

**Original: English****No. ICC-02/05-01/20 OA8****Date: 17 July 2023****THE APPEALS CHAMBER****Before:****Judge Piotr Hofmański, Presiding
Judge Luz del Carmen Ibáñez Carranza
Judge Marc Perrin de Brichambaut
Judge Solomy Balungi Bossa
Judge Gocha Lordkipanidze****SITUATION IN DARFUR, SUDAN****IN THE CASE OF THE PROSECUTOR v. ALI MUHAMMAD ALI ABD-AL-
RAHMAN (“ALI KUSHAYB”)****Public document****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)”**

Decision to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor

Mr Karim A. A. Khan, Prosecutor
Ms Helen Brady

Counsel for the Defence

Mr Cyril Laucci
Mr Iain Edwards

Legal Representatives of Victims

Ms Natalie von Wistinghausen
Mr Anand Shah

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

Other

Trial Chamber I

The Appeals Chamber of the International Criminal Court,

Having before it the “Request for Reconsideration of the Judgment Delivered in the OA8 Appeals Proceedings” of 10 March 2023 (ICC-02/05-01/20-898-Red-tENG),

After deliberation,

Renders, by majority, Judge Ibáñez Carranza partly dissenting, and Judge Perrin de Brichambaut dissenting, the following

DECISION

The “Request for Reconsideration of the Judgment Delivered in the OA8 Appeals Proceedings” is dismissed *in limine*.

Judge Ibáñez Carranza’s partly dissenting opinion and Judge Perrin de Brichambaut’s dissenting opinion are attached to the present decision.

REASONS

I. PROCEDURAL HISTORY

1. On 15 March 2021, the Defence submitted an application challenging the jurisdiction of the Court in the present case, pursuant to article 19(2) of the Statute (hereinafter: “First Jurisdictional Challenge”).¹

2. On 17 May 2021, Pre-Trial Chamber II (hereinafter: “Pre-Trial Chamber”) rejected the First Jurisdictional Challenge and found that the Court had jurisdiction over the present case.²

3. On 1 November 2021, the Appeals Chamber issued its 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)” (hereinafter: “*Abd-Al-Rahman*”).

¹ [Exception d’incompétence](#), ICC-02/05-01/20-302.

² [Decision on the Defence “Exception d’incompétence” \(ICC-02/05-01/20-302\)](#), ICC-02/05-01/20-391 (hereinafter: “Pre-Trial Chamber decision on jurisdiction”).

OA8 Judgment”)³ in which it found that the Pre-Trial Chamber misapplied article 22(1) of the Statute when examined in light of article 21(3), but that this error did not “produce a result that ha[d] a material impact on the ultimate finding of the Pre-Trial Chamber: that the Court may exercise jurisdiction in this case”.⁴

4. On 28 February 2023, the Prosecutor notified Trial Chamber I (hereinafter: “Trial Chamber”) that it had concluded its presentation of evidence in the *Abd-Al-Rahman* case.⁵

5. On 6 March 2023, pursuant to the instructions of the Trial Chamber,⁶ the Defence filed before the Trial Chamber an application for leave to present a motion for acquittal.⁷ As part of the application, the Defence submitted that the foreseeability and accessibility tests set out in the *Abd-Al-Rahman* OA8 Judgment for the exercise of the Court’s jurisdiction had not been met by the evidence.⁸

6. On 10 March 2023, the Trial Chamber rejected the above aspect of the application, finding that a motion for acquittal was not the appropriate avenue to decide this question, and noting that the Defence will have the opportunity to make legal submissions on this issue at the conclusion of the trial.⁹

7. On the same day, the Defence filed a request for reconsideration of the *Abd-Al-Rahman* OA8 Judgment before the Appeals Chamber (hereinafter: “Request for Reconsideration”).¹⁰

³ [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). *See also* the separate opinion of Judge Ibáñez, paras 93-95.

⁴ [Abd-Al-Rahman OA8 Judgment](#), paras 87-88; *see also* para. 92.

⁵ [Notice of the conclusion of the Prosecution’s presentation of evidence](#), ICC-02/05-01/20-887.

⁶ [Second Directions on the conduct of proceedings](#), 15 December 2022, ICC-02/05-01/20-836, paras 10-12; [Addendum to Directions on the Conduct of Proceedings Motion for Acquittal](#), ICC-02/05-01/20-855, 24 January 2023, paras 4-6.

⁷ [Application for leave to present a motion for acquittal](#), ICC-02/05-01/20-891 (hereinafter: “Application for leave to file a motion for acquittal”).

⁸ [Application for leave to file a motion for acquittal](#), paras 3-5.

⁹ [Decision on the Defence’s application for leave to file a motion for acquittal](#), ICC-02/05-01/20-900 (hereinafter: “Decision on application for leave to file a motion for acquittal”), para. 8.

¹⁰ [Request for Reconsideration of the Judgment Delivered in the OA8 Appeals Proceedings](#), ICC-02/05-01/20-898-Red-tENG (a confidential version was notified on the same day).

8. On 22 March 2023, the Prosecutor filed its response to the Request for Reconsideration (hereinafter: “Prosecutor’s Response”).¹¹

9. On 23 March 2023, the Defence submitted a request seeking leave to reply to the Prosecutor’s Response (hereinafter: “Defence Request for Leave to Reply”).¹²

II. MERITS

A. Relevant parts of the *Abd-Al-Rahman* OA8 Judgment

10. In addressing the Defence’s submissions concerning the alleged violation of the principle of *nullum crimen sine lege*, the Appeals Chamber found that the Pre-Trial Chamber misapplied article 22(1) of the Statute when examined in light of article 21(3), and committed an error of law in concluding that it was “unnecessary [...] to make a determination as to whether and to what extent, at the time of their commission, the conducts charged against Mr Abd-Al-Rahman were criminalised by either Sudan’s national law or as a matter of international customary law”.¹³

11. 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 courts place particular emphasis on the concepts of “foreseeability” and “accessibility”.¹⁴ It further found that “for conduct that takes place on the territory of a State that is not a Party to the Statute, it is not enough that the crimes charged can be found in the text of the Statute. In interpreting article 22(1) of the Statute in a manner consistent with human rights law, a chamber must look beyond the Statute to the criminal laws applicable to the suspect or accused at the time the conduct took place and satisfy itself that a reasonable person could have expected, at that moment in time, to find him or herself faced with the crimes charged.”¹⁵ The Appeals Chamber found, however, that the Pre-Trial Chamber’s error did not have a “material impact on the

¹¹ [Prosecution’s response to the Defence request to reconsider the Appeal Judgment on jurisdiction](#), ICC-02/05-01/20-908-Red (a confidential version was notified on the same day).

¹² [Demande d’autorisation de répliquer](#), ICC-02/05-01/20-909. The document was reclassified as “public” on 28 March 2023, pursuant to an order of the Appeals Chamber (Email from the Chamber to CMS, 27 March 2023, 18:02).

¹³ [Abd-Al-Rahman OA8 Judgment](#), para. 87, referring to [Pre-Trial Chamber decision on jurisdiction](#), para. 42.

¹⁴ [Abd-Al-Rahman OA8 Judgment](#), para. 85.

¹⁵ [Abd-Al-Rahman OA8 Judgment](#), para. 86.

ultimate finding of the Pre-Trial Chamber: that the Court may exercise jurisdiction in this case”.¹⁶

12. In applying the foreseeability test to the case, the Appeals Chamber determined that Mr Abd-Al-Rahman “was reasonably capable of taking steps to comprehend and comply with his obligations under international law, and he was capable of appreciating the attendant penal consequences”,¹⁷ and that he “was in a position to know that his conduct could attract criminal proceedings relating to crimes under international law, which are represented in the Statute.”¹⁸ In particular, it found that

According to the Confirmation Decision, Mr Abd-Al-Rahman spent a considerable part of his career as a non-commissioned officer in the military. During the relevant period Mr Abd-Al-Rahman was the head of the *Janjaweed* militia in the Wadi Salih and Mukjar localities. He had command over other deputies of the militia as well as members of the Sudanese Armed Forces. In March of 2002, before the period covered by the charges, the Sudanese Government and the Sudan People’s Liberation Movement formally undertook to comply with their obligations under international law, including common article 3 of the 1949 Geneva Conventions, to “take constant care to protect civilians and civilian objects [against attack]”. Part of this undertaking was to create a body to investigate and report on incidents involving “serious violation” of the parties’ obligations including, but not limited to, grave breaches of the 1949 Geneva Conventions.¹⁹

13. Moreover, the Appeals Chamber considered that, in principle, “the crimes under the Statute were intended to be generally representative of the state of customary international law when the Statute was drafted”, and that this “weighs heavily in favour of the foreseeability of facing prosecution for crimes within the jurisdiction of this Court, even in relation to conduct occurring in a State not party to the Statute.”²⁰

14. 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

¹⁶ [Abd-Al-Rahman OA8 Judgment](#), paras 88, 92.

¹⁷ [Abd-Al-Rahman OA8 Judgment](#), para. 88.

¹⁸ [Abd-Al-Rahman OA8 Judgment](#), para. 91.

¹⁹ [Abd-Al-Rahman OA8 Judgment](#), para. 88 (footnotes omitted), referring to [Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman \(“Ali Kushayb”\)](#), 9 July 2021, ICC-02/05-01/20-433 (hereinafter: “Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman”), paras 69-71, 79, and, *inter alia*, to Agreement between the Government of the Republic of Sudan and the Sudan People’s Liberation Movement to Protect Non-Combatant Civilians and Civilian Facilities from Military Attack, 31 March 2002.

²⁰ [Abd-Al-Rahman OA8 Judgment](#), para. 89.

undertakings that would reasonably belong to a commander in the militia”, the Appeals Chamber 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”.²¹

15. The Appeals Chamber also found that there was no basis, at that time, to question the legality of the charges brought under the Statute in this case. It noted that on appeal the Defence “ha[d] not indicated that the Pre-Trial Chamber erred in confirming jurisdiction in respect of any of the specific charges” against Mr Abd-Al-Rahman; rather the Defence’s arguments were limited to questioning “the Pre-Trial Chamber’s application of article 22(1) of the Statute as a matter of principle.”²²

B. The submissions of the parties

1. The Defence’s submissions

16. In its request, 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.²³

17. In particular, after recalling the factors which the Appeals Chamber relied on to assess the criteria of foreseeability and accessibility,²⁴ and on the basis of which it concluded that it was satisfied that “the risk of prosecution was sufficiently acute to be foreseeable to Mr Abd-Al-Rahman”,²⁵ the Defence argues that in light of facts which came to light during the presentation of the Prosecution’s evidence, the Appeals Chamber should reconsider the above determination.²⁶ The alleged “new facts”, in the Defence’s view, call into question the factors considered by the Appeals Chamber, and introduce a further factor.²⁷ The “new facts” referred to by the Defence consist of

²¹ [Abd-Al-Rahman OA8 Judgment](#), para. 90.

²² [Abd-Al-Rahman OA8 Judgment](#), paras 91-92.

²³ [Request for Reconsideration](#), paras 1 and 5.

²⁴ In particular, the Defence recalled: (i) the time Mr Abd-Al-Rahman spent as a “non-commissioned officer” in the Sudanese Armed Forces; (ii) the fact that Mr Abd-Al-Rahman stands accused of having command over the Janjaweed militias in the Wadi Saleh and Mukjar localities and of having exercised authority over the members of those militias and some Sudanese Armed Forces personnel; (iii) an agreement of March 2002 between the Government of Sudan and the Sudan People’s Liberation Movement; and (iv) the customary international law definition of the crimes stated in the charges. *See Request for Reconsideration*, para. 14.

²⁵ [Request for Reconsideration](#), para. 15, referring to [Abd-Al-Rahman OA8 Judgment](#), para. 90.

²⁶ [Request for Reconsideration](#), para. 15.

²⁷ [Request for Reconsideration](#), paras 15 and 27 (the Defence submits, as a further factor, that “the conduct alleged in the charges was made compulsory and refusal to carry out an instruction to engage in it could expose transgressors to prosecution and penalties that included death”; *see* para. 27).

evidence the Prosecutor tendered before the Trial Chamber (testimony given by Prosecution witnesses or documentary evidence), as well as evidence which the Prosecutor did not tender into evidence and which the Defence alleges was relied on by the Appeals Chamber in the *Abd-Al-Rahman* OA8 Judgment.²⁸

18. The Defence submits 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.²⁹ The Defence argues that reconsideration was "foreseen" in paragraph 91 of the *Abd-Al-Rahman* OA8 Judgment,³⁰ and by putting forward alleged "new facts", it argues that reconsideration is warranted.

19. The Defence submits that "reconsideration of a previous decision by [a chamber] is an exceptional measure and one that cannot be granted under normal circumstances".³¹

20. The Defence requests that the Appeals Chamber find that the Court has no jurisdiction to prosecute Mr Abd-Al-Rahman, and accordingly, that it bring the proceedings to an end.³² The Defence further submits that "[s]ince the grounds that preclude the Court's exercise of jurisdiction over Mr Abd-Al-Rahman are not within the ambit of article 17, the avenue for prosecuting Mr Abd-Al-Rahman afresh, on the basis of new facts, which article 19(10) of the Statute offers the OTP does not apply."³³

21. In the view of the Defence, a request for reconsideration is appropriate in the present circumstances, and "a fresh jurisdictional challenge" may not be entered

²⁸ The Defence refers specifically to the document mentioned at footnote 160 of the [Abd-Al-Rahman OA8 Judgment](#). See [Request for Reconsideration](#), para. 9; see also paras 16-31.

²⁹ [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.").

³⁰ [Request for Reconsideration](#), p. 22.

³¹ [Request for Reconsideration](#), para. 4, referring, *inter alia* to 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, paras 11-12.

³² [Request for Reconsideration](#), para. 1.

³³ [Request for Reconsideration](#), para. 33.

pursuant to article 19(4) of the Statute, since, in its view, such a challenge is limited to article 17(1)(c) of the Statute, which is not applicable in the present case.³⁴

22. As to the timing of the filing of the request, the Defence indicates that the request was submitted within 10 days of the Prosecutor's conclusion of his presentation of evidence.³⁵ While noting its intention to set out similar arguments in support of its motion for acquittal before the Trial Chamber, if leave was granted, the Defence notes that it could not "risk waiting for the outcome of this series of proceedings [...] because its motion [...] would come too late"³⁶ and that it will be for the Appeals Chamber to take into account the outcome of these other proceedings, "should it see fit."³⁷

2. *The Prosecutor's submissions*

23. First, the Prosecutor states that the Appeals Chamber has yet to set out the parameters of its reconsideration on interlocutory appeals, and that even if reconsideration could be considered in some limited circumstances, the Defence has failed to demonstrate that the exceptional remedy of reconsideration applies in this case.³⁸

24. The Prosecutor requests that the Appeals Chamber dismiss the Request for Reconsideration, as in his view, there is no basis to reconsider the *Abd-Al-Rahman* OA8 Judgment, and there would be no prejudice to the accused if the Appeals Chamber were to reject the request.³⁹

25. In particular, when arguing that there is no basis to reconsider the *Abd-Al-Rahman* OA8 Judgment, the Prosecutor submits three main arguments: (i) that if the Defence wishes to challenge aspects of the decision with respect to jurisdictional issues, requesting leave to the Trial Chamber to submit a new jurisdictional challenge, pursuant to article 19(4) of the Statute, is the correct procedural channel;⁴⁰ (ii) that the Defence

³⁴ [Request for Reconsideration](#), para. 8.

³⁵ [Request for Reconsideration](#), paras 9-10.

³⁶ [Request for Reconsideration](#), para. 10.

³⁷ [Request for Reconsideration](#), para. 10.

³⁸ [Prosecutor's Response](#), paras 6 and 11, referring to The Presidency, *The Prosecutor v. Germain Katanga*, [Decision on 'Defence Application for Reconsideration of the Presidency "Decision pursuant to article 108\(1\) of the Rome Statute"' \(ICC-01/04-01/07-3821-Red\)](#), 26 June 2019, ICC-01/04-01/07-3833, para. 25, which states that reconsideration "is an exceptional measure which should only be undertaken if a clear error of reasoning has been demonstrated or if it is necessary to prevent an injustice".

³⁹ [Prosecutor's Response](#), paras 6-10.

⁴⁰ [Prosecutor's Response](#), paras 4 and 7.

has incorrectly asked the Appeals Chamber to assume the function of trier of fact and to evaluate the evidence in the case before it has been assessed by the Trial Chamber;⁴¹ and (iii) that the Defence has failed to demonstrate that alleged new facts have led to a change in the circumstances.⁴² Rather, in the view of the Prosecutor, the Defence has repeated arguments that the Pre-Trial Chamber ruled upon in the confirmation of charges, and for which no leave to appeal was granted; and that were previously raised before the Pre-Trial Chamber in the First Jurisdictional Challenge.⁴³

26. In support of its argument that Mr Abd-Al-Rahman would not suffer prejudice if the Appeals Chamber were to reject the Request for Reconsideration, the Prosecutor submits that, following the Trial Chamber's guidance in this regard, the Defence may make legal submissions at the end of trial for consideration in the decision to be issued under article 74 of the Statute.⁴⁴ The Prosecutor submits that this would be the appropriate course of action, considering the evidentiary nature of the Defence's arguments, the current stage of the case, and the interests of judicial economy. He submits that the Trial Chamber would be best placed to consider these arguments as it holistically evaluates all evidence on the record, followed by the Appeals Chamber's consideration in the article 81 final appeal, if any.⁴⁵

3. *Determination by the Appeals Chamber*

(a) **Preliminary Issue: the Defence's Request for Leave to Reply**

27. The Defence seeks leave to reply to the Prosecutor's Response, pursuant to regulation 24(5) of the Regulations of the Court (hereinafter: "Regulations"), on the basis that it could not have reasonably anticipated the Prosecutor's arguments (i) relating to the applicability of article 19(4) of the Statute; and (ii) that rejecting the request would not cause prejudice to the Defence, since the Defence may raise these arguments at the end of the trial.⁴⁶

⁴¹ [Prosecutor's Response](#), paras 4 and 8.

⁴² [Prosecutor's Response](#), paras 4 and 9.

⁴³ [Prosecutor's Response](#), paras 4 and 9.

⁴⁴ [Prosecutor's Response](#), para. 10, referring to [Decision on application for leave to file a motion for acquittal](#), para. 8.

⁴⁵ [Prosecutor's Response](#), para. 10.

⁴⁶ [Request for Leave to Reply](#), para. 1.

28. Regulation 24(5) of the Regulations provides:

Participants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations. Unless otherwise permitted by the Chamber, a reply must be limited to new issues raised in the response which the replying participant could not reasonably have anticipated.

29. The Appeals Chamber may grant a request for leave to reply if the above-mentioned conditions are met, or if it considers that a reply would otherwise be necessary for the adjudication of the appeal.⁴⁷

30. Having considered the issues on which the Defence requests leave to reply, the Appeals Chamber is of the view that the Defence could have reasonably anticipated them, and that, in any event, further submissions on these issues would not assist the Appeals Chamber in its determination of the request.

31. Accordingly, the Defence's Request for Leave to Reply is rejected.

(b) The Request for Reconsideration

32. The Defence requests that the Appeals Chamber reconsider aspects of its *Abd-Al-Rahman* OA8 judgment, on the basis of alleged "new facts" that emerged 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.⁴⁸

33. At the outset, the Appeals Chamber, by majority, Judge Ibáñez Carranza partly dissenting, and Judge Perrin de Brichambaut dissenting, considers it important to clearly set out the terms used, and, in particular, draw a distinction between reconsideration and review. In its view, reconsideration, in its proper sense, relates to the examination anew of *the same matter, in light of facts as they existed at the time the*

⁴⁷ See for example *Situation in the Islamic Republic of Afghanistan*, [Decision on the Prosecutor's request for leave to reply](#), 23 December 2022, ICC-02/17-206 (OA5), para. 8; *The Prosecutor v. Bosco Ntaganda*, [Decision on Mr Ntaganda's request for leave to reply](#), 17 July 2017, ICC-01/04-02/06-1994 (OA6), para. 9 (footnote omitted); *The Prosecutor v. Bosco Ntaganda*, [Decision on Mr Ntaganda's request for leave to reply](#), 3 March 2017, ICC-01/04-02/06-1813 (OA5), para. 8.

⁴⁸ [Request for Reconsideration](#), paras 1 and 5 (*referring to Abd-Al-Rahman OA8 Judgment*, paras 1, 85-91), and pp. 22, 23

previous decision was rendered.⁴⁹ “Reconsideration” of the same matter on the basis of *new facts*, on the other hand, is more akin to what, in the Statute and the Rules of Procedure and Evidence (hereinafter: “Rules”), constitutes a review of a decision in light of new facts or changed circumstances. For example, rulings on detention must be *reviewed* periodically, and can be modified, if “*changed circumstances so require*”.⁵⁰ Similarly, decisions on admissibility can be *reviewed* on the basis of “new facts”.⁵¹ The Appeals Chamber considers it noteworthy that article 19(10) of the Statute specifically states that “the Prosecutor may submit a request for a review of the decision [on admissibility] 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”.⁵²

34. Similarly, regarding proceedings before the Appeals Chamber, article 84 of the Statute expressly provides for the possibility of requesting a “revision” of a final

⁴⁹ 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.”

⁵⁰ 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 follows: “[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).

⁵¹ 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).

⁵² Article 19(10) of the Statute (emphasis added). See also Pre-Trial Chamber II, *The Prosecutor v. Joseph Kony et al.*, [Decision on the Prosecutor’s Position on the Decision of Pre-Trial Chamber II To Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification](#), 28 October 2005, ICC-02/04-01/05-60, para. 18, in which the Chamber stated that “[t]he instruments governing the Court’s procedure make no provision for such a broad remedy as an unqualified ‘motion for reconsideration’. Review of decisions by the Court is only allowed under specific circumstances, explicitly provided in the Statute and the Rules”. It mentioned, *inter alia*: article 15(5) of the Statute (“The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation”); article 61(8) of the Statute (“Where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence.”); rule 125(3) of the Rules (“If the Pre-Trial Chamber decides not to hold a hearing on confirmation of charges in the absence of the person concerned, and the person is not available to the Court, the confirmation of charges may not take place until the person is available to the Court. The Pre-Trial Chamber may review its decision at any time, at the request of the Prosecutor or on its own initiative.”); and rule 135(4) of the Rules (“Where the Trial Chamber is satisfied that the accused is unfit to stand trial, it shall order that the trial be adjourned. The Trial Chamber may, on its own motion or at the request of the prosecution or the defence, review the case of the accused. [...]). The Pre-Trial Chamber added that “[o]utside such specific instances, the only remedy of a general nature is the interlocutory appeal against decisions other than final decisions, as set forth in article 82, paragraph 1(d) of the Statute [...]”.

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”.⁵³

35. In the instant case, the Defence is asking for re-examination of an issue on the basis of alleged *new facts* that have emerged since the issuance of the *Abd-Al-Rahman* OA8 Judgment. Accordingly, in the Appeals Chamber majority’s view, Judge Ibáñez Carranza partly dissenting, and Judge Perrin de Brichambaut dissenting, the Defence’s request constitutes a request for review of the same matter in light of new facts, and not a request for reconsideration.⁵⁴ As set out in the preceding paragraphs, in the Appeals Chamber majority’s view, review is permissible only in instances which are clearly set out in the Statute or the Rules. There is no legal basis to request the review of judgments issued under rule 158 of the Rules, and, as there is no lacuna in the Court’s legal framework in this regard, it is not permissible to look beyond it.⁵⁵

36. Furthermore, the Appeals Chamber observes that the procedure for challenging the Court’s jurisdiction is clearly set out in the Statute. Article 19(4) of the Statute provides that the jurisdiction of the Court may be challenged more than once, with leave

⁵³ Article 84 of the Statute (emphasis added).

⁵⁴ The present circumstances are thus distinguishable from those in relation to the decision rendered in the *Gbagbo and Blé Goudé* case in 2020, wherein the Appeals Chamber, without reconsidering its previous judgment, reviewed the conditions on the release of the acquitted persons based on new facts. 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), paras 56-66, and in particular, para. 63.

⁵⁵ See *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, [Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled ‘Decision on Sentence pursuant to Article 76 of the Statute’](#), 8 March 2018, ICC-01/05-01/13-2276-Red (A6 A7 A8 A9), para. 76, in which the Appeals Chamber held that “in accordance with article 21 of the Statute, the Court shall apply in the first place the Statute and the Rules. Recourse to subsidiary sources of law enumerated at paragraphs 1 (b) and (c) of the same provision may only be made in case there exists a lacuna in the primary sources of law when interpreted in accordance with the applicable canon of interpretation. The Appeals Chamber also recalls that it has previously found that a lacuna does not exist when, for instance, a matter is exhaustively defined in the legal instruments of the Court. Similarly, the Appeals Chamber considers that when a matter is regulated in the primary sources of law of the Court, there is also no room for Chambers to rely on purported ‘inherent powers’ to fill in non-existent gaps” (footnotes omitted).

of the Court, if “exceptional circumstances” exist.⁵⁶ In this regard, article 19(6) provides that after the confirmation of the charges, challenges to the jurisdiction of the Court must be referred to the Trial Chamber.⁵⁷ Accordingly, the alleged existence of new facts or evidence would have to be considered first by the Trial Chamber. The Trial Chamber in the present case, which has indeed been seized of a request to that effect, has already indicated that the Defence will have the opportunity to make legal submissions on this issue at the conclusion of the trial.⁵⁸

37. More broadly, the Appeals Chamber, by majority, Judge Ibáñez Carranza partly dissenting, and Judge Perrin de Brichambaut dissenting, considers that allowing re-examination of previous judgments based on new facts (*i.e.* review) other than those specifically provided for by the Statute and Rules would seriously undermine certainty and finality of judgments. Granting such powers would, in essence, vest parties with the right to challenge judgments of the Appeals Chamber indefinitely, as it is likely that there will always be “new facts”, which, in the view of the moving party, would justify a review of a previous judgment. This, in turn, would call into question the authority of the Appeals Chamber, and, ultimately, of the Court.

38. For the foregoing reasons, the Appeals Chamber, by majority, Judge Ibáñez Carranza partly dissenting, and Judge Perrin de Brichambaut dissenting, dismisses the Request for Reconsideration *in limine*.

39. While Judge Ibáñez Carranza agrees with the majority that the Request for Reconsideration should be dismissed, she would have done so for different reasons. As explained further in her partly dissenting opinion, Judge Ibáñez Carranza considers that, as a matter of law and for procedural reasons, the request cannot be entertained as a request for review. In her view, there is a clear distinction among review, revision and reconsideration. Review of decisions by the Court, is only allowed under specific

⁵⁶ Article 19(4) of the Statute reads as follows: “The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).”

⁵⁷ Article 19(6) of the Statute reads as follows: “Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. [...]”

⁵⁸ [Decision on the Defence’s application for leave to file a motion for acquittal](#), para. 8.

circumstances, explicitly provided in the Statute and the Rules, and it is permissible in relation to preliminary issues and provisional measures. Revision is a measure expressly provided for in article 84 of the Statute, which only applies to final judgments (*res judicata*). 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. Judge Ibáñez Carranza is of the view, 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. In her view, however, 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. Furthermore, Judge Ibáñez Carranza considers that 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 or judgment, if the evidence has not been first assessed by the Trial Chamber.

40. As set out in his dissenting opinion, Judge Perrin de Brichambaut would have addressed the Request for Reconsideration on the merits. In this regard, Judge Perrin de Brichambaut aligns himself with the jurisprudence of several pre-trial and trial chambers of the Court, and considers 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. With regard to the facts of this case, Judge Perrin de Brichambaut however finds that the Defence has failed to demonstrate that the threshold for reconsideration has been met. As a result, Judge Perrin de Brichambaut would have rejected the Request for Reconsideration.

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



Judge Piotr Hofmański
Presiding



Judge Luz del Carmen Ibáñez Carranza



Judge Marc Perrin de Brichambaut



Judge Solomy Balungi Bossa



Judge Gocha Lordkipanidze

Dated this 17th day of July 2023

At The Hague, The Netherlands