

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 6 April 2011

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single 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 Document

**Decision on Joshua Arap Sang's Request for Translation and Interpretation into
Kalenjin**

Decision 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 Joshua Arap Sang
Joseph Kipchumba Kigen-Katwa

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar
Silvana Arbia, Registrar
Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the “Chamber”) of the International Criminal Court (the “Court”)¹ renders this decision with respect to “Registry’s assessment of Mr. Joshua Arap Sang’s English proficiency level” (the “Registry’s Submission”).²

1. On 8 March 2011, the Chamber, by majority, decided to summon William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang to appear before the Court on 7 April 2011.³

2. On 31 March 2011, the Registrar filed before the Chamber the Registry’s Submission, together with three annexes attached thereto.⁴ These annexes include two letters electronically communicated on 24 March 2011 to the Registrar by the Defence Counsel for Mr. Sang, wherein it is requested, *inter alia*, that the proceedings be conducted in Kalenjin as the language which Mr. Sang is “familiar and comfortable with”.⁵ Upon receipt of the two letters, the Registrar conducted an assessment of the proficiency level of Mr. Sang, the outcome of which is reflected in the Registry’s Submission. In particular, the Registrar concluded that Mr. Sang appears to be completely fluent in English and, accordingly, did not recommend the use of Kalenjin for the initial appearance and subsequent proceedings in the case.

3. On 1 April 2011, the Single Judge issued a decision ordering the Prosecutor and the Defence for Mr. Sang, should they wish to respond to the Registry’s Submission, to file their responses no later than 4 April 2011 at 16.00 hours (the “1 April 2011 Decision”).⁶

¹ Pre-Trial Chamber II, “Decision Designating a Single Judge”, ICC-01/09-02/11-9.

² ICC-01/09-01/11-20 and its annexes.

³ Pre-Trial Chamber II, “Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang”, ICC-01/09-01/11-01.

⁴ Annex 1 and annex 2 to the Registry’s Submission are currently classified as “confidential”, whilst annex 3 is filed as a public document.

⁵ Annex 1 to the Registry’s Submission. The Single Judge does not consider that the information revealed from this annex currently classified as “confidential” affects its level of classification.

⁶ Pre-Trial Chamber II, “Decision Pursuant to Regulation 24(1) of the Regulations of the Court”, ICC-01/09-01/11-21.

4. On 4 April 2011, the Prosecutor submitted his response to the Registry's Submission, wherein he, *inter alia*, "requests that the Chamber reject Mr. Sang's request to have the initial appearance and subsequent proceedings conducted in the Kalenjin language."⁷

5. On 4 April, the Single Judge, pursuant to a request to that effect,⁸ granted the Defence for Mr. Sang an extension of time limit until 5 April 2011 to file its response to the Registry's Submission.⁹

6. On 5 April 2011, the Defence submitted its response to the Registry's Submission, wherein, whilst acknowledging Mr. Sang's understanding and knowledge of English, it 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".¹⁰

7. The Single Judge notes articles 44(2), 50 and 67(1) of the Rome Statute (the "Statute"), rule 6(2) of the Rules of Procedure and Evidence (the "Rules") and regulation 40(2) of the Regulations of the Court.

8. At the outset, the Single Judge recalls that, pursuant to article 50(2) of the Statute, the working languages of the Court are English and French. However, under article 67(1)(a) of the Statute, the suspect shall have the right "[t]o be informed properly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks". In a similar vein, article 67(1)(f) of the Statute accords to the suspect the right "[t]o 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 of or documents presented to the Court are not in a language which the accused fully understands and speaks".

⁷ ICC-01/09-01/11-29.

⁸ ICC-01/09-01/11-30.

⁹ ICC-01/09-01/11-32.

¹⁰ ICC-01/09-01/11-37.

9. In this regard, the Single Judge refers to the following interpretation of the applicable law by the Appeals Chamber:

58. [...] Whether one speaks of article 67 (1) (a) or (f) of the Statute, it seems that the starting point, as far as languages are concerned, will be a working language of the Court. That is, proceedings will in principle be offered in English or French. An accused may state, however that he or she wishes to use another language – presumably on the basis that he or she does not fully understand and speak a working language of the Court.

59. The subject of understanding is exclusively the accused. Thus, the Chamber must give credence to the accused's claim that he or she cannot fully understand and speak the language of the Court. This is because it is the accused who can most aptly determine his or her own understanding and it should be assumed that he or she will only ask for a language he or she fully understands and speaks.

60. The matter does not, however, end there. What if the accused fully understands and speaks the language of the Court? The Chamber may have reasons as to why it does not find it appropriate to grant a request to have interpretation into another language. For example, an accused may fully understand and speak more than one language and it may be evident that he or she is asserting the right to use a different language to that being offered by the Court even though the latter is one of the languages that he or she also fully understands and speaks. The Chamber may consider that the accused is acting in bad faith, is malingering or is abusing his or her right to interpretation under article 67. If the Chamber believes that the accused fully understands and speaks the language of the Court, the Chamber must assess, on the facts on a case-by-case basis, whether this is so.

61. Given the addition of the word *fully*, and the drafting history, the standard must be high. Therefore, the language requested should be granted unless it is absolutely clear on the record that the person *fully* understands *and* speaks one of the working languages of the Court and is abusing his or her right under article 67 of the Statute. An accused fully understands and speaks a language when he or she is completely fluent in the language in ordinary, non-technical conversation; it is not required that he or she has an understanding as if he or she were trained as a lawyer or judicial officer. If there is any doubt as to whether the person fully understands and speaks the language of the Court, the language being requested by the person should be accommodated. Ultimately, the Chamber in question is responsible for ensuring the fair trial of the accused [footnote omitted].¹¹

10. In view of the above, the Single Judge is thus called upon to determine whether Mr. Sang fully understands and speaks English within the meaning of article 67(1)(a) and (f) of the Statute. For this purpose, the Single Judge turns to the analysis and the conclusions conducted by the Court Interpretation and Translation Section (STIC) and reflected in the Registry's Submission. In this respect, the Single Judge wishes to

¹¹ Appeals Chamber, "Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled "Decision on the Defence Request Concerning Languages", ICC-01/04-01/07-522, paras 58-61.

underline that the staff members of the STIC are highly qualified professionals who satisfy the strict requirements for providing the language services of the Court, in accordance with article 44(2) of the Statute and rule 6(2) of the Rules. Thus, they are best placed to ascertain whether the interpretation of court proceedings into Kalenjin for Mr. Sang is necessary or not.

11. According to the STIC, which has analyzed relevant open source video material, Mr. Sang “has a near-native command of English, and has strong communication skills.”¹² He speaks idiomatic English, especially when talking about broadcasting, his area of expertise.¹³ When interviewed in English, Mr. Sang “displays absolutely no sign of not understanding any of the questions, and responds immediately to the questions put.”¹⁴

12. The Single Judge equally considers the information also provided by the Registrar to the effect that Mr. Sang attended Kitale Academy Secondary School and the Kenya Institute of Mass Communication and is currently pursuing a degree in journalism at Moi University, all of which are educational institutions where the language of instruction is English.¹⁵ In the view of the Single Judge, Mr. Sang’s educational history forms a compelling basis for the conclusion that he has indeed acquired advanced knowledge of the English language as determined by the Registrar.

13. In light of the above, the Single Judge finds to be beyond doubt that Mr. Sang is completely fluent in ordinary non-technical conversation in English and thus, based on the legal standard set by the Appeals Chamber and already applied in the jurisprudence of the Court,¹⁶ he “fully understands and speaks” English within the meaning of article 67(1)(a) and (f).

¹² ICC-01/09-01/11-20, para. 23.

¹³ Registry’s Submission, para. 24.

¹⁴ *Ibid.*, para. 27.

¹⁵ *Ibid.*, paras 33-36.

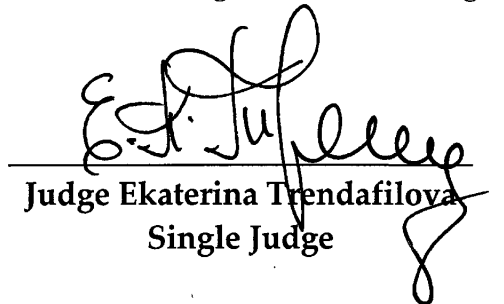
¹⁶ See Trial Chamber II, “Decision in a number of procedural issues raised by the Registry”, ICC-01/04-01/07-1134.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS

Mr. Sang's request to be provided with interpretation and translation into Kalenjin in the present proceedings.

Done in both English and French, the English version being authoritative.


Judge Ekaterina Trendafilova
Single Judge

Dated this Wednesday, 6 April 2011

At The Hague, The Netherlands