



**DISSENTING OPINION OF**  
**JUDGE PERRIN DE BRICHAMBAUT**

1. In today's decision,<sup>1</sup> the majority of the Appeals Chamber (hereinafter: "Majority") dismissed the Defence's request for reconsideration of the *Abd-Al-Rahman* OA8 Judgment<sup>2</sup> (hereinafter: "Request for Reconsideration") *in limine*, on the ground that the request constitutes a request for review of the same matter in light of new facts, and not a request for reconsideration, and that there is no legal basis to request review of judgments issued under rule 158 of the Rules of Procedure and Evidence (hereinafter: "Rules").
2. For the reasons that follow, I would have addressed the Request for Reconsideration on the merits and subsequently rejected it.
3. First, I note that the statutory framework does not provide for a procedure for reconsideration of judgments issued under rule 158(1) of the Rules. This notwithstanding, several pre-trial and trial chambers have held that they have the power to reconsider their own decisions, while at the same time emphasising that reconsideration is exceptional and should only be undertaken if a clear error of reasoning has been demonstrated, or if it is necessary to do so to prevent an injustice.<sup>3</sup>

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<sup>1</sup> See Decision on the Defence's request for reconsideration of the Judgment on the appeal of Mr Abd-Al-Rahman against Pre-Trial Chamber II's "Decision on the Defence 'Exception d'incompétence' (ICC-02/05-01/20-302)", 17 July 2023, ICC-02/05-01/20-993 (OA8).

<sup>2</sup> [Judgment on the appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II's "Decision on the Defence 'Exception d'incompétence' \(ICC-02/05-01/20-302\)"](#), ICC-02/05-01/20-503 (OA8) (hereinafter: "*Abd-Al-Rahman* OA8 Judgment"). See also the separate opinion of Judge Ibáñez, paras 93-95.

<sup>3</sup> See, for example, Pre-Trial Chamber I, *Situation in the Republic of the Philippines*, [Decision on the Prosecutor's Second request for extension of page limit for article 15\(3\) Request](#), 11 May 2021, ICC-01/21-6, para. 9; *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, [Decision on the Request for Reconsideration of Decision ICC-02/05-01/20-110 Submitted by the Defence \(ICC-02/05-01/20-113\)](#), 23 September 2020, ICC-02/05-01/20-163-tENG, para. 12; Trial Chamber X, *The Prosecutor v. Al Hassan*, [Decision on Defence request for reconsideration and, in the alternative, leave to appeal the 'Decision on witness preparation and familiarisation'](#), 9 April 2020, ICC-01/12-01/18-734,

4. I align myself with the above-mentioned jurisprudence. While the Appeals Chamber has previously left open the question of whether, and under which circumstances, it could reconsider a judgment issued pursuant to rule 158 of the Rules,<sup>4</sup> I consider that given the exceptional nature of the remedy, the purpose of which is to correct a clear error of reasoning or to prevent an injustice, it is appropriate to endorse the possibility of reconsideration.

5. Turning to the facts of this case, I find that, for the reasons that follow, the Defence has not shown that the threshold for reconsideration has been met.

6. At the outset, I recall that in the *Abd-Al-Rahman* OA8 Judgment, the Appeals Chamber found that the Pre-Trial Chamber erred in law by misapplying article 22(1) of the Statute, when examined in light of article 21(3) of the Statute.<sup>5</sup> The Appeals Chamber stated that the principle of *nullum crimen sine lege* “generally requires that a court may exercise jurisdiction only over an individual who could have reasonably expected to face prosecution under national or international law”, and that in this

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para. 11; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, [Decision on Defence request seeking partial reconsideration of the ‘Decision on the Defence request for admission of evidence from the bar table’](#), 22 February 2018, ICC-01/04-02/06-2241, para. 4; Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, [Decision on Request for Reconsideration of the Order to Disclose Requests for Assistance](#), 15 June 2016, ICC-02/04-01/15-468, para. 4; Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba et al.*, [Decision on Defence Request for Reconsideration of or Leave to Appeal ‘Decision on “Defence Request for Disclosure and Judicial Assistance”’](#), 24 September 2015, ICC-01/05-01/13-1282, para. 8; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, [Decision on the Prosecution’s request for reconsideration or, in the alternative, leave to appeal](#), 18 March 2015, ICC-01/04-02/06-519, para. 12; Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Decision on the Sang Defence’s Request for Reconsideration of Page and Time Limits](#), 10 February 2015, ICC-01/09-01/11-1813, para. 19. *See also* Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, [Decision on the defence request to reconsider the “Order on numbering of evidence” of 12 May 2010](#), 30 March 2011, ICC-01/04-01/06-2705, para. 18 (“[...] it is well established that a court can depart from earlier decisions that would usually be binding if they are manifestly unsound and their consequences are manifestly unsatisfactory”).

<sup>4</sup> *See The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Decision on counsel for Mr Gbagbo’s request for reconsideration of the ‘Judgment on the Prosecutor’s appeal against the oral decision of Trial Chamber I pursuant to article 81\(3\)\(c\)\(i\) of the Statute’ and on the review of the conditions on the release of Mr Gbagbo and Mr Blé Goudé](#), 28 May 2020, ICC-02/11-01/15-1355-Red (OA14), para. 57. With regard to requests seeking reconsideration of decisions, *see for example The Prosecutor v. Laurent Gbagbo*, [Decision on requests related to page limits and reclassification of documents](#), 16 October 2012, ICC-02/11-01/11-266 (OA2), paras 12, 15; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Decision on Mr Ruto’s request for reconsideration of the “Decision on the request for suspensive effect”](#), 27 September 2013, ICC-01/09-01/11-993-Red (OA5), para. 8; *The Prosecutor v. Uhuru Muigai Kenyatta*, [Decision on the victims’ request to participate in the appeal proceedings](#), 24 April 2015, ICC-01/09-02/11-1015 (OA5), para. 7; *The Prosecutor v. Bosco Ntaganda*, [Decision on Mr Ntaganda’s request for reconsideration of the decision on time and page extensions](#), 1 October 2019, ICC-01/04-02/06-2426 (A A2), para. 6.

<sup>5</sup> [Abd-Al-Rahman OA8 Judgment](#), para. 87.

context, courts place particular emphasis on the concepts of “foreseeability” and “accessibility”.<sup>6</sup> When applying the foreseeability test, the Appeals Chamber relied on a number of factors, including facts as presented in the decision on the confirmation of charges, and the state of customary international law of the crimes charged<sup>7</sup> and taking into account “the framework of laws applicable to the conflict in Darfur, the undertakings of the parties to the conflict, and the appreciation for those laws and undertakings that would reasonably belong to a commander in the militia”, concluded that it was satisfied that “the risk of international criminal liability was acute to such a degree that it was foreseeable to an officer of Mr Abd-Al-Rahman’s rank”.<sup>8</sup>

7. By reference to the Appeals Chamber’s statement that “only once a link is drawn with the charges in this case can the question of the legality of the charges be definitely answered”,<sup>9</sup> the Defence submits that the trial has now reached the stage at which the question of the legality of the charges can be definitely answered,<sup>10</sup> and that the Appeals Chamber’s analysis in the *Abd-Al-Rahman* OA8 Judgment was “not definitive” and it “must be revisited” in light of the Prosecutor’s evidence.<sup>11</sup> The Defence argues that reconsideration was “foreseen” in paragraph 91 of the *Abd-Al-Rahman* OA8 Judgment,<sup>12</sup> and by putting forward alleged “new facts”, it argues that reconsideration is warranted.

8. I am not persuaded by the Defence’s arguments.

9. First, for the Appeals Chamber to consider the request, it would be required to assess the evidence submitted at trial and enter findings before the Trial Chamber has had the opportunity to do so. In requesting that the Appeals Chamber reconsider its earlier conclusions in this manner, the Defence is in essence asking the Appeals Chamber to act as the trier of fact, and to *de facto* assume the role of the Trial Chamber.

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<sup>6</sup> [Abd-Al-Rahman OA8 Judgment](#), para. 85.

<sup>7</sup> [Abd-Al-Rahman OA8 Judgment](#), para. 88 (*referring, inter alia*, to [Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman](#)) and para. 89.

<sup>8</sup> [Abd-Al-Rahman OA8 Judgment](#), para. 90; *see also* paras 89 and 91.

<sup>9</sup> [Abd-Al-Rahman OA8 Judgment](#), para. 91.

<sup>10</sup> [Request for Reconsideration](#), para. 6.

<sup>11</sup> [Request for Reconsideration](#), para. 14 (the Defence submits that the Appeals Chamber “look[ed] at the factors which it consider[ed] relevant to ascertaining whether the criteria of foreseeability and accessibility [were] examined [and to] that end it [drew] on the presentation of the facts in the decision on the confirmation of the charges and point[ed] out that its inquiry [was], as a result, not definitive and must be revisited in the light of the [Prosecutor’s] evidence.”).

<sup>12</sup> [Request for Reconsideration](#), p. 22.

This is procedurally incorrect, as it would reverse the sequence as to how facts are established, and by whom, and subsequently what instance chamber reviews those findings, based on the standard of reasonableness. It is recalled in this context that

the Statute has vested the trial chamber with the specific function of conducting the trial. As part of that function and in light of the principle of immediacy, the trial chamber has the primary responsibility to determine the reliability and credibility of the evidence received in the course of the trial and then comprehensively assess the weight of the evidence. In turn, this entails that the trial chamber has the primary responsibility to evaluate the connections and fairly resolve any inconsistencies between the items of evidence received at trial.<sup>13</sup>

10. Accordingly, I consider that it would not be appropriate to assess these alleged “new facts”.

11. I also note in this context that the Defence has already raised this issue before the Trial Chamber. When requesting leave to present a motion for acquittal, it submitted, *inter alia*, that the foreseeability and accessibility tests set out by the Appeals Chamber for the exercise of the Court’s jurisdiction have not been met by the evidence, and that for this reason Mr Abd-Al-Rahman should be acquitted on all counts.<sup>14</sup> The Trial Chamber rejected the above aspect of the application, considering it to be “fundamentally a jurisdictional legal issue”.<sup>15</sup> While finding that a motion for acquittal was not the appropriate avenue to decide this question, the Trial Chamber noted that the Defence will have the opportunity to make legal submissions on this issue at the conclusion of the trial.<sup>16</sup>

12. In addition, I find that the Defence misinterprets the *Abd-Al-Rahman* OA8 Judgment. In paragraph 91, the Appeals Chamber “recognise[d] that only once a link is drawn with the charges in this case can the question of the legality of the charges be definitely answered”,<sup>17</sup> and noted that on appeal the Defence “ha[d] not indicated that

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<sup>13</sup> See e.g. *The Prosecutor v. Bosco Ntaganda*, [Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgment’](#), 30 March 2021, ICC-01/04-02/06-2666-Red (A) (A2), para. 40 (footnote omitted); *The Prosecutor v. Laurent Gbagbo and Blé Goudé*, [Judgment in the appeal of the Prosecutor against Trial Chamber I’s decision on the no case to answer motions](#), 31 March 2021, ICC-02/11-01/15-1400 (A), para. 69 (footnote omitted).

<sup>14</sup> [Application for leave to file a motion for acquittal](#), paras 3-5.

<sup>15</sup> [Decision on application for leave to file a motion for acquittal](#), para. 8.

<sup>16</sup> [Decision on application for leave to file a motion for acquittal](#), para. 8.

<sup>17</sup> [Abd-Al-Rahman OA8 Judgment](#), para. 91.

the Pre-Trial Chamber erred in confirming jurisdiction in respect of any of the specific charges” against Mr Abd-Al-Rahman.<sup>18</sup> Contrary to the Defence’s suggestion,<sup>19</sup> at no point did the Appeals Chamber indicate that it would reconsider its decision in light of new facts or evidence presented at trial.

13. In light of the foregoing, I consider that the Defence has failed to demonstrate that the *Abd-Al-Rahman* OA8 Judgment contains a clear error of reasoning, or that reconsideration is warranted to prevent an injustice. As a result, I would have rejected the Defence’s Request for Reconsideration.

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



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**Judge Perrin de Brichambaut**

Dated this 17<sup>th</sup> day of July 2023

At The Hague, The Netherlands

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<sup>18</sup> The Defence’s arguments were confined to the “Pre-Trial Chamber’s application of article 22(1) of the Statute as a matter of principle”. See [Abd-Al-Rahman OA8 Judgment](#), para. 91.

<sup>19</sup> [Request for Reconsideration](#), p. 22.