

Trial Hearing
WITNESS: DAR-D31-P-0023

(Open Session)

ICC-02/05-01/20

1 International Criminal Court
2 Trial Chamber I
3 Situation: Darfur, Sudan
4 In the case of The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali
5 Kushayb") - ICC-02/05-01/20
6 Presiding Judge Joanna Korner, Judge Reine Alapini-Gansou and Judge Althea Violet
7 Alexis-Windsor
8 Trial Hearing - Courtroom 2
9 Wednesday, 15 November 2023
10 (The hearing starts in open session at 9.33 a.m.)
11 THE COURT USHER: [9:33:12] All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE KORNER: [9:33:43] Yes, good morning, all.
15 Can we have the appearances first of all from the Defence, please.
16 MR LAUCCI: [9:33:52] Yes, good morning, Madam President. Same composition
17 as yesterday.
18 PRESIDING JUDGE KORNER: [9:33:56] Thank you.
19 Prosecution.
20 MR NICHOLLS: [9:34:00] Good morning, Madam President. Good morning, your
21 Honours. Julian Nicholls, Ed Jeremy and Diana Saba. Thank you.
22 PRESIDING JUDGE KORNER: [9:34:11] Thank you. We've chased away your
23 team as well.
24 Yes, and the victims.
25 MR SHAH: [9:34:15] Yes, good morning, Madam President. Our case manager is

1 absent, but he'll be joining us later on.

2 PRESIDING JUDGE KORNER: [9:34:20] Thank you.

3 All right, Mr Laucci, we've seen your explanation about Dr Gout. How is it that
4 Dr Gout had any impression that he was going to complete his evidence today; and, if
5 he did, why did nobody disabuse him of this idea before last night?

6 MR LAUCCI: [9:34:52] I will first answer the first question. That was the schedule
7 because Madam Marsh was supposed to start on Thursday initially. That was what
8 was planned — three days for Dr Gout and two days for Madam Marsh. So that was
9 the announced schedule and it was on this basis that the arrangements were made.
10 Now, regarding the second question, well, we did not talk to him until last night --

11 PRESIDING JUDGE KORNER: [9:35:18] I'm sorry, Mr Laucci, my understanding,
12 certainly before we broke, was Ms Marsh was going to come on Friday and the
13 professor was -- professor -- Dr Gout was going to come -- be here from Monday and
14 Thursday. And once you knew that there was going to be a voir dire — admittedly,
15 we all thought it would be completed on Monday — but this witness, looking at his
16 evidence -- and I note that you hopefully say you're going to finish today, but what
17 we've already all been through is that nobody understands what he's saying, and
18 therefore you're going to have to go quite slowly through to get him to explain it. So
19 there was no possibility that, once we had the voir dire, that he could finish.

20 MR LAUCCI: [9:36:12] Well, we had hoped that on Monday, the voir dire would be
21 completed, which would have left Tuesday for the examination-in-chief and
22 Wednesday for the finalisation. My team was in touch with Dr Gout before, of
23 course, his arrival and tried to see with him if he had any flexibility to go on Thursday.
24 The answer was no, but okay, he was on schedule so we -- we say let's give it a try.
25 Unfortunately, the voir dire took much longer than expected and this is where we are.

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1 But we had no opportunity -- I think we mentioned something through VWU that
2 with the length of the voir dire, that was becoming more and more difficult. It's not
3 impossible, but --

4 PRESIDING JUDGE KORNER: [9:37:09] But why didn't -- last night I made it
5 absolutely clear that it was going to -- I-- I thought, indeed, were it to go ahead, still
6 think there would be a problem about him finishing before Friday, and why at that
7 stage didn't -- didn't you tell us, actually, we told him he'd be -- he'd go on
8 Wednesday, or he said he had to leave on Wednesday?

9 MR LAUCCI: [9:37:35] Well, I'm ready to take the blame for being overoptimistic
10 that he may eventually have the flexibility, and I can tell you that the discussion
11 yesterday evening with a member of my team and myself was really to explore this.
12 We ended the conversation yesterday on him telling me, "Well, I'm in the process of
13 seeing what I can do to rearrange." I don't know the outcome of these explorations,
14 efforts. We may hear from him now, but yeah.

15 PRESIDING JUDGE KORNER: [9:38:11] The third thing I should say is that it's
16 actually not up to him whether he goes or not. The Court has the power to say,
17 "You're staying until you complete your evidence". However, I'm not minded,
18 I'll tell you straightaway, to do that at the moment. But for future reference, I think
19 it's better to overestimate with witnesses, particularly experts, the time that they'll be
20 required for, or at least to tell them it's flexible.

21 Well, I suppose we'd better find out if he has been able to move his commitments for
22 the rest of this week. That's the first thing.

23 The second thing is that suggestion 7th or 8th, there's a problem with that because
24 Judge Alapini-Gansou is supposed to be sitting on another case on the 7th. And at
25 the moment, I mean, we haven't -- we're going to have to make inquiries anyhow.

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1 The following week I'm in difficulties because you told us you were running out of
2 witnesses by the first of December --

3 MR LAUCCI: [9:39:26] Beginning of December, yeah.

4 PRESIDING JUDGE KORNER: [9:39:28] So we're just going to have a look at it. So,
5 all right, we'll see what he says he can do.

6 Now, the next thing is on the -- on the length of time and your -- and the report. As
7 you saw, we allowed in, what is it, three-quarters of it. I think it's just the last section
8 we take the view that he does not qualify as an expert. But I still, Mr Laucci, want to
9 know why we need -- and it's really the section on --

10 MR LAUCCI: [9:40:05] Intertribal coordination.

11 PRESIDING JUDGE KORNER: [9:40:07] All that. Where we've heard from one
12 expert a lot of this, and admittedly his is much fuller and much longer, but why is it
13 relevant?

14 MR LAUCCI: [9:40:21] I'm very happy to answer that, Madam President.

15 So Dr Gout, as we know from yesterday and the day before, has completed his thesis
16 on customary institutions within Sudan and, well, all these issues about the tribal
17 institutions, and hopefully including coordination, are really the field of expertise that
18 he has explored in connection with his thesis. So his knowledge in this field,
19 I believe, is admitted.

20 Now, regarding the questions that we have asked to him on this, and the response
21 that you see in the report, I cannot be clearer than saying that what is written in the
22 report in this chapter is not less important than what is not written in the report.

23 Meaning that it is, I will say it in French, (Interpretation) it's an answer or a
24 demonstration which we want to carry out.

25 (Speaks English) That we want to achieve -- that is, in this chapter 2, he demonstrates

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1 his knowledge, great knowledge about intertribal coordination, and despite this
2 knowledge, when we have asked him about the position of *agid al-ogada*, his answer
3 was, "Well, I cannot speak about it because I have no real knowledge about it".

4 And the fact that an expert in intertribal coordination has no or too little knowledge
5 on the position of *agid al-ogada* is something relevant for our case.

6 PRESIDING JUDGE KORNER: [9:42:28] I fully appreciate that. It can be dealt with
7 in two questions: In the extensive research you did into tribal mores and customs
8 and the like, did you ever hear from anybody — without being as leading as
9 that — about *agid al-ogada*? Answer, no. Two questions.

10 Why does that -- why does that need the whole -- I think it's about 10 pages.

11 MR LAUCCI: [9:43:04] Yes, because for this "no" to have any value, it's needed to
12 come after the demonstration of his knowledge, in-depth knowledge, of intertribal
13 coordination. Because that me or anyone doesn't know about *agid al-ogada* is not a
14 big mystery. The fact that someone who is expert in Sudanese customary
15 institutions and tribal coordination does not know about them, says much more.

16 PRESIDING JUDGE KORNER: [9:43:39] Yes, but why does it -- I mean, going
17 to -- I'm sorry, I still don't understand that. I mean, you say if we cut out all of this,
18 then there is a good chance that he might -- well, there's a chance he may finish today
19 or at least first thing tomorrow morning. But what you've got is -- and that's the
20 only issue that you want all this for.

21 MR LAUCCI: [9:44:02] The full -- actually, you have seen the letter of instruction.

22 PRESIDING JUDGE KORNER: [9:44:08] No, I'm just trying to find it again, sorry.

23 MR LAUCCI: [9:44:11] And the only reason why we have asked him to -- to talk to
24 us about intertribal coordination was definitely -- the only aim was to establish that
25 the *agid al-ogada* was not a position of intertribal coordination. That's what we want

1 to demonstrate.

2 PRESIDING JUDGE KORNER: [9:44:36] Yes, but as I say, it doesn't need -- we've not
3 only got -- you see -- and, well, I mean, you've got to -- sorry, actually, one of things
4 you've got to do this morning, I forgot actually, is you've got to apply to put it in
5 under Rule 68(3).

6 For what it's worth and, as I say, it -- it's all in his report, but for the life of me, you
7 know, the -- all the stuff about the customary -- for example, paragraph 36 onwards,
8 the "Customary institution of the *Nafar* or nobility house", the territorial institution of
9 the Dar, and then I'm just looking for the tables about how many cows you get if you
10 commit a crime, somewhere.

11 MR LAUCCI: [9:45:40] I will have to ask him some questions about the payment of
12 *diya*, by the way. That's another important aspect that I have to explore with him,
13 which is in this chapter.

14 PRESIDING JUDGE KORNER: [9:45:50] Yes, it is, but why is *diya* -- I may have
15 missed that, but why is *diya* relevant to your defence?

16 MR LAUCCI: [9:45:56] Because I want to explore with him the tribal solidarity, and
17 I think *diya* is one example of this where when one member of the tribe has
18 committed -- has caused the damage, let's say -- I will not enter into the discussion as
19 to whether it is a result of a crime or not, but has caused the damage -- there is the
20 solidarity of the tribe which will support the *diya* in certain circumstances, and I want
21 to explore with him deeper what -- in what circumstances this solidarity will play and
22 in which conditions this solidarity may not play -- that is, the tribe refusing to
23 support and take responsibility for the acts of this member.

24 To be -- to have a full answer, Madam President, when someone is -- is causing
25 damages by committing acts which go against the instruction of the tribe, will the

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1 tribe be -- will it be willing to have this support and solidarity and support the *diya* for
2 the damages.

3 PRESIDING JUDGE KORNER: [9:47:26] Wait a minute, your -- part of your defence
4 is that because he was a member of the Ta'aisha tribe, which didn't support joining
5 the militia or whatever it is, thereby he would have been fined or whatever; is that
6 what you're trying to (Overlapping speakers) --

7 MR LAUCCI: [9:47:53] What I would say is -- well, it's more than that. Actually,
8 what we intend to demonstrate is that joining the counterinsurgency and, even more,
9 playing a prominent role in this counterinsurgency against the decision of the tribe
10 would have resulted in the person being outcast, banished.

11 PRESIDING JUDGE KORNER: [9:48:16] All right. Well, I mean, okay, you've got
12 the -- first of all, you've got to apply to put the report in, for which we'll obviously
13 give you leave.

14 I think it's then a matter for you to decide what course you take. I mean, unless,
15 Mr Jeremy, do you want to say anything on this?

16 MR LAUCCI: [9:48:42] If that can save time, I'm ready to drop most questions, most
17 questions, on chapter 2, except this small aspect of the *diya* and the tribal solidarity
18 with the offenders. That -- I want to explore that with Dr Gout. But I'm ready
19 to -- to -- to drop the rest -- not to drop, but to refer to the report for the rest -- that is,
20 as the basis for establishing his expert knowledge in this field of intertribal
21 coordination. And with that, once the knowledge -- expert knowledge is admitted in
22 this specific field, I will just have to ask him, and in the same way as you suggested,
23 Madam President, "And in your research" --

24 PRESIDING JUDGE KORNER: [9:49:38] Well, no, my suggestion was unfortunately
25 a terrible leading question, sorry, Mr Laucci.

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1 MR LAUCCI: [9:49:43] "What did your research allow you to learn about the
2 position of *agid al-ogada*", something like that.

3 PRESIDING JUDGE KORNER: [9:49:51] All right. Well, first of all, I had better
4 hear, I suppose, from the Prosecution. Yes. Sorry, Mr Nicholls.

5 MR NICHOLLS: [9:49:57] Just first of all, your Honours -- sorry, if I can go back to
6 the matter of the scheduling because it impinges on this. First of all, I appreciate that
7 this is never easy; however, this is very difficult for the Prosecution. This is not the
8 only matter we're working on. As of 8 November, there was an email from my
9 colleagues saying we may need to go into Thursday. So that's a week ago that we
10 were -- you know, it now turns out that for some reasons we don't know he's not
11 available. And I'm not trying to be aggressive or nasty, it's just the reality.

12 So -- but if one day is clearly not going to be enough for the direct, I-- I would prefer,
13 and I think we all would, that Mr Laucci not have to rush this and, you know, frankly,
14 I don't want to hear later, "I didn't have time to do -- get through all of this because
15 I had to do it in one day". Again, I'm not -- I just don't want that to become an issue
16 in the future.

17 My proposal, which I discussed with my friend -- there's no objection to,
18 I believe -- is -- which I think you've already decided against, but my proposal would
19 be that we kick the whole thing because we're not going to finish the direct. I don't
20 see the point of starting the direct, coming back maybe a month later to finish the
21 direct and then go into cross. Yes, we would lose a day here, which is not --

22 PRESIDING JUDGE KORNER: [9:51:27] Two days.

23 MR NICHOLLS: [9:51:29] Two days, yes -- well, no, because -- well, yes, two days, if
24 he were to go into a third, that's true.

25 But it just doesn't make sense, particularly for this type of witness, after having gone

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1 through this voir dire, I think, to break for an entire -- we don't know how long before
2 the direct. It's not ideal, and I think the most helpful way for the Chamber to see a
3 witness who isn't going to be -- has been qualified as an expert, and his report is
4 coming in, is just to hear the direct, hear the cross, and --

5 PRESIDING JUDGE KORNER: [9:52:00] I mean, most of us -- I am -- we are against
6 you on this, because it's for the very reason that he is an expert that we've got his
7 report, that breaking doesn't make any difference.

8 If it was a witness as to fact without a report, then I would have a lot more -- indeed,
9 I would almost certainly accede to that because it would be most undesirable. But
10 where the report is going in, there's no reason at all why we can't break, even though
11 it's not most desirable way of doing it. So we are against you on that.

12 MR NICHOLLS: [9:52:33] I understand that and accept it, of course, but then

13 I would -- I would advocate that it be clear on the record that he's got the time he
14 needs to do his direct and not that there's a limit at the end of today.

15 And I would also ask -- my last point -- and Mr Edwards may have something to say
16 on the substance of the report, but my last request would be that your Honours, when
17 the witness comes in, inquire what these reasons are so that -- okay, thank you.

18 PRESIDING JUDGE KORNER: [9:53:04] I'm certainly going to do that.

19 I can -- I consider it really ill-advised that nobody has spoken to him about this, and
20 that he didn't make this clear when all of this was being discussed.

21 As I say, I'm making it absolutely clear that in future we do have the power to order
22 the witness to stay, whatever commitments he has.

23 MR NICHOLLS: [9:53:33] Thank you. I would pass to Mr Jeremy.

24 PRESIDING JUDGE KORNER: [9:53:37] Mr Jeremy, just on this aspect of the tribal
25 matters.

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1 MR JEREMY: [9:53:41] Yes, and very briefly, I mean, as we say in our filing 1018,

2 I think the main difference that we saw between Dr Gout's report and Professor

3 de Waal's report was this absence of this *Nafar* concept. So, to the extent that that is

4 additional, then we wouldn't object to that being explored.

5 I mean, Mr Laucci's suggestion to have this limited approach, yes, I think we can

6 agree with that on this, since it was discussed, the *agid al-ogada* point. I mean, I think

7 we'd say the fact that the witness doesn't know about it relates more to the lack of

8 expertise rather than the lack of existence of it in the report.

9 PRESIDING JUDGE KORNER: [9:54:23] (Overlapping speakers) Well, I know.

10 That's going to be your argument. Yes, I know. All right, then in that case we will

11 continue today.

12 So, Mr Laucci, you had better formally make your application before the witness

13 comes in.

14 MR LAUCCI: [9:54:42] Indeed, so I formally request the Chamber to admit the

15 report of Dr Gout under Rule 68(3) to be admitted into evidence. That will, of course,

16 save a considerable amount of time in the examination-in-chief, will allow me to limit

17 to focused questions, aiming at making clear what is not always so clear in the written

18 version.

19 PRESIDING JUDGE KORNER: [9:55:13] Quite. Well, yes, we grant that

20 application.

21 (Trial Chamber confers)

22 PRESIDING JUDGE KORNER: [09:55:22] I suppose -- sorry. Oh, yes, all right.

23 Sorry, Mr Jeremy. Yes, off you go.

24 MR JEREMY: [9:55:35] Yes, no objection.

25 PRESIDING JUDGE KORNER: [9:55:36] Thank you very much.

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1 I don't know, I suppose, Mr Shah, I ought to ask you formally. I mean, you are a
2 party even though you haven't really got a dog in this game.

3 MR SHAH: [9:55:47] No objection from our side.

4 PRESIDING JUDGE KORNER: [9:55:50] Thank you very much.

5 We grant the request that the report is admitted as set out in the email that was sent to
6 the parties yesterday. So that excludes, I think, section 5 of the report.

7 MR LAUCCI: [9:56:09] Much appreciated, your Honour.

8 PRESIDING JUDGE KORNER: [9:56:11] All right.

9 All right. Let's have the witness in, unless there's anything else that we need to do.

10 And we'll get -- if he says he's still got to go, then we'll get back to you after the break
11 about timings.

12 (The witness enters the courtroom)

13 PRESIDING JUDGE KORNER: [9:57:41] Yes, Dr Gout, good morning.

14 We gathered from a very late email last night from the VWS that you were under the
15 impression that your evidence would be concluded today and that you had
16 commitments elsewhere.

17 First of all, can I say, it's very unfortunate that you were ever given this impression
18 because -- and it should have perhaps been clear to you from the Monday when we
19 had the beginning of the voir dire that there was no way your evidence could be
20 concluded by today. But I understand that you had -- may -- or were trying to make
21 arrangements to change what your commitment is.

22 So the first thing I need to ask you is: Why can't you be here tomorrow? Or can
23 you now be here tomorrow?

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25 (The witness speaks French)

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1 THE WITNESS: [9:58:55](Interpretation) Good morning, your Honour. Indeed
2 I have to -- absolutely have to go back to my home because I have professional
3 commitments with my university. I've got meetings, section meetings, and I've got
4 meetings with a teaching structure in order to vote on a new training which we're
5 currently negotiating in international law, in particular, and I am expected to be there
6 to meet these obligations. And also because to come here I pushed back a lot of my
7 teaching, which is all coming together next week and I no longer have the possibility
8 to push them back any more because the semester finishes at the middle of December.
9 So I was trying to find dates on which I could come back and present them to you if
10 you so wish.

11 PRESIDING JUDGE KORNER: [9:59:52] As I've just made clear to Mr Laucci, once
12 you're sworn as a witness, it's not for the Defence or indeed the witness to decide
13 when they leave, it's for the judges. But I can appreciate that if you were given
14 information which was misleading and you've got teaching commitments, which
15 I appreciate -- but for tomorrow you're saying you can't -- I understand the teaching
16 commitment is next week, but are you saying for tomorrow you simply cannot move
17 the meetings or get somebody to act on your behalf?

18 THE WITNESS: [10:00:44](Interpretation) I can try. I can try to confirm, your
19 Honour, during the break. I'll have to make several telephone calls to shift those
20 commitments. Does that mean I could go back home tomorrow evening?

21 PRESIDING JUDGE KORNER: [10:01:01] Yes. You will definitely be able to go
22 back -- I'm not convinced you will have concluded your evidence, but we have
23 another witness on Friday who has got to give evidence; so, yes, you will definitely be
24 able to leave tomorrow evening. But if you haven't concluded, obviously, then we
25 would need to know from you what other -- if you haven't concluded tomorrow

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1 evening, it would only probably be one more day that would be needed.

2 All right. I tell you what, Mr Gout, can you -- Dr Gout, could you, during the break,
3 see if you can at least move tomorrow and then we will try very, very hard indeed to
4 complete your evidence, all right?

5 THE WITNESS: [10:01:51](Interpretation) Of course, your Honour.

6 PRESIDING JUDGE KORNER: [10:01:53] Thank you very much for at least being
7 helpful.

8 Yes, all right. Let's go then straightaway -- what's happened, Dr Gout, is that we
9 made a ruling on the scope of your evidence. Your report has now been entered into
10 evidence and Mr Laucci is going to ask you really, effectively, as has been happening
11 for the last two days, to explain various parts of your report and then you'll be
12 cross-examined again.

13 MR LAUCCI: [10:02:44] Thank you, Madam President. I will conduct the
14 examination-in-chief in French.

15 QUESTIONED BY MR LAUCCI: (Interpretation)

16 Q. [10:02:54] Good morning.

17 A. [10:02:56] Good morning.

18 Q. [10:02:56] As the Presiding Judge explained to you, all your report, with the
19 exception of chapter 5, has been entered into evidence, so it is available to the Court
20 as referenced. Thus, I'm going to restrict my questioning to a number of specific
21 points that are of interest to the Defence so that we can clarify some aspects in your
22 report as much as possible.

23 So I would like to ask you, in response to my questions, is to give simple, simple
24 responses, short, if you can, and if you could better explain what we find in your
25 report.

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1 Now, I'll begin right away. I don't think it's necessary for you to confirm your
2 identity again, so I'll save some time there.

3 Now, the first issue I'd like to explore with you is the sources of Sudanese law.
4 Could you tell us what are the primary sources of Sudanese domestic law according
5 to the 1998 constitution?

6 A. [10:04:36] Of course. According to the 1998 constitution, you have two major
7 sources of Sudanese law that are set out, Sharia and popular consensus.

8 Q. [10:04:56] When you say that they are set out, are you referring to a specific
9 article within the constitution?

10 A. [10:05:02] Yes. I would have to check the actual --

11 THE INTERPRETER: [10:05:08] Overlapping.

12 MR LAUCCI: [10:05:16](Interpretation) Could we have tab 22 up on the screen,
13 DAR-OTP-0139-0003, and if we could please go to page 0013 and then page 0014.
14 So this is the 1998 constitution, and if we could go to page 13, please.

15 Q. [10:06:08] Do you see -- I think we're at page 15. Could we go to
16 page-- thank you. Page 13, scroll to the very bottom of the page, please.

17 Can you see the title of this last article? Is this what you're referring to?

18 Can we move to the following page.

19 Is this the provision?

20 A. [10:07:01] Yes, it is.

21 Q. [10:07:05] Here we see the following, amongst the various sources:

22 (Speaks English) "... the national consent through voting, the Constitution and
23 custom ..."

24 (Interpretation) Which custom is referred to here?

25 A. [10:07:26] I'm sorry. There was some interference and I didn't hear the

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1 question.

2 Q. [10:07:33] I just read the first line of the provision.

3 (Speaks English) "The Islamic Sharia and the national consent through voting, the
4 Constitution and custom ..."

5 (Interpretation) And I would like to focus on this word "custom." Which custom is
6 meant here?

7 A. [10:07:52] Sudanese custom, customary --

8 THE INTERPRETER: [10:07:57] Overlapping. If a pause could be observed
9 between question and answer. Many thanks.

10 PRESIDING JUDGE KORNER: [10:08:06] Mr Laucci, did you hear that? You spoke
11 over him. You must wait until the translation is finished.

12 THE INTERPRETER: [10:08:12] Many thanks from the interpreters.

13 PRESIDING JUDGE KORNER: [10:08:15] Sorry, the last bit wasn't translated. You
14 said "Sudanese custom, customary" something, sir.

15 THE WITNESS: [10:08:41](Interpretation) Sudanese customary norms — that is to
16 say, the norms produced and applied by communities, by the ethnic groups of Sudan.

17 MR LAUCCI: [10:08:56](Interpretation)

18 Q. [10:08:56] And my following question was to ask you: How would you define
19 Sudanese custom?

20 A. [10:09:11] Once again, all the various rules that are not produced by the
21 Sudanese state but by customary traditional authorities that are taken into account in
22 Sudanese law and recognised in Sudanese law, in state law.

23 Q. [10:10:06] My transcription has frozen. That's not serious.

24 I'm going to continue with this particular provision.

25 (Speaks English) "... no law shall be enacted contrary to these sources, or without

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1 taking into account the nation's public opinion, the efforts of the nation's scientists,
2 intellectuals and leaders."

3 (Interpretation) Which scientists, intellectuals and leaders are referred to in this
4 provision?

5 A. [10:11:09] Reference is made, in my opinion, to academics, intellectuals and
6 leaders from the NIF and the CEP --

7 THE INTERPRETER: [10:11:31] The NISS and the NCP.

8 MR LAUCCI: [10:11:39](Interpretation)

9 Q. [10:11:39] What does that mean, that no law may be adopted -- enacted without
10 taking into account the nation's public opinion, the efforts of the nation's scientists,
11 intellectuals and leaders? In practical terms, what does that mean?

12 A. [10:12:04] It means that all Sudanese normative acts must be in accordance with
13 the interpretation by these academics, intellectuals and authorities, the sources of
14 Sudanese law, in particular Sharia.

15 Q. [10:12:28] And who decides?

16 PRESIDING JUDGE KORNER: [10:12:35] The live note says at line 20 to 21:

17 "Reference is made, in my opinion, to academics, intellectuals and leaders from the
18 NIF and the CEP".

19 I thought he said NIS. In any event, if he didn't, could he say what the NIF is and
20 the CEP?

21 THE WITNESS: [10:13:05](Interpretation) Of course, the NIF, National Islamic Front,
22 and then NCP, which was the part that -- National Congress Party.

23 THE INTERPRETER: [10:13:23] Says the witness.

24 MR LAUCCI: [10:13:36](Interpretation)

25 Q. [10:13:36] Who decides about these laws enacted and whether they are in

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1 accordance with the opinion of the leaders of the NIF or the NCP?

2 A. [10:13:52] The authorities of the national executive. The authorities
3 I mentioned a few moments ago, al-Bashir.

4 Q. [10:14:05] Very well. And if President al-Bashir decides that legislation is not
5 in accordance with his opinion, what happens then?

6 A. [10:14:18] Well, I think you need to look at the provisions that have to do with
7 the division of powers between the executive branch and the legislative branch. The
8 distribution of powers may seem clear, but -- but, you see, it is misused because the
9 executive tends to legislate by way of decree and takes advantage of the state of
10 emergency.

11 Q. [10:14:57] Very well. Have I understood you to say that this power to ensure
12 that legislation is in accordance with their opinion is -- is -- takes form in legislation
13 by decree?

14 A. [10:15:18] Yes, obviously.

15 Q. [10:15:22] You said *notamment* -- in particular -- in French, *notamment*.
16 Anything else?

17 A. [10:15:34] No, no, I can't think of any other illustration.

18 Q. [10:15:41] Do you have examples of such decrees? I believe you mentioned
19 President al-Bashir who intervened in an area that usually comes within this sphere of
20 law?

21 A. [10:16:01] For example, freedom of religion. I have to remember the exact
22 provision in the 1998 constitution, but there is a reference to Islam as being the faith of
23 the majority of the Sudanese population, and when you consider that -- well, before,
24 in 2004, there was a decree regarding counterinsurgency in Darfur based on a
25 religious discourse and one sees that the decree claims that the insurrectionists and

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1 their sympathisers are not true Muslims and, thus, not members of the nation, which
2 affects the capacity of Sudanese people to be considered as full-fledged citizens.

3 That's an example.

4 Q. [10:17:18] Yes. That example interests me. Which decree are you talking
5 about?

6 A. [10:17:26] Late in 2003, I believe it was a decree -- a decree, rather, that had to do
7 with the counterinsurgency strategy after an attack.

8 Q. [10:17:41] Did the Defence show you this?

9 A. [10:17:44] Yes.

10 PRESIDING JUDGE KORNER: [10:17:52] Do you mean you hadn't seen it before the
11 Defence showed it to you?

12 THE WITNESS: [10:18:01](Interpretation) No, your Honour. I had mentioned it,
13 but I didn't have a chance to actually look at it. I was later very happy to have the
14 chance to look at it.

15 PRESIDING JUDGE KORNER: [10:18:21] I'm sorry, just so we get it clear. So
16 during the period you were in Sudan, you didn't have a chance -- you heard about
17 this, but you didn't have a chance to see the actual decree?

18 THE WITNESS: [10:18:40](Interpretation) Yes, that is correct, your Honour.

19 PRESIDING JUDGE KORNER: [10:18:43] Does this form part of your thesis, this
20 area?

21 THE WITNESS: [10:18:53](Interpretation) No, your Honour. Regarding the same
22 question put by the Defence, I looked at freedom of religion of non-Muslims in
23 Khartoum and actually Muslims too in Khartoum. That is what I was looking at,
24 and reference was made to the 2003 decree.

25 PRESIDING JUDGE KORNER: [10:19:21] Yes, thank you.

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1 THE WITNESS: [10:19:22](Interpretation) I began by referring to the 2003 decree.

2 MR LAUCCI: [10:19:27](Interpretation)

3 Q. [10:19:28] Could we now turn to document --

4 PRESIDING JUDGE KORNER: [10:19:37] Mr Laucci, I think it may be helpful if one
5 of your team actually listens to the English translation through the headphones and
6 stops you when you start asking a question before the translation is finished.

7 MR LAUCCI: [10:19:53](Interpretation) Yes, your Honour. I will endeavour to be
8 more disciplined.

9 Q. [10:19:57] Could we now call up document DAR-D31-00000231. No,
10 00000-1310001. No, it ends with five times zero. And if we could go to the second
11 page.

12 THE COURT OFFICER: [10:20:44] Could counsel please say which tab it is in the
13 Defence list?

14 MR LAUCCI: [10:20:49](Interpretation) Tab 23.

15 THE INTERPRETER: [10:21:07] From the interpreter: Tab 23, 00000231.

16 MR LAUCCI: [10:21:14](Interpretation)

17 Q. [10:21:15] Sir, can you see the document up on the screen?

18 A. [10:21:17] Yes.

19 Q. [10:21:18] Is this the document you were referring to?

20 A. [10:21:21] Yes, this is the one.

21 Q. [10:21:26] Could you repeat to us, what's the connection that you have made
22 between this document and this power of the president under article 35 of the
23 constitution?

24 A. [10:21:47] In my opinion, this document has the effect of assigning the
25 status -- assigning legal status to certain Sudanese people who will be targeted

1 directly by this counterinsurgency strategy, and they will be deemed to be no longer
2 part of the *ummah*, the national community of Sudan. And, thus, they will be
3 targeted by this counterinsurgency strategy and their rights will be affected, their
4 right to -- their human rights and fundamental liberties.

5 Q. [10:22:39] Okay. If we could perhaps -- if we could scroll down please, if we
6 could scroll down. One of the following pages please.

7 Dr Gout, what I would suggest is if you could tell us when to -- tell us when to stop
8 when we see the particular passage that you're referring to.

9 Next page, please.

10 If we could just give the witness a few moments to read.

11 A. [10:23:22] The first paragraph. The quote of this verse is already a way of
12 taking a position to justify the counter-insurrection strategy and creates an
13 antagonism between the true believers and the insurgents.

14 First paragraph.

15 And then after that, I'll look at the rest.

16 The end of the second paragraph may speak to that.

17 A parallel is drawn between belonging to the Sudanese nation and the ethnic identity
18 of the insurgents.

19 So this is what we call *Arabité* and *Islamité*.

20 And then we see paragraph 3, we see reasons for -- further down. So that's all for this
21 particular page.

22 Q. [10:24:47] Very well. Could we move to page 4?

23 A. [10:25:17] Paragraph 3 of the objectives. And then the two following
24 paragraphs, "Means".

25 And just if you could give me a moment to read the first paragraph.

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1 Yes, paragraph 1, after the title "Purposes of creating semi-regular forces".

2 Q. [10:26:16] Very well. And the last page, so that we can be complete.

3 A. [10:26:32] The first paragraph "General orders", the provisions, paragraph 2 of
4 that section.

5 And in the last part of the document, paragraph 2, "Assessment of the situation".

6 Q. [10:27:02] Very well. Thus, in your opinion, this document that we have here,
7 that you've just reviewed is an illustration of article 65?

8 MR JEREMY: [10:27:23] Yeah.

9 MR LAUCCI: [10:27:23](Overlapping speakers)

10 PRESIDING JUDGE KORNER: [10:27:26] (Microphone not activated)

11 THE INTERPRETER: [10:27:27] Microphone, please.

12 Microphone please, your Honour.

13 MR LAUCCI: [10:27:36](Interpretation) Very well. This is a repetition of what has
14 already been said. I shall rephrase.

15 Q. [10:27:42] What link or connection do you make between this document and
16 article 65 mentioned earlier?

17 A. [10:27:51] The fact that this is an illustration of the capacity of the domestic
18 authorities, the executive branch, to -- their capacity to determine or modify the
19 application of certain legislative or constitutional provisions. In this case
20 discrimination against a Sudanese citizen by using the pretext of ethnicity. These are
21 tricks or artifices.

22 Q. [10:28:31] Very well. But this discrimination that you make mention of, was it
23 discrimination based on belonging to the Sudanese nation or to belonging to the
24 Muslim faith? What were -- what was the grounds of discrimination, the criteria?

25 A. [10:28:56] In actual fact, I don't think it's quite possible to make a distinction

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1 between the two. We worked with some colleagues on a research programme
2 having to do *Arabité* and *Islamité* in Sudan, and this was based on various disciplinary
3 approaches. And the conclusions were that the construction of the Sudanese identity
4 is based on variations, combinations of these two -- these two things, *Arabité* and
5 *Islamité* -- Arabness and Islamicness, so to speak.

6 So, for example, in actual fact, there is a fatwa from 2012 adopted by decree as well
7 that deprived South Sudanese people who were Muslim of their faith to justify the
8 counterinsurgency strategy and to give the counterinsurgency a certain
9 dimension -- let's say, a simple dimension.

10 Q. [10:30:30] So you're speaking about a fatwa from '92. Over what period of time
11 did it have its effects?

12 A. [10:30:43] To be very honest, I don't remember this loss of time.

13 PRESIDING JUDGE KORNER: [10:30:46] I'm sorry, Mr Laucci, I'm going to stop you
14 now. Firstly, there's -- it's going too quickly again between you and the witness.

15 MR LAUCCI: [10:30:59](Interpretation) I'm doing my best.

16 PRESIDING JUDGE KORNER: [10:31:01] Second, I don't think he ever mentioned a
17 fatwa.

18 And, third, I'm sorry, while I've interrupted, I'm really sorry -- can we have the
19 document back up again.

20 MR LAUCCI: [10:31:15] (Interpretation) There must, your Honour, have been
21 a -- well, from what I read in the transcript, if you look at line 15, a fatwa, and I think
22 that the exact word was "fatwa", instead of "fat war".

23 PRESIDING JUDGE KORNER: [10:31:32] All right. But I'm sorry, I'm at a complete
24 loss to understand. Can we go -- unfortunately, you didn't highlight one of these
25 documents as one you were going to use, Mr Laucci, so we haven't got a copy here.

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1 MR LAUCCI: [10:31:44](Interpretation) I was surprised by one of the answers of the
2 witness, so that made it necessary to show it but...

3 PRESIDING JUDGE KORNER: [10:31:52] All right, can we go back to the top,
4 please.

5 MR JEREMY: [10:31:55] Sorry to interrupt, Madam President. Just one point: So
6 this document was shown to the witness as part of the preparation log. That was
7 shared with the Chamber, the preparation log.

8 PRESIDING JUDGE KORNER: [10:32:03] Yes.

9 MR JEREMY: [10:32:04] There was then a subsequent follow-up email from the
10 Prosecution to the Defence about this specific document because it was shown to the
11 witness, but there were no comments indicated in the log. Then Mr Laucci
12 responded to our email saying what the witness had said about this document
13 that -- that -- the Chamber wasn't copied on that. I think it would probably be
14 relevant now to share that email with the Chamber.

15 PRESIDING JUDGE KORNER: [10:32:32] Okay, well, he's now given his -- no, my
16 complaint was that we were given the new -- a new document, but this was not
17 highlighted as one that was going to be used.

18 But can we go back to the top, please, of the -- of the document. Sorry. Yes, the first
19 page. No. Yeah, can we -- and -- right.

20 This is headed, Dr Gout, the "National Security Council 2004 plan for ending the
21 rebellion in the states of Darfur". And I'm not quite clear what you're saying.

22 You say it was discriminatory, which tends to suggest that it's unjust -- discrimination
23 tends to -- against, tends to suggest it's an unjustified action. And what I really want
24 to know is why you say a plan for ending an insurgency that everybody accepts was
25 happening is discrimination against part of the population which, I think the

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1 impression that you're giving, is that in some way the government shouldn't have
2 been doing this.

3 THE WITNESS: [10:34:13](Interpretation) Your Honour, it's all the different
4 provisions that I cited which identify the portion of the Sudanese population as
5 being -- as being responsible for the insurrection and to the extent to which, let's say,
6 the visas that precede the provisions in this document, the considerations are based
7 on the principles of Islam. These -- under that logic on the -- belonging to the nation,
8 you have to interpret this distinction between rebels who would be from non-Arab
9 ethnic groups and not Muslim from true Sudanese people. And it's at the beginning,
10 if you take the consideration of paragraph 1 --

11 PRESIDING JUDGE KORNER: [10:35:20] Yes, could we move the cursor down,
12 sorry, in the document now.

13 THE WITNESS: [10:35:25](Interpretation) The other one, the next page it is.

14 PRESIDING JUDGE KORNER: [10:35:34] Right. Which paragraph?

15 THE WITNESS: [10:35:36](Interpretation) The first paragraph.

16 PRESIDING JUDGE KORNER: [10:35:39] "Allah", starting "Allah".

17 THE WITNESS: [10:35:45](Interpretation) Yes.

18 PRESIDING JUDGE KORNER: [10:35:46] And?

19 THE WITNESS: [10:35:50](Interpretation) This is the basis, the foundation, this is the
20 justification for this action, which is undertaken in order to fight against the
21 insurrection in Darfur. And this basis, well, it explains what it's declaring, the point
22 of different groups, different ethnic groups. It's pointing out different ethnic groups
23 described here in a fairly bad way in order to justify what is carried out, to justify
24 their targeting in the counter-insurrection because they themselves are not Arabs and
25 not Muslims. But it's not a fatwa as such. You see it much more clearly -- well,

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1 I heard people speak about it much more clearly when it came to the 1992 fatwa,
2 which was meant to deprive them of their faith -- or deprive the South Sudanese of
3 their faith, and they were targeted by the counter-insurrection.

4 PRESIDING JUDGE KORNER: [10:37:08] So you're saying that -- I just want to be
5 clear what you are saying about this -- that this was an unjustified order to put down
6 the rebellion because it was in fact discriminatory against -- you say Muslims, but
7 against non-Arabs. My understanding, and I may be wrong on this, is that -- is that
8 the rebels were themselves Muslims, just from a different tribe.

9 THE WITNESS: [10:37:47](Interpretation) Yes, of course.

10 PRESIDING JUDGE KORNER: [10:37:48] So if the rebels are themselves Muslims,
11 how is this anti-Muslim? That's what I'm -- that's what I'm trying to get at.

12 THE WITNESS: [10:37:55](Interpretation) It's a strategy to justify the action. You
13 mustn't forget that there is a regime which is basing its legitimacy on an Islamist
14 policy, the Islamisation of Sudan, to harmonise Sudanese society to justify this action.
15 And that's the only way they can justify what they're doing in those terms. So the
16 fact that this was discriminatory to the Sudanese population, to the extent that outside
17 of specialists on Sudan, in the media which was for the main public, you often saw
18 this confusion, the idea that indeed the rebels of Darfur were not necessarily Arabs,
19 which is partly false, and they're not partly -- and that they're not Muslims, which is
20 also partly false.

21 PRESIDING JUDGE KORNER: [10:38:59] All right. So, your -- your view is that
22 this document isn't simply a document on how to put down a rebellion, whether the
23 rebellion was justified or not, but is actually, at the same time, one of discrimination.

24 THE WITNESS: [10:39:24](Interpretation) Yes, your Honour, that's what I wanted to
25 say.

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1 PRESIDING JUDGE KORNER: [10:39:27] All right. I'm really sorry, Mr Laucci, but
2 at the moment, I was -- I was failing to understand why a document which up till
3 now has been dealt with on the basis that it was a plan to get rid of the insurgents was
4 now also discriminatory. Yes, thank you.

5 MR LAUCCI: [10:39:48](Interpretation) You're most welcome, your Honour.

6 Q. [10:39:50] Now, you said in answer to the question, your Honour, that this
7 document, the one which is on the screen, was not a fatwa, so what difference would
8 you make?

9 A. [10:40:05] Well, quite simply it would seem to me -- sorry, I should have waited
10 for the end of the translation.

11 Q. [10:40:18] The five-second rule applies as well.

12 A. [10:40:21] Well, I don't see a classification as such in this regard. It would seem
13 that this is a document -- and I would say that I haven't been able to consult it, I've
14 spoken about it with academics from Juba University in Khartoum, and I also got
15 information by reading articles, academic articles, on these issues, and it would seem
16 that the decree of 1992 was defined explicitly as a fatwa. So that's the difference in
17 the formal classification of the document, but it's a decree.

18 MR LAUCCI: [10:41:06](Interpretation)

19 Q. [10:41:07] Precisely. You use the word "decree". What makes you say that
20 this document is a decree?

21 A. [10:41:19] Well, could we see the top of the document and the final
22 page afterwards? "Presidency of the Republic". That's what I see that makes it
23 possible for me to say that it's a decree.

24 Q. [10:41:43] So you're referring to the authority which issued this document.

25 And with regards to this 1992 document, does that come from the same authority, to

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1 the best of your knowledge?

2 A. [10:41:54] To the best of my knowledge, yes. Yes.

3 Q. [10:42:02] Very well. I think that we have finished with this document.

4 You speak about decrees. Is there a difference in type between a decree and a
5 constitutional decree, a difference in their nature?

6 A. [10:42:29] In principle, yes, there is. A constitutional decree has the status
7 of -- well, it has constitutional value. A presidential decree, for example, or a
8 ministerial decree is an act which is submitted to the form of the constitution and the
9 competence of the executive which is set out in the constitution in principle.

10 MR LAUCCI: [10:43:02](Interpretation) Could we have on the screen the report, if
11 you would be so kind.

12 Q. [10:43:13] DAR-D31-000 -- tab 1 on the list, DAR-D31-00000134, tab 1 on the list.

13 And I would like to go to paragraph 14 thereof, and this is pages 7 and 8.

14 Well, I think we can go straight to page 8.

15 Now, you mention in this paragraph of your report -- well, can we see the footnotes at
16 the bottom, at the very bottom.

17 So, you have this expression, "*Décret constitutionnel*", "Constitutional Decree", and you
18 cite several of them. What exactly is this?

19 A. [10:44:32] These are the decrees that were adopted by the putschist regime in
20 order to bring a normative framework to Sudan.

21 Q. [10:44:45] When you say the "putschist regime", which authority within that
22 regime?

23 A. [10:44:51] Well, I'm thinking of two individuals in particular. That's -- sorry,
24 I'm going to wait for the translation.

25 So I'm thinking of two individuals here. There's al-Bashir and al-Turabi.

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1 Q. [10:45:17] What was the authority of al-Turabi in order to issue decrees?

2 A. [10:45:26] Al-Turabi -- I'm sorry. If I remember, al-Turabi was president of the
3 national parliament. So, in principle, there was no possibility to issue a decree.

4 Q. [10:45:45] Very well. And these decrees, if we could -- so if we could go back
5 up to the top of the page.

6 Now, you speak about a decree, and this is to start -- this starts on the previous page,
7 but this is related to the appropriation of private property of persons who could be
8 opponents of the regime -- the appropriation of private property belonging to
9 individuals likely to be opponents of the regime. So what is this about?

10 A. [10:46:41] Well, this is referring to the state authorities preventing the opponents
11 of the putschist from having the means to combat that, and the establishment of the
12 *al-Inqaz* regime. So that's the way I see it and not within the framework of the
13 counterinsurgency.

14 Q. [10:47:21] So it's the political position which is in this decree, in your
15 estimation -- it's the political opposition which is targeted in this decree through the
16 appropriation of private property. Is that -- does that include property, movable
17 property, immovable property?

18 A. [10:47:41] I have no specific answer in that regard, but I would imagine so.

19 Q. [10:47:45] You mean both?

20 A. [10:47:46] Yes. Both.

21 Q. [10:47:52] Now, this decree was -- I'm sorry.

22 A. [10:47:57] Yes, I keep to my answer.

23 Q. [10:48:02] This decree, was it applicable to Darfur, in your estimation?

24 A. [10:48:10] Constitutional decree, yes, it would seem so.

25 Q. [10:48:19] And this decree, was it still in force in 2003 and 2004?

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1 A. [10:48:29] I don't think so, because you have to refer to the provisions of the
2 constitution of '98 in order to check that, and I think it's at 135 or 137. We'd have to
3 have this provision of the 1998 constitution. I think that this constitution -- how
4 would you say it in French? -- that it abrogates certain of these decrees, some of these
5 decrees.

6 Q. [10:49:16] If it's possible to -- at the request of
7 Dr Gout, would it be possible to show the constitution which is at tab 22.

8 A. [10:49:34] Yes, I think it must be 137, not 135.

9 MR JEREMY: [10:49:42] Sorry to interrupt, Madam President, just while we're
10 looking for the source, it's not clear to me which decrees are actually...

11 PRESIDING JUDGE KORNER: [10:49:48] I think it's the appropriation -- I'm
12 assuming it's the appropriation of property that you're talking about.

13 MR LAUCCI: [10:49:54](Interpretation) We're discussing decree number 2.

14 MR JEREMY: [10:49:58] Okay, thank you.

15 THE WITNESS: [10:50:10](Interpretation) Decree number 2, 1999.

16 MR LAUCCI: [10:50:20](Interpretation)

17 Q. [10:50:23] So if we go to page 0030 -- 28, 0030 -- no, 0030, sorry.

18 A. [10:50:26] Article 135, "Declaration of War".

19 Q. [10:50:30] And if we go to article 137.

20 A. [10:50:35] Yes, it's not article 135. That's it.

21 PRESIDING JUDGE KORNER: [10:50:46] What's it?

22 MR LAUCCI: [10:50:49](Interpretation)

23 Q. [10:50:50] Yes. Could you explain what you see in this?

24 A. [10:51:00] Well, you asked me if the constitutional decree, which was still in
25 force in 2003 and this article in 2004. Now, if you read article 137, you will see that

1 when it enters into force, the constitutional decrees in force at the time shall be
2 repealed.

3 Q. [10:51:23] So this applies to all constitutional decrees that you mentioned in
4 your report?

5 A. [10:51:28] I suppose it does, but I cannot.

6 Q. [10:51:41] At least number 14?

7 A. [10:51:42] Yes.

8 Q. [10:51:43] And, to the best of your knowledge, these repealed decrees, were they
9 replaced by equivalent provisions?

10 A. [10:51:53] Yes, counsel, at least some of them.

11 Q. [10:52:02] Could you develop that?

12 A. [10:52:06] Well, the decree or the decrees on the place of Sharia, they can be
13 found in the '98 constitution and 2005. The decrees on the form of the federalist form
14 of the Sudanese state can also be found there in the constitutional provisions, for
15 example.

16 Q. [10:52:32] Would you be able to guide us towards the place of Sharia, to that
17 provision?

18 A. [10:52:39] Well, the decree number 7 of 1993 is -- well, the application of
19 international rules relating to the protection of human rights in Sudan and
20 this -- these human rights are applicable to the extent where they conform with Sharia.
21 That's provided for in that decree. Sharia determines the interpretation of these
22 rules.

23 And that can be found in the constitutional provisions which you mentioned a
24 moment ago on the sources of Sudanese law -- popular consensus and Sharia as the
25 sources of Sudanese law.

1 Q. [10:53:33] And to what extent or how, this regulation 65 on the sources, the
2 equivalent of the decree relating to the place of Sharia which was repealed?

3 A. [10:53:52] Because, in my opinion, and not just my opinion, the council of the
4 United Nations as well, the Human Rights Council of the United Nations as well, then
5 Sudanese law, or the regime, is a dualist legal regime, and I can define it if you so
6 wish.

7 A dualist regime is a legal system, or regime, according to which international law
8 and national law are distinct. They do not have the same basis or foundation. And
9 for a national -- international law to be applied domestically, it has to change status.
10 It has to be enacted. It has to be adopted, once again, on the national proceedings on
11 the sources. So you have -- there's a constitutional status which is established, and,
12 in the worst cases for me, I would say a jurisprudential basis as well. And so as
13 Sharia is a source of constitutional Sudanese law, all the international laws that have
14 to be transposed into domestic law risk being interpreted in accordance with Sharia,
15 so that changes their substance.

16 That's the proof of the dualist nature of Sudanese law and I quoted -- well, can I refer
17 to the report. That's the document that I give to my students to teach them about the
18 council of the United Nations that illustrates it well and it's a report of 2018. It's not
19 a report, actually. These are observations or final comments of the Human Rights
20 Council on the fifth periodical report in Sudan relating to the implementation of the
21 international pact on civil and political rights. And there we are, in 2018, we are
22 speaking about the constitution of 2005, but it's exactly the same logic. The Human
23 Rights Council is concerned about the dualist nature of Sudanese law. So they are
24 concerned about the dualist nature of Sudanese law, so this means that international
25 law which is expressed in the pact is going to be interpreted -- well, it would change

1 in substance through -- viewed through the prism of Sharia.

2 Q. [10:56:56] Would you have a concrete explanation for the way in which this
3 human rights -- internationally protected human rights are impacted by the need to
4 conform with Sharia?

5 A. [10:57:21] Well, just to give you an illustration -- is that what you're asking for,
6 an example?

7 Well, this is what we were speaking about yesterday, counsel. That is to say, the
8 situation, the treatment that was meted out to non-Muslims on the one hand and to
9 Shiites on the other in Sudanese law. And this illustration is related to my study on
10 the practices of expropriation in the federal state of Khartoum.

11 In principle, the non-Muslims had to benefit from the 1996 UN pact, article 7, for
12 minorities. So article 26 of the United Nations pact, number 66, for religious
13 minorities. And you have the theocratic nature of the regime and law in Sudan.
14 So according to that, these non-Muslims are classified as *dhimma*, the protected
15 community in Islam. So, necessarily, there you have communities which must enjoy
16 a special regime applicable to them.

17 And these expropriation practices made the specialist NGOs say that there was a
18 violation of the provisions of human rights with regard to the protection of minorities.
19 And that must have been the case, because Sudan should have adopted a legal
20 framework which would have offered these communities a possibility to have a
21 derogatory rule which they could rely on to make it possible to have their
22 particularity recognised in order to preserve their religion and to be able to practice
23 worship -- to preserve their worship places as well, so what I found in my studies and
24 my interviews, in particular with the {ICR : (Redacted)} place. And
25 according to him, it wasn't the case. These non-Muslims who belonged to displaced

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1 communities, displaced from Khartoum, were targeted, as were all other vulnerable
2 displaced communities because of their religious belonging or identity. So there was
3 no legislation protecting their identity so they weren't discriminated against on a
4 religious basis under law.

5 Q. [11:00:31] Very well. Last question before the break.

6 When there is a text such as the one that we had on the screen a moment ago, as you
7 said, with a view to excluding a certain part of the population from the international
8 community, the Sudanese -- Sudanese community and the Muslim as well, would this
9 text have an impact on the application of human rights for that community?

10 A. [11:01:08] Well, an artificial community, you mean?

11 Q. [11:01:14] The one in the text.

12 A. [11:01:15] Yes, of course, as you could see when you just read the NGO reports
13 on the treatment that was meted out to sympathisers or supposed members of the
14 armed groups.

15 MR LAUCCI: [11:01:35](Interpretation) This is a good moment for the break, your
16 Honour.

17 PRESIDING JUDGE KORNER: [11:01:38] I'm afraid I'm still slightly at the loss.
18 There were decrees against treatment of members of the armed groups, whether
19 rightly or wrongly, for these purposes the government was determined to put down
20 the rebellion; is that right?

21 THE WITNESS: [11:02:10](Interpretation) Yes, I think so. I think that's correct.

22 PRESIDING JUDGE KORNER: [11:02:17] The rebellion happened to be conducted
23 by people who were for these purposes I'll simply say "non-Arab", because, as we
24 understand it, their belief was they were being discriminated against.

25 THE WITNESS: [11:02:43](Interpretation) Your Honour, well, on that point, on that

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1 specific point, I would tend to make a distinction between what is said in general, yes.
2 The headquarters of the insurgents belonged to non-Arab groups for the most part,
3 but there were always Arab combatants within those groups and all of that became
4 much clearer at a later date. And I think this shows, to my mind, that as of 2014,
5 when a uni-national front of insurrection emerged and Arabs and non-Arabs took
6 part, met -- well, they joined the insurrectional movements.

7 PRESIDING JUDGE KORNER: [11:03:48] Sorry, can we not go to up to 2014, please,
8 and just stick to this area.

9 But what I'm more interested in is this: You say that what concerned the UN and
10 others was that decrees were being issued which breached the, I imagine it's the
11 interog -- the rights -- the (indiscernible) rights or whatever it was, but it matters
12 not -- breaches the human rights legislation which protects minorities.

13 THE WITNESS: [11:04:25](Interpretation) Yes, your Honour. That's what I'm
14 saying.

15 PRESIDING JUDGE KORNER: [11:04:30] And you say that obviously the decrees
16 about expropriation of property and the right. But is it your contention that Sharia
17 law actually mandates that laws should or may be passed to make that discrimination,
18 because that's what you seem to be saying?

19 THE WITNESS: [11:05:04](Interpretation) Well, I'm not so sure I've understood the
20 question entirely but I'll try to respond.

21 PRESIDING JUDGE KORNER: [11:05:14] Okay, no. I want to make sure you
22 understand the question.

23 Your contention is that because of the dualist system, because international law has to
24 be incorporated into Sudanese law by means of a decree or whatever, Sharia law as an
25 intervening factor, if you like, in Sudanese law, changes the nature of the

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1 international law which is incorporated?

2 THE WITNESS: [11:06:04](Interpretation) Yes, your Honour. It does change the
3 content -- the content of the international provisions of the law.

4 PRESIDING JUDGE KORNER: [11:06:14] Right. But are you saying that Sharia law,
5 which you say -- this was your example of Sharia law having an effect at this
6 particular, mandates that it is -- that -- that -- that non-Muslim groups should be
7 discriminated against? Is that what your contention is? Is that the change that you
8 say took place?

9 THE WITNESS: [11:06:48] Yes, your Honour, and I can give an example, if you wish.

10 PRESIDING JUDGE KORNER: [11:06:56] No, I don't want an example. So what is
11 the -- I want the actual -- what I want is the actual law.

12 What is it in Sharia law that mandates that non-Muslim people may be discriminated
13 against? That's what I'm asking.

14 THE WITNESS: [11:07:13](Interpretation) Oh, I see. Yes, there are provisions in the
15 Islamic law, in the Koran, that set aside a special place, or position for the *dhimma*, the
16 protected people. And this concept was used to a great extent in Sudan politically,
17 not legally but politically, to have people believe that non-Muslim people had a
18 special status in Sudanese society and that led to many misunderstandings.

19 PRESIDING JUDGE KORNER: [11:07:51] You say a "special status", do you mean a
20 lesser status?

21 THE WITNESS: [11:07:59](Interpretation) No, no, not at all, your Honour. In
22 principle, not a lower status but the possibility of benefiting from a personal status
23 that would be distinct to Muslim law, particularly in terms of marriage, freedom of
24 religion, the patriarchal system, inheritance and so on and so forth.

25 I can give details of this if you wish, your Honour.

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1 PRESIDING JUDGE KORNER: [11:08:35] No, I just wanted to make sure that
2 I clearly understood what you were saying. Yes, thank you.
3 I'm sorry, we've run over slightly and it's difficult enough for the interpreters, so we'll
4 sit again at twenty to 12 -- 11:40.
5 THE COURT USHER: [11:08:51] All rise.
6 (Recess taken at 11.08 a.m.)
7 (Upon resuming in open session at 11.45 a.m.)
8 THE COURT USHER: [11:45:37] All rise.
9 Please be seated.
10 PRESIDING JUDGE KORNER: [11:45:58] Mr Laucci, before we go on, we better deal
11 with the question of timing. It's become apparent to all three of us that there is no
12 way, we believe, that Dr Gout can finish his evidence by tomorrow, including
13 cross-examination and any re-examination and any judges' question.
14 So Dr Gout, thank you for trying to -- we understand that you tried to move your
15 meetings and you wanted a reassurance from us that you would complete your
16 evidence tomorrow. We can't give that assurance. In fact, we are pretty certain one
17 way or another that we're going to need -- your evidence is going to need at least
18 another -- after today, another two days we estimate.
19 So therefore, we are not going to ask you -- if you haven't managed to move them,
20 we're not going to ask you to move your meetings tomorrow. Your evidence will
21 stop for the time being at the end of today.
22 The question is, however, when you should return.
23 Now, can I just understand this, we haven't yet managed to get dates, but we do have
24 dates in December, the week beginning, I think it's the 1st -- 4 December.
25 Is that going to give you problems in respect of your teaching?

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1 THE WITNESS: [11:47:56](Interpretation) Your Honour, yes, certainly. But I'll have
2 to look further into the possibilities and see if I can shift teaching duties. Right now,
3 I think -- well, a bit later in the year, I think we're looking more at exams and oral
4 examinations for masters students; so I'll see if it's possible to -- I will look to
5 determine whether or not it's possible to shift these various commitments.

6 Are we talking two days or three days?

7 PRESIDING JUDGE KORNER: [11:48:41] I would -- no. I would allow for two
8 days after today. If you -- and this is off the top of my head, but if you could be
9 available, unless -- I don't think you have any witnesses, Mr Laucci, for Monday, the
10 4th and Tuesday, the 5th of December.

11 MR LAUCCI: [11:49:05] These days are available for the moment.

12 PRESIDING JUDGE KORNER: [11:49:06] Well, that's what I thought.

13 If you could look into, perhaps over lunch -- as I say, you will be free tomorrow, but if
14 you could see whether it would be possible to do those two days.

15 Yes.

16 MR LAUCCI: [11:49:19] Two contributions in that conversation if they can be
17 helpful. First, I'm more and more confident that the examination-in-chief will be
18 completed today. That's one. And second, maybe, I don't know if the Chamber
19 would have any interest in exploring the possibility of an audio -- a video conference
20 appearance for the rest of Dr Gout's appearance.

21 PRESIDING JUDGE KORNER: [11:49:52] Yes, I don't see how that's going to help,
22 but -- I mean, because he's only coming from Paris, as I understand -- Toulouse, yes,
23 which is a quick flight. But I mean, if -- if it would help, I don't -- certainly a video
24 conference is, I think, all right with us. I mean, it doesn't make much difference. As
25 we've said all along, we've all been used to -- so that would be of assistance, yes.

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1 Yes, Mr Nicholls. Sorry.

2 MR NICHOLLS: [11:50:26] Yeah, I would just say if it's really impossible otherwise,
3 but as it is close, as we started this way, we would prefer that he come back and --

4 PRESIDING JUDGE KORNER: [11:50:38] Yes. Well, I mean, unless there is a good
5 reason. As I say, if it were anywhere else, but Toulouse is really not that difficult to
6 get to by plane or indeed train, I suppose.

7 All right, before we -- before you carry on, Mr Laucci, anyhow, Judge Alexis-Windsor
8 has got a question on the topic we were coving before the break. All right.

9 But I think if over lunch, Dr Gout, you could have a look and see what's available;
10 that would be helpful on the basis that, as Mr Nicholls said, I think it's -- it's
11 preferable but not mandatory that you return. So if it helps you to have it by video
12 link, that's fine. In other words, if you need to do academic stuff after or before court,
13 yes.

14 All right. Can we -- yes, as I say, Judge Alexis-Windsor has got a question.

15 JUDGE ALEXIS-WINDSOR: [11:51:55] Good morning, Dr Gout.

16 THE WITNESS: [11:52:01](Interpretation) Good morning, your Honour.

17 JUDGE ALEXIS-WINDSOR: [11:52:02] One question: To your knowledge, was
18 there any fatwa or decree declaring rebels to be non-Muslims in 2020 -- sorry, in 2003
19 to 2004?

20 THE WITNESS: [11:52:23](Interpretation) To my knowledge, no. No,
21 your Honour.

22 JUDGE ALEXIS-WINDSOR: [11:52:25] Thank you.

23 THE WITNESS: [11:52:26](Interpretation) Not -- no document entitled "fatwa", not
24 to my knowledge.

25 JUDGE ALEXIS-WINDSOR: [11:52:37](Overlapping microphones) Or a decree?

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- 1 THE WITNESS: [11:52:43](Interpretation) Not to my knowledge, your Honour.
- 2 JUDGE ALEXIS-WINDSOR: [11:52:46] Thank you.
- 3 PRESIDING JUDGE KORNER: [11:52:49](Microphone not activated) All right. Yes,
- 4 Dr Laucci, thank you -- Mr Laucci, Dr Laucci, whatever.
- 5 MR LAUCCI: [11:52:58] That works.
- 6 Q. [11:53:05] (Interpretation) In actual fact, I had two questions to conclude this
- 7 point before the break and I'll take -- I took advantage of the break to consult with the
- 8 interpreters and I will try to speak slowly. And if you give a longer answer, try to
- 9 pause from time to time so that the interpreters can follow.
- 10 Now the two questions are as follows: You told us about the impact of the Sharia on
- 11 the rights of minorities. You mentioned Article 27 of the agreement. Did that also
- 12 apply to other freedoms and liberties guaranteed under the agreement or --
- 13 A. [11:53:52] Yes.
- 14 Q. [11:53:54] Second question. And my second question: Does that also apply to
- 15 international humanitarian law?
- 16 A. [11:54:07] In my opinion, yes, counsel.
- 17 Q. [11:54:13] Do you see any reason at all why there would be an exception for
- 18 international humanitarian law?
- 19 A. [11:54:25] Counsel, to better understand the question, I'd like to ask you what do
- 20 you mean by an "exception"?
- 21 Q. [11:54:33] Do you see any reason for the rule about the compatibility -- the
- 22 national complementarity between law and Sharia law? Do you see any reason why
- 23 there would be an exception for international humanitarian law?
- 24 A. [11:54:57] Now I understand. No, I don't see any reason for exception.
- 25 Q. [11:55:04] I'll go on to the next topic that we have already examined during the

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1 first session, specifically, the position of international humanitarian law.

2 And I'm speaking to paragraph 73 to 96 of your report.

3 Under the 1998 constitution, international conventions ratified by Sudan, are they
4 directly applicable before Sudanese courts?

5 A. [11:55:54] Going by my interpretation, the dualist character of Sudanese law is
6 such that it is necessary -- it is absolutely necessary for the application of international
7 law in Sudan. It has to be in internal law and so there must be
8 a transposal -- a transposition. There's no direct applicability in practice
9 between -- when it comes to international law in Sudan.

10 Q. [11:56:44] And what is this transposition?

11 A. [11:56:49] It consists of setting out, again, the provisions of the international
12 convention in domestic legislation or in acts of other nature. For example,
13 regulations. Of course, first and foremost, in the constitution, at least when it comes
14 to human rights.

15 Q. [11:57:44] Very well. And the 2005 constitution, did it change anything to the
16 situation?

17 A. [11:57:54] Absolutely not. As I was saying before the break, 27 -- paragraph 27
18 of the -- Article 27, paragraph 3 of that constitution, the 2005 constitution, continues
19 that relationship between Sudanese state law and international law.

20 Q. [11:58:25] Could we call up tab 21, and that is the 2005 constitution, tab 21, tab
21 21, DAR-OTP-0136-0605. And if we could go to page 0617.

22 Tab 21, DAR-OTP-0136-0605, page 0617.

23 Now you were referring to Article 27, paragraph 3, and we have it up on the screen
24 here, right in front of us. And I shall read it out:

25 (Speaks English) "All rights and freedoms enshrined in international"

1 humanitarian -- "human rights treaties, covenants and instruments ratified by the
2 Republic of the Sudan shall be an integral part of this Bill."

3 (Interpretation) This is "Part Two" of the constitution, "Bill of Rights".

4 How do you interpret this article?

5 A. [12:00:14] There are two ways to interpret it. First of all, the approach taken by
6 my colleague from the university in Khartoum, who is of the view that this article
7 makes the provisions directly applicable under Sudanese law, namely, the provisions
8 to be found in treaties and covenants and instruments ratified by the Sudan.
9 I disagree with him. So this is my -- my interpretation is that this provision -- this
10 specific provision transposes into Sudanese constitutional law in a generic way the
11 various international provisions to be found in treaties and agreements ratified by
12 Sudan. So this is the transposition of those rights from international treaties ratified
13 by Sudan.

14 Q. [12:01:36] So just to be sure that we understand this well, in both cases,
15 according to the two interpretations, the result, is it that the treaties related to human
16 rights are applicable in the Sudanese system?

17 A. [12:01:57] No, counsel. In the first case - that of my colleague from the
18 University of Khartoum - the answer is yes, the international treaties related to
19 human rights are directly applicable as international instruments in Sudanese law
20 and there is no need to transpose anything at all.

21 Now, these Sudanese judges can make a direct application thereof. And, according
22 to my interpretation, which I take from my field of studies on the non-Muslim
23 community and on the Sudanese sites, and according to my interpretation thereof,
24 these rights and freedoms set out in international instruments change their status.
25 They are recognised by the constitution via these provisions, but afterwards, they

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1 have to be stipulated and, as such, laws or decrees or rules of application at Sudanese
2 level have to be applied to implement them and specify their content.

3 Q. [12:03:14] Do you know precedents, jurisprudence, which confirms one or the
4 other interpretation?

5 PRESIDING JUDGE KORNER: [12:03:26](Overlapping speakers)

6 MR JEREMY: [12:03:27] Sorry for the interruption. I think just since we are talking
7 about the specific individual, for the record, it would be useful to know who that
8 individual is --

9 PRESIDING JUDGE KORNER: [12:03:29] Yes.

10 MR JEREMY: [12:03:30] -- either going into private session or perhaps pointing to
11 a footnote of the report where that individual is named.

12 PRESIDING JUDGE KORNER: [12:03:43] You mean the colleague from Khartoum?

13 MR JEREMY: [12:03:46] Exactly.

14 PRESIDING JUDGE KORNER: [12:03:49] Yes. Doctor, do you have any objection
15 to telling us who he is in open session? If not, we can go into private.

16 THE WITNESS: [12:04:10](Interpretation) I would prefer to go into private session,
17 taking account of the personal situation of this colleague.

18 PRESIDING JUDGE KORNER: [12:04:17] Yes, all right, then we will go into private
19 session just for a moment.

20 (Private session at 12.04 p.m.)

21 THE COURT OFFICER: [12:04:27] We are in private session, Madam President.

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

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1 (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Open session at 12.05 p.m.)

9 THE COURT OFFICER: [12:05:41] We are back in open session, Madam President.

10 MR LAUCCI: [12:05:53](Interpretation) I'll take up my question again.

11 Q. [12:05:56] Do you have a knowledge of jurisprudential precedents which are
12 decisive in these debates between your interpretation, on the one hand, and that of
13 your colleague on the other?

14 A. [12:06:13] Well, perhaps some jurisprudence was mentioned yesterday by the
15 Office of the Prosecutor, Goldenburg. That reserves a particular place for the
16 personal status of non-Muslim groups. That was Goldenburg mentioned yesterday,
17 and this personal law can, in principle, be claimed by members of the *dhimmi*, the
18 non-Muslims and -- in terms of these personal rights, but it can't be admitted into
19 a court proceeding unless it accords with Sharia, and this means that the whole
20 purpose of Article 27 of the convention falls in this regard.

21 Q. [12:07:17] So, unless I'm mistaken, the Goldenburg precedent is from the
22 constitution 2005. Do you have any examples after 2005?

23 A. [12:07:35] No, I don't, that's why I hesitated to mention this example. It's
24 a previous example.

25 PRESIDING JUDGE KORNER: [12:07:41] Well, what I think we'd like you to clarify

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1 then, is why your view -- in your view, given there is no -- after the 2005 constitution,
2 there is no case you can think of, your colleague in Khartoum who was a professor of
3 Sudanese law is wrong?

4 THE WITNESS: [12:08:16](Interpretation) Because the provisions of international
5 law -- international human rights law are not applied, at least in the sense that it -- it
6 would have been given by the council, the Human Rights Council, or the *ECOWAS,
7 they aren't applied in that way by the Sudanese authorities. The regime governing
8 these laws doesn't correspond with what is provided for by conventional provisions
9 and this is something that I demonstrated in my article, in particular, relating to the
10 status of non-Muslims in Khartoum.

11 So Article 27 isn't applied; whereas, it should be. Its scope is modified.

12 PRESIDING JUDGE KORNER: [12:09:05] Okay, I understand what you say, but
13 why isn't that simply an example of the government -- say, on paper, "We accept all of
14 this, but actually we're not going to do it, we're going to ignore what we say we've
15 adopted" -- it's possibly not unknown in other countries either -- As opposed to it
16 being legally unsound, which is what you're saying?

17 THE WITNESS: [12:09:42](Interpretation) Well, this is a practice that is shared by
18 most states in the international community. You are completely right. If -- well,
19 you were asking me what -- what evidence do I have to maintain my position? And
20 I keep to it -- that's with the example of the 70 -- 66 convention or covenant. And the
21 2008 report from Sudan points to -- or refers to Article 27(3) stating specifically that
22 we have doubts with regards to the scope of this provision.
23 Now, do the provisions of the international convention -- are they applicable in Sudan,
24 taking into account this constitutional provision? So that is an element which has
25 governed my reading of these provisions and, according to my studies in the field, it's

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1 just confirmed what my findings were -- 2018 is after my work in the field in this
2 regard, that's confirmed.

3 PRESIDING JUDGE KORNER: [12:11:03] You're saying -- I'm sorry, it's just that,
4 again, it's quite a long answer. You're saying that there was a 2018 or a 2008 report
5 that confirmed your views? Can you -- which was it, 2018 or 2008?

6 THE WITNESS: [12:11:24](Interpretation) I'm sorry, your Honour, 2018, a personal
7 perspective that comes from 2012 to 2013.

8 PRESIDING JUDGE KORNER: [12:11:39] You said there was a report (Microphone
9 not activated)

10 THE INTERPRETER: [12:11:43] Microphone, please.

11 PRESIDING JUDGE KORNER: [12:11:46] You said there was a report which
12 confirmed your view. Can you just specify the report that you're talking about and
13 the year?

14 THE WITNESS: [12:12:00](Interpretation) Yes, I think that the title of the -- it's the
15 final observations of the Human Rights Council of the United Nations on the 5th
16 periodical report of Sudan relating to the application of the covenant.

17 PRESIDING JUDGE KORNER: [12:12:23] In 2018?

18 THE WITNESS: [12:12:27](Speaks English) 2018.

19 PRESIDING JUDGE KORNER: [12:12:32] Yes. Okay, thank you.

20 THE WITNESS: [12:12:43](Interpretation) 2018.

21 MR LAUCCI: [12:12:35](Interpretation)

22 Q. [12:12:41] Could we have the report on the screen, tab 1, and I would like to go
23 to paragraph 83, which is on page 39, DAR-D31-00000134-0039.

24 Now, this is on customary international law and you write that according to
25 international law, Sudan has to respect international humanitarian law and

1 international human rights law as set out by customary rules to which the state did
2 not object to in a persistent way.

3 Now, when you say -- well, could you explain what you want to say in this
4 paragraph?

5 A. [12:14:06] Well, on the one hand, there's conventional law. When Sudan
6 ratified international conventions, the principle is to implement them, to respect the
7 obligations which come therefrom. But under conventional law, there are
8 other -- there is another source of international law which is the interstate custom.
9 Interstate custom states that these are practices between states that are adopted
10 because the states have the feeling that they are made obligatory by a rule. In reality,
11 these are customary conventions. The international judges -- the International Court
12 of Justice, when it tries to identify an applicable rule between two states, it goes in the
13 same direction. It starts with a convention or a customary law, are there acts, are
14 there -- is there legislation adopted by states which constitutes a legal instrument
15 under the convention, and do these -- do they contain norms.

16 And this is the first part of my answer.

17 Now, according to international humanitarian law -- and you will know better than I
18 do -- this is law which is also devoted to customary rules. These are rules of
19 customary origin which, thereafter, have been put into customary sources, so they
20 have acquired the nature of international custom.

21 Now this customary law is imposed on all states, unless -- well, all states directly
22 concerned, I would put it that way, unless -- unless it is -- a state clearly makes their
23 objections in seeing these rules applied to them.

24 We're still in a voluntary approach. It's the will of the state that determines which
25 rules are going to be applicable to them.

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1 Q. [12:16:55] When you say that international customary law prevails on all states
2 concerning it, does that mean that it's directly applicable in the domestic legislation of
3 that state?

4 A. [12:17:19] In my mind, no, counsel. It depends on the nature of the legal
5 regime of the state and the way in which it envisages its relations with the rules of
6 international law. If -- well, this is what I was saying a moment ago with
7 conventional law, if that is valid, in my view, you also have to consider that this
8 relationship is also -- or also concerns the application of customary law in Sudanese
9 law. The transposition is necessary.

10 Q. [12:17:56] Where there is a lack of transposition, what will the situation be then?

11 A. [12:18:02] So I'm going to speak as an international jurist. Where there is a lack
12 of transposition, Sudan or the state, to speak more widely, commits an international
13 illicit act, its responsibility is engaged to fulfil its international obligations. It does
14 not mean that these rules are applicable in domestic law, nevertheless.

15 Q. [12:18:41] To the best of your knowledge, the rules of international
16 humanitarian law, were they the subject -- or have they been subject to a transposition
17 in domestic Sudanese law, or were they in 2003-2004? Had they been transposed?

18 A. [12:19:03] No, not to the best of my knowledge, counsel.

19 Q. [12:19:07] To the best of your knowledge, were they transposed after this
20 period?

21 A. [12:19:16] Well, according to my memory, I think I did mention a law which we
22 talked about of 2007, and I would have to find the title of this law, but in this law, it
23 would seem to me that transposition is mentioned.

24 JUDGE ALEXIS-WINDSOR: [12:19:46] Mr Laucci, one moment, please, if I may
25 interrupt you.

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1 Dr Gout, if I may, before you go on, there's a question I must ask you. Have I
2 understood you to be saying that international customary law, for it to be applicable,
3 must be transposed into domestic law, as in domestic legislation?

4 And when I say "international customary law", I am not speaking of the customary
5 law that is specific to Sudan. I mean generally, that would be generally applicable to
6 all nations, mores that have been obeyed by all nations, be it the Geneva Conventions,
7 be it the Hague laws of general application?

8 THE WITNESS: [12:20:43](Interpretation) Thank you, your Honour. No, perhaps
9 I need to specify in my response. Everything is going to depend -- everything will
10 depend on the state. Everything will depend on the way each state envisages its
11 relations with international law, whether it is a mono system or a dual system.

12 In the case of Sudan, there is a clear distinction to be made, and, afterwards, you
13 have -- it has to be transposed. Well, they have to adopt acts in applying the
14 international law and domestic law.

15 Now -- so this means you have to adopt decrees or you have to adopt regulatory acts.

16 I would repeat my answer: You have to apply -- have application -- you have to
17 have regulatory acts of application.

18 Would you like me to go back to my answer to take it up again, your Honour?

19 JUDGE ALEXIS-WINDSOR: [12:21:46] It leads to further questions. That was
20 going to be my only question.

21 Of the 15 members of the Security Council, there are five permanent members, one of
22 which is the United Kingdom. The United Kingdom, like Sudan, does it not have
23 a dualist mode of incorporation of international law?

24 THE WITNESS: [12:22:25](Interpretation) Your Honour, thank you for this question.

25 Whatever the case, as far as I'm concerned, there is only one way of envisaging

1 a relationship with the states and the law. In one way or another, you are going to
2 make in domestic legislation -- these dispositions of international law, you are going
3 to make them applicable in domestic law. Whether that is done by laws or whether
4 that's done by regulatory acts, there will be applying acts.

5 That's what is done when parliament adopts a law in the United Kingdom to ratify an
6 international treaty. And it's not the treaty that is applied, it is the national law that
7 ratifies this international act. That's my interpretation.

8 JUDGE ALEXIS-WINDSOR: [12:23:08] I appreciate all of the above. I'm not
9 speaking about conventions, I am speaking about international customary law. In
10 dualist nations, such as Sudan, such as all of the English-speaking Caribbean, such as
11 Australia, such as New Zealand, such as India, in all of these dualist nations, is it your
12 understanding that in order for a rule of customary international law, which is
13 gleaned from general application and applicability of all nations, does that rule -- not
14 a convention, not a treaty -- does that rule of customary international law not be law
15 in any of those jurisdictions unless there is domestic legislation?

16 THE WITNESS: [12:24:08](Interpretation) In fact, your Honour, I do think there are
17 two elements -- that is to say, the first question, is it the case that this customary
18 international law can be imposed in the country, and whether it can be applied into
19 normal domestic law?

20 The answer is yes. But for it to be applied, acts have to be adopted in domestic
21 legislation to put it into practice, which will make it apply. And that is not the same
22 question as it is with the justiciability of this law, whether an individual can make
23 a claim with regard to this customary law before an international judge? In principle,
24 yes, they can.

25 But I -- in Sudan, I don't -- haven't -- or I haven't consulted jurisprudence in Sudan

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1 which would make it possible for me to confirm that.

2 JUDGE ALEXIS-WINDSOR: [12:25:10] Thank you, Dr Gout.

3 Mr Laucci, lest I take over your examination-in-chief and come to harm, I'm done.

4 MR LAUCCI: [12:25:17] And I will take over your follow-up question, your Honour.

5 PRESIDING JUDGE KORNER: [12:25:21] Yes, I think you will have to take it over,

6 Mr Laucci, because at the moment, I don't -- all three of us are very confused about

7 what he is actually saying is the position of customary international law in Sudan, as

8 opposed to conventions, treaties or whatever.

9 MR LAUCCI: [12:25:40](Interpretation) Indeed.

10 Q. [12:25:45] So speaking about the (Speaks English) common law (Overlapping
11 speakers)(Interpretation) Dr Gout, are you familiar with the adage -- I'm going to say
12 it in English, that international law is part of the law of the land?

13 PRESIDING JUDGE KORNER: [12:26:15] I'm not.

14 MR LAUCCI: [12:26:19](Interpretation) Could you explain to us what that is about?

15 A. [12:26:24] Well, that means that international law can be applied -- can be
16 implemented -- can be established in the territory and, in particularly, in a state
17 territory. It is the state which is going to give life to this international law, and, I can
18 even tell you that the dominant field of studies or teaching in international law is not
19 relations between states, it is the application and applicability of international law in
20 domestic law.

21 So that's what I understand by that expression.

22 Q. [12:27:05] So to be very concrete here, under what conditions can a national
23 judge or a Sudanese judge who sits in his tribunal or court, under the constitution of
24 1998, how can that judge apply and use a rule of international customary law in order
25 to resolve a case put to him or her?

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1 A. [12:27:43] Well, he has to be able to do it, he has to have the tools in order to do
2 so. In reality he can say, "Well, I'm going to apply this or that right" -- fundamental
3 freedoms, but he has do that respecting the constitution.
4 So the way in which he interprets this law on these fundamental freedoms will, in fact,
5 in reality, be guided by constitutional principles and not by the customary law itself.
6 So that he will make the rule and the law in accordance with national applicable law.
7 So if we want the customary law or customary rule as set out by international judges,
8 if we want it to be applicable in domestic law, then a law has to be adopted or a rule
9 or a decree has to be adopted which will make it possible to transpose it. If not, it is
10 up to the judge to do so knowing that the judge is held by constitutional principles,
11 such as Sharia.

12 PRESIDING JUDGE KORNER: [12:29:08](Microphone not activated)... Are you
13 actually talking about legislation that says, if you breach the Geneva
14 Convention -- I'm trying to think of one -- of bombing a hospital, you commit a crime,
15 and that will involve the punishment of up to life imprisonment.
16 Is that what you're talking about?

17 THE WITNESS: [12:29:41](Interpretation) That's a good example.

18 PRESIDING JUDGE KORNER: [12:29:46] It's -- what you're saying, is that
19 a Sudanese law has to be enacted to say that effectively it's the sentencing provisions.

20 THE WITNESS: [12:30:05](Interpretation) That's in criminal law to my opinion, that
21 concerns all aspects of applying international law.

22 PRESIDING JUDGE KORNER: [12:30:18] So you're drawing the distinction between
23 criminal and civil law.

24 THE WITNESS: [12:30:28](Interpretation) Not at all, Your Honour. I did not make
25 that distinction in the slightest. I think on the contrary that could be applied to all

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1 aspects of law, not just criminal law.

2 PRESIDING JUDGE KORNER: [12:30:43] (Microphone not activated)... All right, so
3 your final position on this, so that we do understand what your position is, is that in
4 order for customary international law to be applicable in Sudan, there must be some
5 kind of enacting legislation?

6 THE WITNESS: [12:31:11](Interpretation) *There you have it. *That doesn't mean
7 that *this law is not *applicable in Sudan, that Sudan is not bound to (inaudible). It
8 means that for it to be implemented, State agents *must be seized of it, and must
9 embody it in *domestic law, your Honour.

10 PRESIDING JUDGE KORNER: [12:31:33] All right, I will leave it there, Mr Laucci.

11 MR LAUCCI: [12:31:40](Interpretation)

12 Q. [12:31:45] After customary international law, I'd like to now move on to Security
13 Council resolutions. Same question: Are they directly applicable in Sudanese
14 domestic law?

15 A. [12:32:15] As I pointed out in my report, in principle, they are opposable. They
16 can be implemented, indeed. It does require enacting legislation -- except, in
17 a particular case that I presented in my report and that has to do with the use of
18 customary law to make the provisions from the UN Security Council resolutions
19 directly applicable.

20 Q. [12:32:58] Are you referring to the chapter that has to do with recourse to *judiya*?

21 A. [12:33:08] Yes, that's right.

22 PRESIDING JUDGE KORNER: [12:33:12] Sorry, what do you mean by "opposable"?
23 I think that's a French trans -- a direct translation of a concept that doesn't translate
24 directly into English.

25 THE WITNESS: [12:33:27](Interpretation) Yes, of course, your Honour. It means

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1 that the state of Sudan is required by the rule, it is bound to respect it and to apply it.

2 That's what I mean, rules that are mandatory.

3 MR LAUCCI: [12:33:54](Interpretation)

4 Q. [12:33:57] The Sudanese state must recognise and follow these rules under what
5 law?

6 A. [12:34:06] International public law.

7 Q. [12:34:08] Very well. And does that imply that those rules are applicable to
8 nationals of the country -- Sudanese nationals before Sudanese courts?

9 A. [12:34:26] That should be the case, in particular, when it comes to customary law
10 and these are rules that are self-executing. But in a dualist system, one often sees
11 that they are transposed in one way or another and, in Sudan, the problem is that
12 the -- in Sudan, the problem is that the justice system, because ...

13 THE INTERPRETER: [12:35:21] Apologies from the English booth.

14 MR LAUCCI: [12:35:27](Interpretation)

15 Q. [12:35:28] I believe you will have to repeat the end of your answer.

16 A. [12:35:44] Okay. In principle, let me repeat the entire answer. Those
17 self-executing provisions can be invoked directly by Sudanese people, but in
18 a dualistic system, to determine what law can be invoked, it has to be transposed.

19 There has to be a legal foundation to invoke them before a judge.

20 Of course, the problem is -- the end of the answer is that you see Sudan, the
21 justiciability of the law, a person can claim those laws before a Sudanese judge, that is
22 to say, to claim -- make a claim before a judge.

23 Q. [12:36:55] And if there is no transposition, the answer is?

24 A. [12:37:01] The answer is that it's impossible to effectively invoke such laws
25 before a domestic judge.

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1 Q. [12:37:14] Thank you.

2 You mentioned one exception and it had to do with *judiya*. What about Resolution
3 1593 of the UNSC that brought the situation in Darfur to the Court? Did that
4 resolution have an impact on domestic law in Sudan?

5 A. [12:37:51] The Sudanese state is bound by that resolution and the question is,
6 what is the true effect of that resolution? But that's another matter. To my mind, the
7 impact on Sudan -- memorandums of agreement were entered into with the Court in
8 the field in terms of cooperation and also investigations.

9 Q. [12:38:32] Thank you.

10 That concludes this particular topic.

11 And now I'd like to move on to the next topic; namely, intertribal coordination,
12 paragraph 66 to 72 of your report. And --

13 PRESIDING JUDGE KORNER: [12:38:55](Microphone not activated) Mr Laucci, just
14 before, I was just checking, did he explain what *judiya* was because if so, I have
15 missed it.

16 MR LAUCCI: [12:39:04](Interpretation) I didn't ask, but if you wish --

17 Q. [12:39:09] Could you explain what a *judiya* is?

18 A. [12:39:12] In legal terms, your Honour, *judiya* is a customary institution from
19 Darfur that consists of an arbitral customary court that settles disputes between
20 different ethnic groups or different tribes.

21 PRESIDING JUDGE KORNER: [12:39:50] Yes.

22 MR LAUCCI: [12:39:53](Interpretation) Thank you, your Honour.

23 Q. [12:39:56] Now, I said I was moving on to intertribal coordination, paragraph 66
24 to 72. We are not going to deal with all of this. Now, the report is before the
25 Chamber and it explains -- it contains your explanations about *judiya* and tribal

1 councils and codification between communities in relation to law; so I will restrict
2 myself to a few questions that are more general questions.

3 Now, intertribal coordination, if I mention tribal conflicts to you in Darfur, what
4 comes to mind? Well, let me restrict the question a bit, can one speak of tribal
5 conflict in Darfur?

6 A. [12:41:23] To some extent, and that has to do with -- well, in my opinion, that
7 comes from the study of certain practices. To some extent, one can speak of such
8 conflicts. There can be tribal or intercommunity conflict -- if the intensity of that
9 conflict is not such that it's characterised a non-international armed conflict. And
10 indeed, to get back to my example, the *UNAMID -- the practice of the *UNAMID
11 was to avoid social displacement in particular by basing themselves on the institution
12 of *judiya*.

13 Q. [12:42:37] So your answer is that the expression "tribal conflict" was restricted to
14 low-intensity conflicts?

15 A. [12:42:51] Yes, you could put it that way, indeed. Conflicts that are
16 characterised under Sudanese customary law - which is structured on recourse to
17 customary mechanisms, reprisals and *judiyas* - if those conflicts become more intense,
18 the *UNAMID -- the *UNAMID could find themselves unable to respect the
19 conditions of their mandate derived from the UN Security Council, and thus the
20 *UNAMID would have to take action to resolve those conflicts with the support of an
21 institution, such as *judiya*.

22 Q. [12:43:49] And how would the escalation of such conflicts change things?

23 A. [12:44:02] Well, the stakeholders would become more complex, if you had the
24 PDFs, the border guards, members of insurrectional groups taking part in a conflict
25 that began as a tribal conflict, then clearly your changing the degree, you're changing...

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1 Mmm, the way it would be analysed.

2 Q. [12:44:40] And you speak of a grid for reading the situation, what about the
3 conflict in 2003-2004?

4 A. [12:44:53] I suppose that depends on which locality we are talking about in
5 Darfur, but obviously we are talking about a non-international armed conflict in the
6 meaning of international law.

7 Q. [12:45:13] And does that label exclude the definition of tribal conflict in your
8 opinion?

9 A. [12:45:27] No, no, not at all. That is why I mentioned one reservation. It all
10 depends on the situation. It all depends on the armed conflict and the location
11 thereof and the parties involved.

12 Q. [12:45:52] On the basis of your experience in Sudan, are you in a position to tell
13 us about the various issues at stake during the 2003-2004 conflict?

14 A. [12:46:15] Well, if one is speaking about non-international armed conflict, that
15 was after the Al Fasher attack. To my mind, truly, the issue at stake for the major
16 parties directing the groups was the possibility -- and I wrote this in my thesis and in
17 articles, it was about negotiating a return to the domestic political game, to get
18 ministerial portfolios, to get positions in the federated states. That was the issue at
19 hand. If I could add on to what I said earlier, it was an intuition that I had in Sudan.
20 I met former members of insurrectional groups who found themselves integrated into
21 the domestic political system without difficulty, and I had confirmation with the 2020
22 Juba peace accord that most of the insurrectional groups were able to join the
23 constitutional institutions of the state.

24 So that was the issue at hand, with the exception of a few groups.

25 Q. [12:48:04] Could we have tab 1, DAR-31 -- DAR-D31-00000134 --

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1 THE WITNESS: [12:48:18](Interpretation) I'm sorry, I have the English transcript
2 here and I think there's some things that don't make sense. It might be my fault
3 because I'm speaking too quickly.

4 PRESIDING JUDGE KORNER: [12:48:32] I think you -- as we are relying on the
5 English transcript, I think you better correct what has been -- I don't think wrongly
6 translated but not giving the impression that you want.

7 THE WITNESS: [12:48:50](Interpretation) Very well, thank you, your Honour.
8 At the end of my response about the confirmation of my intuition, seeing that with
9 the Juba peace agreement the insurgent movements that were part of the Sudanese
10 revolutionary front were able to return to political authorities -- the constitutional
11 political institutions of the state, in particular, if I recall correctly, the council of
12 partners of the transition -- the transitional partnership council which short-circuited
13 the democratic government, that was my idea, they were able to become part of the
14 government.

15 PRESIDING JUDGE KORNER: [12:49:55] Sorry, he wanted to correct it, so, yes.

16 MR LAUCCI: [12:49:59](Interpretation)

17 Q. [12:50:01] Very well.

18 Now I was saying the report, page 34, paragraph 70, 71, with two charts and the cows,
19 as you mentioned, your Honour.

20 Now I'm not going to ask you to comment on the number of cows, but this definition
21 of *diya* that applies, where does this come from in terms of the sources of law?

22 A. [12:50:47] Positive customary law.

23 THE INTERPRETER: [12:50:50] Says the witness.

24 MR LAUCCI: [12:50:52](Interpretation)

25 Q. [12:50:52] Very well, I imagine -- well, your report indicates that this is an

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1 evaluation that goes back to '92 --

2 THE INTERPRETER: [12:51:03] Correction --

3 MR LAUCCI: [12:51:04](Interpretation)

4 Q. [12:51:05] 1892, so this is quite old.

5 My question is as follows: This *diya* that we see here, is it still practised these days?

6 Not to mention the numbers?

7 A. [12:51:24] Yes, of course, it is practised - and I refer you to the appendices to my
8 thesis - all the *diyias* that are supervised by the *UNAMID, and they set a certain
9 amount that has to be paid to the victim community.

10 Q. [12:51:47] Who pays the *diya*?

11 A. [12:51:53] The community in its entirety -- the tribal group.

12 Q. [12:52:02] And why is that the case?

13 A. [12:52:08] Because they have to under the arbitration sentence adopted by the
14 *judiya*.

15 Q. [12:52:17] Very well. And when --

16 MR JEREMY: [12:52:23] Yes, sorry, to interrupt, Mr Laucci, so -- I mean, we don't
17 challenge the witness's expertise in relation to some of these issues, but do you have
18 a relevance question of what on earth does this relate to --

19 PRESIDING JUDGE KORNER: [12:52:40] I was leading up to that.

20 MR LAUCCI: [12:52:46](Interpretation)

21 Q. [12:52:47] Now the various pieces of information in paragraph 70, the various
22 crimes mentioned, who are the -- which people are perpetrating --

23 A. [12:53:07] The individual members of the group -- of one of the groups in
24 question.

25 Q. [12:53:13] So one of the individual members?

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1 A. [12:53:16] One or several.

2 Q. [12:53:17] And you say that it is the entire group that has to cover the *diyya*?

3 A. [12:53:26] Yes, that is the principle of collective responsibility of the group as
4 part of this particular procedure.

5 Q. [12:53:34] Can the group refuse to bear this *diyya*?

6 A. [12:53:39] In principle, no. No.

7 PRESIDING JUDGE KORNER: [12:53:47] Okay, let's try and break this down. The
8 *diyya* is this tribal form of crime and punishment as it were?

9 THE WITNESS: [12:54:02](Interpretation) Not entirely, not quite. It is a concept
10 from Muslim law that was translated into customary law in Darfur, and this is
11 a mechanism that allows one to assess damages and interest to be paid for harm
12 caused to the community.

13 PRESIDING JUDGE KORNER: [12:54:31] And so can that harm caused to the
14 community be committed by one tribesman -- or one tribesman on members of his
15 own tribe, or one tribe on the member of another tribe or both?

16 THE WITNESS: [12:54:52](Interpretation) Well, your Honour, all scenarios are
17 possible, that is why in my thesis I made a distinction between the ethnic group, the
18 clans and the groups headed by a chief -- *chefferies*, in French.

19 Generally speaking within a clan, one does not have recourse to the *judiya*. The
20 *judiya* is for proceedings to solve disputes between groups.

21 PRESIDING JUDGE KORNER: [12:55:37] Okay, you've listed -- or you've listed
22 what was agreed apparently in 1892, at paragraph 70, the estimated *diyya* that is
23 payable -- I'm not actually quite clear as to what is it supposed to be showing, actually.
24 I mean, it says a man or woman, an eye, feet and whatever.
25 What's it supposed to be showing?

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1 I'm looking at -- yes. I don't know. What I see on the screen, yes, can we go
2 to -- can you bring the page down slightly. No, down. Page down, so we see the
3 top of the page. Yes, that's what I'm looking at.

4 What is that all supposed to say? What does it mean, a man, a woman, et cetera?

5 THE WITNESS: [12:56:48](Interpretation) Yes, your Honour. These are the various
6 kinds of prejudice suffered, it's a classification system.

7 PRESIDING JUDGE KORNER: [12:57:04] Then we come then to what looks like
8 a feet and a tooth, if my English translation of the French is right. I'm sorry -- I
9 don't -- are you saying that somebody breaks a tooth or damages a foot or what?

10 THE WITNESS: [12:57:19](Interpretation) Well, insofar as -- if this is a physical harm
11 caused by a conflict between tribes, I would expect that we're talking about rather
12 serious harm, violent harm, I don't have much more to say. These are old
13 documents that bear witness to codification of customary law amongst various tribes.

14 PRESIDING JUDGE KORNER: [12:57:56] So are you saying you don't actually know
15 what is meant by this? Apart from a generic system?

16 THE WITNESS: [12:58:15](Interpretation) Well, "*homme*" et "*femme*" means murder.
17 And then we see "physical harm" -- "physical attacks upon someone" or "offences
18 against human dignity".

19 PRESIDING JUDGE KORNER: [12:58:36] All right, okay, well, it's some sort of
20 tribal -- but Mr Laucci, would you like to now bring it to what this has got to do with
21 anything.

22 MR LAUCCI: [12:58:51](Interpretation)

23 Q. [12:58:53] Yes, I'll take a shortcut, your Honour.

24 PRESIDING JUDGE KORNER: [12:58:57] Without leading.

25 MR LAUCCI: [12:59:00] Without leading.

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1 Q. [12:59:02] (Interpretation) Now the group on which the *diyya* is based, does this
2 group have the possibility of saying that the harm caused -- "The murder was
3 committed by someone for whom we do not wish to bear the burden", for any
4 particular reason?

5 A. [12:59:37] Yes. Yes, counsel, that is possible. That is a form of ostracisation.
6 It's not common, but it could occur.

7 Q. [12:59:52] And when would it happen? Under what sort of circumstances?

8 A. [12:59:59] Well, in the case of a murder, but I don't have any example to give
9 you.

10 Q. [13:00:11] And this ostracisation would mean that the *diyya* is not paid and would
11 there be other consequences for the person ostracised?

12 A. [13:00:29] The consequence... *The consequence will actually determine the
13 law that applies. *This consequence is that *this person will no longer be protected,
14 *he will no longer come under customary law. *Then the state authorities will be
15 able to apprehend the person and begin criminal proceedings, *in the case of murder,
16 before *the state authorities.

17 Q. [13:01:08] I'm going to go five minutes more, if you will give me leave.

18 On Monday -- on Monday, morning, so -- and here, I'm on transcript 134, French
19 transcript, page 20, lines 6 to 9 for the most part.

20 Now you spoke to us about a case in which --

21 PRESIDING JUDGE KORNER: [13:01:35] Because the English is different, can you
22 give us -- what's the time -- the nearest time that's shown?

23 MR LAUCCI: [13:01:47] The time. (Interpretation) 10:21:03.

24 PRESIDING JUDGE KORNER: [13:01:55] Thank you.

25 MR LAUCCI: [13:01:57](Interpretation)

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1 Q. [13:01:59] Now, you quoted an example of a previous armed conflict or one
2 previous to 2003-2004, which was in the fiefdom of Rizeigat, in particular, the *Dar* of
3 El Daein, and, in this example, you explained to us that the tribe concerned, the
4 Rizeigat, refused to participate and to be involved in this conflict -- that was the
5 Rizeigat.

6 Now my question is, when it comes to an individual who is against this instruction,
7 would that person -- if that person took part and committed a murder, what
8 would -- would the Rizeigat tribe keep its solidarity? Or would it be another case, in
9 your regard?

10 A. [13:03:28] Well, you said another case of banishment -- of ostracisation for the
11 transcript. So here, you're speaking about -- well, without any particular illustration,
12 yes, indeed, yes.

13 Q. [13:03:58] Now where it concerns the conflict in 2003 --

14 MR JEREMY: [13:04:04](Overlapping microphones) Madam President, the question
15 and the answer to the time period is completely unclear to me.

16 PRESIDING JUDGE KORNER: [13:04:10] I don't -- it's not that so much, it's that I
17 don't know that Dr Gout is -- was actually saying --

18 You said have a look at what he said earlier, and the question that led to his answer
19 on Monday --

20 Could "you give one [...] brief example of a customary legal order that exists or
21 existed independently of [...] the state order ..."

22 And he then said:

23 "I can give you a previous example [...] and this has to do with the *Dar*, the territory
24 area and the Rizeigats of Darfur ..."

25 And then he went on to say that the -- this *Dar* had been "criticised by the central

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1 government after the armed conflict began ..."

2 And then you ask him -- I'm not sure where it arises from that: "... the Rizeigat

3 refused to participate [...] when it comes to an individual who is against this

4 instruction, would that person [...] that person took part and committed a murder,

5 what [...] would the Rizeigat tribe keep its solidarity?"

6 None of that makes sense to me at all, leaving aside Mr Jeremy's objection that's what

7 this got to do with the conflict.

8 I mean, I can actually see what you are trying to do, but as phrased, it doesn't make

9 any sense.

10 MR LAUCCI: [13:06:05](Interpretation) I am concerned in this case that we are

11 still -- there's a gap between the French and English, and I am not blaming anybody

12 here with regards to the interpreters.

13 So leaving the Rizeigat aside, let's go on to another case that's of more interest to us.

14 PRESIDING JUDGE KORNER: [13:06:33] Well, I think we better leave

15 that ...(Overlapping speakers) Mr Laucci, this is not going to be quite as quick as you

16 thought.

17 We'll leave it till after lunch, yes.

18 MR LAUCCI: [13:06:41](Interpretation) I understand, afterwards. Very well.

19 PRESIDING JUDGE KORNER: [13:06:42](Overlapping microphones) All right,

20 we'll sit again at 2:35.

21 THE COURT USHER: [13:06:49] All rise.

22 (Recess taken at 1.06 p.m.)

23 (Upon resuming in open session at 2.39 p.m.)

24 THE COURT USHER: [14:39:07] All rise.

25 Please be seated.

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1 PRESIDING JUDGE KORNER: [14:39:35] Yes, Mr Laucci.

2 MR LAUCCI: [14:39:37] Thank you, Madam President.

3 Q. [14:39:42] (Interpretation) Dr Gout, I hope you were able to refresh yourself.

4 I would like to go rapidly to that precedent of El Daein that we were discussing

5 before the break and the decision of the tribunal Rizeigat that you mentioned for

6 refusing to participate in a counter-insurrection. Do you know the reason for that?

7 MR JEREMY: [14:40:28] Sorry to interrupt. Is there a date for this?

8 MR LAUCCI: [14:40:33](Interpretation) *The El Daein precedent was before 2003-2004.

9 THE WITNESS: [14:40:46](Interpretation) I would like to clarify, decision between
10 groups Rizeigat and El Daein, that is the El Daein region that refused to participate in
11 the counter-insurrection.

12 MR LAUCCI: [14:41:14] (Interpretation)

13 Q. [14:41:16] Yes, thanks for the clarification. It was the reason for that decision
14 that I was asking about.

15 A. [14:41:25] Regarding the reason, it was clearly presented by a researcher of an
16 international bureau in Sudan, of whom we talked about yesterday or the day before
17 yesterday, who told me in Sudan that if the Rizeigat did not want to participate in the
18 counterinsurgency, it was the Rizeigat of El Daein did not want to take part in the
19 counterinsurgency, it is simply because they have a customary territory. Sometimes
20 in some regions where there is right of asylum they are called fiefs.

21 Q. [14:42:26] Can you tell us the name of that researcher? I don't know whether we
22 need to go to private session.

23 A. [14:42:35] It is Jérôme Tubiana.

24 MR JEREMY: (Overlapping speaking) ... still not clear to me. Perhaps the witness
25 can tell us rather than Mr Laucci --

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1 PRESIDING JUDGE KORNER: [14:42:53] (Microphone not activated)

2 MR JEREMY: [14:42:55] Sorry, still in relation to the date, it's still not clear to me.

3 Mr Laucci gave us an answer, but if the witness can clarify about what date this *judiya*
4 was.

5 PRESIDING JUDGE KORNER: [14:43:09] (Microphone not activated)

6 THE INTERPRETER: [14:43:10] Microphone, please.

7 MR LAUCCI: [14:43:14] (Interpretation) I can ask, but as far as I understand, it was
8 an event that took place elsewhere.

9 Q. [14:43:23] I think the name of the researcher was not caught in the transcript. If
10 you can say it again.

11 A. [14:43:37] It was Jérôme Tubiana.

12 Since we are talking about a counterinsurgency, that decision came after that
13 counterinsurgency was launched.

14 PRESIDING JUDGE KORNER: [14:43:59] Stop for a moment. And I'm sorry to
15 interrupt the interpretation. Which counterinsurgency? What date, what year are
16 we talking about?

17 MR LAUCCI: [14:44:12] (Interpretation)

18 Q. [14:44:13] About the Rizeigat and El Daein.

19 A. [14:44:19] I worked on this community on several articles. Regarding the
20 counterinsurgency, it was that of 2004. The Rizeigats of El Daein did not have any
21 interest in participating because they already had a territory and they did not need
22 any more territory.

23 Maître Jeremy wanted the date of the decision. It is true that there was a decision
24 that was taken, but it was a position of the group.

25 Q. [14:45:16] I think -- I thought it was a previous event, so I misunderstood it.

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1 The problem comes from me.

2 PRESIDING JUDGE KORNER: [14:45:28] You started speaking again before the
3 interpretation had finished.

4 MR LAUCCI: [14:45:33] Sorry.

5 Q. [14:45:36](Interpretation) I was saying that I was responsible for the confusion.
6 I thought that the Rizeigat issue had taken place -- event was previously.

7 What is the link between the possession of a *Dar* and the decision to participate or not
8 in the counterinsurgency of 2003-2004?

9 A. [14:46:10] In my understanding of the Darfur context, the interest for a
10 community or a clan, chiefdom or ethnic group to take up arms, amongst other things,
11 is determined by the need to settle on a particular territory to obtain functions or jobs
12 either in administrative -- public administration or customary administration which is
13 *idara ahliya*. So, if one has a *Dar*, there are no reasons to take such risks, but I would
14 like to clarify that the residents of El-Daein never had any reason to take part in a
15 counterinsurgency.

16 It could also concern events previous to 2004, but what was of interest to me was
17 2004.

18 PRESIDING JUDGE KORNER: [14:47:27] All right. Mr Laucci, I still -- Dr Gout, we
19 still don't understand - that's where all of this started - what the link between this is
20 and this payment of, what's it called *dain* (phon). What is the link between the
21 Rizeigat not joining in the counterinsurgency and the payment of *dain* (phon), or
22 whatever it is -- *diya*, sorry. Thank you.

23 THE WITNESS: [14:48:03](Interpretation) Madam President, those are two different
24 things. The payment of *diya* is decided in a *judiya* proceedings and it is a modality
25 for the settlement of inter-ethnic or intertribal disputes, but it does not by itself

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1 determine the decision to join the counterinsurgency, so there is no link.

2 MR LAUCCI: [14:48:36] (Interpretation)

3 Q. [14:48:38] Maybe the next question might clarify the links between the two.

4 Once a tribe takes a decision not to join the counterinsurgency, what would -- one of
5 the members of that tribe who does not respect that decision and participates in the
6 counter-insurrections, what is the risk that that person runs, what is the danger?

7 A. [14:49:15] We talked about that a short while ago, the risk of ostracism.

8 Q. [14:49:33] That is how I wanted to ask the question raised by the President so as
9 to explain the link or not.

10 Do you know the position that was taken in 2003-2004 by the Ta'aisha tribe regarding
11 the counterinsurgency?

12 A. [14:50:02] No, counsel. I never specifically worked on the Ta'aisha tribe, so I'm
13 not aware of the position that was taken.

14 Q. [14:50:29] Very well. If I tell you now that the Ta'aisha tribe has a *Dar*, would
15 you be able to add to your answer?

16 A. [14:50:40] That is correct. It appears in the map that I produced for the Court
17 and it is taken from my thesis, the *Dar* of the Ta'aisha. And if I am not mistaken, it is
18 actually located in South Darfur in the border area between the Darfurs.

19 Q. [14:51:09] Very well. Based on the discussion that we had on Mr Tubiana, the
20 fact that the Ta'aisha tribe has a *Dar*, does that make it a tribe that would normally
21 have a reason to participate in a counter-insurrection?

22 MR JEREMY: [14:51:41] Madam President, this calls for speculation. The witness
23 has already said he doesn't know anything about the Ta'aisha.

24 PRESIDING JUDGE KORNER: [14:51:48] No, I think -- I mean, I can't -- I don't think
25 I can take this much longer, so I'm going to ask -- Mr Laucci, I'm going to ask the

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1 question you want to ask.

2 Sir, what would happen if a tribe - and let's stick with the Rizeigat - they took the
3 decision not to engage with the counterinsurgency, but a member of that tribe
4 ignored that tribal decision and decided that he, even though nobody else did, would
5 go and join in the counterinsurgency? What would the effect be? What would
6 happen, if anything?

7 THE WITNESS: [14:52:43](Interpretation) Yes, Madam President, you have pointed
8 out whether something might happen. I said that what might happen is that that
9 person would be ostracised. It is also possible that nothing happens.

10 MR LAUCCI: [14:52:58] (Interpretation)

11 Q. [14:53:01] To conclude that intertribal issue - the answer was already given, but I
12 want to close the topic on that - are you familiar with the term *agid al-ogada*?

13 A. [14:53:22] No, counsel, I'm not familiar with that term, that is, *agid al-ogada*, even
14 though you find it in some of the passages in my thesis concerning the judgments of
15 the *judiya*. This term is in my thesis.

16 Q. [14:53:51] Are you able to tell me what that ruling was
17 regarding -- (Overlapping speakers)

18 PRESIDING JUDGE KORNER: [14:54:01] (Microphone not activated) before you go
19 on what the ruling was, where in your thesis? Have you got it there? Tell us where
20 in your thesis. The Prosecution have got it, and Defence. Where does that term
21 occur?

22 THE WITNESS: [14:54:14](Interpretation) For example, in the case
23 Tergam v Rizeigat in 2008. I reproduced certain excerpts in my report, and it is part
24 of the annexes in my thesis. So that term was simply used to characterise or qualify
25 the commanders but not beyond that.

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1 If you look at page 41 of the report, you will see the reference only. But to find the
2 word, you need to read about the case in the annex to my thesis. The term is
3 mentioned there in part of the legal or judicial acts of the *judiya*.

4 MR LAUCCI: [14:55:46](Interpretation)

5 Q. [14:55:47] Please answer only if you can remember the answer. You talked
6 about commanders; commanders of what?

7 A. [14:55:58] Well, it depends. Commanders of armed groups of the fighters,
8 militia people or soldiers, military groups.

9 Q. [14:56:17] What is Tergam?

10 A. [14:56:24] It's an ethnic group in Darfur. I'm sorry I answered too fast. It is an
11 ethnic group in Darfur.

12 Q. [14:56:36] So this case Tergam v Rizeigat, which you referred to, opposed these
13 two groups; is that correct?

14 A. [14:57:04] Yes, that is correct. I'm sorry.

15 Q. [14:57:05] Very well.

16 MR JEREMY: [14:57:11] I'm sorry to interrupt my friend. If it assists, with thanks to
17 my colleague, I think it's page 85 of your thesis where you reference this
18 "*ogada*" -- sorry, of the annex to the thesis, page 85.

19 MR LAUCCI: [14:58:43](Interpretation)

20 Q. [14:58:45] I am waiting to see what you are reading. I wanted additional
21 information.

22 A. [14:58:55] I am looking for that term in the case because it appears in this
23 document.

24 Q. [14:59:07] Unfortunately, time is flying by.

25 PRESIDING JUDGE KORNER: [14:59:18](Microphone not activated) What have we

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1 now got on our screen? Is that the annex to the thesis? Right.

2 THE WITNESS: [14:59:30](Interpretation) Yes, you have it there. It is indeed
3 page 85, military commanders, *ogada*.

4 MR LAUCCI: [14:59:43]

5 Q. [12:59:43](No interpretation) (Overlapping speakers)

6 (Speaks English) "All the military commanders (*'uqada*), administrators and chiefs
7 (*umara'*), of the two tribes came together on 28 August 2008 in the vicinity of Jami
8 Adar, Bulbul Abu Gazo administrative units, al-Salam municipality, to hold a
9 conference of reconciliation."

10 What do you understand that this "*ogada*" are and represent based on this?

11 A. [15:00:29] Well, these are military commanders. It's a traditional institution
12 that exists in Darfur for a long time, I would say since the time of the sultan, and they
13 are presented as a customary institution. It's not exactly the case because they don't
14 have a legal competence, and that's the reason I didn't work on that in my thesis.

15 Q. [15:01:01](Interpretation) Very well. And just to finish with this. These are
16 people who each represents one of the tribes each, or what's the situation?

17 A. [15:01:16] Yes, well, in this procedure you indeed have delegations of the tribes
18 which are made up of all these authorities and they go together to participate in what
19 they call the reconciliation procedure. But reconciliation is only just the final process
20 in the proceedings in the arbitration process, which is a legal procedure.

21 Q. [15:01:44] Very well. So they are part of the representatives of their respective
22 tribes. So I'll stop there with regards to this text and on this issue.

23 I'm now going on to the next subject, which is the impact of the state of emergency on
24 domestic law in Sudan. And I am on paragraph 102 to 134 of your report.

25 Dr Gout, could you please shed some light on the following questions. When the

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1 state of emergency is declared in Sudan, what are the rights and freedoms that are
2 impacted by it?

3 A. [15:02:43] Well, all rights and liabilities which are recognised by the Sudanese
4 constitution and which are imposed on Sudan due to their ratification of international
5 conventions relating to human rights.

6 Q. [15:03:03] But should a distinction be made between the category of -- or the
7 right to life, for example, protection against torture, et cetera, so you have rights that
8 can be derogated? All these rights, are they impacted on differently given their -- the
9 fact that they can be derogated against?

10 A. [15:03:32] Yes, well, you have to take into account the un-derogatory laws,
11 which is generally the case when you have a state of emergency, it's impacted on.
12 And here I can refer to different European cases as well. So you have un-derogatory
13 laws which can be impacted as well.

14 Q. [15:03:59](Microphone not activated)

15 THE INTERPRETER: [15:04:01] Microphone, please.

16 MR LAUCCI: [15:04:04](Interpretation) Could we have on the screen document at
17 tab 35, DAR-D31-00000263, and page 1 would suffice.

18 MR JEREMY: [15:04:28] I'm sorry to interrupt. Madam President, I know that
19 perhaps 102 to 105 were announced, and indeed there is a reference to the state
20 emergency in that heading, but then it very quickly went to the impact of the state of
21 emergency on certain rights in Darfur, which for me goes into part 5, which you
22 decided the expert should not talk about.

23 So, I mean, we've heard what he has to say on that part and we'll look at it carefully,
24 but it may be that we make an application for that -- that part to be struck.

25 PRESIDING JUDGE KORNER: [15:05:17] That's right, Mr Laucci. That was

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1 part -- because when he gave evidence yesterday, it became clear that he was actually
2 giving general, rather than specifics, as related to Sudan, a general dissertation and
3 hadn't done -- that's right, because it didn't form any part of his -- that's right, it didn't
4 form any part of his thesis and he'd had a look at the various documents that he'd
5 been provided with, so we did -- we did exclude that.

6 MR LAUCCI: [15:06:06](Interpretation) Did -- I mentioned 102 to 134. Maybe that's
7 where the mistake comes from. Because the questions I have are strictly limited to
8 paragraphs -- or chapter 4.2, "Application to the Darfur context and relation to the
9 state of emergency", which goes from paragraph 102 to paragraph 105. I made an
10 error if I said anything else.

11 MR JEREMY: [15:06:34] Well, Mr Laucci did indeed announce those
12 paragraphs 102-105, but then the substance of his questions relating to the state of
13 emergency went into paragraphs, you know, for example, 5.1, which you said that
14 Dr Gout is not an expert on, relates to infringements on fundamental rights and
15 freedoms in the context of the state of emergency, which is exactly what Mr Laucci's
16 question was relating to.

17 PRESIDING JUDGE KORNER: [15:07:15] Yes, because I think what -- we did
18 exclude that, Mr Laucci, because in fact he was simply giving a general overview
19 without any specialised knowledge into what -- and I think that's one of things he
20 said yesterday, which is why we didn't allow it.

21 MR LAUCCI: [15:07:33](Interpretation) Very well. In that case I misunderstood the
22 decision, but very well. I am ready to miss that part. So that just means we'll finish
23 earlier.

24 Q. [15:07:48] So in that case, the last chapter of my questions relate to the issue of
25 *hiraba, ghanima* and more exactly the comparison that you make with what you call

1 the armed -- the community armed reprisals. And I'm at paragraph 97 to 101.

2 So starting there, what do you understand by community armed reprisals?

3 A. [15:08:47] Well, this is a legal institution of customary law by which a group or
4 community is going to use force and it is going to make legal demands for rights, for
5 land rights, for example, and with regards to the function of *idara ahliya*, et cetera. So
6 it is not -- as for *hiraba* -- it's not for the *hiraba*, it's not about banditry. As for *ghanima*,
7 for war booty, this is a demand for -- it is a legal positioning towards another
8 community.

9 Q. [15:09:54] Very well. But this positioning, is it limited to a simple demand or
10 claim, or does it go beyond that?

11 A. [15:10:13] Well, it's a claim of rights and titles. That's the principle aim. But in
12 the context -- in the context of armed conflict in Darfur, and this is what I specify in
13 my thesis, it's also a means to put the UN -- to make the UN mission face up to its
14 obligations. The peacekeeping mission has the mandate -- the UN peacekeeping
15 mission has the mandate of -- of avoiding the aggravation of armed conflict, that
16 means inter-ethnic conflict in non-international armed conflict and by taking up
17 weapons and practising these reprisals, and this is something that I got from my
18 exchanges with -- well, the community are going to force the *MINUAD* to act and to
19 use *judiya* in order to determine the rights -- sharing of rights and titles between the
20 community in question.

21 Q. [15:11:39] So, when it comes to just claiming rights, why do these reprisals need
22 to be armed?

23 A. [15:11:51] Well, this is a point which is also dealt with in my thesis. I interpret
24 this as being protective measures, that is to say, before losing access completely to a
25 territory, before losing the functions, the administrative functions that make it

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1 possible to issue legal decisions, you have to secure these functions and the territory
2 as well, and armed force is used in order to do so.

3 Q. [15:12:23] When you say "armed force", does that imply armed violence or is it
4 just the demonstration of force by showing a number of forces?

5 A. [15:12:39] No, this implies armed violence, and that is where you have
6 types -- different types of harm which require reparations. They have to be
7 evaluated, as we were able to see in the document presented before the break.

8 Q. [15:13:03] But if these claims of titles are made by recourse to violence, in what
9 way is it different to just a normal conflict?

10 A. [15:13:17] Because we don't claim to seize the goods of somebody else or
11 practice banditry, but to be paid or to be paid through remuneration from war booty
12 like in *ghanima*.

13 Q. [15:13:37] Very well, but if I have understood this well, you used force in order
14 to achieve your rights?

15 A. [15:13:44] Yes.

16 Q. [15:13:45] So that takes me back to my question, how is that different to an
17 armed conflict?

18 A. [15:13:59] Because of the objectives that are followed. Armed conflict will
19 aim -- well, it's also to seize territory when communities participate in it but without
20 having the rights that they call for, even if the result is the same. That is to say, the
21 participation of what we call the Janjaweed, border guards, for example, SAF, that is
22 going to make it possible for the communities to seize a territory, but not through a
23 reprisals institution. That's the only difference that I would make. But it's true that
24 the end result will be the same, to seize a territory.

25 PRESIDING JUDGE KORNER: [15:14:54] Okay, to seize a territory as a result of

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1 what? A court order or a -- whatever you call the local courts? Or just saying

2 "Actually, I say this is my land and I'm going to take it"?

3 THE WITNESS: [15:15:15](Interpretation) No, it's a seizure that is based on the
4 attribution of titles and functions of traditional chiefs, and this happened in particular
5 in 1992 and 1994 when the Sudanese government at the end of the conflict
6 redistributed titles through the territory to communities who did not have them.

7 The Arab communities, in particular.

8 MR LAUCCI: [15:15:56](Interpretation)

9 Q. [15:15:58] When you say "titles", do you mean *Dar*?

10 A. [15:16:02] No. The functions, the administrative functions of the *idara ahliya*
11 implies the territory as well. So it's the equivalent of a *Dar*.

12 PRESIDING JUDGE KORNER: [15:16:26] Well, you say that happened because the
13 Sudanese government redistributed, so they passed a decree of some kind or another,
14 did they?

15 THE WITNESS: [15:16:42](Interpretation) I'm sorry, your Honour. Not exactly that.
16 It appears in my report. If you see what the government did in the '90s was -- they
17 made the *Dar* smaller in order to break them -- make them weaker and this was
18 accompanied by armed groups, Arab armed groups in their attempts to seize the
19 territory. That happened since 1987 that these practices became current in Darfur.
20 So this isn't a decree. This is just a recognition that such and such a community is
21 established in a territory and they are attributed -- or they are recognised as having
22 the possibility of being able to administer themselves with traditional chiefs like
23 *umdah*.

24 PRESIDING JUDGE KORNER: [15:17:47] Yes, well -- and how did the -- where is it
25 in your report? I'm sorry, I'm not following what paragraph it is in at the moment.

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1 MR LAUCCI: [15:18:00] (Interpretation) The armed reprisals finishes 101 and I think
2 it has to start -- paragraph 101 --

3 THE WITNESS: [15:18:29] (Interpretation) I think it's under the customary part
4 previous to that, customary legal orders.

5 MR LAUCCI: [15:18:50] (Interpretation) Yes, there is a chapter called the application
6 of reprisals that starts in paragraph 49 -- 49 and it goes to paragraph 51.

7 PRESIDING JUDGE KORNER: [15:19:10] I rather think that's what we ought to be
8 looking at, isn't it, Mr Laucci?

9 THE WITNESS: [15:19:21](Interpretation) No, it's well before that, unfortunately,
10 Madam President. You can find it in particular on page 15 of the report --

11 PRESIDING JUDGE KORNER: [15:19:36] Paragraph, please.

12 THE WITNESS: [15:19:37] (Interpretation) -- and page 16.

13 PRESIDING JUDGE KORNER: [15:19:38] Paragraph, please.

14 THE WITNESS: [15:19:48](Interpretation) I'm just having a look. You have the
15 table on page 15 and this specifies -- well, this gives indications with regard to the
16 division or the re-division of *Dar* after 1994 and 1992 and this is an element that
17 appears.

18 MR LAUCCI: [15:20:15] So we're talking about paragraph 32, paragraph 2.

19 THE WITNESS: [15:20:21] (Interpretation) And in paragraph 33 you also have
20 elements referring to number 2 and you will have also information with regards to
21 the development of *Dar* in Darfur under the influence of the government.

22 PRESIDING JUDGE KORNER: [15:20:42] At the moment I'm sure this is -- I'm sure
23 you're right on this, but what I'm saying is that all of -- my question was, sorry: Was
24 this, as you put it, the reduction in size of the *Dars*, was that by some kind of
25 government order or decree?

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1 THE WITNESS: [15:21:16](Interpretation) It was done after the peace conference,
2 what's called the peace conference, which was organised by the government and
3 which was similar to the *judiya* and had the result of determining the size of the
4 territory of each group and to the administrative functions of each group.

5 PRESIDING JUDGE KORNER: [15:21:38] Right. So it was a bit like the Versailles
6 treaty, if you -- if you take a rather grander --

7 THE WITNESS: [15:21:47](Interpretation) Yes, at a slightly smaller scale.

8 PRESIDING JUDGE KORNER: [15:21:50] Yeah, so that's done -- this is what I'm
9 trying to understand. That's done by some authority, but what I'm -- what I want to
10 know is, is the -- the seizure that you have talked about, or the retaliation or
11 retribution, is it your contention that all of that can happen without some kind of
12 government order making it, if you like, legal as far as it goes?

13 THE WITNESS: [15:22:43](Interpretation) Thank you, your Honour, for the question.
14 No, the government is still involved in one way or another and even in the *judiya*
15 processes which are established by the *MINUAD*. So the government is going to at
16 least have to recognise the result of the *judiya*. They will have to take note of it. But
17 the government is there. In the peace conference, it is the government who manages
18 that, but under the authority of the *MINUAD*. The government is present and it
19 notes the decisions that are taken.

20 PRESIDING JUDGE KORNER: [15:23:17] That's actually what I was asking. Thank
21 you.

22 MR JEREMY: [15:23:25] Just a clarification, the *MINUAD*, is that the UN
23 peacekeeping mission? And the relationship to that wasn't clear to me.

24 THE WITNESS: [15:23:39](Speaks English) It is the UNAMID, yes.

25 PRESIDING JUDGE KORNER: [15:23:47] All right, yes. You're right. Sorry, I'm

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1 really sorry about this. You have talked in general terms about what you have said
2 is community armed reprisals and you have said that it's a legal institution or
3 customary law by which a group or community is able to use force and make legal
4 demands for rights. And when you were asked what the force was, you said real
5 force.

6 But what I -- what I'm trying to understand is that you used the words "legal
7 demands" for rights. There has to be some kind of authorisation, does there, for an
8 armed group suddenly to descend upon a village and start removing the cattle?

9 THE WITNESS: [15:24:53](Interpretation) If we're talking exclusively about an
10 intercommunity conflict between different groups who apply customary law, then the
11 decision is taken by the authorities of the group. And at the end of -- that comes
12 under the supreme chief of *Dar*. That's not always the case. It could be a lower
13 ranked person. But it's not necessarily about organised armed groups like the PDF.
14 That's it.

15 If the decision is taken, well, if the decision is within the framework of a more
16 complex logic which follows the counterinsurgency, then things have been negotiated
17 upstream with the SAF, with the PDF and with a state authority, and there the state
18 law has its place to play in the decision. Well, the state authorities at least.

19 PRESIDING JUDGE KORNER: [15:26:02] All right. All right. Well, Mr Laucci,
20 I'm going to see where you're going to go, but at the time moment, I'm still not clear
21 what (Overlapping speakers)

22 MR LAUCCI: [15:26:10] (Interpretation) I'm going to try to clarify a bit more.

23 Q. [15:26:15] Dr Gout, you spoke to us about this -- these claims, these demands
24 which would also involve a recourse to force and that's going to lead to a result which
25 you tell us should be validated in one way or another by a peace conference by the

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1 government, et cetera.

2 Before coming to this validation, this final validation, to the best of your knowledge,
3 were there intermediary steps, including, for example, if we're speaking about
4 territorial claims, the attribution of land or the -- the attribution of land to members of
5 a group, which would mean there would be a mass, so this group would be able to
6 validate or take over this new territory? To be more precise, this demand or claim at
7 the level of the group, is it marked by individual decisions?

8 A. [15:27:54] Yes, the decisions have to be taken by an authority at a particular time,
9 indeed.

10 Q. [15:28:01] Very well. But taking a group, a tribe, an Arab tribe that doesn't
11 have a territory and who can make a claim for one, they take up arms such that
12 ultimately land be granted to them at the end of this process, is it just about power
13 relationships or will there be a moment during the process in the decision-making
14 process where they say such and such member of this Arab group will have this -- be
15 granted this land, this other person will have the other one, such that the regional
16 land is transferred from one group to another?

17 A. [15:28:53] Very well, counsel. I understand the question better. So it's not
18 about individual attributions of land. It's not about individual attributions of land,
19 but ultimately decisions have to be taken so that has to be done through the *judiya*
20 process. Nevertheless, this will be recovered by the state authorities or by the UN
21 mission. Now, this is about a general attribution for the group, and afterwards, you
22 have the authorities of the group who will have to proceed with the allocation, when
23 you think about the *hakura* mission, for example, which refers to this type of practice.

24 PRESIDING JUDGE KORNER: [15:29:50] What? You say the *ekura* (phon) mission?

25 THE WITNESS: [15:29:55](Interpretation) No, you can think of the attribution,

1 individual attribution of land through *hakura*. *Hakura* is the attribution by an
2 authority -- a customary authority of land to an individual.

3 MR LAUCCI: [15:30:24] (Interpretation)

4 Q. [15:30:24] The distribution of titles to individuals, that is land titles, was that one
5 of the means used to transfer a territory from one tribal group to another?

6 A. [15:30:47] Yes, without any doubt at all, that was one of the means used.

7 Q. [15:31:00] Are you aware of the procedure followed to hand over these land
8 titles to the individuals concerned?

9 A. [15:31:17] To my knowledge, it was true the customary means, *hakura*. Another
10 means with the attribution of functions upstream by the *diya*, and so those who
11 detained those functions distributed the land titles to the members of the community,
12 that is the territory that had been seized.

13 Q. [15:31:56] The logic and the mechanism that you have described, was it
14 applicable in the 2003-2004 conflict?

15 A. [15:32:10] Yes, it is one of the elements of that conflict, that is, the issue of the
16 distribution of land amongst the communities.

17 Q. [15:32:28] And did this conflict lead to the transfer of land from one ethnic
18 group or tribe to another?

19 A. [15:32:46] Yes. Yes, on several occasions on a smaller scale, generally it was a
20 usual practice from 2003-2004.

21 Q. [15:33:20] Do you have any concrete examples to give us?

22 A. [15:33:24] In my report there is a box relating to the council of revolutionary
23 awakening. That was a council --

24 PRESIDING JUDGE KORNER: [15:33:45] Where -- sorry, just before you go on,
25 where is that, please, the paragraph of the report? Because pages don't help.

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1 THE WITNESS: [15:33:56](Interpretation) Your Honour, I will look at the paragraph
2 in question. It is page 28, box 3, after paragraph 64. It is a recent example, but these
3 are constant practices. I don't know whether that example -- you understand that
4 example, your Honour.

5 MR LAUCCI: [15:34:41] (Interpretation)

6 Q. [15:34:41] I'm not -- I don't know whether it is convenient for the President, but
7 my question was different, whether you could give me a concrete example.

8 A. [15:34:57] No, I don't have any precise example to give you, but I confirm that
9 these were frequent practices and everybody in Sudan talks about them.

10 PRESIDING JUDGE KORNER: [15:35:13] Can you pause a minute because my brain
11 is beginning to give up.

12 The box you've pointed us to deals with 2014 to 2017. And what you were asked is
13 do you -- sorry, at line 16 of page 95 -- sorry, the line 11 and 12:

14 "The logic and the mechanism that you have described," and I'm not sure which logic
15 and mechanism we're talking about, anyhow, "was it applicable" to the conflict which
16 is the subject of this case?

17 You said, "Yes, it is one of the elements of that conflict ... the issue of the distribution
18 of land amongst the communities."

19 Question: "And did this conflict lead to the transfer of land from one ethnic group or
20 tribe to another?"

21 "... yes, on several occasions ..."

22 Now, that -- can you explain exactly how you say that the attacks that took place,
23 which is what this conflict is about, falls under the head of what you have described
24 as the transfer of land?

25 THE WITNESS: [15:36:57](Interpretation) Your Honour, first part of my answer, I

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1 just talked about it -- these are well-known practices. I mention it in my report.
2 Secondly, it is also in my report, the land reforms as from the '80s in Sudan compelled
3 the nomadic groups to penetrate even further into the sedentary groups considered as
4 African groups and to take up arms so that it makes it possible either to secure
5 transhumance routes or to acquire territory. That is in my report also and it also
6 touches on the conflict in general in Darfur.

7 PRESIDING JUDGE KORNER: [15:38:17] Okay. First of all, where in your report is
8 that?

9 MR LAUCCI: [15:38:30](Interpretation) The reference to agrarian reforms is in
10 paragraph 125.

11 PRESIDING JUDGE KORNER: [15:38:54] 125 is an excluded part, but I don't see
12 any -- are you talking about your thesis now?

13 MR LAUCCI: [15:39:02] (Interpretation) No, no, no. I'm talking about the report.
14 It's chapter 5, I think what I get is an answer to your question.

15 PRESIDING JUDGE KORNER: [15:39:16] Sorry, you answered, Mr Laucci, but the
16 witness has just said it, but paragraph -- this is headed "People's Armed Forces Act ...
17 and Popular Defence Forces Act (1989)".

18 Oh, I see, yes, you have one sentence, I see, that specifies the unregistered land. But
19 I'm really sorry, Dr Gout, is it your -- well, this is -- I really think you need to spell this
20 out. Is it your contention that because of the land reforms which you referred to in a
21 couple of sentences, the nomadic groups had to penetrate other land and you said,
22 I think, "had to", at least it was translated into English, yes, "to penetrate even further
23 into the sedentary groups considered as African groups and to take up arms ..." So
24 am I to understand your contention is that what was happening was a legitimate form
25 of action under the -- the community armed reprisals that you've been describing? Is

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1 that what you're saying?

2 THE WITNESS: [15:41:02](Interpretation) Your Honour, not necessarily. It is
3 participation in armed conflicts, and the counterinsurgency made it possible to seize
4 land, but it is not always the institution of reprisals. The institution of reprisals is a
5 special institution, specific institution intended to protect the rights of the community,
6 so it is not in all cases that a community takes up arms. But that institution exists.

7 PRESIDING JUDGE KORNER: [15:41:50] All right. Well, let's see if we can get this
8 right.

9 In -- what is -- what is the relevance of these community armed reprisals, *hiraba* and
10 *ghanima*, what is the relevance, in your view, to what happened between March 2003,
11 roughly, and March 2004?

12 THE WITNESS: [15:42:27](Interpretation) According to the applicable institution,
13 *hiraba*, *ghanima* or customary reprisals, the results are not the same. If a community
14 claims to engage in reprisals, they realise that they do not have to resort to state law to
15 repress serious violations that may have been perpetrated, or the communities may
16 be -- may set up committees to determine the distribution of rights and titles. Apart
17 from this, there is the *ghanima* or *hiraba* and customary law who may have nothing to
18 do with that.

19 PRESIDING JUDGE KORNER: [15:43:48] So all that's necessary for these concepts to
20 come into play is a community claiming to act in reprisal for some kind of
21 encroachment on their rights?

22 THE WITNESS: [15:44:14](Interpretation) Precisely, your Honour. They have to
23 invoke a prejudice or some harm done to them.

24 PRESIDING JUDGE KORNER: [15:44:26] Right. And then they don't have to
25 go -- I'll do it for you, Mr Laucci. And then from what you say, they do not therefore

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1 have to get any authorisation from any kind of state law?

2 THE WITNESS: [15:44:48](Interpretation) To resort to force, no. Indeed.

3 PRESIDING JUDGE KORNER: [15:44:55] Right.

4 MR LAUCCI: [15:44:56] (Interpretation)

5 Q. [15:45:02] And if acts are committed, I don't want to talk about them as crimes, if
6 that leads to prejudice to people or property, what would be the reprisal -- reprisals
7 regime that would be applicable?

8 A. [15:45:28] The collective responsibility of the group.

9 Q. [15:45:35] Does that exclude individual criminal responsibility of the
10 perpetrators?

11 A. [15:45:48] Only if the perpetrators are not ostracised.

12 Q. [15:45:59] To be perfectly clear, if the perpetrators are ostracised, there can be
13 criminal responsibility applied?

14 A. [15:46:12] Yes, without any doubt.

15 Q. [15:46:18] And if they are not, it becomes collective responsibility through the
16 *judiya*?

17 A. [15:46:29] Yes, that is the path that was favoured by the government and they
18 wanted to promote to a certain extent reconciliation between local communities.

19 Q. [15:46:55] I am almost done. I believe this is the last question relating to
20 *ghanima*.

21 This *ghanima*, the concept of *ghanima*, where -- what is its legal derivation? Where is
22 it derived from?

23 A. [15:47:26] Islamic law in the Koran and the Sunnahs. So it depends on the
24 interpretation of the case law and the rules of Islamic law that apply it. So that is the
25 origin of that concept.

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1 Q. [15:47:56] Very well. And regarding the *hiraba*, you mentioned earlier that
2 these were criminal acts?

3 A. [15:48:09] Yes. And this led to banditry.

4 Q. [15:48:26] What is the origin in law of *hiraba*?

5 A. [15:48:31] The same origin, Islamic law, which was transposed into positive law
6 in Sudan.

7 MR LAUCCI: [15:48:46] (Interpretation) That is the end of my questioning, your
8 Honour.

9 PRESIDING JUDGE KORNER: [15:48:51] Well, as you say, this has gone now the
10 opposite effect, we've gone a lot more quickly.

11 Do I take it, Dr Gout, that you haven't changed tomorrow's arrangements because
12 you were told you didn't have to?

13 THE WITNESS: [15:49:17](Interpretation) That's correct, your Honour.

14 PRESIDING JUDGE KORNER: [15:49:20] All right. Then what is going to have to
15 happen is, as I said -- and it's unfortunate, because I think as we've come to it now we
16 probably could have concluded -- well, I don't know, depends on what the
17 Prosecution want to ask. You'll have to come back. I understand you still haven't
18 been able to confirm that 4 and 5 December are available; is that right?

19 THE WITNESS: [15:49:51](Interpretation) Your Honour, I think I can come back to
20 the Court by Friday, I think I can have a positive answer, if that is convenient to you.

21 PRESIDING JUDGE KORNER: [15:50:08] Well, we really need to
22 know -- surely -- do you not know whether you've got teaching commitments on the
23 4th and 5th? You do have teaching commitments and you would have to move
24 them?

25 THE WITNESS: [15:50:25](Interpretation) Yes. I have already made the request to

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1 move those lectures and I'm waiting for the response. I have not yet had it.

2 PRESIDING JUDGE KORNER: [15:50:42] All right. All right, if you can inform -- is
3 there any objection from the Prosecution if the Defence team and Dr Gout engage in
4 conversation about simply arrangements, rather than this going through VWS, which
5 I prefer this to be --

6 MR NICHOLLS: [15:51:14] No, not at all about scheduling and availability. You
7 know, I trust they won't be talking about the content with a sworn witness.

8 PRESIDING JUDGE KORNER: No.

9 MR NICHOLLS: [15:51:21] So that's no problem.

10 While I'm on my feet, I might be wrong, but we thought we noticed that the witness
11 had some notes or something that were not in the binder. Maybe I misread --

12 THE WITNESS: [15:51:28] *Non, non.*

13 MR NICHOLLS: [15:51:28] If I'm wrong about that, that's fine.

14 PRESIDING JUDGE KORNER: That's all right.

15 MR NICHOLLS: [15:51:30] We thought we had seen it. Thank you.

16 PRESIDING JUDGE KORNER: [15:51:36] All right, Dr Gout, can you liaise then with
17 Mr Laucci, or whoever it is you have been liaising on the Defence team, about, from
18 our point of view, the 4th and 5th - and the 5th may be a backup day, but I think you
19 should take -- make it -- get it cleared, as it were - of December. It becomes more
20 difficult thereafter. And it really is preferable. I think certainly from your point of
21 view, you don't want to worry about all this over Christmas if we could complete
22 your evidence then.

23 All right. And you can -- as I say, you can't discuss the substance of your evidence
24 with the team, but you can talk about administration.

25 All right, if you would like to leave court and let --

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1 MR LAUCCI: [15:52:39] Just a last word, of course, to thank Mr Gout, to thank the
2 Bench and to thank my colleagues for understanding and flexibility about this, well --

3 PRESIDING JUDGE KORNER: [15:52:52] I think it's the Bench and --

4 MR LAUCCI: [15:52:56] (Overlapping speakers) I know, but also the absence of
5 objections and I think that's very constructive and it's appreciated.

6 PRESIDING JUDGE KORNER: [15:53:02] All right.

7 Yes, thank you very much indeed, Dr Gout. We'll see you whenever it is next time.

8 THE WITNESS: [15:53:15](Interpretation) Thank you.

9 (The witness exits the courtroom)

10 PRESIDING JUDGE KORNER: [15:53:32] Two things.

11 Firstly, I keep forgetting to say this, but I've been reminded. As you know,

12 Judge Alexis-Windsor wasn't here for the evidence of D-16, but she has indeed read
13 all the transcripts that -- of the evidence that took place, as probably is clear.

14 Now, Mr Laucci, it's almost certainly me, and I am not going to say anything about
15 my colleagues, but I had not understood until now that part of your defence - is this
16 right, I'm just checking with you - is that under the concepts of community armed
17 reprisals, *hiraba* and *ghanima*, the attacks, if your client, which is not accepted, was
18 part of them, were justified under these concepts? Is that part of your defence?

19 MR LAUCCI: [15:54:43] Well, if it is my opinion that you are asking for, my opinion
20 will be no, it could not be justified that way.

21 If you are asking about whether that is the way the Sudanese authorities may have
22 considered what was happening, well, that's indeed a possibility. Actually, I do not
23 take position on that. What I want and what we are trying to achieve in this defence
24 is to make sure that the complexities, to say the least, of the Sudanese context, the
25 Sudanese law and the way things used to happen under the rule of Al-Bashir are

1 enough clarified and considered by the Court, because we believe that is a highly
2 relevant aspect of this case.

3 PRESIDING JUDGE KORNER: [15:55:49] But at the moment, and certainly what
4 Dr Gout is saying, is that according to the applicable institution *hiraba*, *ghanima* or
5 customary reprisals, if a community claims to engage in reprisals and they don't have
6 to resort to state law to repress serious violations and set up committees, and
7 then -- yes, and then you -- so all that's necessary for these concepts to come into play
8 is a community claim to act as a reprisal. But what -- at the moment I don't see how
9 that's relevant.

10 I mean -- I mean, it's all very -- it's very interesting about these intertribal war and
11 everything, but how is that relevant to the charges faced by Mr Al-Rahman and the
12 attacks we've heard about? That's why at the moment -- and that's why I asked you
13 why a part of your defence is these were justified attacks.

14 MR LAUCCI: [15:57:08] At minimum, really, the Defence will never say the attacks
15 were justified. You will never hear that on this side of the room. What you will
16 hear is - and that is related to the third line of defence - is that for a layperson, a
17 Sudanese citizen with no education whatsoever, taking into consideration the
18 Sudanese context as a whole and as it is described by various witnesses, including
19 Dr Gout, what was happening in Sudan was just the way things should happen and
20 that is important for the -- our case and our submissions under Article -- I lost it, error
21 of law aspect and the absence of moral elements legal knowledge. This is where
22 these issues are, but I believe -- I don't want to speak for Dr Gout, and you will have
23 the opportunity to ask him that question, but I believe what you quote from him there
24 was no judgment of value as to what he thinks about what he describes, he was just
25 describing, and the same way for this defence, we are trying to describe what is our

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1 understanding of how things used to happen in this -- under the wonderful rule of
2 President Al-Bashir, and nothing else.

3 PRESIDING JUDGE KORNER: [15:58:51] I see, so -- yes, all right. So, effectively,
4 it's on the basis that, as you put it in your opening, an uneducated person might well
5 think that this was just part of standard Sudanese practice, right.

6 MR LAUCCI: [15:59:17] (Interpretation) That is what happened under Al-Bashir.

7 MR NICHOLLS: [15:59:17] (Overlapping speakers)

8 PRESIDING JUDGE KORNER: [15:59:22] Sorry, Mr Nicholls.

9 MR NICHOLLS: [15:59:24] Oh, sorry. That still wouldn't make it relevant if the
10 way things used to happen is there's an overwhelming amount of crime and that
11 happens. It only becomes relevant if there's an argument that this was, under some
12 framework, lawful and would be understood not to have been criminal by a farmer
13 because (Overlapping speakers)

14 PRESIDING JUDGE KORNER: [15:59:44] Well, I know, I mean, but that's taking
15 it -- I mean, at the moment I just want -- the argument about that -- and I have no
16 doubt the Prosecution will be asking Dr Gout some questions about this, but I just
17 wanted to know what the purpose of these questions were.

18 All right. So that means we can't sit tomorrow, unless there's any matters anybody
19 wants to raise, and we'll sit on Friday to hear Ms Marsh.

20 Mr Edwards, I presume you're dealing with her. Yes, okay.

21 Well, then, both you and I had better have the warning, because everybody is
22 speaking English, to remember to leave breaks for the interpreters.

23 MR EDWARDS: [16:00:33] I'll be meeting with Ms Marsh tomorrow -- actually, it's
24 probably worth saying she flies in from London tomorrow evening, early evening.

25 I'll have an opportunity to speak with her. It's not going to be a classic preparation

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1 session at all. I might -- I'll probably speak with her for about 10 minutes about the
2 way it works here, but she's extremely familiar with these sort of proceedings. So I'll
3 just raise now that my learned friends should probably not expect a lengthy
4 preparation log because I'm really just going to be explaining the (Overlapping
5 speakers)

6 MR NICHOLLS: [16:01:14] If we got a prep log that said "We said hello", we won't
7 object to anything.

8 MR EDWARDS: [16:01:21] That's probably all they're going to get.

9 PRESIDING JUDGE KORNER: [16:01:22] I think with a handwriting expert, there's
10 not much that's going to change or be expanded upon.

11 MR EDWARDS: [16:01:29] That's right.

12 PRESIDING JUDGE KORNER: [16:01:30] All right, yes.

13 All right, then we'll sit again on Friday at 9.30.

14 And your witnesses are -- oh, I'm sorry, one thing I meant to say to Dr Gout is, I was
15 reminded, of course he can't have video link, we have no internet. So -- and there's
16 no office in, I'm told -- there's no country office in France, which does somewhat
17 surprise me. All right. So he will have to be present. So if you could tell him that.
18 Yes, thank you very much.

19 THE COURT USHER: [16:02:09] All rise.

20 (The hearing ends in open session at 4.02 p.m.)