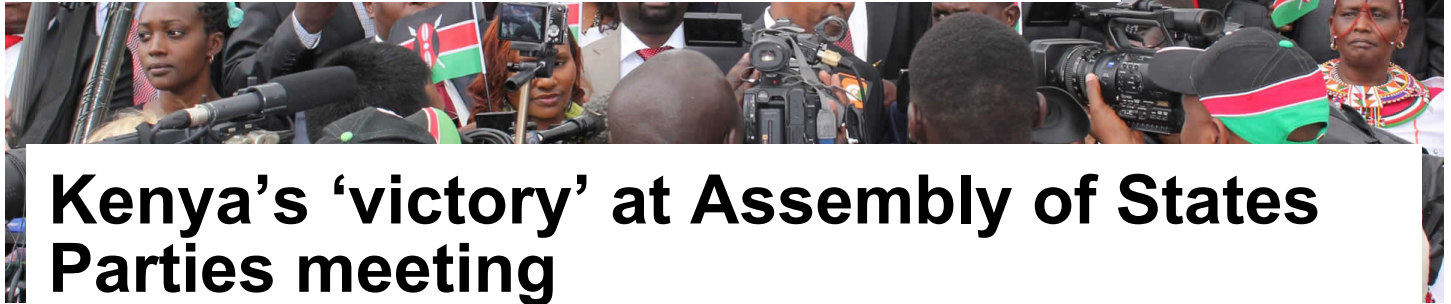


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Kenya's 'victory' at Assembly of States Parties meeting



Thursday, November 28, 2013 - 14:16

By Nevins Biko*

Kenya's delegation at The Assembly of States Parties (ASP) celebrated what they termed as key amendments to the rules of procedure and evidence regarding the cases against President Uhuru Kenyatta and his Deputy William Ruto.

The ASP adopted amendments to Rule 134 of the rules of procedure which will now allow Uhuru and Ruto not to attend their trials and be represented instead by their lawyers. The Kenyan delegation had been lobbying hard for this amendment. The ASP amended two other rules: Rule 68 which deals with the issue of prior recorded evidence, and Rule 100 has been replaced by a new rule to allow change of venue for the trial.

Kenya's reaction

Cabinet Secretary for Foreign Affairs Amina Mohammed said the changes had addressed concerns raised by Kenya and the AU. "It was through the spirit of give and take. We are happy that these new rules will help to strengthen operations of the ICC," she told the delegates.

She said the International Criminal Court (ICC) will now have to recognize President Uhuru Kenyatta and his Deputy William Ruto as leaders and not as mere suspects. "The ICC has been telling us that our president and his deputy are mere suspects at the court and should be treated as such. Not anymore after this amendments," said Mohammed.

Mohammed said the amendments would improve the efficacy of the court. "We have achieved all that we came to achieve," she added.

Opposition

During the assembly and in break-out meetings held during the meeting, arguments were made that amending the statute goes to the heart of the establishment of the ICC and will lead to entrenching impunity.

Many nations rejected proposals to amend the Rome Statute itself to provide for immunity of heads of state, but Kenya and AU have insisted that they will still push for the amendments.

Specifics

Under the amended Rule 134, President Uhuru Kenyatta and deputy President William Ruto may be excused from being present during trial by pleading they have "extraordinary public duties." The recusal is not automatic as either President Uhuru and his Deputy Ruto will have to write to the court seeking to be excused.

The court will then consider the request "expeditiously" and if alternative measures are inadequate, will grant the request if it determines that it is in the interest of justice and provided that the rights of the accused are fully insured. Such a 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," the amended rule states.

Apart from this insertion, the rule remains as it was and other accused persons who do not have "extraordinary public duties at the highest national level" such as radio journalist Joshua Arap Sang, will still be required to make a formal application for excusal which will only be granted if the court is satisfied that there exists exceptional circumstances to allow such an absence.

Rule 68

The ASP allowed an amendment to Rule 68 which deals with the issue of prior recorded evidence. The ICC prosecutor has applied to have testimony of witnesses who are not present in court to be allowed as evidence. Defense lawyers in the Ruto case had objected to this type of testimony.

However, this rule will not be applied in any of the cases currently before the court. This means that any testimony from absent Kenyan witnesses will not be admissible.

Rule 100

Another amendment that was passed by the plenary was Rule 100 which deals with the place of proceedings. The rule was replaced totally and now states that "the chamber, at any time after the initiation of an investigation may proprio motu or at the request of the prosecutor or the defense, decide to make a recommendation changing the place where the chamber sits."

**Nevins Biko is a pseudonym for a Nairobi-based journalist and blogger.*

Lead image: Amina Mohammed (I) and Keriako Tobiko, Director of Public Prosecutions (Photo: The Hague Trials Kenya)

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