

**UNITED
NATIONS**



International Residual Mechanism
for Criminal Tribunals

Case No.: MICT-13-38-PT

Date: 14 December 2021

Original: English

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Pre-Trial Judge

Registrar: Mr. Abubacarr Tambadou

Order of: 14 December 2021

PROSECUTOR

v.

FÉLICIEN KABUGA

PUBLIC

**ORDER FOR SUBMISSIONS ON
THE PROCEDURE FOR THE CONDUCT OF TRIAL**

Office of the Prosecutor:

Mr. Serge Brammertz
Mr. Rashid S. Rashid
Mr. Rupert Elderkin

Counsel for Mr. Félicien Kabuga:

Mr. Emmanuel Altit

I, IAIN BONOMY, Presiding Judge of the Trial Chamber of the International Residual Mechanism for Criminal Tribunals (“Trial Chamber” and “Mechanism”, respectively) and the Pre-Trial Judge in this case;¹

RECALLING that, on 4 June 2021, the Trial Chamber issued an order setting forth deadlines for pre-trial preparations and the commencement of trial;²

NOTING the progress that the parties have made in completing their pre-trial obligations as set forth in the Order of 4 June 2021;

NOTING that the Pre-trial conference, pursuant to Rule 81 of the Rules of Procedure and Evidence (“Rules”), and the date for the commencement of trial will be scheduled in due course, bearing in mind the outcome of the ongoing medical assessment;³

CONSIDERING that, in anticipation of the commencement of trial, it is appropriate to adopt guidelines on the procedure for the conduct of trial, and the Trial Chamber has compiled a draft of the guidelines it proposes to adopt;⁴

CONSIDERING FURTHER that, prior to finalizing and adopting the guidelines, it is appropriate that the parties and the Registry should have an opportunity to provide comments on, as well as to propose any revisions or additions to, the draft guidelines;

PURSUANT to Article 18 of the Statute and Rule 55 of the Rules;

HEREBY INVITES the parties and the Registry to file any submissions on the guidelines on the procedure for the conduct of trial, as provisionally set out in the Annex to this Order, by Monday, 24 January 2022.

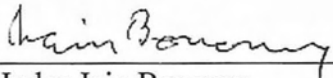
¹ See Order Assigning a Trial Chamber, 1 October 2020, p. 1; Order Designating a Pre-Trial Judge, 29 October 2020, p. 1.

² Order Establishing a Pre-Trial Work Plan, 4 June 2021 (“Order of 4 June 2021”), p. 2, Annex.

³ See, e.g., Order for Further Independent Medical Expert Evaluation, 1 December 2021 (confidential). See also Order of 4 June 2021, p. 2 (wherein it is noted that the health of the Accused is a complicating factor that may warrant adjustments to the pre-trial work plan, in particular in relation to, *inter alia*, the commencement of trial).

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

Done this 14th day of December 2021,
At Arusha,
Tanzania



Judge Iain Bony
Pre-Trial Judge

[Seal of the Mechanism]

⁴ See *Prosecutor v. Maximilien Turinabo et al.*, Case No. MICT-18-116-PT, Order on the Procedure for the Conduct of Trial, 21 September 2020; *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. MICT-15-96-PT, Order on the Procedure for the Conduct of Trial, 6 December 2016.

ANNEX

DRAFT GUIDELINES ON THE PROCEDURE FOR THE CONDUCT OF TRIAL

A. Motion Practice

1. Motions may be made by the parties, either orally or in writing. When an oral motion is made, the opposing party may be invited to respond orally at that time, or may be granted a time limit within which to file a written response or make oral submissions. When a motion is made in writing, the opposing party will have fourteen days within which to file any response, unless the Trial Chamber orders otherwise.
2. As a general rule, replies to responses will not be accepted by the Trial Chamber unless on good cause shown. A party wishing to make such a reply must seek leave of the Trial Chamber to do so, specifying why the circumstances amount to good cause. A party seeking leave of the Trial Chamber to file a reply to a response should also include the substance of the reply, which should be done within seven days of the filing of a response to a motion. However, the Trial Chamber may rule on a matter, without awaiting a response or a reply, where exigent circumstances exist or where there is no prejudice to the parties.
3. The Trial Chamber retains the right to alter these periods where appropriate in terms of Rule 153(A) of the Rules and its inherent power to ensure that the trial is advanced fairly.
4. To the extent possible, submissions should be public. Where a party files a motion confidentially and/or *ex parte*, it should indicate within its submission the rationale for classifying it as confidential and/or *ex parte*, as the case may be. If not and if the confidential nature is not readily apparent, the decision will be issued publicly, and an order for the public classification of the motion may be made.
5. The Trial Chamber, through its Senior Legal Officer, may contact the parties to expedite the briefing schedule, bearing in mind the exigency of the matter and the fairness of the proceedings. The Trial Chamber may adjudicate minor matters related to motion practice through informal communications *via* the Senior Legal Officer, which will be put on the record in a written decision or orally in open court at a later date.

B. Court Management

6. This trial will use the electronic court management system (“e-court”) and the parties are reminded that all documents shall be handled through e-court. Hard copies of a document may be used by a party only where the party has been unable, due to exceptional circumstances, to upload a document to e-court. When use of hard copies is permitted, the tendering party is responsible for providing copies to the Trial Chamber, the Registry, the other party, the witness, and the court reporters and interpreters.

7. Any party calling a witness shall upload to and release in e-court any document at least one month prior to using it in court or tendering it as evidence. An English or French translation of any Kinyarwanda document must be uploaded at the same time. To the extent the party is waiting upon an official translation of the document into one of the two working languages of the Mechanism, the party shall submit a draft translation, which may be marked for identification pending submission of any official translation.

8. A system for monitoring the use of time shall be established by the Registry, which will be responsible for recording time used for: (i) the examination-in-chief of each witness; (ii) cross-examination; (iii) re-examination; (iv) questions by the Judges; and (v) all other matters, including procedural and administrative matters. Regular reports on the use of time shall be compiled by the Registry in conjunction with the Trial Chamber, which shall be provided periodically to the parties. The Trial Chamber shall continually monitor the use of time and may make further orders, as it considers necessary, concerning the time used by the parties.

9. A system for the organization of transcripts shall be established by the Registry, which will ensure that the transcripts are organized by date and page number. Pagination shall not continue from the previous day of the hearing, but shall start anew from page one at the beginning of each day of the hearing.

10. As far as practicable, the trial shall be conducted in public in accordance with the provisions of Rule 92 of the Rules. When a party makes a request to enter private or closed session pursuant to Rule 93 of the Rules, that party must briefly state the reasons for that request and the Trial Chamber will then determine whether entering private or close session is necessary.

C. Time Allotment for Case Presentation

11. The Trial Chamber may regulate the length of the examination-in-chief of a witness. In doing so, the Trial Chamber will have due regard to all relevant circumstances, including the time indicated by the party. Unless otherwise specified in these guidelines, a party shall be allotted one hour for cross-examination for every hour of direct examination of an opposing party's witness. A party who considers that a time limit imposed by the Trial Chamber has unduly restricted their examination of a witness to the extent that they may suffer unfair prejudice may apply for additional time to complete the examination.

D. Witness Scheduling, Exhibit Lists, and Proofing Notes

12. By 4:00 p.m. on each Thursday, the party, whose case is being presented, shall provide the Trial Chamber, the Registry, and the other party with an electronic list of the witnesses it intends to call during the coming two weeks, indicating: (i) the order of their testimony; (ii) the time estimated for the examination-in-chief of each witness; and (iii) any protective measures applicable to the witnesses. It is the duty of the calling party to notify the Trial Chamber, the Registry, and the other party as soon as practicable of any changes to the order of the witnesses.

13. The calling party shall provide to the Trial Chamber, the Registry, and the other party an electronic list of the documents or material that it intends to use for the examination-in-chief of each witness at least seven days before the start of the testimony. The documents must be translated into one of the official languages of the Mechanism and into the language of the Accused, except that public documents, such as United Nations Security Council Resolutions, United Nations Secretary-General reports, and similar material need not be translated into the language of the Accused.

14. If it emerges from proofing that additional exhibits need to be used with a witness, the calling party must inform the other party, the Registry's court-officer, and the Trial Chamber of this as soon as possible, but no later than 48 hours prior to the testimony of the witness in order to: (i) allow the other party to prepare properly for cross-examination; (ii) assist the Registry in assigning potential exhibit numbers; and (iii) ensure that the Trial Chamber is fully informed should it be required to rule on any issue arising. Proofing notes shall also be distributed to the Trial Chamber, the Registry, and the other party 48 hours prior to the testimony of the witness.

15. Upon the witness making the solemn declaration pursuant to Rule 106(A) of the Rules, the cross-examining party shall provide electronically to the Trial Chamber, the Registry, and the other

party an estimated time for cross-examination and a list of the documents and other material that the party intends to use in cross-examination. A party seeking to use a document or material during cross-examination that has not been so listed and disclosed may only be permitted to do so with the leave of the Trial Chamber. The opposing party may then request a short adjournment in order to examine the material.

16. Once a witness has begun testifying before the Trial Chamber, the parties should have no *ex parte* communication with the witness before the completion of the witness's testimony, except with the leave of the Trial Chamber. Such leave shall not extend to communication with the witness involving the substance of the witness's testimony and should be conducted in compliance with any applicable protective measures provisions.

E. Procedure for Rule 111 Witnesses

17. Motions for the admission of a Rule 111 statement or transcript as the evidence of a witness should be submitted no later than six weeks in advance of the witness's scheduled testimony unless with leave of the Trial Chamber on cause shown. A list of exhibits associated with the witness's Rule 111 statement shall be included in the Rule 111 submission.

18. If considered necessary for clarity and context, the presenting party may read a concise summary, lasting no more than five minutes, of the Rule 111 witness's statement in court. A draft of the summary should be provided to the Trial Chamber for approval at least 24 hours before the evidence of the witness is to be presented. Further examination-in-chief of a witness whose evidence is being given *via* Rule 111 of the Rules will, other than in exceptional circumstances, be limited to 30 minutes and should be focused on clarifying or highlighting particular aspects of the witness's evidence. There will be no so-called hybrid witnesses, and parties should not expect to lead direct examination of a Rule 111 witness for the purposes of augmenting the witness's out-of-court statement or testimony. If there is a need, parties should revise and supplement existing statements to the extent that the original testimony, statement, or statements are incomplete. The time for cross-examination of a Rule 111 witness shall not in general exceed one hour per witness. Any party may be allotted more time on a case-by-case basis and upon a showing of good cause.

F. Procedure for Rule 116 Witnesses

19. To the extent expert testimony is needed,¹ an expert witness should appear only for cross-examination. The expert report should cover everything needed in connection with a party's case. Even without cross-examination, the opposing party can still challenge any expert's evidence and raise objections against the expert and his or her evidence in their final trial brief.

20. Expert reports should be fully referenced in order to facilitate the Trial Chamber's determination of their probative value and, ultimately, the weight to be ascribed to them.

G. Applications for Witness Testimony by Video-Conference Link

21. Applications pursuant to Rule 96 of the Rules for witness testimony to be provided *via* video-conference link shall be made as soon as possible – but at least six weeks – in advance of the witness's scheduled testimony and after consultations with the Registry. Following a decision by the Trial Chamber on the application, the calling party shall liaise with the Registry with regard to logistical arrangements.

H. References to Prior Statements or Testimony of Testifying Witness

22. For the avoidance of unnecessary contention, parties shall not interpret or paraphrase what a testifying witness has either previously stated or testified but must quote from the relevant statement or transcript, restricting the quotation to what is strictly necessary for the understanding of the question asked. When referring to a prior statement or testimony, the parties shall provide exact page and, where available, line references to the statement or transcript in question.

I. Scope of Cross-Examination and Re-Examination

23. In applying Rule 106(H)(ii) of the Rules the cross-examining party should put to the witness the general substance of its case conflicting with the evidence of the witness, rather than every detail that the party does not accept.

J. Admission of Certain Forms of Evidence

24. The preferred method for tendering evidence is through a witness while the witness is on the stand. The tendering party shall demonstrate the nexus between the witness and the document

before offering the document into evidence. Once tendered, the Trial Chamber will decide whether to grant or to deny admission, or defer its decision to a later time. The Trial Chamber will then announce its decision on the record and invite the Registry to assign an exhibit number and corresponding status to the document. If the Trial Chamber defers its decision, the document will remain marked for identification only. Such proposed evidence is not admitted until the Trial Chamber makes a ruling on admissibility, either orally or in writing, at which point it will be given an official exhibit number. In the event that the documents to be tendered into evidence are not included in the Rule 70(E) or (M) exhibit list, the tendering party must apply for leave from the Trial Chamber to add those documents or material to its respective list. Further, if these documents are not in either of the official languages of the Mechanism, they will be marked for identification pending translation and further order of the Trial Chamber, or denied admission into evidence.

25. Following the admission of an exhibit into evidence, the parties shall have two working days to request a change to the status of the exhibit. Upon the expiration of this period, the Registry may release to the public, without further consultation with the Trial Chamber or the parties, exhibits that have been classified as public.

26. Out-of-court statements, which the Trial Chamber considers relevant and probative, may be admitted under Rule 105(C) of the Rules. The statement of a non-testifying individual may be used during cross-examination and, if appropriate, admitted into evidence, provided that the statement is necessary to the Trial Chamber's assessment of the witness's credibility and is not used to prove the truth of its contents.

27. If objections to evidence are raised on grounds of authenticity or reliability, documents and/or video recordings may be admitted in order for the weight of those exhibits to be determined by the Trial Chamber during its final deliberations, within the context of the trial record as a whole. As provided for in Rule 105(E) of the Rules, the tendering party may be requested to provide the Trial Chamber with verification of the authenticity of evidence obtained out of court. Additionally, when an objection is made on the ground of reliability, the tendering party may be required to produce sufficient indicia of reliability to make a *prima facie* case for the admission of the piece of evidence in question. On the request of a party or *proprio motu*, the Trial Chamber may order the party tendering copies of evidence to present the original or the best legible, audible, or visible copy available.

¹ See Status Conference, T. 6 October 2021 p. 7 (giving notice to the Prosecution that its proposed experts and their anticipated evidence is being closely scrutinized and that the Trial Chamber would very much like the Prosecution to consider reducing that list and focusing on the specific expert evidence, if any, that is necessary for this particular case).

28. It is the duty of each party to present its evidence in a specific and concise manner. In general, voluminous documents, such as books, diaries, or reports, will not be admitted into evidence in their entirety, but only those parts will be admitted that the Trial Chamber considers appropriate to admit in light of the submissions of the parties. Those will generally be the portions referred to in testimony.

29. The parties should tender documents from the bar table sparingly to avoid over burdening the record. In the case that a party chooses to submit a bar table motion, the exhibits being tendered shall be identified on a spread sheet, which provides the following information in separate columns: description of documents, authenticity of documents, and references to the paragraphs in the Indictment and Pre-Trial Brief to which the documents are relevant. It is anticipated that, notwithstanding limitations as to what should be contained in annexes and appendices to motions,² argumentation related to, for example, the relevance, probative value, and authenticity of each of the proposed exhibits may also be contained in this spread sheet and that similar argumentation may be contained in spread sheets annexed to responsive pleadings without the need to seek extension of word limits.³

² See Practice Direction on Lengths of Briefs and Motions, MICT/11/Rev.1, 20 February 2019, para. 16.

³ Guidance as to the information to be included in a motion (and supporting annex(es)) to admit materials through a bar table motion can be found in *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. MICT-15-96, Decision on Prosecution Motion for Admission of Documents Underlying Expert Report of Christian Nielsen, 5 March 2018, paras. 12-14.



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Case Name/ Affaire :	Prosecutor v. Félicien Kabuga		Case Number/ Affaire n° :	MICT-13-38-PT
Date Created/ Daté du :	14 December 2021	Date transmitted/ Transmis le :	14 December 2021	No. of Pages/ Nombre de pages : 10
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