



Original: **English**

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

Date: 05 April 2011

**PRE-TRIAL CHAMBER II**

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

**SITUATION IN THE REPUBLIC OF KENYA**

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

**PUBLIC**

**Defence Response to “Registry’s assessment of Mr. Joshua Arap Sang’s English proficiency level”**

**Source:** Defence

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

**The Office of the Prosecutor**

Luis Moreno-Ocampo, Prosecutor  
Fatou Bensouda, Deputy Prosecutor

**Counsel for the Defence**

Counsel for William Samoei Ruto:  
Kioko Kilukumi Musau, Joseph  
Kipchumba Kigen-Katwa and Kithure  
Kindiki  
Counsel for Henry Kiprono Kosgey:  
George Odinga Oraro, Julius Kemboy  
and Allan Kosgey  
Counsel for Joshua Arap Sang:  
Joseph Kipchumba Kigen-Katwa, Joel  
Kimutai Bosek and Philemon K.B. Koech

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms. Silvana Arbia, Registrar

**Counsel Support Section**

**Deputy Registrar**

Mr. Didier Daniel Pereira, Deputy  
Registrar

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

1. It is true that the Applicant, Mr. Joshua Arap Sang, has some understanding and knowledge of English. However, this degree of understanding and knowledge is not to an extent or depth that would make him comfortable to proceed with the hearing in Court on an issue as serious as the allegations and charges facing him.
2. The Applicant maintains that his understanding and knowledge of the English language does not reach the threshold required by article 67(1)(a) of the Rome Statute, being that he does not “fully understand and speak” English.
3. The Prosecutor’s allegations against him are based on his work as a broadcasting journalist. Made out in Kalenjin language. In all probabilities, the Prosecution office will request to present his case against the Applicant from excerpts and extracts of comments made by the Applicant in the Kalenjin language. In these circumstances:
  - a. there is no prejudice in affording the applicant an opportunity to have his case made out to him, by way of translation and interpretation, in the Kalenjin language, right from the outset of the case; and
  - b. if the applicant’s request for Kalenjin translation and interpretation is not found to have merit, then it will not be fair in future to indulge the Prosecutor on the same motion for the same Kalenjin interpretation and translation.
4. A denial of the Applicant’s request for Kalenjin interpretation and translation is likely to favour the Prosecutor’s cause and case, to the prejudice and injury to the Applicant.
5. There is no prejudice to any party in fact and law in accommodating the applicant’s request to be afforded Kalenjin interpretation and translation.
6. It is not fair to deny the Applicant’s request simply because of the costs of getting Kalenjin interpretation and translation. This consideration contravenes the applicant’s rights under article 67(1)(f) of the Rome Statute. As noted by the ICTY and ICTR Appeals Chambers, reasons of judicial economy do not justify depriving the defendant of the right to effectively participate in the process, and the corresponding right to receive those translations and interpretations which are necessary to give effect to this

overarching right.<sup>1</sup> The ICTY Appeals Chamber has also underscored that it is inappropriate to limit a defendant's access to translation and interpretation based purely on the capacity restraints of the Court's translation section.<sup>2</sup>

7. In any event and without prejudice, Kalenjin interpretation and translation cannot possibly be at any significant cost to the International Criminal Court.
8. This application is made by the Applicant in good faith, out of genuine and real fear of being prejudiced at the trial, and with good conscience.
9. The Applicant emphasises that he has no wish and or desire to abuse the rights provided for by Article 67 of the Rome Statute.
10. The Applicant regrets that:
  - a. the Registry has imputed improper motives on the part of the Applicant as to the *bona-fides* of his request for translation;
  - b. the Registry made a finding as to the Applicant's proficiency in English without inviting his comments; and
  - c. the Registry, using the case of Mr. Germain Katanga,<sup>3</sup> made an assessment by itself (the Registry), whilst in Mr. Germain Katanga's case, the opinion of a suitable qualified expert was used to resolve the doubt that had arisen.
11. For avoidance of doubt, the Applicant is herein agreeable to the use of a suitably qualified expert to give an opinion as to the Applicant's full understanding of English in a manner that enables the Applicant to understand and have the benefit of a fair trial. Such an expert should be identified by the Court (as opposed to either the Registry or the Prosecution).

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<sup>1</sup> Prosecutor v. Prlić, Decision On Defendants Appeal Against "Décision portant attribution du temps à la défense pour la présentation des moyens à décharge" 1 July 2008 at para 16.

See also Prosecutor v. Milošević, Decision On Prosecution Motion For Permission To Disclose Witness Statements In English, 19 September 2001; Augustin Ndirabatware v. The Prosecutor, Case No. ICTR-99-54-A, Decision on Augustin Ndirabatware's Appeal of Decisions Denying Motions to Vary Trial Date, 12 May 2009, para. 31; Prosecutor v. Jadranko Prlić et al., Case No. IT-04-74-AR.73.4, Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case, 6 February 2007, para. 23. See also The Prosecutor v. Édouard Karemera et al., Case No. ICTR-98-44-AR15bis.3, Decision on Appeals Pursuant to Rule 15bis(D), 20 April 2007, para. 2.

<sup>2</sup> Prosecutor v. Praljak, Decision On Slobodan Praljak's Appeal Of The Trial Chamber's 13 October 2008 Order Limiting The Translation Of Defence Evidence, 5 December 2008, at para 24.

<sup>3</sup> ICC-01/04-02/07-522.

12. Granting the Applicant's request for Kalenjin interpretation and translation will not be inconsistent with Kenyan municipal law, nor amount to criticism of Kenya's legal framework.
13. Kenyan court's afford suspects and accused the right to interpretation whenever the applicant requests for such translation. In Kenya, interpretation is afforded to a suspect without questioning the *bona-fides* of the Applicant for such interpretation.
14. The Applicant is a member of the Nandi sub-tribe of the Kalenjin community. He, however, perfectly comprehends the Kalenjin language. A specifically Nandi interpreter and translator is desirable, but any Kalenjin translation and interpretation is acceptable. All his broadcasts as a journalist were conducted in the Kalenjin language, applicable to all Kalenjin sub-tribes/macro languages.

**Relief Sought:**

15. Wherefore the Applicant prays or orders that he be availed the services of interpretation and translation.



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Joseph Kipchumba Kigen-Katwa  
On behalf of Joshua Arap Sang

Dated this Tuesday, 05 April 2011

At The Hague, The Netherlands