

ANNEX D

Public

PROTOCOL ON THE CONDUCT OF THE PROCEEDINGS

I. INTRODUCTION

1. This Protocol aims at setting out the general guidelines of the presentation of evidence.
2. For the purposes of this Protocol, 'article' shall mean an article of the Rome Statute, 'rule' shall mean a rule of the Rules of Procedure and Evidence. References to 'documents' shall mean documents or any other forms of non-testimonial evidence.

II. SEQUENCE OF THE PRESENTATION OF EVIDENCE

3. Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:

- 1) Evidence for the Prosecution;
- 2) Evidence for the Accused;
- 3) Prosecution evidence in rebuttal;
- 4) Defence evidence in rejoinder;
- 5) Evidence ordered by the Trial Chamber; and
- 6) Any further relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused are found guilty on one or more of the charges.

III. VIVA-VOCE WITNESSES

A. GENERAL

4. Witnesses will be examined as follows:
 - (i) The party calling the witness shall conduct an examination-in-chief using non-leading questions, except in respect of preliminary matters that are necessary to provide background or context, and which are not in dispute; or in respect of other areas that the Chamber may deem appropriate;
 - (ii) The opposing party may subsequently conduct the cross-examination, ordinarily being permitted to use leading questions;

- (iii) The party calling the witness may then conduct a re-examination under the same conditions as the examination-in-chief ; and
- (iv) The Judges may, at any stage,¹ put any questions to the witness.

5. Cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of that case. The Trial Chamber may, in the exercise of its discretion, permit enquiry into additional matters.

6. The parties are encouraged to avoid cross-examination on grounds already covered by a prior cross-examiner. The order in which the Defence teams conduct their cross-examination of prosecution witnesses will alternate every witness, unless they agree otherwise.

7. The re-examination of a witness shall be limited to the issues raised during cross-examination. Ordinarily, this will conclude the witness' testimony. On an exceptional basis and upon a showing of good cause, the Trial Chamber may authorise the re-cross-examination and further re-examination of a witness on limited and specific issues. Any questioning of the defence after further re-examination must be restricted to matters raised in re-examination by the Prosecution.

8. The cross-examining party is required to put to a witness, who is able to give evidence relevant to the case for that party, the nature of its case that is in contradiction to the witness's evidence. However, the cross-examining party is required only to put the general substance of its case conflicting with the evidence of the witness, and not every detail that the party does not accept. Additionally, the cross-examining party is required to put to the witness any facts or evidence upon which it intends to rely to impeach the credibility of the witness, in order to give the witness an opportunity to respond thereto. Failure to do so may result in the Chamber disregarding or assigning less weight to the impeaching evidence.

B. MANNER OF QUESTIONING

9. The parties are to organise their presentation of evidence in a way that avoids the unnecessary repetition of evidence already on the record.

10. The Trial Chamber may prohibit inappropriate, misleading, or irrelevant questions.

¹ Although the interest of efficiency may militate in favour of the Judges asking questions after all parties have completed their questioning, the timing remains within the discretion of the Chamber.

11. The parties should avoid lengthy, complicated, or compound questions that tend to confuse the witness. Where practicable, the parties should avoid paraphrasing the testimony or statement of the witness, but shall quote the directly relevant passage and indicate the exact page numbers (including ERN numbers where applicable), paragraph numbers, and/or relevant lines. The parties are requested to restrict such quotations to situations when it is strictly necessary for the understanding of the question.

12. The parties may put to a witness the evidence obtained from a previous witness, provided that the identity of that witness is not given. Parties may not ask witnesses to comment on the credibility of other witnesses.

13. The credibility of a witness may be impeached by any party, including the party calling the witness.

14. Objections to the form of questioning or other matters shall be timely, specific, and brief. A party waives an objection when not made in a timely manner.

15. Hearsay evidence is admissible.

C. USE OF DOCUMENTS DURING THE EXAMINATION

16. Parties should only seek to question a witness on documents that are relevant to that witness's testimony. It is for a party to demonstrate a clear connection between the exhibit and the substance of the testimony of that witness.

17. Five working days prior to the witness's appearance, the party calling the witness shall provide the Trial Chamber, the Registry, and the other parties with a list of the documents or material it intends to use with the witness during the examination-in-chief. The list can be communicated by e-mail. It is the duty of the calling party to notify the Trial Chamber, the Registry, and the other parties as soon as possible of any changes thereto. In addition, witness preparation notes and any attendant log shall be distributed to the other parties as soon as practicable after the conclusion of the preparation session and prior to the commencement of the witness's evidence.

18. Objections by the other parties to the use of particular documents, if any, shall be filed no later than two working days before the examination, or – in exceptional circumstances - made orally.

19. Three working days prior to the expected commencement of cross-examination, the cross-examining party shall provide the Trial Chamber, the Registry, and the other parties with a list of the documents it intends to use during cross-examination. Where necessary, the other parties may request a short adjournment in order to examine the material.

20. If any of the documents that the calling or cross-examining party wishes to use during the witness's appearance are not included on the original list, it must apply for leave of the Trial Chamber to use them with the witness, showing good cause.

21. As a rule, parties can only use documents during their examinations that have been properly disclosed. If a cross-examining party wishes to use material that has not been disclosed in advance, it may only do so with leave of the Trial Chamber. In that case, the party shall provide copies of the material to the Chamber and the other parties no later than 24 hours before the commencement of the cross-examination.

D. ADMISSIBILITY OF THE PREVIOUSLY RECORDED TESTIMONY OF AN ATTENDING WITNESS

22. In accordance with rule 68(3), a Trial Chamber may admit, in whole or in part, the evidence of a witness who is present before the Chamber, in the form of previously recorded testimony, including statements taken under rule 111, interviews recorded pursuant to rule 112, or any other previously recorded testimony ("previously recorded testimony").

23. Motions for the admission of previously recorded testimony pursuant to rule 68(3) should, in principle, be submitted to the Chamber at least 21 days before the witness is scheduled to appear. The application shall be accompanied by a copy of the previously recorded testimony indicating precisely which passages the party calling the witness wishes to tender into evidence. If these passages contain references to other material that is available to the party calling the witness, they shall equally be attached to the application. The other parties shall have ten days following the notification of the application to raise any objections.

24. The witness must attest at the hearing that his or her previously recorded testimony accurately reflects what the witness would say if examined. The parties may be directed to read a summary, or the relevant parts of the witness's previously recorded testimony into the record of the proceedings.

E. ADMISSIBILITY OF THE PREVIOUSLY RECORDED TESTIMONY OF A WITNESS NOT ATTENDING

25. In accordance with rule 68(2), a Trial Chamber may admit, in whole or in part, the evidence of a witness who is not present before the Chamber, in the form of previously recorded testimony.

26. Motions for the admission of previously recorded testimony pursuant to rule 68(2) may be submitted to the Chamber at any time during the trial, provided that sufficient notice is given to the other parties. The application shall address the applicable scenario envisaged under rule 68(2) together with any supporting material, and be accompanied by copy of the previously recorded testimony indicating precisely which passages the party calling the witness wishes to tender into evidence. If these passages contain references to other material that is available to the party calling the witness, they shall equally be attached to the application. The other parties shall have ten days following the notification of the application to raise any objections.

F. REFRESHING THE MEMORY OF A WITNESS

27. Where a witness demonstrates an inability to independently recall a particular fact, the calling party may, *inter alia*, use the previously recorded testimony of the witness to refresh the witness's recollection, regardless of whether the previously recorded testimony has been admitted into evidence.

28. A party shall first establish (i) that the witness cannot recall a particular issue, and (ii) that his or her testimony has been previously recorded. Subsequently, the calling party should provide the witness with an opportunity to read the identified paragraphs, or read said paragraphs to the witness. The calling party must further ascertain whether the witness's recollection has been refreshed, and if so, may examine the witness again on the matter at issue.

G. FALSE TESTIMONY UNDER SOLEMN DECLARATION

29. During the examination, the Chamber may, at the request of a party, repeat the witness's duty to tell the truth and the consequences that may result from a failure to do so. If a party makes such a request, the application will be made outside the hearing of the witness.

H. HOSTILE OR ADVERSE WITNESSES

30. The calling party may request that the Chamber declare its witness “hostile” or “adverse” if the party believes that the witness is not desirous of telling the truth to the Court at the instance of the party calling him.

31. Prior to applying to declare a witness “hostile” or “adverse”, the calling party may request to refresh the witness’s memory from his/her prior statement(s) about issues on which the witness’s evidence has deviated, following the procedure set out above. If the witness disputes the correctness of the prior statement, the calling party may question the witness on the reason for the deviation.

32. The Chamber will determine whether there is an objective basis for a witness to be declared “hostile” or “adverse”, including on the basis of one or more of the following factors:

- 1) Whether the witness has been hostile in general demeanour;
- 2) Whether there is an impression of evasiveness on the part of the witness;
- 3) Whether the present testimony of the witness before the Court has been in whole, or in part, deliberately or systematically inconsistent with a previously recorded statement or testimony in relation to a material issue or issues before the Court;
- 4) Whether the witness has been systematically adverse to the calling party not only by deliberately impugning the credibility of the case of the calling party but also by appearing systematically to support the case of the party opposed in interest to the calling party.

33. If declared “hostile” or “adverse”, the calling party will be permitted to cross-examine the witness on all issues considered relevant, including his or her credibility and character.

I. SELF-INCRIMINATION

34. The Registry is directed to make all necessary arrangements to provide independent legal advice from a qualified lawyer to witnesses who may incriminate themselves during their testimony.

35. The party calling such witnesses are directed to notify, as soon as practicable, the Victims and Witnesses Unit (the “VWU”) and the Chamber if they believe that a witness may give self-incriminating statements during his or her testimony. If the witness considers that he or she requires assurance under rule 74(3)(c), the advising lawyer shall seize the Chamber with a relevant application, notifying the Prosecution thereof.

36. The Prosecution shall present to the Chamber its views on the matter in such time as to allow the Chamber to rule before the commencement of the witness's testimony.

J. TESTIMONY OF EXPERT WITNESSES

37. The full statement and/or report of any expert witness to be called by a party shall be disclosed within the time-limit prescribed by the Trial Chamber.

38. Within thirty days of disclosure of the statement and/or report of the expert witness, or such other time prescribed by the Trial Chamber, the opposing party shall file a notice indicating whether:

- (i) It accepts the expert witness statement and/or report; or
- (ii) It wishes to cross-examine the expert witness; and
- (iii) It challenges the qualifications of the witness as an expert or the relevance of all or parts of the statement and/or report and, if so, which parts.

39. If the opposing party accepts the statement and/or report of the expert witness, the statement and/or report may be admitted into evidence by the Trial Chamber without calling the expert witness to testify in person.

K. IN-COURT PROTECTIVE MEASURES

40. The parties are directed to make applications for in-court protective measures with respect to witnesses in such time as to enable the consultation with the VWU and the responses to the application, pursuant to rules 87(1) and (2), as well as the Chamber's ruling on the application before the commencement of testimony of the witness concerned, and, in any event, no later than one month before the commencement of testimony.

41. In exceptional cases, upon good cause shown, applications for protective measures that are not filed within this timeframe, including applications by witnesses themselves, may be considered.

42. The application shall be filed confidentially, but not ex parte. The information which the applying party seeks to withhold from the other party shall be provided in an ex parte annex to the application.

IV. DOCUMENTARY AND OTHER EVIDENCE

A. GENERAL

43. Pursuant to article 69(4), the Trial Chamber will not admit evidence that it considers to be without relevance and probative value. It is for the submitting party to demonstrate the relevance and probative value of the evidence.

44. There is no rule prohibiting the admission into evidence of documents merely because the source or custodian was not called to testify. The party submitting the evidence must however demonstrate *prima facie* that the evidence is authentic.

B. 'BAR TABLE' APPLICATIONS

45. The parties may submit evidence from the bar table via more than one application. However, parties are encouraged to submit such evidence in as practicable and efficient a manner as possible.

46. Bar table applications shall generally include for each document or group of documents a paragraph relevant to: (i) the description of the document(s); (ii) the authenticity/reliability of the document(s); and (iii) the relevance and probative value of the document(s).

47. Bar table applications may be filed at any point during trial proceedings.

C. EVIDENCE OF CONSISTENT PATTERN OF CONDUCT

48. Evidence of consistent pattern of conduct or similar facts is admissible to the extent that it is relevant to the matter at hand.

49. An action cited as a similar fact need not necessarily constitute an offence, and the different counts within the document containing the charges may serve as evidence of similar facts with respect to each of the allegations made.

D. JUDICIAL NOTICE

50. Pursuant to article 69(6), a Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.

51. At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated or agreed facts, or of the authenticity of evidence from other proceedings of the Court relating to matters at issue in the current proceedings.

V. E-COURT

52. The trial proceedings are conducted using e-court. All documents shall therefore be handled through e-court.

53. Parties shall ensure that the documents uploaded into the e-court system (i) have the required meta-data, and, where applicable (ii) are fully searchable through Optical Character Recognition or OCR.

54. Hardcopies may be used by a party only where the party has been unable, due to unforeseen circumstances, to upload a document into e-court. When the use of hardcopies is permitted, the party is responsible for producing copies for the Trial Chamber, the witness, opposing parties, the Registry, and the interpreters.

VI. TRANSCRIPTS OF HEARINGS

55. The parties should propose public redacted versions of any confidential transcripts no later than two weeks after the conclusion of the witness testimony.

56. Requests for corrections to the transcript shall be submitted, within five working days from the notification of the edited version of the transcript, to the responsible person within the Registry.

57. The requests shall be based on the edited version of the transcript and contain a table providing: (i) full reference of the transcript, date and the case name, (ii) the passage extracted from the edited version of the transcript, containing the discrepancies to be reviewed, (iii) pages and lines of the passage from the edited version of the transcript, and (iv) the language originally used by the speaker.

