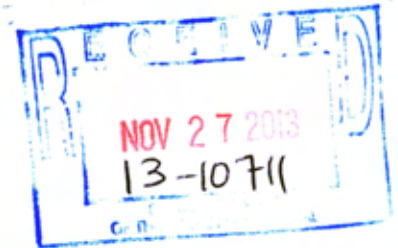


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Note to the Secretary-General

Through Ms. Malcorra

ICC — Kenya — Update further to the 12th session of the Assembly of States Parties

27/11/13

1. The purpose of this note is to inform the Secretary-General of recent developments relating to the Kenyan cases before the International Criminal Court.

Amendment to the Court's Rules of Procedure and Evidence

2. The Assembly of States Parties to the Rome Statute today adopted a series of amendments to the Court's Rules of Procedure and Evidence.

3. The amendments are as follows:

- A new rule, proposed by the United Kingdom, which provides for the possibility that an accused who is subject to a summons to appear — as opposed to an arrest warrant — may ask the Trial Chamber to be allowed to be present at his/her trial by video link.
- A new rule, proposed by Botswana, Jordan and Liechtenstein, pursuant to which an accused who is subject to a summons to appear may ask to be excused from being present during part or parts of his/her trial.

This new rule essentially gives effect to the existing ruling of the Appeals Chamber in the Ruto case.

Accordingly, the Trial Chamber may only grant the request if it is satisfied that:

- a) exceptional circumstances justify the absence;
- b) alternative measures, including changes to the trial schedule or a short adjournment of the trial, would be inadequate;
- c) the accused has explicitly waived his / her right to be present; and
- d) the rights of the accused will be fully ensured in his or her absence.

The Trial Chamber must rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question. Any absence must be limited to what is strictly necessary and must not become the rule.

- A new rule, proposed by Kenya, in accordance with which an accused who is subject to a summons to appear and who has "extraordinary public duties at the highest national level" may be excused, upon request, from being present at his/her trial.

The accused must be represented by counsel and explicitly waive his/her right to be present at the trial.

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The Trial Chamber must grant the request if (i) alternative measures are inadequate, (ii) it is in the interests of justice and (iii) it is satisfied that the rights of the accused are fully ensured.

The Trial Chamber must take its decision with due regard to the subject matter of the specific hearings at which the accused would not be present.

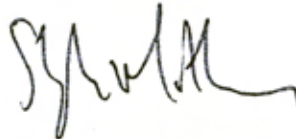
4. The full texts of the new rules are attached to this Note.
5. The new rules take effect immediately.
6. The implications of these new rules for the two Kenyan cases are that, while the final decision still rests with the Trial Chamber, both President Kenyatta and Deputy President Ruto may request and, subject to certain conditions, be granted permission either to participate in their trial via video link or else to be excused from being present during parts or all of their trial.
7. I have been informed by Ambassador Tiina Intelmann, the President of the Assembly of States Parties, that the Minister of Foreign Affairs of Kenya, who represented Kenya at the Assembly, was pleased with the outcome.
8. We understand that, during the negotiations on the new rules, the ICC judges were unhappy with the proposed changes, in particular, with the notion that an accused who participates via video link could be viewed as being "present" at his/her trial.

Amendment to the Rome Statute

9. On 18 November 2013, the Secretary-General received a communication from the Permanent Mission of Kenya to the United Nations submitting the texts of four proposed amendments to specific articles of the Rome Statute of the International Criminal Court.
10. The amendments proposed by Kenya relate to the following articles;
 - i. Article 63 - presence of the accused at trial;
 - ii. Article 27 - irrelevance of the official capacity;
 - iii. Article 70 – offences against the administration of justice; and
 - iv. Article 122 – amendments to provisions of an institutional nature.
11. Pursuant to Article 121 (1) of the Rome Statute, it is the responsibility of the Secretary-General to promptly circulate to all States Parties the text of any amendments proposed by a State Party.
12. We understand that it is possible that, in view of the adoption of the new Rules of Procedure and Evidence, the Kenyan Government may decide to withdraw its proposed amendments.

13. There is still a certain "window of opportunity" for the Government of Kenya to do this, as there are still certain steps that this Office would need to take before circulating the proposed amendments, in particular, seeking certain clarifications from the Permanent Mission of Kenya and translating the proposals.

14. We will keep the Secretary-General informed of developments.



Stephen Mathias
Assistant Secretary-General
in charge of the Office of Legal Affairs
27 November 2013

Cc: The Deputy Secretary-General
Mr. Serpa Soares
Mr. Feltman
Mr. Kim

WORKING GROUP ON AMENDMENTS

Chair's text on amendments to the Rules of Procedure and Evidence for the consideration of States Parties

New Draft Rule 134bis

Presence through the use of video technology

1. An accused subject to a summons to appear may submit a written request to the Trial Chamber to be allowed to be present through the use of video technology during part or parts of his or her trial.
2. The Trial Chamber shall rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question.

New Draft Rule 134ter

Excusal from presence at trial

1. An accused subject to a summons to appear may submit a written request to the Trial Chamber to be excused and to be represented by counsel only during part or parts of his or her trial.
2. The Trial Chamber shall only grant the request if it is satisfied that:
 - a) exceptional circumstances exist to justify such an absence;
 - b) alternative measures, including changes to the trial schedule or a short adjournment of the trial, would be inadequate;
 - c) the accused has explicitly waived his or her right to be present at the trial; and
 - d) the rights of the accused will be fully ensured in his or her absence.
3. The Trial Chamber shall rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question. Any absence must be limited to what is strictly necessary and must not become the rule.

New Draft Rule 134quater

Excusal from presence at trial due to extraordinary public duties

1. An accused subject to a summons to appear who is mandated to fulfill extraordinary public duties at the highest national level may submit a written request to the Trial Chamber to be excused and to be represented by counsel only; the request must specify that the accused explicitly waives the right to be present at the trial.
 2. The Trial Chamber shall consider the request expeditiously and, if alternative measures are inadequate, shall grant the request where it determines that it is in the interests of justice and provided that the rights of the accused are fully ensured. The decision shall be taken with due regard to the subject matter of the specific hearings in question and is subject to review at any time.
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