

Annex A

Public

Prosecution's observations on the conduct of the proceedings

PROTOCOL ON THE CONDUCT OF THE PROCEEDINGS**I. INTRODUCTION**

1. This Protocol aims to set out general guidelines for 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 form of non-testimonial evidence.

II. OPENING STATEMENTS

3. The opening statements for each party will be presented in the following order:
 - (i) Prosecution;
 - (ii) Legal Representative of the Victims ("LRV");
 - (iii) Defence for Gbagbo and Blé Goudé, in whichever order is agreed as between the Defence teams.
4. The Prosecution and Defence teams for each of the accused shall have approximately four hours to present their opening statements. The LRV shall have approximately 30 minutes.¹ Any statements from the accused persons, under article 67(1)(h), should be made within the time allotted to their respective Defence teams. It is not necessary for the parties to use the entirety of their allotted time.
5. The parties and the LRV are permitted to use audio visual aids such as videos, photographs, and maps as needed. They are directed to disclose to the Chamber, the other parties and the LRV, no later than five days before the start of the trial, copies of any documents (including visual aids) they intend to use, unless such documents are on the Prosecution's list of evidence.²

¹ As requested by the LRV in her Submissions on the Provisional Agenda for the Status Conference to be held on 21 April 2015, 14 April 2015, ICC-02/11-01/15-36, para.8.

² *Ruto* General Directions 1, para.4. *See also Ruto* General Directions 2, para.11. *See* Prosecution's submission on the provisional agenda for the 21 April status conference, ICC-02/11-01/15-35-Conf, para. 30.

III. SEQUENCE OF THE PRESENTATION OF EVIDENCE

6. Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:
 - (i) Evidence for the Prosecution;
 - (ii) Evidence for the victims, where authorised by the Chamber;³
 - (iii) Evidence for the Defence, in whichever order is agreed as between the Defence teams;
 - (iv) Prosecution evidence in rebuttal;
 - (v) Defence evidence in rejoinder;
 - (vi) Evidence ordered by the Chamber; and
 - (vii) Any further relevant information that may assist the Chamber in determining an appropriate sentence if the accused are found guilty on one or more of the charges.

IV. SCHEDULING OF WITNESSES

7. A party calling witnesses shall provide the Chamber, cross-examining party or parties and LRV with a list, by e-mail, of all witnesses it expects to call in the following calendar month, and updated, confirmed witness schedules on a weekly basis.⁴
8. It is the duty of the presenting party to notify the Chamber, cross-examining party or parties and LRV as soon as possible of any changes to the order of witnesses.

V. ORDER OF QUESTIONING OF WITNESSES

9. Witnesses will be examined as follows:
 - (i) The party calling the witness shall conduct an examination-in-chief.
 - (ii) The other party or parties may subsequently cross-examine the witness.
 - (iii) The party calling the witness may then conduct a re-examination; and

³ In accordance with the modalities of victim participation, to be determined by the Chamber. See Prosecution's observations on the modalities of victim participation at trial [to be filed].

⁴ See *Bemba* Directions on Conduct, para.30; *Ruto* General Directions 1, para. 12.

- (iv) The Chamber may put any questions to the witness, at any stage of the testimony.
10. Where an application has been made and leave granted,⁵ the LRV may ask questions of a particular witness after the calling party has concluded its examination-in-chief.⁶
 11. The order in which the Defence teams conduct their cross-examination of Prosecution witnesses will alternate every witness, unless they agree otherwise.
 12. When both Accused wish to call the same witness, they shall coordinate with each other so as to avoid having to call the witness more than once. The Chamber therefore expects that in such a case the witness will be called by both Defence teams jointly. They shall agree among themselves how to organise the examination-in-chief and re-examination. In principle, all questions on behalf of both accused are to be put during examination-in-chief. The Defence teams may agree to partition the examination-in-chief of a witness or assign one Defence team to conduct the entire questioning. When one Defence team conducts the examination-in-chief on behalf of both accused, the other Defence team shall not have the right to cross-examine the witness.⁷
 13. Where a witness is called on behalf of one of the Accused, the order of questioning will be: examination-in-chief on behalf of the Accused calling the witness, cross-examination on behalf of the other Accused, cross-examination by the Prosecution, and re-examination on behalf of the Accused calling the witness.⁸
 14. According to rule 140(2)(d), the Defence has the right to be the last to examine a witness. This means that if a witness was not called by an accused, the latter shall have the right to ask additional questions of the witness after he or she was re-examined by the party calling him or her. If the Defence does not exercise its right to cross-examine a particular witness, it also waives its right to ask final questions of that witness, unless new matters are raised by additional questions of the Chamber or the participants after the examination-in-chief.⁹

⁵ In accordance with the procedure proposed by the Prosecution in the Prosecution's observations on the conduct of the proceedings [to be filed].

⁶ See *Katanga* Directions for the conduct of proceedings, para.88.

⁷ See *Katanga* Directions for the conduct of proceedings, para. 65.

⁸ See *Prosecutor v. Kupreskic et al*, IT-95-16, Decision on Order of Presentation of Evidence, 21 January 1999.

⁹ See para. 45, below, for the scope of questioning under rule 140(2)(d).

VI. IN-COURT PROTECTIVE MEASURES

15. The parties are directed to make applications for in-court protective measures with respect to witnesses no later than one month before the commencement of testimony.¹⁰
16. In exceptional cases, upon good cause being shown, applications for protective measures not filed within this timeframe, including applications by witnesses themselves, may be considered.¹¹
17. 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.¹²

VII. SELF-INCRIMINATION

18. 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.¹³
19. The party calling such witnesses are directed to notify, as soon as practicable, 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.¹⁴
20. 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.¹⁵

VIII. USE OF DOCUMENTS DURING THE EXAMINATION OF WITNESSES

21. Parties should only seek to use documents during witness examination that are relevant to that witness's testimony. It is for a party to demonstrate a clear

¹⁰ See *Ruto* General Directions 1, para.30.

¹¹ See *Ruto* General Directions 1, para.30.

¹² See *Ruto* General Directions 1, para.30.

¹³ See *Ruto* General Directions 1, para.29.

¹⁴ See *Ruto* General Directions 1, para.29.

¹⁵ See *Ruto* General Directions 1, para.29.

connection between the document and the substance of the testimony of that witness.

22. As a rule, parties can only use documents, during their examinations, that have been properly disclosed.

A. DISCLOSURE OF DOCUMENTS FOR USE DURING EXAMINATION-IN-CHIEF

23. The party calling a witness shall provide the Chamber, Registry, parties and LRV, no later than five working days prior to the witness's appearance, with a list of the documents it intends to use with the witness during its examination-in-chief. The list can be communicated by e-mail. It is the duty of the calling party to notify the Chamber, Registry, parties and LRV as soon as possible of any changes thereto. If any of the documents that the calling party wishes to use during the examination-in-chief are not included on its list of evidence, it must apply for leave from the Chamber to add those documents to its list of evidence.¹⁶
24. 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-in-chief, or – in exceptional circumstances - made orally.
25. The attendance log and any disclosable information shall be distributed to the other parties and LRV as soon as practicable after the conclusion of the preparation session and prior to the commencement of the witness's evidence.¹⁷

B. DISCLOSURE OF DOCUMENTS FOR USE DURING CROSS-EXAMINATION

26. As regards documents to be used during cross-examination that are not already in evidence or marked for identification,¹⁸ the party intending to make use of such documents shall provide a list of the documents to the Chamber, the Registry, the other parties and the LRV, and, where the documents are not already available in E-Court, ensure electronic copies thereof are uploaded into E-Court¹⁹, no later than three working days prior to the expected commencement

¹⁶ See, for example, *Prosecutor v. Karadzic*, IT-95-5/18-PT, Order on the Procedure for the Conduct of Trial, 8 October 2009 ("Karadzic Order on Conduct"), Appendix A, paras.B-C. By list of evidence, the Prosecution means the Prosecution or Defence *final* list of evidence, to be filed as ordered by the Trial Chamber.

¹⁷ See ICC-02/11-01/11-784-Conf & ICC-02/11-01/11-784-Conf-Anx, paras. 13-14 and 30.

¹⁸ Pending a decision of the Trial Chamber as to whether or not to admit into evidence.

¹⁹ Following the procedure to be established in a joint E-Court Protocol. As mentioned in submissions during the Status Conference on 21 April 2015, the Prosecution is operating under the assumption that a joint E-court Protocol will be adopted (ICC-02/11-01/15-T-1-CONF-ENG, p.82, l.16-23). There are presently two separate E-Court protocols in place (ICC-02/11-01/11-30-AnxI and ICC-02/11-02/11-59-Anx).

of cross-examination. Where necessary, the other parties may request a short adjournment in order to examine the material.²⁰

27. As regards documents to be used during cross-examination that are already in evidence or marked for identification, a list of all such documents shall be provided to the Chamber, the Registry, the other parties and the LRV after completion of the examination-in-chief of that witness at the latest.²¹
28. If any of the documents that the cross-examining party wishes to use during the witness's appearance are not so listed and disclosed, it must apply for leave of the Chamber to use them with the witness, showing good cause. The other parties may then request a short adjournment in order to examine the material.²²

C. USUAL DISCLOSURE OBLIGATIONS CONTINUE TO APPLY

29. The foregoing is without prejudice to the usual disclosure obligations that are ordinarily comprised in the procedural laws of this Court.²³

IX. QUESTIONING OF WITNESSES

30. The parties are to organise their presentation of evidence in a way that avoids the unnecessary repetition of evidence already on the record.
31. The parties should avoid lengthy, complicated, or compound questions that tend to confuse the witness. The Chamber may prohibit inappropriate, misleading, or irrelevant questions.
32. 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.
33. 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

²⁰ See *Ruto* General Directions 1, para. 24.

²¹ See, for example, *Karadzic* Order on Conduct, Appendix A, para.G.

²² See, for example, *Karadzic* Order on Conduct, Appendix A, para.G.

²³ See *Ruto* General Directions 1, para. 25.

witnesses to comment on the credibility of other witnesses. The credibility of a witness may be impeached by any party, including the party calling the witness.

34. 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.

35. Hearsay evidence is admissible.

A. EXAMINATION-IN-CHIEF

36. The party conducting an examination-in-chief shall use 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.

B. CROSS-EXAMINATION

37. The cross-examining party or parties may ordinarily use leading questions.

38. 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 Chamber may, in the exercise of its discretion, permit enquiry into additional matters.

39. 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.²⁴ 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.

40. The parties are encouraged to avoid cross-examination on grounds already covered by a prior cross-examiner.

²⁴ For the avoidance of any doubt, failure by a non-calling party to put, in cross-examination, each and every point of disagreement with the testimony of a witness called by an opposing party will not be taken to mean that the non-calling party concedes the truth of each and every part of that witness' testimony. In particular, the non-calling party will not be prevented thereby from relying upon evidence led, as part of its case, to the contrary.

41. When a witness called by one Accused is subsequently cross-examined by the co-accused (who did not jointly call the witness), the latter Defence has the obligation to put all questions that are relevant to its case at that time. In principle, the cross-examining co-accused will not be allowed to put leading or closed questions in relation to matters that are being raised for the first time, unless the witness is clearly adverse to the co-accused.²⁵

C. RE-EXAMINATION

42. The re-examination of a witness shall be conducted under the same conditions as the examination-in-chief and limited to issues raised for the first time during cross-examination.
43. Where questions put to a witness by the Chamber after cross-examination and re-examination raise entirely new matters, the parties are entitled to further cross-examine and re-examine the witness on such new matters.²⁶

D. QUESTIONS UNDER RULE 140(2)(D)

44. Any final questions by the Defence under rule 140(2)(d) must be limited to matters raised since the Defence last had the opportunity to question the witness. The same rules that apply to examination-in-chief shall equally apply to final questioning.

E. QUESTIONING BY THE LRV

45. The LRV should only question a witness to the extent relevant to the victims' interests. The scope of questioning is therefore limited to questions that have the purpose of clarifying the witness' evidence and to elicit additional facts.²⁷
46. The LRV should conduct her questioning in a neutral manner and avoid leading or closed questions, unless specifically authorised by the Chamber to use such questions with a particular witness. If the LRV is authorised to challenge the credibility or accuracy of a witness' testimony, leading, closed as well as questions challenging the witness' reliability may be allowed, subject to the same limitations outlined in relation to cross-examination.²⁸

²⁵ *Katanga* Directions for the conduct of proceedings, para. 76.

²⁶ See *Prosecutor v. Kupreskic et al*, IT-95-16, Decision on Order of Presentation of Evidence, 21 January 1999.

²⁷ *Bemba* Directions on Conduct, para. 20; ICC-01/04-01/06-2127, para.26.

²⁸ *Katanga* Directions for the conduct of proceedings, para.91; ICC-01/04-01/06-2127, paras. 29-30.

F. REFRESHING THE MEMORY OF A WITNESS

47. 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.
48. 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

49. 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

50. 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.
51. 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.
52. 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:
 - (i) Whether the witness has been hostile in general demeanour;
 - (ii) Whether there is an impression of evasiveness on the part of the witness;
 - (iii) 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;

- (iv) 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.

53. 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.

X. TESTIMONY OF EXPERT WITNESSES

54. 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 Chamber.

55. Within thirty days of disclosure of the statement and/or report of the expert witness, or such other time prescribed by the 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.

56. 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 Chamber without calling the expert witness to testify in person.

XI. ADMISSION OF EVIDENCE

57. Pursuant to article 69(4), the 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.

A. ADMISSION OF DOCUMENTS TENDERED THROUGH A WITNESS

58. If the calling party demonstrates a clear connection between a document and the substance of a witness’ testimony, the Chamber may admit that document into evidence as an exhibit. Individual applications should be made in respect of each document which a party seeks to admit into evidence through a witness.

59. 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. ADMISSION OF THE PREVIOUSLY RECORDED TESTIMONY OF A WITNESS NOT ATTENDING

60. Applications to admit, under rule 68(2), the previously recorded testimony of a witness who is not present before the Chamber may be made 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 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 documents that are 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.

C. ADMISSION OF THE PREVIOUSLY RECORDED TESTIMONY OF AN ATTENDING WITNESS

61. Applications to admit, under rule 68(3), the previously recorded testimony of a witness who is present before the Chamber should, in principle, be made 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 documents that are 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.
62. 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.

D. 'BAR TABLE' APPLICATIONS

63. 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.

64. 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).

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

XII. EVIDENCE OF CONSISTENT PATTERN OF CONDUCT OR SIMILAR FACTS

66. Evidence of consistent pattern of conduct or similar facts is admissible to the extent that it is relevant. An action cited as a similar fact need not necessarily constitute an offence. The evidence of actions referred to in different counts of the relevant Document(s) Containing the Charges may serve as evidence of similar facts with respect to each of the allegations.

XIII. JUDICIAL NOTICE

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

68. At the request of a party or *proprio motu*, the 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.

XIV. SITE VISIT

69. The party intending to request the Chamber to undertake a site visit shall specify, in its application, the locations which, in its view, the Chamber should visit and the purpose of visiting those locations. The relevance of information that the party intends to obtain during such a visit to the issues in the present case shall also be specified.²⁹

XV. E-COURT

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

²⁹ See *Ruto* General Directions 1, para.33.

71. 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.
72. 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 Chamber, the witness, opposing parties, the Registry, and the interpreters.

XVI. RECOURSE TO PRIVATE/CLOSED SESSION

73. Insofar as possible, witness testimony should be given in public. Recourse to private and/or closed session will at times be unavoidable, in particular for protected witnesses. Requests for private and/or closed sessions should specify reasons justifying the request in a neutral and objective fashion, if possible referring to the points that will be touched upon. To the extent that this does not unduly inhibit the sequence of questioning, parties and the LRV should endeavour to group together identifying questions.

XVII. PUBLIC REDACTED TRANSCRIPTS OF HEARINGS

74. The parties should propose public redacted versions of any confidential transcripts no later than two weeks after the conclusion of the witness testimony.³⁰
75. 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.
76. 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.

³⁰ See *Ruto* General Directions 1, para.34.