

Hearing

(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. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and
5 Mohammed Hussein Ali - ICC-01/09-02/11
6 Presiding Judge Ekaterina Trendafilova, Judge Hans-Peter Kaul and Judge Cuno
7 Tarfusser
8 Hearing
9 Friday, 8 April 2011
10 (The hearing starts in open session at 2.30 p.m.)
11 THE COURT USHER: All rise. The International Criminal Court is now in session.
12 PRESIDING JUDGE TRENDAFILOVA: Good afternoon to everyone. Please be seated.
13 The hearing on the initial appearance is now in session. I would like to welcome
14 everyone who is here today in the courtroom. Mr Muthaura, Mr Kenyatta - please do not
15 stand up - and Mr Ali, on behalf of the Chamber I welcome you to this meeting.
16 I welcome the Office of the Prosecutor, with Mr Moreno-Ocampo present with his team.
17 I would like also to welcome the Defence teams of the three suspects, the Registrar with
18 her team. I greet the interpreters, the court reporters, the court staff and the security
19 officers who diligently assist us in our work. Finally, I greet those in the public gallery
20 and those outside the courtroom following this hearing today.
21 Before we get our proceedings underway, I would ask the court officer to usher the
22 photographers into the courtroom, because the Chamber has authorised video recording
23 and taking of photographs for one minute-and-a-half, and no longer.
24 Good afternoon. You have one minute-and-a-half, no longer. Please take your pictures.
25 I do believe your time is over. Could you take pictures? So thank you.

1 I would now turn to the court officer and ask him to call the case, please.

2 THE COURT OFFICER: The case of The Prosecutor versus Francis Kirimi Muthaura,
3 Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11.

4 PRESIDING JUDGE TRENDAFILOVA: Thank you, court officer. On behalf of the
5 Chamber, I now ask the parties in this hearing and the Registrar to introduce themselves,
6 and starting with the Office of the Prosecutor. But before you start, Mr Prosecutor, I
7 would like to ask everyone who is going to take the floor today to speak slowly and to
8 pause before responding to any question, in order to provide the interpreters the time
9 necessary to proceed with their duties.

10 So, Mr Prosecutor, would you introduce yourself and the members of your team that are
11 present in today's hearing.

12 MR MORENO-OCAMPO: Thank you, your Honour. Your Honour, the Office of the
13 Prosecutor is represented for, in this case, by Adesola Adeboyejo, who will be the senior
14 trial attorney in charge of this case; Cynthia Tai, senior trial attorney for the case too;
15 Akingbolahan Adeniran, who is a trial lawyer of the case; Shamiso Mbizvo, who is the
16 associate international cooperation adviser; Karen Corrie, associate trial lawyer; and Grace
17 Goh, case manager; and myself, the Prosecutor, Luis Moreno-Ocampo.

18 PRESIDING JUDGE TRENDAFILOVA: Thank you, Mr Prosecutor.
19 I turn to the Defence teams and, as far as in this case we have three suspects and
20 consequently three different teams, the Chamber suggests that the Defence teams present
21 themselves in the order adopted by the Prosecutor in his case. Thus, I ask the team for
22 Mr Muthaura, please.

23 MR KHAN: Madam President, I am most grateful, your Honours. Ambassador
24 Muthaura, who sits to my left, is represented by Mr Kennedy Ogeto, co-counsel, and legal
25 assistant Mr Muriuki Mugambi, who sits in the middle of the second table to the back of

1 the court. My name is Karim Khan.

2 PRESIDING JUDGE TRENDAFILOVA: Thank you, Mr Khan. Now it's the turn of
3 Mr Kenyatta's Defence team.

4 MR KAY: I'm Steven Kay of Queen's Counsel, representing Mr Uhuru Kenyatta. My
5 co-counsel is Gillian Higgins and my legal assistant is Benjamin Joyes. We're all of the
6 English Bar.

7 PRESIDING JUDGE TRENDAFILOVA: Thank you, Mr Kay -- Counsel Kay. Now,
8 finally it's the Defence team of Mr Ali. Would you introduce yourself, please.

9 MR KEHOE: Yes, good afternoon, your Honours. My name is Gregory Kehoe on
10 behalf of General Ali. The Defence team consists of Mr Evans Monari and the gentleman
11 that's seated to my right, Mr Gershom Otachi.

12 PRESIDING JUDGE TRENDAFILOVA: Thank you, Counsel Kehoe.

13 Now I turn to the Registrar. Madam Registrar, who is with you today?

14 MS ARBIA: Madam President, your Honours, with me today is Marc Dubuisson,
15 Director of Court Services, and Cyril Laucci, legal officer. Thank you.

16 PRESIDING JUDGE TRENDAFILOVA: Thank you, Madam Registrar. Lastly, I will
17 introduce the Judges of the Bench and our legal support staff. On my right is Judge
18 Hans-Peter Kaul, on my left Judge Cuno Tarfusser. My name is Ekaterina Trendafilova
19 and I am the Presiding Judge of Pre-Trial Chamber II. Seated in front of the Bench are
20 the senior legal adviser Mr Gilbert Bitti; legal officers Eleni Chaitidou and Mohamed El
21 Zeidy; associate legal officer Silvestro Stazzone. Also in the courtroom are local support
22 staff Simon Grabrovec and Niccolo Pons, as well as Habibatou Gani, an intern to the
23 Chamber.

24 Having concluded with the presentation of those present in the courtroom today, I would
25 like to turn to Mr Muthaura. Please, Mr Muthaura, would you kindly stand up and

1 introduce yourself by telling us your name, your date and place of birth and finally your
2 current profession. Please do remember to switch on your microphone.

3 MR MUTHAURA: Madam President, my name is Francis Muthaura. I was born in
4 Mariene, Central Meru district of Kenya. I am currently Permanent Secretary, Head of
5 Public Service and the Secretary to the Cabinet in the Office of the President of Kenya.

6 PRESIDING JUDGE TRENDAFILOVA: And the date of birth? Mr Muthaura, excuse
7 me, the date of your birth?

8 MR MUTHAURA: I was born on 20 October 1946.

9 PRESIDING JUDGE TRENDAFILOVA: Thank you very much. That is all that we ask
10 you to do right now.

11 Regarding your language proficiency, the Chamber has concluded on the basis of the facts
12 enumerated in your biography, as well as following your answer that you just gave us,
13 that you fully understand and speak English, and by this the Chamber is satisfied that the
14 requirement of Article 67(1)(a) and (f), that you fully understand one of the working
15 languages of the Court, the English language, is satisfied.

16 Now, in keeping with the established order in which the Chamber will address the
17 suspects, the same question will be put to Mr Kenyatta. Mr Kenyatta, would you kindly
18 stand up and introduce yourself by referring to your birthplace, of course your full name,
19 your birthplace and of course birth date.

20 MR KENYATTA: Thank you, your Honour. My names are Uhuru Muigai Kenyatta. I
21 was born on 26 October 1961 in Nairobi, Kenya.

22 PRESIDING JUDGE TRENDAFILOVA: And your current profession?

23 MR KENYATTA: I am currently, courtesy of the people of Gatundu South, their member
24 of Parliament, and courtesy of the duly-elected President of Kenya, I am Deputy Prime
25 Minister and Minister for Finance.

1 PRESIDING JUDGE TRENDAFILOVA: Thank you, Mr Kenyatta. You could be seated.

2 MR KENYATTA: Thank you, your Honour.

3 PRESIDING JUDGE TRENDAFILOVA: Again, as far as your English proficiency is
4 concerned, the Chamber concludes that, based on the facts as specified in your biography
5 and your answers, that you are fluent in English, and by this the Chamber is satisfied that
6 the same requirements, pursuant to the same provision of Article 67(1)(a) and (f), are met.
7 Finally, I turn to Mr Ali. Mr Ali, would you kindly stand up and tell us your full name,
8 your place and date of birth and current profession.

9 MR ALI: Thank you, your Honour. My names are Mohammed Hussein Ali. I was
10 born on 16 February 1956, in Eldoret, Kenya. Currently, I'm the Chief Executive Officer
11 of the Postal Corporation of Kenya.

12 PRESIDING JUDGE TRENDAFILOVA: Would you speak also louder, Mr Ali.

13 MR ALI: Yes, currently I'm the Chief Executive Officer of the Postal Corporation of
14 Kenya.

15 PRESIDING JUDGE TRENDAFILOVA: Yes. Thank you, you may be seated. Again,
16 with regard to your language proficiency, the Chamber is satisfied that the requirements
17 related to your proficiency in one of the working languages of this institution are met.
18 At this juncture, the Chamber would like to remind all the parties that they have certain
19 obligations under the statutory framework of this Court, as embodied in the Rome
20 Statute, the Rules of Procedure and Evidence, the Regulations of the Court and the
21 Code of Professional Conduct for Counsel.

22 The Judges expect the parties to continuously and in good faith respect the relevant
23 provisions concerning their conduct and we also like to state that any deviation therefrom
24 will not be tolerated. I make this point with regard to the present hearing, but also
25 referring to all the proceedings before the Chamber in the future. In light of what I have

1 just said, it should be underlined that the Chamber will not hesitate to implement
2 sanctions as provided for in Article 70, 71, Rule 170 and 171, if need be.

3 In this regard I would emphasise that these are not measures that the Judges of this
4 Chamber actively seek out to adopt. However, out of respect for the law governing the
5 International Criminal Court and to preserve the integrity of these proceedings, we will,
6 where necessary, do so.

7 I take the opportunity at this point in time to bring to the attention of Mr Muthaura,
8 Mr Kenyatta and Mr Ali a concern of the Chamber which I already raised in yesterday's
9 hearing. It came to the knowledge of the Chamber through following some articles in the
10 Kenyan newspapers that there are movements towards retriggering the violence in Kenya
11 by way of delivering dangerous speeches. I would like to remind the suspects - and note
12 I am not referring to anyone in particular; this is a general point to be made to all
13 suspects - such action could be perceived as a breach of one of the conditions clearly set
14 out in the summonses to appear, namely, to continue committing crimes within the
15 jurisdiction of the Court.

16 Accordingly, this might prompt the Chamber to replace the summonses to appear with
17 warrants of arrest. However, the Judges would not prefer to resort to such a drastic
18 measure and would rather (and we assume the suspects endorse this view) continue
19 carrying out the proceedings smoothly and respecting the liberty of the suspects so that
20 you could appear before us in all the proceedings to follow as free people.

21 Having dispensed with the necessary preliminary matters, the Judges of this Chamber
22 find it necessary to highlight the nature and the purpose of the initial appearance. Thus,
23 the Bench will convey to the parties its expectations that they strictly and professionally
24 hold on to the subject matter of today's hearing. Moreover, for the sake of clarity and
25 mindful of those joining us in the public gallery and those following this hearing outside

1 the Court, the next clarifications are deemed necessary.

2 First, today's hearing is not a trial. Second, it is not a confirmation hearing either. Third,
3 no evidence will be presented or collected. Fourth, nor will the issue of guilt or
4 innocence be addressed or decided.

5 The purpose of the initial appearance is governed by two provisions of the statutory
6 documents, Article 60(1) and Rule 121(1), which limit the scope of the initial appearance to
7 the following three issues: Namely, that the Pre-Trial Chamber is satisfied that the
8 person summoned to appear before it has been informed of the crimes which he or she is
9 alleged to have committed; second, that the Pre-Trial Chamber is satisfied that the person
10 has been informed of his or her rights under the statutory documents; and, finally, that the
11 Pre-Trial Chamber set the date on which it intends to hold the hearing to confirm or to
12 decline to confirm the charges.

13 The Chamber, being respectful about the law of the International Criminal Court, will
14 strictly adhere to the subject matter of this hearing and accordingly will now proceed
15 consecutively with the three issues which shape the agenda of today's hearing.

16 MR KHAN: Madam President, perhaps before you do that, with your leave I have
17 instructions from my client to make -- to repeat once again his commitment and
18 willingness to comply vigorously with all the conditions that have been imposed by the
19 Bench. Your Honour will note, and I don't want the public who are listening to this in
20 Kenya for a moment to come to get the impression that there has been any adverse
21 comment spoken by Ambassador Muthaura. Indeed, he has been most diligent not to
22 say a word about these proceedings other than his commitment to cooperate with the
23 Court and to comply with all orders of the Bench.

24 So, your Honours, I don't want the public who are listening to these proceedings to think
25 in any way, whilst your comments are general, that there is anything said -- anything that

1 has been said or done by Ambassador Muthaura that is a cause for concern, and we do
2 reassure you that there is the sincere willingness of the Ambassador to comply with each
3 and every one of the conditions your Honours have imposed and we will continue to do
4 so.

5 Your Honours, I hope that is a reassurance.

6 PRESIDING JUDGE TRENDAFILOVA: Thank you, Mr Khan. I think that I made it
7 very clear that I am not referring to anyone, number one.

8 A second point, it is very important that the Chamber is convinced of the behaviour of
9 anyone who appears before the Chamber of acting in good faith and with respect to the
10 proceedings and to this institution.

11 Of course, thirdly, I respect your desire to make a very clear point to the public, so by this
12 I will proceed further on. Being cognisant of the public nature of this hearing and the
13 duty of the Chamber vis-à-vis the rights of the Defence, I would ask now the court officer
14 to please read the counts for which the Chamber decided with majority to summon
15 Mr Muthaura, Mr Kenyatta and Mr Ali.

16 Please, court officer, proceed with the counts and the modes of individual criminal
17 responsibility of each of the suspects present today.

18 THE COURT OFFICER: Thank you, Madam President.

19 Mr Francis Kirimi Muthaura, there are reasonable grounds to believe that Francis Kirimi
20 Muthaura is criminally responsible as indirect co-perpetrator under Article 25(3)(a) of the
21 Statute for the following acts constituting crimes against humanity committed from on or
22 about 24 January 2008 until 31 January 2008:

23 (i) Murder within the meaning of Article 7(1)(a) of the Statute committed in Nakuru
24 town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift
25 Valley Province), Republic of Kenya;

- 1 (ii) Forcible transfer of population within the meaning of Article 7(1)(d) of the Statute
 2 committed in Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town
 3 (Naivasha District, Rift Valley Province), Republic of Kenya;
- 4 (iii) Rape within the meaning of Article 7(1)(g) of the Statute committed in Nakuru town
 5 (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley
 6 Province), Republic of Kenya;
- 7 (iv) Other inhumane acts within the meaning of Article 7(1)(k) of the Statute committed
 8 in Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha
 9 District, Rift Valley Province), Republic of Kenya;
- 10 (v) Persecution within the meaning of Article 7(1)(h) of the Statute committed in
 11 Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha
 12 District, Rift Valley Province), Republic of Kenya.
- 13 Mr Uhuru Muigai Kenyatta, there are reasonable grounds to believe that Mr Uhuru
 14 Muigai Kenyatta is criminally responsible as indirect co-perpetrator under Article 25(3)(a)
 15 of the Statute for the following acts constituting crimes against humanity committed from
 16 on or about 24 January 2008 until 31 January 2008:
- 17 (i) Murder within the meaning of Article 7(1)(a) of the Statute committed in Nakuru
 18 town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift
 19 Valley Province), Republic of Kenya;
- 20 (ii) Forcible transfer of population within the meaning of Article 7(1)(d) of the Statute
 21 committed in Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town
 22 (Naivasha District, Rift Valley Province), Republic of Kenya;
- 23 (iii) Rape within the meaning of Article 7(1)(g) of the Statute committed in Nakuru town
 24 (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley
 25 Province), Republic of Kenya;

- 1 (iv) Other inhumane acts within the meaning of Article 7(1)(k) of the Statute committed
2 in Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha
3 District, Rift Valley Province), Republic of Kenya;
- 4 (v) Persecution within the meaning of Article 7(1)(h) of the Statute committed in Nakuru
5 town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift
6 Valley Province), Republic of Kenya.
- 7 Mr Mohammed Hussein Ali, there are reasonable grounds to believe that Mr Mohammed
8 Hussein Ali is criminally responsible as having contributed to crimes committed by a
9 group of persons within the meaning of Article 25(3)(d) of the Statute for the following acts
10 constituting crimes against humanity committed from on or about 24 January 2008 until
11 31 January 2008:
- 12 (i) Murder within the meaning of Article 7(1)(a) of the Statute committed in Nakuru
13 town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift
14 Valley Province), Republic of Kenya;
- 15 (ii) Forcible transfer of population within the meaning of Article 7(1)(d) of the Statute
16 committed in Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town
17 (Naivasha District, Rift Valley Province), Republic of Kenya;
- 18 (iii) Rape within the meaning of Article 7(1)(g) of the Statute committed in Nakuru town
19 (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley
20 Province), Republic of Kenya;
- 21 (iv) Other inhumane acts within the meaning of Article 7(1)(k) of the Statute committed
22 in Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha
23 District, Rift Valley Province), Republic of Kenya;
- 24 (v) Persecution within the meaning of Article 7(1)(h) of the Statute committed in Nakuru
25 town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift

1 Valley Province), Republic of Kenya.

2 Thank you.

3 PRESIDING JUDGE TRENDAFILOVA: Thank you, court officer. Now the Chamber
4 will proceed with the three different items on the agenda of today's hearing, and the first
5 one is to hear from Mr Muthaura, Mr Kenyatta and Mr Ali whether they have been
6 informed of the crimes which they are alleged to have committed in advance of this
7 hearing. This is something that should have been done before you were to come to this
8 courtroom for today's initial appearance. Mr Muthaura?

9 MR MUTHAURA: Yes, I was informed, Madam President.

10 PRESIDING JUDGE TRENDAFILOVA: Thank you. The same question I would pose to
11 Mr Kenyatta?

12 MR KENYATTA: Yes, I have been informed, but I was informed through some press
13 releases from the Prosecutor's Office and then subsequently brought and given the
14 charges through official means, but that was the first time I got to hear that I was a suspect
15 before this Court.

16 PRESIDING JUDGE TRENDAFILOVA: But still the Registrar --

17 MR KENYATTA: The Registrar did eventually after that, yes.

18 PRESIDING JUDGE TRENDAFILOVA: Yes, this was the order that the Chamber took --

19 MR KENYATTA: Yes.

20 PRESIDING JUDGE TRENDAFILOVA: -- and assigned the Registrar with the task, and
21 as far as the report that I have received today is concerned --

22 MR KENYATTA: It was delivered.

23 PRESIDING JUDGE TRENDAFILOVA: -- you have been informed and there is a
24 document signed by you, but I wanted to hear from you.

25 MR KENYATTA: It was delivered.

Hearing

(Open Session)

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1 PRESIDING JUDGE TRENDAFILOVA: Thank you, Mr Kenyatta.

2 MR KENYATTA: Thank you.

3 PRESIDING JUDGE TRENDAFILOVA: Mr Ali, the same question. Have you been
4 informed in advance of this meeting -- of this hearing?

5 MR ALI: Yes, I was informed, your Honour.

6 PRESIDING JUDGE TRENDAFILOVA: You have been informed. Thank you very
7 much.

8 Now we resort to the second item on our agenda, whether -- again Mr Muthaura will be
9 addressed, Mr Kenyatta and Mr Ali, whether you have been informed of the rights that
10 are provided to you by the statutory documents of the International Criminal Court?

11 MR MUTHAURA: Yes, Madam President.

12 PRESIDING JUDGE TRENDAFILOVA: Yes, thank you. How about you, Mr Kenyatta?

13 MR KENYATTA: Yes, I have been informed.

14 PRESIDING JUDGE TRENDAFILOVA: Thank you. And Mr Ali?

15 MR ALI: Yes, I have been informed, your Honour.

16 PRESIDING JUDGE TRENDAFILOVA: Thank you. Thank you. In addition to your
17 statements made right now before the Chamber, I still would like to reiterate, albeit not
18 exhaustively, the rights of the accused central to the conduct of the proceedings.

19 According to the statutory regime of this Court, Mr Muthaura, Mr Kenyatta and Mr Ali,
20 you are afforded with the following rights:

21 You will be presumed innocent until proven guilty beyond reasonable doubt at trial, with
22 the onus firmly placed on the Prosecutor to prove your guilt;

23 You have the right not to have imposed on you any reversal of the burden of proof, or any
24 onus of rebuttal;

25 You have the right to conduct your defence in person, or through legal assistance;

1 You have the right to receive and to have disclosed to you material which shows or tends
2 to show innocence, mitigates guilt or which may affect the credibility of the Prosecution's
3 evidence - material which are in the possession of the Prosecutor;

4 You have the right, at the confirmation hearing, to object to the charges, to challenge the
5 evidence as presented by the Prosecutor and to present evidence yourself. There will be
6 no trial in case the charges are not confirmed by this Chamber;

7 You will be informed promptly and in detail of the nature, cause and content of the
8 charges in a language which you fully understand and speak;

9 You are entitled to waive your right to be present at the hearing on the confirmation of the
10 charges. However, the Chamber is entitled to order you to appear if it considers it
11 necessary and decides not to call the hearing in your absence, Rule 125(4);

12 You are also entitled to waive your right to attend status conferences for the purposes of
13 the proper and efficient disclosure procedure;

14 You will have adequate time and facilities for the preparation of your defence;

15 You will be tried without undue delay in order that you know your fate regarding the
16 present case as soon as possible;

17 You may put questions to and examine witnesses and this duly applies to the
18 confirmation of charges hearing;

19 You may make unsworn oral or written statements in your defence;

20 You have the right to appeal certain decisions in accordance with Article 82(1) of the
21 Statute and the relevant Rules of Procedure and Evidence;

22 Furthermore, the Registry is obliged to organise the staff of the Registry in a manner that
23 promotes the rights of the Defence consistent with the principle of fair trial.

24 Finally, we resort to the third item on our agenda, setting up the date for the confirmation
25 of charges hearing. The Chamber, being satisfied that you are informed of the crimes

1 that you have allegedly committed and of the rights pursuant to the statutory provisions,
2 have decided, bearing in mind the following factors, the Chamber's respect for
3 international human rights standards; taking heed of the fact that the parties will require
4 some time to prepare and, thereafter, to disclose evidence for the purposes of the
5 confirmation hearing; as well as the number of suspects in this case before the Chamber.
6 The Chamber considered also the simultaneously running proceedings of the two cases
7 pending before the Chamber, and that the Judges already set the date for the case of the
8 Prosecutor versus the other three suspects from the Kenya State for 1 September as the
9 starting date of the confirmation hearing and that the confirmation hearing in this case
10 will entail a certain period of time.

11 The fact that there are no detained suspects in the present case convinced the Judges of
12 Pre-Trial Chamber II to decide to set up 21 September 2011 for the commencement of the
13 confirmation hearing. The Judges have decided that as of today, until the said date, there
14 is sufficient time for the extremely professional lawyers on both sides to prepare for the
15 confirmation of charges hearing.

16 Certainly, depending on some specific circumstances that could emerge in the course of
17 the disclosure proceedings, the Chamber may change the starting date of the confirmation
18 hearing.

19 I would like to listen to the comments of the parties, if the Prosecutor has a comment to
20 make and the Defence teams, accordingly.

21 MR MORENO-OCAMPO: The Prosecutor will present a filing with observation but, in
22 principle, we have no objections to the decisions of the Pre-Trial Chamber.

23 PRESIDING JUDGE TRENDAFILOVA: Thank you, Mr Prosecutor. We are going to
24 deal with the written submissions in due course. What about the Defence teams of
25 Mr Muthaura, Mr Kenyatta and Mr Ali?

1 MR KHAN: Madam President, I'm grateful. I take it that the Prosecutor has no
2 objections to 21 September and, on behalf of Ambassador Muthaura, the sooner the better.
3 So we have no objections, either.

4 PRESIDING JUDGE TRENDAFILOVA: Other Defence teams?

5 MR KAY: Your Honour, it's very important that there is disclosure to the Defence of the
6 evidence that you have seen so that we may read it and prepare our defences accordingly;
7 and we hope that the disclosure regime will fully inform us promptly and in sufficient
8 time to enable necessary Defence preparations which, at this stage, we have not received
9 anything. Thank you.

10 PRESIDING JUDGE TRENDAFILOVA: Thank you, counsellor.

11 MR KEHOE: Your Honours, we of course do not object and we'll be prepared to move
12 forward on 21 September. And if I might echo the concerns of my learned colleague,
13 Mr Kay, about the expeditious disclosure of information from the Office of the Prosecutor,
14 that would assist greatly in moving this case along, which all parties in this side of the
15 room want to move on as quickly as possible. Thank you.

16 PRESIDING JUDGE TRENDAFILOVA: I thank the counsels, and I would like to make
17 several points. Of course, it is absolutely beneficial for the clients of Mr Khan, Mr Kay
18 and Mr Kehoe that the confirmation hearing is scheduled as early as possible. This is
19 beneficial for your clients, but still they should be provided - and in particular their
20 Defence teams - with enough time to properly study the evidence to be disclosed by the
21 Prosecutor and to prepare for the confirmation of charges hearing because, as we all know,
22 this Chamber is going to serve as a filter whether at all to send this case to trial or just to
23 decline to confirm the charges and to terminate the proceedings at this stage in the
24 proceedings before the International Criminal Court.

25 The Chamber, being very diligent itself, in order to properly conduct the proceedings with

1 due respect for the principle of expeditiousness has yesterday issued a decision on
2 disclosure setting up the principles that the Chamber would like to be guiding the two
3 parties - the Prosecutor's team and the three Defence teams - in proceeding with the
4 disclosure of the evidence for the purposes of the confirmation hearing.

5 In addition, the Chamber respecting Rule 121(2)(b) has appointed me as a Single Judge in
6 order to observe the proper conduct of the disclosure proceedings; and, being respectful
7 for the principle of expeditiousness and being concerned about the interests of the
8 Defence and their right to be tried without undue delay, I shall proceed now with an oral
9 decision for a status conference to be held on 18 April starting at 11.30 in the morning
10 with the team of the Prosecutor, the three teams of the Defence and we invite the Registrar
11 to be present.

12 Of course, I would once again highlight to Mr Muthaura, Mr Kenyatta and Mr Ali that
13 you are not obliged to attend the status conferences. By this, I hope that you are going to
14 rely on the highly professional teams that you have chosen to present your interests
15 before this Chamber. So the invitation goes to your Defence counsels, mainly.

16 At the status conference, the Prosecutor - of course, he will be the central protagonist
17 because he is the triggering force in these proceedings - he will be expected and requested
18 to provide the information on the following, Mr Prosecutor:

19 First, an estimate of the overall amount of documents he intends to use as evidence at the
20 confirmation hearing; the number of witnesses, if any, that he intends to call to testify at
21 the confirmation hearing;

22 The number of witness statements, Mr Prosecutor, you intend to use at the confirmation
23 hearing pursuant to Rule 76 of the Rules of Procedure and Evidence;

24 Third, an indication as to whether you intend to request that certain documents be
25 disclosed to the Defence in redacted form and, in the affirmative, an estimate of the

1 amount of such documents;

2 Fourth, an indication as to whether the Prosecutor intends to request that protective

3 measures be put in place for the protection of witnesses, victims or other persons at risk,

4 prior to disclosure of the names of witnesses or of certain documents and the steps that

5 the Prosecutor is taking or he intends to take in this regard;

6 Finally, an indication as to whether the Prosecutor obtained documents, and how many if

7 possible to give us this information, or any other information on the conditions of

8 confidentiality in accordance with Article 54(3)(e), Articles 72 and 93 of the Rome Statute,

9 that contain exculpatory information under Article 67(2) of the Rome Statute or are to be

10 considered material for the preparation of the Defence pursuant to Rule 77 of the Rules of

11 Procedure and Evidence; and, in the affirmative, whether measures to obtain the consent

12 of the information provider regarding disclosure of this material to the Defence, and of

13 course communicating to the Chamber, have already been taken.

14 The Defence teams are invited to indicate whether they anticipate to present evidence at

15 the confirmation hearing and, if so, its envisaged amount, including whether they intend

16 to call live witnesses at the confirmation hearing.

17 The Registry is invited to be present, the Registrar is invited to be present, at the status

18 conference in order to indicate the technical modalities that would be most suitable for

19 ensuring the efficiency and expeditiousness of the disclosure proceedings.

20 I trust that ten days as of this moment on, up until 18 April - and knowing that already the

21 principles that should be guiding all the teams regarding the disclosure of evidence are

22 known since yesterday - will be enough for the Prosecutor's team and for the Defence

23 team to prepare for a meaningful and very useful discussion in order to establish a proper

24 disclosure calendar so that we can, as expeditiously as possible, proceed ahead and keep

25 the date 21 September for the confirmation of charges hearing.

1 Mr Prosecutor, would you like to make a comment, an observation? No. Someone from
2 the Defence team?

3 MR KHAN: Yes, Madam President. We would -- we're most grateful for the very
4 proper guidance given by the Bench regarding the disclosure regime. As has already
5 been alluded to, it is central to the preparation of the Defence and it is absolutely vital if
6 the confirmation hearing date is to take place as scheduled, number one. And, number
7 two, is to be effective and meaningful.

8 Your Honour, of course, the instructions given today can hardly be taken as a surprise to
9 the Prosecutor. Back on 15 December, when he publicly named all three suspects in the
10 article, in the ex parte Article 58 procedure, he knew that if he got what he wanted, if a
11 summons was issued, he would be required to give disclosure. And, of course, a
12 decision was given on 8 March. So I would take that a diligent and professional
13 prosecutor would be in an advanced state of preparation, in order to discharge his
14 obligations under the Statute.

15 Your Honours, what I would ask in addition to the timeline, and the information that the
16 Prosecutor is required to give is, at a minimum, that by the next hearing the Prosecutor
17 give us, the Defence, what they gave you back on 15 December. Now, your Honour, that
18 has clearly been identified. It is clearly available and there seems to be no reason on
19 earth why the Prosecutor cannot give us that in order to have adequate time and facilities
20 for the preparation of the Defence.

21 In addition to that, of course, and on an expedited basis, any information within his
22 custody and knowledge that he knows to be material to the preparation of the Defence,
23 and that is otherwise exculpatory or exonerating.

24 Now, your Honour, all of that should be in a discrete file, one would imagine, in the
25 organised Prosecution office and I would ask, it is not onerous in the least that my learned

1 friend be required to give that by the next status conference.

2 I am most grateful for the opportunity to say a few remarks on this issue.

3 PRESIDING JUDGE TRENDAFILOVA: Thank you, Mr Khan. Of course everyone

4 knows, who is an expert in this field, that the triggering force in any criminal proceedings

5 is the Office of the Prosecutor. In addition, everyone is aware of the fact that the

6 Prosecutor would file an application to a Chamber if the Prosecutor is convinced that he

7 has a good, well-founded case in the evidence and information at his disposal. So of

8 course, because of this, I said that the Prosecutor, with all my respect for the office, is the

9 main protagonist, is supposed to be the main protagonist during this status conference.

10 We have already started, following a decision on the reclassification of documents

11 submitted to the Chamber, we have started reclassifying some of the documents on the

12 basis of which the Chamber has proceeded with its duties and the Prosecutor's office quite

13 diligently is proceeding, following our reclassification decision.

14 Just a moment, Mr Ocampo. And finally, we all understand that the sooner the better,

15 the evidence on which the Prosecutor relies for the confirmation of charges hearing is

16 available to the Defence. You are going to be in a position, expeditiously and very

17 professionally, to prepare and serve best the interests of your clients.

18 Mr Ocampo, you wanted to take the floor, please.

19 MR MORENO-OCAMPO: Just to clarify: The Prosecutor considered that the fullest,

20 full disclosure is a cornerstone of a trial, and that is what we always did, and we are

21 prepared to disclose the evidence in proper time. We have -- we will present, we will file

22 in due course, two issues that we are concerned. One, the first one is connected with the

23 challenge of admissibility and the relation with the possibility to proceed with disclosure

24 before this challenge is decided because maybe the decision is against the admissibility of

25 the case and then it's a different situation. So that's why this is one concern we will raise,

1 and second we have some observations on the modality of the disclosure. But saying
2 that, of course we are ready and fully -- we understand the importance of disclosure, we
3 are ready, but there are some issues that we will raise in writing. Thank you.

4 PRESIDING JUDGE TRENDAFILOVA: Thank you, Mr Prosecutor. Excuse me,
5 Mr Khan, I would like just to answer what the Prosecutor raised right now.

6 First, with regard to the modalities of disclosure, I'm looking forward to have submitted
7 to the Chamber some of your concerns but I would just share with you in this public
8 hearing that I am a little bit surprised, because these modalities of disclosure have been
9 working with this Chamber since the first case, that the Chamber in this composition has
10 been dealing with, so we never anticipated any surprise in this regard.

11 Number two, with regard to the challenge on the admissibility, as was filed by the Kenyan
12 government, you know that it wouldn't in any way disrupt the proper conduct of the
13 disclosure of what you have up until now; it could prevent you from proceeding with
14 further investigations, that you have all the rights to conduct under the statutory
15 documents.

16 Please, we shall encourage you, and this is something that we are going to discuss during
17 the status conference, that you proceed with the disclosure of what is available for the
18 team that you have composed for the purposes of this case. In case that you need
19 some decision on behalf of the Chamber regarding some investigative activities that
20 already you have initiated, the Chamber will decide accordingly.

21 Finally, the Chamber is very much motivated. Again, being absolutely cognisant of the
22 principle of expeditiousness, after the filings that the Chamber should receive on 28
23 April - which is the deadline for the submissions to be made regarding this challenge, as
24 filed by the Kenyan government - we are going immediately to proceed with our work.
25 So we do not believe on behalf of the Chamber could be some impediments to the

1 expeditiousness that is so very much favoured by Pre-Trial Chamber II.

2 Please, Mr Khan.

3 MR KHAN: Madam President, I am most obliged. We concur in entirety with the
4 sentiments and ruling expressed by the Bench. The filing by a third party, namely, the
5 Government of Kenya cannot be used as a device to somehow slow down proceedings or
6 to prejudice our client to get timely disclosure and we would, with the greatest respect,
7 urge not just discussion on this issue but a clear commitment from the Prosecution to get
8 this disclosure in order and to provide it before, or at least the first tranche of disclosure,
9 namely, that that was put before the Bench by the next hearing.

10 Your Honour, what I want to avoid is coming here in ten days' time and asking for
11 precisely the same thing, the same material that I have identified now and so, your
12 Honours, rather than just having a further discussion and a further use of court time at the
13 next status hearing I would ask that perhaps the Prosecutor be requested to look at least
14 that clearly identifiable evidence, namely, the information that was relied upon in order to
15 issue the summons, seek any necessary redactions and serve it at the next status
16 conference and that will allow all parties to make informed submissions rather than just
17 have the same points repeated by all sides.

18 Your Honours, I am most grateful. That's my observation on this point.

19 PRESIDING JUDGE TRENDABILOVA: Mr Khan, thank you very much. I do believe
20 that we went beyond the subject matter of today's initial appearance, and we are very
21 strict about adhering to what is our duty today, right now. But still, I do believe that it
22 was not a mistake to listen shortly to some of the initial observations by the two parties
23 regarding our next status conference because it would, in a way, facilitate and improve
24 the work that we are supposed to do on the 18th at 11.30 in this same Courtroom 1.
25 So let's us just do not proceed further on with these specific issues related to disclosure

1 because we shall have plenty of time to consider them.

2 MR KEHOE: Your Honour, just addressing several issues concerning the confirmation
3 hearing that we may want to address. I know your Honour noted at the outset that you
4 asked the Prosecutor to tell us an idea of the number of documents that we are talking
5 about.

6 It's also important to address how many pages we are talking about because a single
7 document could be 500 pages, if in fact you look at it in that fashion. So, if someone
8 comes in and says "I have five documents," it could 5,000 pages. Now, obviously, that
9 could be an exaggeration but, nevertheless, when we are talking about the scope of the
10 disclosure, and how long it is going to take for the Defence to get prepared, it is important
11 to know how much information we need to digest.

12 The second issue, your Honour, that we would like to address at that confirmation
13 hearing, is the extra-judicial comments by the Office of the Prosecutor in the theatre.

14 Your Honour expressed some concern about possible unrest down in Kenya, and your
15 Honour accurately and appropriately addressed all parties in that regard.

16 I want to say at the outset, your Honours, that it's not helpful when those extra-judicial
17 comments go down to Kenya by the Office of the Prosecutor at various times. So we ask
18 that your Honour put -- have some discussion during the confirmation hearing about how
19 all the facts and circumstances concerning these three gentlemen can be addressed before
20 this Chamber and answered before this Chamber in the appropriate fashion. Thank you.

21 PRESIDING JUDGE TRENDAFILOVA: Thank you, counsel. I think that it is a valid
22 point about the number of pages, so I do believe that the Prosecutor is going to be very
23 helpful in this regard, and about the extra-judicial comments. There is a filing, the
24 Chamber after the expiration of 21 days pursuant to Regulation 34, which grants the
25 Prosecutor enough time, if he would like to make a response to your application, will take

1 in due course his decision.

2 MR KEHOE: I understand that that is pending, your Honour. In the interim, we would
3 ask your Honour to consider putting some type of understanding among all the parties
4 about how we, the press is going to be addressed in the arena. And I say that, your
5 Honour, in light of your Honour's comments concerning the need for security in the area
6 which all parties readily agree to. So we do have that gap, the time, as your Honour
7 mentions. There is another ten days and then thereafter some period of time before a
8 decision is rendered by my learned counsel's filing.

9 PRESIDING JUDGE TRENDABILOVA: Thank you. This issue will be considered in
10 the decision to be taken by the Chamber in due course.

11 Are there some other comments? No. I think that by this we have concluded our work
12 for today and I would like, on behalf of my colleagues, to thank the Prosecutor's team, to
13 thank the three Defence teams, to thank the Registrar for the extremely professional
14 conduct regardless of the fact that we have deviated a little bit from very strictly following
15 the agenda but it was useful in order to give some indications about the seriousness of our
16 meeting on the 18th, and I would like as well to thank the interpreters, to thank the court
17 reporters and please accept my apologies, yesterday I forgot to address you, but I am
18 equally thankful for the work that you are doing, to thank the security and the courtroom
19 staff.

20 The hearing on the initial appearance in the case of The Prosecutor versus Mr Muthaura,
21 Mr Kenyatta and Mr Ali is closed.

22 THE COURT USHER: All rise.

23 (The hearing ends at 3.27 p.m.)