

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/11

Date: 31 March 2011

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
THE PROSECUTOR *v.* WILLIAM SAMOEI RUTO, HENRY KIPRONO KOSGEY
AND JOSHUA ARAP SANG**

**Public
URGENT**

**With two confidential annexes and one public annex
Registry's assessment of Mr. Joshua Arap Sang's English proficiency level**

Source: Registrar

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Other

THE REGISTRAR of the International Criminal Court (the "Court");

NOTING the *"Prosecutor's Application pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang"*¹ submitted by the Office of the Prosecutor on 15 December 2010;

NOTING the *"Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang"*² issued by the Pre-Trial Chamber II on 08 March 2011 ;

NOTING articles 21 and 67(1)(a) and (f) of the Rome Statute ("the Statute"), Rule 13(1) of the Rules of Procedure and Evidence ("RPE"), Regulations 23 *bis*, 24 *bis* and 40 of the Regulations of the Court ("RoC"), Regulations 57, 61 and 70 of the Regulations of the Registry ("RoR");

CONSIDERING that, on 24 March 2011 at 16.16 hours, the Katwa and Kemboy Advocates communicated electronically to the Registry two letters concerning respectively the "Summons served on Joshua Kirwa Sang. Situation in the Republic of Kenya. Majority decision dated 8th march 2011" (Confidential Annexes 1 and 2 to the present filing);

CONSIDERING that the letter draws the attention of the Registry on four main points, namely:

1. Mr. Joshua Arap Sang 's preference to express himself and to be addressed in Kalenjin all through the proceedings;

¹ ICC-01/09-30-Conf-Exp

² ICC-01/09- 01/11-01.

2. Mr. Joshua Arap Sang 's proposed list of legal representatives;
3. Mr. Joshua Arap Sang's indigence and ;
4. Mr. Joshua Arap Sang's request of assistance of the Court for obtaining a visa to the Netherlands for the initial appearance.

CONSIDERING the role of the Registry as the Court's channel of communication under Rule 13(1) of the RPE;

CONSIDERING that the said letter contains information about some Court Management Section staff members and are thus annexed to the present filing as confidential pursuant to Regulation 23*bis* of the RoC;

CONSIDERING that the Registry conducted an assessment with respect to Mr. Joshua Arap Sang's English proficiency level;

SUBMITS respectfully, under Regulation 24*bis* of the RoC, the Registry's assessment of Mr. Joshua Arap Sang's English proficiency level and its annexes as confidential;

TRANSMITS, respectfully to the Chamber as follows:

- A first letter from the Katwa and Kemboy Advocates, dated 16 March 2011, in Confidential Annex 1,
- A second letter from the Katwa and Kemboy Advocates by dated 24 March 2011, in Confidential Annex 2, and

- A list of open-sources documents used for the present assessment of Mr. Arap Sang's fluency in English, together with transcripts of these, in Public Annex 3.

Interpretation and Translation

1. At the outset, the Registry deems useful to make a clear distinction between, on the one hand, "interpretation" and, on the other hand, "translation". Both form part of the language services provided by the Registry under Regulation 40 of the Regulations of the Court and Regulation 57 of the Regulations of the Registry. While interpretation relates essentially to oral *viva voce* debates, such as those in the Courtroom, translation implies rendering of the languages of documents, be they written, audio- or video-, into another language.
2. Regulation 61 of the Regulations of the Registry defines interpretation as follows:
 1. Interpretation services shall include the following:
 - a) Simultaneous interpretation, where the interpreter renders the speaker's message immediately and continuously from a booth;
 - b) *Chuchotage* or whispering, which is simultaneous interpretation by an interpreter whispering an interpretation of what is said to a maximum of two listeners;
 - c) Consecutive interpretation, where the interpreter interprets aloud, usually taking notes as the speaker speaks and then concisely interpreting several sentences at a time for an unlimited number of listeners;
 - d) Liaison interpretation, where the interpreter interprets aloud in and out of two or more languages, interpreting a few sentences at a time, for a very limited number of listeners; and

- e) Sight translation, for written documents that need to be translated orally.
The interpreter may need to read the document once before performing the sight version.
 2. For simultaneous interpretation, interpretation booths and audio equipment shall be made available.
 3. The Registry shall advise on the mode of interpretation most suitable for the event to be interpreted.
3. Regulation 70 of the Regulations of the Registry defines translation as follows:
Translation services shall include the following:
- a) Translation, where the translator submits accurate and faithful translations on various subjects in the appropriate style within prescribed time limits. He or she proofreads the translation and checks its consistency before submitting it. If the draft translation is subsequently revised, he or she inputs the corrections and proofreads the final document;
 - b) Self-revised translation, where the translator submits accurate and faithful translations on various subjects in the appropriate style having carried out the appropriate research. He or she revises his or her output, proofreads and checks the consistency of the translation before submitting the final product;
 - c) Revision, where a reviser ensures that a translated text faithfully renders the source text and meets the readability criteria appropriate for the text in question. Revision is a bilingual process that involves comparing the source text with the translation and making corrections and/or editorial improvements where necessary;
 - d) Editing, where an editor ensures that a text is free of grammatical errors and that it meets the readability criteria appropriate for the document in question. Editing is a monolingual process that includes stylistic editing, i.e. tailoring language to readers, ensuring smoothness of text, checking

syntax and idiom, house style and typography and punctuation as well as copyediting / proofreading for consistency; and

- e) Proof-reading, where a text undergoes final checking for any typographical, spelling or other error not normally related to the overall style and content of the text.

“a language which the accused fully understands and speaks”

4. Under Article 67(1)(a) of the Rome Statute (“Rights of the Accused”), the Accused have a right “to be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks”. (emphasis added)
5. Under Article 67(1)(f) of the Rome Statute, the Accused have a right “to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks”. (emphasis added)
6. The Appeals Chamber interpreted Article 67(1)(a) and (f) in a protective way in the *Katanga and Ngudjolo* case.³ The Appeals Chamber places the onus of verifying the person’s fluency in a language on the Court, not on the person applying for interpretation. This assessment shall be done by the Chamber on a case-by-case basis.⁴ In case of doubt, the requested language shall be accommodated.⁵ Requests for interpretation in a language other than the Court’s languages shall be granted as long as applicants do not abuse their rights under Article 67 of the Statute.⁶ The Appeals Chamber further sets that the standard “fully understands and speaks” a

³ ICC-01/04-01/07-522.

⁴ *Idem*, par. 2, 60.

⁵ *Idem*, par. 3.

⁶ *Idem*, par. 1, 59-60.

language as a high standard, which is met when the person is completely fluent in the language in ordinary, non-technical conversation.

7. The Appeals Chamber acknowledged that this standard was higher than the one provided under other legal sources or applicable before other international Courts.⁷ For instance, the European Court for Human Rights applies a lower standard, based on Article 6 of the European Convention, which requires interpretation when the person does not understand or does not speak the language of the Court.⁸
8. Although applying a different, less protective standard, some aspects of these other Court's case-law may bear some relevance in the present case. For instance, the Human Rights Committee found, in a case relating to the use of a regional dialect before French courts, that the requirements of a fair hearing do not "mandate States Parties to make available to a citizen whose mother tongue differs from the official court language, the services of an interpreter, if this citizen is capable of expressing himself adequately in the official language".⁹ Although the latter standard of "expressing himself adequately" differs in the Appeals Chamber's case-law, the finding concerning mother tongue is relevant for the determination of the Chamber.
9. Another relevant finding of the European Court of Human Rights is that interpretation shall extend to the translation (sic) or interpretation of all documents or statements in the proceedings "which it is essential for the defendant to understand in order to have the benefit of a fair trial",¹⁰ and not beyond. Pre-Trial Chamber I referred to these finding in interpreting the words

⁷ *Idem*, par. 42-48.

⁸ European Court of Human Rights, *Kamasinski v. Austria*, 19 December 1980, A. 168, par. 74; *Lagerblom v. Sweden*, 14 January 2003.

⁹ Human Rights Committee, Communication No. 219/1986, *Guesdon v. France*, 25 July 1990, par. 10.2; see also Communication No. 221/1987, *Cadoret v. France*, 11 April 1991, par. 5.6.

¹⁰ European Court of Human Rights, *Luedicke, Belkacem and Koç v. Germany* (Applications 6210/73, 6877/75 and 7132/75), 28 November 1978, A. 29, par. 48.

“as are necessary to meet the requirements of fairness” in Article 67(1)(f).¹¹ Regardless of the Chamber’s forthcoming decision as to interpretation, the Registry of course endeavours to ensure proper translation in the languages of the Court, where necessary.

10. It is also important to highlight that the Appeals Chamber’s standard does not require that the person has an understanding as if he or she was a trained lawyer or judicial officer.¹²
11. Based on the drafting history, the Appeals Chamber also excluded the interpretation according to which the person may select the language of his/her choice,¹³ thus confirming Pre-Trial Chamber I’s earlier finding.¹⁴
12. As a matter of comparison, interpretation into Lingala was granted in the *Katanga and Ngudjolo* case, after Pre-Trial Chamber I had initially denied the request for interpretation in this language¹⁵ and based on the Appeals Chamber’s above ruling, on the main ground that the Pre-Trial chamber lacked the time necessary, before the confirmation hearing, to complete a thorough factual determination of whether the Accused met the standard of fluency in French required by the Appeals Chamber.¹⁶ When the question was then reopened before Trial Chamber II, for purpose of interpretation at trial, the Chamber decided to seek the opinion of suitably qualified experts, who were to independently assess Mr. Katanga’s proficiency in French and Lingala.¹⁷ Based on the experts’ report,¹⁸ Trial Chamber II found that Mr. Katanga’s level of French fell short of the requirements

¹¹ ICC-01/04-01/06-268, p. 6; ICC-01/04-01/07-127, par. 41; ICC-01/04-01/07-304, p. 4 ; ICC-01/04-01/07-446, p. 6.

¹² ICC-01/04-01/07-522, par. 3, 61.

¹³ *Idem*, par. 51-56.

¹⁴ ICC-01/04-01/07-127, par. 30.

¹⁵ ICC-01/04-01/07-127.

¹⁶ ICC-01/04-01/07-539, par. 18.

¹⁷ ICC-01/04-01/07-1134, par. 49.

¹⁸ ICC-01/04-01/07-1444.

set out by the Appeals Chamber¹⁹ and ordered accordingly the Registry to continue to provide him with interpretation into Lingala. Interpretation from and into Lingala was provided for all hearings attended by Mr Germain Katanga. However, no translations into Lingala were ever requested or provided for Mr Katanga or his defence team. The only translations into Lingala carried out by the Registry were for the PIDS. As in the *Katanga and Ngudjolo* case before Trial Chamber II, the Registry would like to avoid having to ensure interpretation into Kalenjin in the present case, unless the Pre-Trial Chamber is convinced that such interpretation is necessary to meet the requirements set by the Appeals Chamber.

13. Based on this legal framework, the Registry draws the attention of the Chamber on different pieces of information which, according to the Registry, concur in demonstrating Mr. Arap Sang's complete fluency in English in ordinary, non-technical conversation. It is not the Registry's ambition to demonstrate that the suspect has an understanding of English legal terms, as if he or she was a trained lawyer or judicial officer though, since this standard of fluency goes expressly beyond the Appeals Chamber's applicable standard.

14. The Registry also finds necessary to draw the attention of the Chamber on the fact that, should interpretation into Kalenjin be granted, the quality of interpretation that the Registry would be able to provide would most likely prevent understanding legal terms as a trained lawyer or judicial officer may normally do. It is even doubtful that the quality of interpretation would reach the Appeals Chamber's standard of fluency in ordinary, non-technical conversation. As a result, Mr. Arap Sang would find, in light of his apparent fluency in English, very little benefit, if any, in getting debates interpreted into Kalenjin. The present observation only relates to interpretation. With respect to translation of documentary evidence, including the alleged speeches, the Registry will, where necessary, avail itself of the services of experts in translation in this language, in

¹⁹ ICC-01/04-01/07-1473, par. 8.

order to ensure the highest quality and reliability of translations, as required under Regulation 70 of the Regulations of the Registry.

15. Eventually, the Registry finds that a comparison with the domestic law of Kenya might be useful for the Chamber's determination.

16. Under Article 7 of the Constitution of Kenya:²⁰

- (1) The national language of the Republic is Kiswahili.
- (2) The official languages of the Republic are Kiswahili and English. [...]
- (3) The State shall
 - a) Promote and protect the diversity of language of the people of Kenya; and
 - b) Promote the development and use of indigenous languages [...].

17. Under Section 198 of the Criminal Procedure Code:²¹

- (1) Whenever any evidence is given in a language not understood by the accused, and he is present in person it shall be interpreted to him in open court in a language which he understands.
- (2) If he appears by advocate and the evidence is given in a language other than English and not understood by the advocate, it shall be interpreted to the advocate in English.
- (3) When documents are put in for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as appears necessary.
- (4) The Language of the High Court shall be English, and the language of subordinate Court shall be English or Swahili.

18. From the provisions above, it results that Kenya, in spite of its Constitutional commitment to "Promote and protect the diversity of language of the people of

²⁰ <http://www.kenyalaw.org>

²¹ Chapter 75 of the Laws of Kenya, Section 198 ("Interpretation of evidence to accused or his advocate")

Kenya” under Article 7(3)(a) of the Constitution, provides the use of English – at High Court level – and English or Swahili – for subordinate Court – only, under Section 198(4) of the Criminal Procedure Code. Should the Court find that Mr. Arap Sang’s level of fluency in English or Swahili is insufficient and order interpretation into Kalenjin, such finding may be interpreted as a criticism against Kenyan domestic legislation excluding Kalenjin from judicial debates in spite of a constitutional commitment to promote languages. In light of the principle of complementarity, the Registry would thus advise sticking to the Kenyan domestic higher standard by providing, on top of English and French, interpretation into Swahili only.

19. Reference to Kenyan law also concurs in showing that Mr. Arap Sang, as a Kenyan citizen, is expected to understand and speak English or Swahili at a level that is sufficient to allow him to defend his rights before the domestic Courts of his Country.
20. The Registry identified the following factual elements which concur in demonstrating that Mr. Arap Sang meets the Appeals Chamber’s requirements with respect to English, namely that he is fluent in English in ordinary, non-technical conversation.

Report on the verification of Fluency in English of Mr Joshua Arap Sang

21. As mentioned in the letter transmitted by the Katwa and Kemboy Advocates on behalf of Mr. Arap Sang, the latter has informed the Court of his preference to express himself and to be addressed in Kalenjin, a Kenya macro-language,²² during the initial appearance hearing. There are several variants of this language

²² Macrolanguages are defined “multiple, closely related individual languages that are deemed in some usage contexts to be a single language”. The Kalenjin people speak several languages that are not mutually intelligible but are linguistically closely related. The languages within the Kalenjin macrolanguage group are: Elgeyo / Keiyo; Kipsigis; Marakwet / Markweeta; Nandi / Naandi; Pokoot; Sabaot / Sebei; Tugen and Terik. These are all variants of Kalenjin but not close enough to be understood by speakers of only one.

group and it is understood that Mr Arap Sang speaks the Nandi variant. In order to ascertain whether the interpretation of court proceedings into Kalenjin for Mr. Arap Sang would represent the reflection of the real needs for interpretation provision, the Court Interpretation and Translation Section (STIC) has been requested to verify the fluency of Mr. Arap Sang's English through examination of open source videos.

22. For that purposes, and considering time constraints, the Registry was able to identify four videos, which list and transcripts are annexed to the present filing. The Registry observes that the very fact that Mr. Arap Sang is a public person provides a wide range of materials, which can be used to assess his fluency in English, without having to assess directly his proficiency by way of a specific examination, as was done for Mr. Katanga. The present report and conclusions as to Mr. Arap Sang's fluency in English are based on the four video documents mentioned in the annex and on the information collected with respect to his professional and educational background.

English of Mr. Arap Sang

23. In general terms we would rate Mr. Arap Sang's proficiency in English as good. He has a near-native command of English, and has strong communication skills.

24. Mr. Arap Sang speaks idiomatic English, especially when talking about broadcasting, his area of expertise. For example, he speaks of "topical issues", "shaping opinion", "clocking" a particular number of listeners, being "on mike" and "not just filling airtime." He has a rich vocabulary, perfect syntax, good grammar and an easy turn of phrase.

25. Mr. Arap Sang's pronunciation is clear and his delivery is good. He does not mumble or slur his words. Mr. Arap Sang expresses himself in a bold, confident

and emphatic style, taking time to articulate his words clearly. He smoothly navigates from topic to topic. The rhythm of his sentences is perfect.

26. It is clear from the language that Mr. Arap Sang uses that he is well educated, with a strong command of current events in his country. In the videos we viewed, he mentions a broad range of issues. For example, he easily touches upon specialized and well-defined universal notions such as “globalization”, “governance” and “peace-building”. These matters can be addressed only by someone with a good mastery of the English language, which is the only medium in which he must have educated himself on such topical issues, considering that these notions are practically non-existent in the vernacular languages of the region.
27. In video #2²³, Mr. Arap Sang is being interviewed by another journalist and replies extemporaneously. He displays absolutely no sign of not understanding any of the questions, and responds immediately to the questions put.
28. He is able to express his thoughts in a nuanced manner, without any particular pauses, hesitations or false starts. He does not have to search for his words when speaking in English.
29. When reading from a prepared text, he occasionally mispronounces words, but maintains a lively rate of speed. English speakers would not have any difficulty in understanding his spoken English.
30. Interpreting Mr. Arap Sang’s remarks into French would be a relatively easy task. Our staff and freelance interpreters have often worked with speakers with a far worse command of English.

²³ <http://www.youtube.com/watch?v=z5V6uQ86RX0>

31. To conclude, in our professional opinion, Mr. Arap Sang fully understands and speaks English. He is a well educated and highly eloquent journalist whose testimony in English will pose very little difficulty to the interpreters, or indeed to the Chamber, the parties and the participants. Problems of interpretation would actually become much bigger, should he be authorized to express himself in Kalenjin in the courtroom.

Other information with regards to Mr Joshua Arap Sang's English Proficiency level

32. It is worth mentioning that neither Mr Joshua Arap Sang nor his counsels has raised any official complaint with respect to Mr. Arap Sang's understanding of the *Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*" notified to him in English.

33. The Registry also wishes to pinpoint the fact that the education system in Kenya, beset by non-enrollment and low completion rates, offers eight years of compulsory primary education, beginning at age six, four years of secondary school, and four years of university education. The language of instruction from the secondary stage onward is English.

34. Furthermore it appears that Mr Arap Sang attended the Kitale Academy Secondary School²⁴. According to the official website of the said School²⁵, it was established by the C.M.C Missionaries with a curriculum tailored to meet the learning needs and aspirations of the privileged children of the White Settlers. Today, the school is a public institution having risen from the previous Whites-

²⁴ http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profile.html?tx_jbtrial_pi2%5Btab%5D=facts&tx_jbtrial_pi2%5Bprofile%5D=joshua-arap_sang_995

²⁵ http://www.kitaleschool.com/index.php?option=com_content&view=article&id=17&Itemid=20

only status to an all-inclusive institution serving the educational needs of all people interested in achieving holistic learning.

35. In addition, Mr. Arap Sang is a graduate of the Kenya Institute of Mass Communication which is among the major journalism and communications training institutions in Kenya.²⁶ Many leading communications and media professionals in Kenya and east Africa gained their skills at the Kenya Institute of Mass Communication.

36. Moreover, Mr. Arap Sang is pursuing a degree in journalism from the Nairobi campus of Moi University. Mr. Arap Sang is in his final year and his final examinations will begin on 12 April 2011, just few days after he appears in Court.²⁷

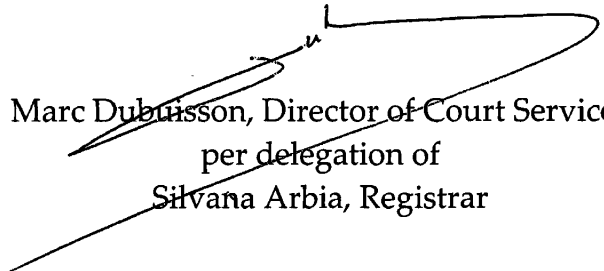
Conclusion

37. Based on the legal standard set by the Appeals Chamber and on the preliminary assessment made by the Court Interpretation and Translation Section on the basis of documents listed in Public Annex 3, the Registry concludes that Mr. Arap Sang appears to be completely fluent in ordinary, non-technical conversation in English and thus fully understands and speaks this language, in accordance with Article 67(1)(a) and (f). For these reasons, the Registry does not recommend the use of interpretation in Kalenjin for the forthcoming initial appearance and subsequent proceedings in the case.

²⁶ <http://www.virtualcampuses.eu/index.php/Kenya>

²⁷ In an interview conducted by the Daily Nation newspaper, Mr. Arap Sang said "I intend to travel with my books so that I will revise in my hotel room," he says. "I will also use the 10 hours flight to catch up with my first paper." 18 March 2011. Available at the URL address: <http://news2.onlinenigeria.com/news/general/84311-Radio-host-warms-new-role-newsmaker.html?print>

38. Should the Chamber find it necessary and where time allows – unfortunately not before the initial appearance - , the present report could be complemented by a proper expertise of Mr. Arap Sang’s fluency in English. In order to provide the most objective basis for the assessment, the Registry would recommend in that case basing the expertise on pre-existing documents, be they written, audio- or video-, which could be identified, instead of submitting Mr. Arap Sang to a language examination, as was done for Mr. Katanga in the absence of such available materials.



Marc Dubuisson, Director of Court Services
per delegation of
Silvana Arbia, Registrar

Dated this 31 March 2011

At The Hague, The Netherlands