

Separate concurring opinion of Judge Sergio Gerardo Ugalde Godínez

1. I have joined the majority in adopting the ‘Decision on Defence Request for Reconsideration or Leave to Appeal the “Directions on the Conduct of Proceedings”’, but I wish to provide full disclosure of other reasons that I considered in adopting the decision.

Concerning the right to challenge decisions of the Chamber

2. At the outset, I would like to make some remarks about the use that has been made of the right to request leave to appeal decisions issued by the Chamber in the present case, which in several instances seems aimed primarily at challenging the powers and the discretion that the Chamber possesses in discharging its duties under the Rome Statute.

3. The Chamber’s powers and discretion in directing the conduct of proceedings are fundamentally premised in Article 64 of the Statute -with emphasis in paragraphs 2, 3 and 8-, together with Chapter 6 of the Rules of Procedure and Evidence, and also on accepted general principles concerning the governance of procedural activity by international Courts and Tribunals. When it comes to procedural activity, international tribunals have an inherent right to regulate procedural fairness. Procedural fairness is predicated on the notion that the adjudicator possesses an intrinsic responsibility to adopt fair procedures, which are appropriate and adapted to the conditions of a particular case.

4. While this responsibility of the adjudicator is confined by the limits that may be expressly imposed by the applicable legal architecture, the fact is that, where said legal architecture is not exhaustive, the adjudicator enjoys a broad margin of discretion in adopting decisions with the aim of affording the parties the ability to exercise their rights in the case at hand. Thus, the adjudicator’s ultimate procedural duty is to guarantee equitable and impartial proceedings, where parties neither dictate terms nor are unfairly prejudiced by the conduct of proceedings.

5. For the purposes of the present case, I observe that Article 64 of the Statute is labelled “Functions and powers of the Trial Chamber” and that paragraph 2 specifies that the right and the duty of the Trial Chamber is to “*ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.*”

6. Specifically concerning procedure at the International Criminal Court, the case law of the Court is clear that its aim is to establish the truth in a manner consistent with the rights of the accused as outlined in Article 67 of the Statute.¹ At the same time, it is “vital for cases to be properly managed from the start to forestall unnecessary delays. Undoubtedly, delays in proceedings are inimical to the proper administration of justice.”² Indeed, “[t]he expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial.”³

7. Fairness and expeditiousness are, therefore, fundamental aspects of the procedural activity at trial. Fairness here is predicated in terms of impartial and equitable treatment of the parties. Expeditiousness concerns the legal obligation that the chamber must fulfil so that the procedural activity, while being fair, is equally expeditious – i.e. without unnecessary delays – and effective.

8. Accordingly, all decisions made by a chamber must endeavour to achieve the fairness and expeditiousness of the proceedings in order to be fully consistent with the duties and powers of the chamber under the Statute. The manner in which a chamber may decide to discharge these duties and powers depends on the circumstances of the case and on the matter being decided.

9. In the instant case the Chamber has conferred with the parties and, when necessary, will continue doing so. However, the Chamber is not under any legal obligation to confer with the parties for every decision or in relation to every single aspect of the trial. As stipulated in Article 64, the Chamber confers with the parties in the discharge of its duties concerning the fairness and expeditiousness of the proceedings. But it is wrong to think that this translates into a legal prerequisite that would compel the Chamber to confer on every aspect of every decision. This is confirmed by Rule 134, which stipulates the Chamber’s power to rule, on its own motion, on any issue concerning the conduct of the proceedings prior to the commencement of the trial.

¹ Appeals Chamber, *The Prosecutor v. Mathieu Ngudjolo Chui*, [Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled “Judgment pursuant to article 74 of the Statute”](#), 07 April 2015, ICC-01/04-02/12-271-Corr, paras 253-257.

² Appeals Chamber, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings”](#), 12 July 2010, ICC-01/04-01/07-2259, para. 45.

³ Appeals Chamber, *Situation in the Democratic Republic of Congo*, [Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal](#), 24 July 2006, ICC-01/04-168, para. 11.

10. It is therefore my view that a practice of systematically challenging procedural decisions taken in line with the current legal framework is unwarranted under the Statute. The right to seek review of a decision, or, as the case may be, request leave to appeal under Article 82(1)(d) of the Statute, cannot and shall not be exercised lightly and excessively. The exercise of this right is necessarily limited to the most serious situations; those that, first, significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and, second, which require an immediate resolution by the Appeals Chamber to materially advance the proceedings. On this point, I would stress the words “significantly affect” and “materially advance”.

11. This means that, when seizing this or any other Chamber with complaints concerning an impugned decision or decisions, the parties must always be discerning in presenting meaningful challenges that are well-grounded and -reasoned. While the practice of challenging decisions based on obvious disagreements appears to be largely ingrained, it is still the incorrect way to approach appealable issues under the current applicable framework.

12. I must also deprecate the subtle implication that challenges to procedural decisions are made on the basis that, if the Chamber does not concede the challenge now, it will come back to haunt the Chamber later on at the time when the judgement is appealed. This suggests that often attempts to appeal any and all decisions, including appeals against the judgement, are made first and foremost as a matter of litigation strategy, rather than in response to any real grievance or because of any particular merit of the challenge made. While I do not generalize that this happens all the time, to me it seems to happen rather frequently.

13. While the parties’ right to challenge decisions by a Chamber, be it this one or any other, offers an important procedural avenue in guaranteeing a fair and expeditious trial and allowing for judicial review of decisions which are clearly outside the boundaries of the applicable legal framework and significantly prejudice the rights of the parties; it is not unlimited and must be exercised judiciously and reasonably.

Concerning the Third Issue raised by the Defence: Witness Preparation Protocol

14. The Third Issue raised by the Defence is fundamentally predicated in that the witness preparation protocol adopted by the Chamber, first, allows the possibility that the calling party may influence the witnesses and, second, deviates from the practice followed in the majority of past cases before the Court.

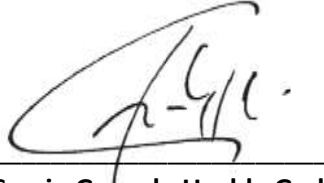
15. I have joined the majority in rejecting this aspect of the Defence's request, even though I believe that this question qualifies as an appealable issue.

16. As has been stated consistently, in considering the request, the Chamber must have regard to whether: (i) the matter is an 'appealable issue'; (ii) the issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and (iii) in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings, all three criteria being cumulative.

17. I fully agree that the Chamber, in the discharge of its duties, possesses sufficient legal authority when exercising its discretion to adopt the Witness Preparation Protocol and that it was not under any legal obligation to confer with the parties concerning the details of the adopted protocol. Nonetheless, the question of whether witness familiarisation or witness preparation is appropriate has been the subject of divergent jurisprudence and the Appeals Chamber has not yet had the opportunity to pronounce itself on these issues. While I believe that the Chamber acted within its legal boundaries and power, I accept that a different view could be taken, and I consider the issues raised by the Defence constitute 'appealable issues' in the sense that their resolution is essential for the judicial case under examination in order to determine whether a party's rights at trial could be significantly prejudiced. Therefore, in my view, the first leg of the criteria was fulfilled.

18. However, the request for leave to appeal does not fulfil the legal criteria for this issue to be certified in the present case, as it failed to satisfy the other two legs of the criteria. First, the Defence fails to articulate and demonstrate how exactly the adoption of the current protocol significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial. In terms of fairness, the point is how exactly the protocol, which applies equally to both parties, would specifically affect the rights of the accused so fundamentally that the certification for appeal becomes necessary at this stage. Putative scenarios are not enough to satisfy this requirement. Even if this requirement had been fulfilled, the Defence also failed in fulfilling the third leg, namely, in demonstrating how an immediate resolution by the Appeals Chamber of this matter may materially advance the proceedings in the present case.

19. For these reasons, I have joined the majority in rejecting the request.

A handwritten signature in black ink, consisting of a large, sweeping initial 'S' followed by 'G' and 'U', and a smaller 'G' and 'D' with a period. The signature is written above a horizontal line.

Judge Sergio Gerardo Ugalde Godínez

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

Dated 8th April 2022

At The Hague, The Netherlands