nothing that we can see at the moment that would necessarily prevent maximum  
15 disclosure and, in due course, as protective measures come to bite, then redactions  
16 can be lifted. But we certainly hope that the Prosecution, who can itemise these  
17 matters now, are in a position to let us have what they've got.

18 JUDGE TRENDAFILOVA: Mr Hooper, I just wanted -- didn't want to interrupt you,  
19 but I need to make a clarification. During the initial appearance I just explained and  
20 replied to the Prosecutor's assertion that disclosure has to stop due to the  
21 admissibility challenge, but it was not in an oral decision that was taken. So it was  
22 just a simple explanation in order to put the Prosecutor on notice about Article 19(8)  
23 of the Rome Statute. Thereafter, the Prosecutor applied to the Chamber as provided  
24 by the statutory documents, and we are going quite soon to respond thereto.

25 MR HOOPER: That's a very helpful comment, if I may say so, from your Honour.

1 Thank you.

2 JUDGE TRENDAFILOVA: Thank you. We turn to the last set of issues on which  
3 I would like the Prosecutor and the Defence to make their submissions. Actually, to  
4 indicate, Ms Tai, the overall amount of documents that contain potentially  
5 exculpatory information pursuant to Article 67(2).

6 We have received a report from the Prosecutor on Thursday giving us the  
7 information as requested in a decision setting up the deadline 15 April to receive the  
8 response that was instead submitted to the Chamber on the 14th, one day earlier,  
9 where the Prosecutor has identified only two documents that he has received  
10 pursuant to Article 93(8) of the Rome Statute - this is actually the State  
11 cooperation - and that he has not received any documents or information pursuant to  
12 Article 54(3)(e) or pursuant to -- or containing some information pursuant to Rule 77.  
13 So the Prosecutor informed us that he had already requested the information  
14 provider for the consent to disclose these two documents to the Defence. And on  
15 this point I will stop, asking the parties to make some observations.

16 So, on the two documents of potentially exculpatory nature received pursuant to Rule  
17 93(8), and the Prosecutor has already proceeded with consultations with the  
18 information provider to receive the consent of the information provider, which  
19 implies that these two documents, after this consent will be granted by the  
20 information provider, will disclose these two documents to the Defence.

21 MS TAI: Your Honour, in fact, consent has already been obtained after the filing of  
22 that document on the 14th.

23 JUDGE TRENDAFILOVA: Thank you, Ms Tai. Very expeditious. So, you are  
24 ready to disclose these two documents to the Defence teams.

25 On behalf of the Defence teams, would you like to make any observations on the

1 documents, evidence of potentially exculpatory nature? You're going to receive --

2 MR HOOPER: No.

3 JUDGE TRENDAFILOVA: Okay. No. Mr Oraro?

4 MR ORARO: In view of the consent having been received, I have no comment.

5 JUDGE TRENDAFILOVA: Yes. And finally Mr Katwa, if you would like to make  
6 a comment on this.

7 MR KATWA: (Microphone not activated)

8 JUDGE TRENDAFILOVA: Okay. On my behalf, we ended up, what was very  
9 important for the Chamber, to receive information so that we can proceed with  
10 our -- so, I'm sorry, I have to slow down. So I myself am not very strict about the  
11 requests that I address to the parties and participants, so the interpreters, please,  
12 please do excuse me, and the court reporters.

13 But we actually came to the end of our status conference. If there are no other  
14 comments, observations, issues to be raised, we did our job quite expeditiously, and  
15 being very strict about the subject matter of today's hearing, receiving information for  
16 the purposes of a decision to be taken establishing a disclosure calendar. And we  
17 are not going to go beyond the strict subject matter of today's hearing. Mr Hooper, I  
18 see that if you'd like --

19 MR HOOPER: I was about to go beyond it.

20 JUDGE TRENDAFILOVA: Well, Mr Hooper, I would like you to rest assured that  
21 you are going to have status conferences of this kind, in addition to you having all the  
22 opportunities to address any issue of your concern to the Chamber in writing, but just  
23 I have to check the availability of this courtroom for May and we are going to have  
24 another status conference of this kind, in order to see whether the disclosure  
25 proceedings is moving smoothly, whether it's helpful for the two parties so that we



- 1 advance to 1 September very well-prepared.
- 2 MR HOOPER: Very well.
- 3 JUDGE TRENDAFILOVA: So then I would like to thank the parties, the
- 4 representatives of the Registrar, the interpreters, the court reporters, the security
- 5 officers, the court staff team, and the legal officers that are helping the Chamber in
- 6 these two cases. And this puts an end to our hearing. The hearing is closed.
- 7 THE COURT USHER: All rise.
- 8 (The hearing ends at 10.20 a.m.)