Cour
Pénale
Internationale

International
Criminal
Court

# PARTLY DISSENTING OPINION OF JUDGE LUZ DEL CARMEN IBÁÑEZ CARRANZA

## I. KEY FINDINGS

1. Under the Court's legal framework, a chamber can entertain a request for reconsideration by having recourse to its inherent discretion, and only if compelling reasons exist.

2. It is improper, as a matter of procedure, to submit a request for reconsideration before the Appeals Chamber to challenge the Court's jurisdiction, if such a challenge has not been first filed before the Trial Chamber, pursuant to article 19(4) and (6) of the Statute.

3. The existence of new facts and evidence cannot be considered *per se* as a "compelling reason" for the purpose of reconsideration of an Appeals Chamber's previous decision, if the evidence has not been first assessed by the Trial Chamber. The Trial Chamber will assess the evidence presented at trial, at the end of the proceedings, in a holistic manner, in its article 74 decision.

## II. INTRODUCTION

4. The Defence requests that the Appeals Chamber reconsider aspects of its *Abd-Al-Rahman* OA8 judgment,[1] on the basis of alleged "new facts" that emerged at trial, during the presentation of evidence by the Prosecutor. In particular, it requests that the Appeals Chamber reconsider its finding that the Court has jurisdiction and bring the proceedings against Mr Abd-Al-Rahman to an end.[2]

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[1] Judgment on the appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II's "Decision on the Defence '*Exception d'incompetence*' (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.

[2] Request for Reconsideration, paras 1 and 5 (*referring in particular to Abd-Al-Rahman* OA8 Judgment, paras 1, 85-91), and pp. 22, 23.

5. In today's decision,[3] the majority of the Appeals Chamber (hereinafter: "Majority") dismissed the Defence's request for reconsideration of the *Abd-Al-Rahman* OA8 Judgment (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").

6. While I join the Majority in dismissing the Request for Reconsideration, I respectfully disagree with the Majority in relation to the approach and the reasoning leading to such conclusion. I consider that the request cannot be entertained as a request for review, as a matter of law and for procedural reasons.

## III. MERITS

7. As mentioned above, the Defence seeks reconsideration of the *Abd-Al-Rahman* OA8 Judgment, in particular paragraphs 1 and 85 to 91, on the basis of "new facts" that allegedly emerged at trial, during the Prosecutor's presentation of evidence.[4]

8. The Majority considers that the Defence's request constitutes a request for review of the same matter in light of new facts, and not a request for reconsideration.[5] I cannot agree with this approach.

9. In this regard, I find it important to start by clarifying the different nature of the following measures and procedures: review, revision, and reconsideration.

10. Review of decisions by the Court, as recalled by the Majority,[6] is only allowed under specific circumstances, explicitly provided in the Statute and the Rules. In particular, review is permissible in relation to preliminary issues and provisional measures. In such instances, decisions are reviewed in light of new facts or changed circumstances. For example, rulings on detention must be reviewed periodically, and

[3] *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) (hereinafter: "Majority Decision").
[4] Request for Reconsideration, paras 1 and 5.
[5] *See* Majority Decision, para. 35.
[6] *See* Majority Decision, para. 35.

can be modified, if "changed circumstances so require".[7] Similarly, pursuant to article 19(10) of the Statute, decisions on admissibility can be reviewed on the basis of "new facts".[8]

11. In this context, I note that revision is a measure expressly provided for in article 84 of the Statute, which only applies to final judgments (*res judicata*). Article 84 provides for the possibility of requesting a "revision" of a final judgment on conviction or sentence on specific grounds, including that "[n]ew evidence has been discovered that: (i) [w]as not available at the time of trial […]; and (ii) [i]s sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict".[9]

12. Reconsideration, on the other hand, consists of the re-examination of the same matter by the same authority that issued the previous decision or judgment.[10] In my view, reconsideration is mainly an administrative measure and one which concerns mostly questions of law and evidence, not only new facts.

13. I note that neither the Rome Statute nor the Rules provide for reconsideration of previous decisions or judgments. Nevertheless, it is my view that under the Court's legal framework, a chamber can entertain a request for reconsideration by having recourse to its inherent discretion. It goes without saying that this discretion has to be exercised judiciously. While generally a request for reconsideration has to be raised within certain time limits, the Rome Statute framework does not impose any such time limits.

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[7] Article 60(3) of the Statute stipulates that "[t]he Pre-Trial Chamber shall periodically *review* its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such *review*, it may modify its ruling as to detention […], if it is satisfied that changed circumstances so require." (Emphasis added). *See also* rule 118(2) of the Rules which reads as follow: "[t]he Pre-Trial Chamber shall *review* its ruling on the release or detention of a person in accordance with article 60, paragraph 3, at least every 120 days and may do so at any time on the request of the person or the Prosecutor." (Emphasis added).

[8] Article 19(10) of the Statute reads as follows: "If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a *review* of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17." (Emphasis added).

[9] Article 84 of the Statute (emphasis added).

[10] *See for example* Oxford English Dictionary (https://www.oed.com/) defining the term "reconsider" as follows: "[t]o consider (a matter or a thing) again; [t]o consider (a decision, conclusion, opinion, or proposal) a second time, with a view to changing or amending it; [t]o rescind, alter."

14. Furthermore, reconsideration is only permitted if compelling reasons to do so exist, including, in particular, human rights considerations. In this regard, I recall that article 21(3) of the Statute requires that "[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights". Compelling reasons include "exceptional circumstances" and measures to prevent an injustice. However, the term is broader: it could also include, for example, instances, where it is established that a chamber having issued a decision or a judgment has, *inter alia*, omitted to consider relevant factors, or if it is necessary to address situations, as set out above, in which human rights violations occurred. In my view, it is precisely because reconsideration can encompasses a variety of situations, as just mentioned, that it is not regulated in the Court's legal framework.

15. This is consistent with the laws applicable in various domestic jurisdictions, including of States that are Parties to the Rome Statute. For instance, in the Supreme Court of Uganda case *Mohammed Mohamed Hamid v Roko Construction Ltd,* the applicant sought a review of a judgment of the Supreme Court on grounds of legal errors apparent on the face of the record. The court stated:

> [I]t is clear there is no notice of appeal since the applicant cannot appeal against the judgment of this court. What we have on record is instead Miscellaneous Cause No. 18 of 2017, filed by the applicant seeking for a review of the judgment of this court in Civil Appeal No. 14 of 2015. Nonetheless this court can treat such an application as being analogous to a notice of appeal using its inherent powers under rule 2(2) of the rules of this court. However, before the court can exercise this power, the applicant must demonstrate to the court's satisfaction that the application for review is not frivolous. The rationale was given by Tumwesigye JSC, in *Civil Application No. 16 of 2017, Kiganda John and Anor vs. Yakobo M.N Senkungu et al*., where he stated as follows:" *In my view, the question is whether the applicant's application for review of this court's decision in SCCA No 17 of 2014 should be treated as frivolous and not worthy of serious consideration, or is such as should warrant this court's attention. Deciding this question at an early stage is important because the decisions and orders of this court as the final court of this country's judicial system should not be open to constant and needless application for their alteration. There must be an end and finality to litigation. But there may be special circumstances that may warrant alteration of the court's decision or orders where, if not done,*

*blatant injustice may be occasioned. That is why it was found necessary to include rule 2(2) in the rules*".[11]

16. Among the civil law systems, the "Beschwerde" (limited appeal) in German law has two kinds, the simple ("einfache") and prompt ("sofortige") appeal. According to Bernstein, "[a] simple limited appeal ordinarily must be filed in the court whose decision is attacked; only in urgent cases can it be filed in the higher court. The policy behind this rule is that the court below has the power and should, if possible, be given an opportunity to reconsider and vacate its own decision."[12]

17. Under the French system, "review can be had through reconsideration either by the court rendering the decision or by a different court, depending upon the type of decision being reviewed and the type of review sought. […] Review by the court to correct or interpret a judgment it granted is allowed by articles 561 and 562 in the part of the Code relating to judgments. […] Definitive judgments are those which decide a part of or the whole case and are not open to reconsideration".[13] After final judgment, the French Code of Criminal Procedure allows for review of the final decision when a new fact arises or when there is a violation of the provisions of ECHR.[14]

18. The above is also consistent with the jurisprudence of other international tribunals, according to which chambers, including the Appeals Chamber, have the power to reconsider their own decisions in exceptional circumstances.[15] I note in this regard that several pre-trial and trial chambers of the Court have also held that they have the power to reconsider their own decisions, while emphasizing that reconsideration is exceptional and should only be undertaken if a clear error of

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[11] Uganda, Supreme Court, *Mohammed Mohamed Hamid v Roko Construction LTD (Miscellaneous Application No. 23 of 2017)*, Ruling, 16 August 2017, UGSC 77.
[12] Herbert Bernstein, Finality of a Judgment as a requirement for Civil Appeals in Germany, in 47 Law and Contemporary Problems, pp. 35-60, p. 41 (footnotes omitted).
[13] Wallace R. Baker, French Judgments Subject to Immediate Appeal in 47 Law and Contemporary Problems, pp. 17-34, pp 18, 19, Baker also states that: "Judgments on the substance of the dispute and on questions of competence, along with judgments in cases relating to the nullity or validity of an act of procedure, are considered definitive. The definition of a definitive judgment is broader than that of a judgment on the substance".
[14] *Code de procédure pénale*, Article 622 and Article 622-1.
[15] *See for example*, ICTY , *Prosecutor v. Milošević*, Reasons for Refusal of Leave to Appeal from Decision to Impose Time Limit, Bench of the Appeals Chamber, 16 May 2002, IT-02-54-AR73, para. 17. *See also*, Special Tribunal for Lebanon , rules 140 and 176(C)bis of the Rules of Procedure and Evidence.

reasoning has been demonstrated, or if it is necessary to do so to prevent an injustice.[16] However, as set out above, these are not the only circumstances that could warrant the Appeals Chamber to reconsider its decisions, or judgments rendered pursuant to rule 158 of the Rules.

19. In conclusion, I consider that there is a clear distinction among review, revision and reconsideration of previous decisions or judgments.

20. In the present case, the Appeals Chamber is seized of a request for reconsideration, not a request for review. As such, the Appeals Chamber has a duty to address the request for reconsideration, as presented by the Defence. Requalifying the Defence's request for reconsideration as a request for review, as the Majority did in its decision, negatively affects the rights of the Defence: the Defence has not asked for review, and neither party is arguing that the request constitutes a request for review. Moreover, and importantly, no submissions have been made by either parties on the issue of review.

21. Turning to the merits of the request for reconsideration, I observe that the Defence is challenging the jurisdiction of the Court by asking the Appeals Chamber to assess the evidence submitted at trial and enter findings thereupon.

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[16] *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; Pre-Trial Chamber II, *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, 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").

22. For the reasons that follow, I am not persuaded by the Defence's approach.

23. As found above, under the Court's legal framework, a chamber can entertain a request for reconsideration by having recourse to its inherent discretion, and only if compelling reasons exist.

24. First, I note that the Defence is not providing any arguments as to the existence of compelling reasons. In particular, the Defence is not arguing that the Appeals Chamber should exercise its discretion to reconsider the *Abd-Al-Rahman* OA8 Judgment based on human rights consideration, or that it should do so, because it has omitted to consider relevant factors.

25. Second, it is, in my view, procedurally improper to raise a request for reconsideration for the purpose of challenging the jurisdiction of the Court before the Appeals Chamber, without having first presented a jurisdictional challenge before the Trial Chamber, in accordance with article 19(4) and (6) of the Statute.[17]

26. Moreover, alleged new facts cannot be considered *per se* as "compelling reasons" for the purpose of reconsideration, if the underlying evidence has not been first assessed by the Trial Chamber. In requesting that the Appeals Chamber reconsider its earlier conclusions in this manner, the Defence is in essence asking the Appeals Chamber to assess the evidence submitted at trial and enter findings before the Trial Chamber has had the opportunity to do so; or, in other words, to act as the trier of fact, and to *de facto* assume the role of the Trial Chamber. This is procedurally incorrect.

27. As stated by the Appeals Chamber, "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."[18] It is for the Trial Chamber to assess the evidence presented at trial, at the end of the proceedings, in a holistic manner,

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[17] *See* Article 19 (4) and (6) of the Statute.
[18] *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).

in its article 74 decision. These findings may be subsequently reviewed by the Appeals Chamber, if an appeal is lodged by a party, based on the standard of reasonableness. Accordingly, since the Defence's request would require the Appeals Chamber to act as a first instance chamber, the request cannot be entertained.

28. Finally, I note that the Defence has raised this issue before the Trial Chamber, when requesting leave to present a motion for acquittal.[19] The Trial Chamber considered it to be "fundamentally a jurisdictional legal issue", and while finding that a motion for acquittal was not the appropriate avenue to decide this question, it noted that the Defence will have the opportunity to make legal submissions on this issue at the conclusion of the trial.[20] In this regard, and considering that this course of action is in accordance with regular proceedings before the Trial Chamber, I consider that there is no prejudice to Mr Abd-Al-Rahman if this request is dismissed.

29. It is for these reasons that I would have dismissed the Request for Reconsideration.

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

**Judge Luz del Carmen Ibáñez Carranza**

Dated this 17th day of July 2023

At The Hague, The Netherlands

[19] Application for leave to file a motion for acquittal, paras 3-5.
[20] Decision on application for leave to file a motion for acquittal, para. 8.