

Original: **English**No.: ICC-02/05-01/20
Date: **26 September 2023****TRIAL CHAMBER I****Before:** Judge Joanna Korner, Presiding Judge
Judge Reine Alapini-Gansou
Judge Althea Violet Alexis-Windsor**SITUATION IN DARFUR, SUDAN****IN THE CASE OF
THE PROSECUTOR *v.*
ALI MUHAMMAD ALI ABD-AL-RAHMAN (“ALI KUSHAYB”)****Public****Public redacted version of “Prosecution’s challenge to the qualifications of
Witness D-0023 and to the admissibility of the report and related material”, ICC-
02/05-01/20-1018-Conf, 15 September 2023****Source:** Office of the Prosecutor

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

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I. INTRODUCTION

1. Pursuant to paragraph 50 of the Directions on the conduct of proceedings,¹ the Prosecution challenges the qualifications of Mr Philippe Gout (“D-0023”) as an expert, as well as the admissibility of the report produced by D-0023 (“Report”)² and all related material.³ The Report addresses topics which: (i) fall outside his area of expertise; (ii) are not of assistance to the Chamber; and/or (iii) usurp the Chamber’s functions as the ultimate arbiter of fact and law. The Report also has methodological flaws. Consequently, the Chamber should reject the “Defence Request to admit Mr Philippe Gout as an Expert Witness” (“Request”).⁴

II. CLASSIFICATION

2. Pursuant to regulation 23bis(2) of the Regulations of the Court (“Regulations”), this filing is classified as confidential, as it refers to the content of confidential documents.

III. SUBMISSIONS

3. The Defence requests that D-0023 be admitted as an expert witness and the Report he produced and related materials be introduced into evidence,⁵ even though D-0023 is listed as a *viva voce* witness and no application has been made by the Defence pursuant to rule 68(3).⁶ The Defence argues that D-0023 is qualified to provide relevant insight into Sudanese law and, specifically, into customary law in Sudan⁷ due to his academic background and skills in international criminal law.⁸ The Defence also suggests that the Report covers topics “within the scope of the case and [that] match his field of competence”.⁹

4. As established by the jurisprudence of this Court:

¹ Directions on the conduct of proceedings, [ICC-02/05-01/20-478](#).

² [ICC-02/05-01/20-1004-Conf-Anx1](#) (“Report”).

³ [ICC-02/05-01/20-1004-Conf-Anx2](#), [ICC-02/05-01/20-1004-Conf-Anx3](#), [ICC-02/05-01/20-1004-Conf-Anx4](#).

⁴ [ICC-02/05-01/20-1004-Red](#) (“Request”).

⁵ [Request](#), para. 12.

⁶ [Directions on the conduct of proceedings](#), para. 51.

⁷ [Request](#), para. 8.

⁸ [Request](#), paras. 5-7.

⁹ [Request](#), paras. 8-11.

"[...] expert witnesses are persons 'who, by virtue of some specialised knowledge, skill or training can assist the Chamber in understanding or determining an issue of a technical nature that is in dispute'. In determining whether a witness's evidence may be introduced as expert evidence, the Chamber must consider whether: (i) the witness is an expert as defined above; (ii) the testimony in the subject area of expertise would be of assistance to the Chamber; (iii) the content of the report and/or the anticipated testimony falls within the area of expertise of the witness; and (iv) the content of the report and/or the anticipated testimony does not usurp the functions of the Chamber as the ultimate arbiter of fact and law".¹⁰

5. The Prosecution submits that no part of the Report meets these criteria, for the reasons set out below.

A. D-0023 has no demonstrated expertise to deal with some of the topics included in the Report

6. Some of the topics presented in the Report do not fall within D-0023's area of expertise. D-0023 does not appear to have any legal training in [REDACTED].¹¹

7. Furthermore, neither D-0023's doctoral thesis (dealing with the "apprehension by international law of customary law using the example of Sudan"),¹² [REDACTED],¹³ his further publications or his professional background,¹⁴ demonstrate any expertise to opine on the following topics in the Report:

- (i) [REDACTED];
- (ii) [REDACTED];
- (iii) [REDACTED];

¹⁰ *Al Hassan* Decision on Defence's proposed experts witnesses and related applications seeking to introduce their prior recorded testimony under Rule 68(3) of the Rules, [ICC-01/12-01/18-2206](#) ("Al Hassan experts' decision"), para. 9, *footnote omitted*. *Ntaganda* Decision on Defence preliminary challenges to Prosecution's expert witnesses, [ICC-01/04-02/06-1159](#) ("Ntaganda Expert Decision"), para. 8, referring to *Ruto & Sang* Decision on Sang Defence Application to exclude Expert Report of Mr Hervé Maupeu, [ICC-01/09-01/11-844](#), para. 12. *See also Bemba et al.* Decision on Prosecution Request to Exclude Defence Witness D-22-0004, [ICC-01/05-01/13-1653](#), para. 11.

¹¹ [ICC-02/05-01/20-1004-Conf-Anx2](#).

¹² [Request](#), para. 5; [DAR-OTP-00005101](#).

¹³ [ICC-02/05-01/20-1004-Conf-Anx2](#).

¹⁴ [ICC-02/05-01/20-1004-Conf-Anx2](#).

- (iv) [REDACTED];
- (v) [REDACTED]; and
- (vi) [REDACTED].¹⁵

8. D-0023 has not received any formal legal training [REDACTED] or in the topics of [REDACTED] or made any academic contributions on these issues, including in his PhD thesis. D-0023 has never [REDACTED]. The Prosecution also notes that D-0023 does not [REDACTED],¹⁶ [REDACTED].¹⁷

9. Moreover, in support of his opinion evidence on the concepts of [REDACTED],¹⁸ D-0023 simply relies on a [REDACTED]¹⁹ and [REDACTED].²⁰

10. D-0023 similarly does not appear to have the necessary qualifications to opine on matters relating to [REDACTED], a topic that never featured in his research and which also is mostly presented on the basis of a plain reading of the text of Sudanese law.²¹ The same applies to [REDACTED].²²

11. D-0023's academic and professional experiences also fail to demonstrate any expertise to opine on [REDACTED].²³

12. Even in those areas that are indicated as within D-0023's field of expertise in the Registry's List of Experts, it remains within the purview of the Chamber to evaluate the areas of expertise of a proposed expert witness²⁴ and to determine whether the suggested witness has "sufficient expertise in a relevant subject area such that the Chamber may benefit from hearing his or her opinion".²⁵

¹⁵ [Report](#), paras. 97-105 and 121-122.

¹⁶ [ICC-02/05-01/20-1004-Conf-Anx3](#).

¹⁷ [REDACTED].

¹⁸ [Report](#), paras. 97-101.

¹⁹ See [Report](#), fn. 116, 117, 119 and 120.

²⁰ [REDACTED]. See [DAR-OTP-00005100](#) at 0002.

²¹ See *above* para. 7(iii).

²² See *above* para. 7(ii).

²³ See *above* para. 7(iv).

²⁴ *Al Hassan* Decision on Prosecution's proposed expert witnesses, [ICC-01/12-01/18-989-Red](#), paras. 14-15. See also *Prosecutor v. Šainović et al.*, IT-05-87-A, [Judgement](#), 23 January 2014, para. 1295.

²⁵ [Ntaganda Expert Decision](#), para. 9. See also *Prosecutor v. Mladić*, IT-09-92-T, [Decision on Defence request to disqualify Richard Butler as an expert and bar the Prosecution from presenting his reports](#), 19 October 2012, para. 8.

13. D-0023 has no obvious expertise in [REDACTED] as, apart from never receiving any legal training in [REDACTED], D-0023's research [REDACTED] and his academic work do not appear to focus on [REDACTED]. To the extent that D-0023 has any expertise in [REDACTED], this relates only to his research which focused on [REDACTED].²⁶

14. The Report further fails to demonstrate D-0023's expertise in [REDACTED] as in large part it simply [REDACTED].²⁷

15. Additionally, D-0023's alleged expertise in international criminal law²⁸ is equally not well established, since it appears to be based on [REDACTED].²⁹

B. The Report covers topics that are not of assistance to the Chamber

16. Even where the Report concerns topics that may arguably fall within the scope of expertise of D-0023, these topics are not of assistance to the Chamber, either because they were already covered by the joint Prosecution and Defence expert, Mr Alex de Waal ("Joint Expert"),³⁰ or because they are not materially relevant to the case and/or not in dispute.

There is no justification to hear duplicative evidence on topics already covered by the Joint Expert

17. Several topics of the Report relating to the background of the conflict were already explored by the Joint Expert in his report and in-court testimony. It would not, therefore, be in the interest of justice³¹ and the expeditious conduct of the proceedings, to hear duplicative evidence on the following topics:

a. [REDACTED];³²

²⁶ [ICC-02/05-01/20-Conf-Anx2](#), p. 8.

²⁷ See [DAR-OTP-00005100 at 0002](#).

²⁸ [Request](#), para. 6.

²⁹ [ICC-02/05-01/20-1004-Conf-Anx2](#), p. 4, 11, 14.

³⁰ P-1042.

³¹ *Lubanga* Decision on the procedures to be adopted for instructing expert witnesses, [ICC-01/04-01/06-1069](#), para. 14.

³² [Report](#), paras. 26-35. Already sufficiently explored by the Joint Expert at [REDACTED].

b. [REDACTED];³³

c. [REDACTED];³⁴ and

d. [REDACTED].³⁵

18. The presentation of duplicative evidence on these issues would not only defeat the purpose of instructing a Joint Expert, particularly when there is no apparent contradiction between the reports, but also circumvents the Chamber's decision to hear expert evidence on the same issues grouped together, as determined in the Directions on the Conduct of Proceedings.³⁶

19. The concept of [REDACTED],³⁷ described by D-0023 as [REDACTED], while not explored by the Joint Expert, is an ancillary concept to [REDACTED] and, therefore, appears to add little if anything to the Joint Expert's evidence.

The Report covers topics that are not relevant to the case or in dispute, and which do not seem to assist the Chamber

20. The Report also covers topics that are simply not relevant to the case,³⁸ such as [REDACTED],³⁹ [REDACTED],⁴⁰ and [REDACTED]⁴¹ (a topic which is based on examples which fall squarely outside the personal, temporal and geographical scope of the case).

21. The Defence asserts that D-0023 will provide the Chamber with a "better overview on the place and importance of the customary law in Sudanese law, public international law and its implementation in the Sudanese legal system."⁴² None of these issues appear to have any relevance to the issues in contention in this case.

³³ [Report](#), paras. 38-42. [REDACTED].

³⁴ [Report](#), paras. 43-61, 66-69. [REDACTED].

³⁵ [Report](#), paras. 106-180. [REDACTED].

³⁶ [Directions on the conduct of proceedings](#), para. 52.

³⁷ [Report](#), paras. 25, 36-37.

³⁸ *Ntaganda* Decision on Prosecution request seeking the admission of the medical report related to Witness P-0790, [ICC-01/04-02/06-1311](#), para. 13.

³⁹ [Report](#), paras. 86-94.

⁴⁰ [Report](#), para. 123.

⁴¹ [Report](#), paras. 62-65.

⁴² [Request](#), para. 8.

22. In addition, issues related to the existence of [REDACTED],⁴³ apart from having also been addressed by the Joint Expert,⁴⁴ are simply not in contention,⁴⁵ such as [REDACTED].

23. Furthermore, the parts of the Report that simply repeat [REDACTED], do not appear to be of any assistance to the Chamber.⁴⁶

C. The Report covers topics that seek to usurp the Chamber’s function as the ultimate arbiter of law

24. Expert reports should not cover topics which fall within the purview of the Chamber and thus, usurp it of its function as the ultimate arbiter of fact and law.⁴⁷ Jurisprudence from the *ad hoc* tribunals further demonstrates that legal matters, which are not of a technical nature, can be addressed by Counsel in oral or written arguments and shall not be the object of expert evidence.⁴⁸

25. As such, the following parts of the Report should not be admissible since they relate to matters of law which should be exclusively decided by the Chamber:

- a. [REDACTED];⁴⁹ and
- b. [REDACTED],⁵⁰ [REDACTED].⁵¹

26. The Defence can adequately explore these topics in its motions and should not attempt to make legal submissions through an expert witness.⁵² The Chamber, in turn,

⁴³ [Report](#), paras. 43-44, 66-72.

⁴⁴ [REDACTED].

⁴⁵ [Al Hassan experts’ decision](#), para. 9.

⁴⁶ [Report](#), paras. 10-21, 123-134. [REDACTED].

⁴⁷ [Al Hassan experts’ decision](#), para. 9(iv).

⁴⁸ The ICTY Appeals Chamber, after noting the Trial Chamber’s reasoning that “Schabas’s legal expertise fell within its competence and that Nikolić was free to incorporate into his submissions the legal analysis contained in the Schabas Report”, held that “[...] trial chambers have the discretion to bar the testimony of an expert witness called to give evidence on legal matters”. See *Prosecutor v. Popović et al.*, IT-05-88-A, [Judgement](#), 30 January 2015, para. 79. See also *Prosecutor v. Popović et al.*, IT-05-88-T, [Decision on the Admissibility of the Expert Report and Proposed Expert Testimony of Professor Schabas](#), 1 July 2008, paras. 6-7; *Prosecutor v. Nahimana et al.*, ICTR-99-52, [Judgement](#), 28 November 1997, paras. 292-294.

⁴⁹ [Report](#), paras. 73-84.

⁵⁰ [Report](#), paras. 85, 95-96.

⁵¹ [REDACTED].

⁵² See above fn. 48.

possesses the technical knowledge to rule on these issues and requires no technical assistance to dispose of its jurisdictional functions.

D. The Report has methodological flaws

27. The Report also contains a number of methodological flaws. Significant portions of the Report are unsourced,⁵³ and where sourced, the Report often refers to sources that currently remain unavailable to the Prosecution.

28. A number of references are made to [REDACTED].⁵⁴ These [REDACTED] are indicated as the sole source for assertions made in a number of paragraphs in the Report.⁵⁵ Nonetheless, the Prosecution has been informed that [REDACTED].⁵⁶

29. D-0023 has also indicated that [REDACTED] cited in the Report.⁵⁷ D-0023 also does not [REDACTED] cited in the Report,⁵⁸ which D-0023 has indicated he is still trying to obtain.⁵⁹

30. The Prosecution will continue to liaise with the Defence to obtain this missing source material. However, the Prosecution's current inability to consult the underlying material related [REDACTED] and other material, which inform a number of the conclusions in the Report, combined with the fact that in some instances [REDACTED],⁶⁰ significantly impacts the reliability of the Report.⁶¹

⁵³ See, e.g., [Report](#), paras. 23, 43, 48-52, 54-57, 85, 107, 113, 115 entirely unsourced; assertion at para. 26, 3rd sentence; assertion at para. 64, 3rd sentence; para. 84 and, especially 3rd sentence; most of the assertions contained in box 6 (p. 48).

⁵⁴ [Report](#), para. 7.

⁵⁵ [Report](#), paras. 10 (fn. 3), 29 (fn. 25), 44 (fn. 51), 53 (fn. 60), 59 (fn. 62), 60 (fn. 65 and 66), 64 (fn. 70), 69 (fn. 86), 87 (fn. 105), 97 (fn. 116), 98 (fn. 119), 99 (fn. 120), 102 (fn. 125 and 127), 103 (fn. 133 and 134), 105 (fn. 140), 126 (fn. 158).

⁵⁶ DAR-OTP-000005100; Emails from the Defence entitled "RE: Mr Philippe GOUT – missing source material cited in report" dated 13 September 2023 at 09:37h and 14 September 2023 at 10:08h.

⁵⁷ [Report](#), paras.14 (fn. 5-8), 16 (fn. 10), 20, 78, 98 (fn. 117) and 122.

⁵⁸ [Report](#), para. 46, fn. 54 and 58.

⁵⁹ [DAR-OTP-00005100](#).

⁶⁰ [REDACTED].

⁶¹ As held by the ICTR, "[w]hen assessing an expert's report, a Trial Chamber generally evaluates whether it contains sufficient information as to the sources used in support of its conclusions and whether those conclusions were drawn independently and impartially". See *Prosecutor v. Renzaho*, ICTR-97-31-A, [Judgement](#), 1 April 2011, para. 289.

IV. CONCLUSION

31. For the foregoing reasons, the Prosecution respectfully requests the Chamber to reject the inclusion of D-0023 as an expert witness and not to admit the Report and the related material.



Karim A. A. Khan KC
Prosecutor

Dated this 26th day of September 2023

At The Hague, The Netherlands