

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 Tuesday, 14 November 2023
10 (The hearing starts in open session at 9.38 a.m.)
11 THE COURT USHER: [9:38:47] All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE KORNER: [9:39:05] Yes, good morning, all. Can we have the
15 appearances, first of all, please, for the Defence?
16 MR LAUCCI: [9:39:16] Good morning, Madam President, your Honours, dear
17 colleagues. Same composition as yesterday.
18 PRESIDING JUDGE KORNER: [9:39:22] Yes. Prosecution.
19 MR NICHOLLS: [9:39:25] Good morning, Madam President. Good morning, your
20 Honours. Same as yesterday.
21 Just as a quick aside, I wonder if we could possibly offer the witness a lighter pair of
22 headphones. I noticed yesterday he was trying to have them off of one ear as we
23 sometimes do and it was difficult, but these might be more comfortable for him.
24 I just throw it out there. Thank you.
25 PRESIDING JUDGE KORNER: [9:39:47] Thank you very much, Mr Nicholls. If

1 you give it to the court officer, she can give it to the witness.

2 Same as yesterday, Mr Shah, for the victims?

3 MR SHAH: [9:39:53] Good morning, Madam President, your Honours. One
4 addition, our case manager, Saif Kassis. Thank you.

5 PRESIDING JUDGE KORNER: [9:39:59] Thank you very much.

6 Good morning, Dr Gout.

7 Before we go any further, as everybody saw yesterday, we have difficulties with the
8 interpretation. It is not the interpreters' fault, but the problem is that the language
9 that is being used is legal and highly technical.

10 And one of the things that's happening, Dr Gout, is because you speak English — and
11 Mr Edwards is asking you questions — you're answering virtually straightaway so
12 there is -- in French, but there is no gap, which doesn't give the interpreters, who I
13 think are struggling with some of the concepts, the language of some of the concepts,
14 time to catch up. And that, I'm afraid, is why we are getting perhaps a somewhat
15 incomplete translation.

16 Now, your evidence is obviously important to the Defence, so it's really
17 important using the same word — that everything gets down on the transcript. So
18 can you try to leave, please, a pause, even although you've understood Mr Edwards'
19 question, until the translation is finished.

20 I don't know whether you are listening on your earphones to translation? Yes, you
21 are, aren't you. Yes.

22 Just wait until he's finished the question, leave a pause and then give the answer.

23 And it really would help if the answers could be -- I mean, the questions -- actually,
24 it's not Mr Edwards anymore, it is now Mr Jeremy.

25 Mr Jeremy, obviously, if you can keep the questions as short and simple as possible,

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 which I think you probably will; but, equally, Dr Gout, if you can keep your answers

2 short. All right?

3 Yes, all right, without further ado, let's get cracking.

4 WITNESS: DAR-D31-P-0023 (On former oath)

5 (The witness speaks French)

6 QUESTIONED BY MR JEREMY (Continuing)

7 MR JEREMY: [9:42:29]

8 Q. [9:42:29] Good morning, Dr Gout.

9 A. [9:42:32] Good morning.

10 Q. [9:42:32] If the lighter headphones would help, then we can provide those to

11 you now. If the court officer could assist us, please?

12 THE COURT OFFICER: [9:42:38] A colleague will come in to install a lighter pair of

13 headphones to make sure that the audio channels actually go through the correct

14 headphones.

15 PRESIDING JUDGE KORNER: [9:42:54] All right. I thought you just plug them in

16 and it worked. Okay.

17 Yes, Mr Jeremy.

18 MR JEREMY: [9:43:42] Thank you, Madam President, your Honours.

19 Q. [9:43:44] Sir, so we'll begin by looking just briefly at your CV, which we were

20 looking at yesterday.

21 In relation to your professional legal experience, which you list at point 5, just a

22 clarification. So your five months at the Extraordinary Chamber in the Courts of

23 Cambodia and your four months at the Special Tribunal for Lebanon, those were

24 internships; is that right?

25 A. [9:44:20] That is correct.

1 Q. [9:44:39] Now I want to move forward and look a little bit at the process of your
2 instruction and the steps that you took following your instruction.

3 So, in terms of the time line of the preparation of your report, we saw the letter of
4 instruction yesterday, that was dated 13 June 2023; correct?

5 A. [9:45:10] Yes, that is correct.

6 Q. [9:45:21] And we can agree that your report is dated 17 August 2023?

7 A. [9:45:30] Yes, that is correct.

8 Q. [9:45:43] So yesterday we discussed the various interviews that you carried out
9 in connection with your PhD thesis; do you recall that?

10 A. [9:45:57] Yes, I do remember that.

11 Q. [9:46:05] And from my reading of your report, you didn't carry out any
12 additional interviews for the purposes of this report, your ICC report?

13 A. [9:46:21] That is correct, except for one interview, one additional interview with
14 a colleague, but I would have to check the date to make sure that the interview was
15 after -- after the instruction to prepare a report.

16 Q. [9:46:51] Was that your colleague at the London School of Economics?

17 A. [9:47:01] Yes.

18 Q. [9:47:05] So my understanding, sir, is you had a brief conversation, I think on
19 23 June, with that colleague. You said it was a telephone conversation during which
20 no notes were taken; is that correct?

21 A. [9:47:21] I thought it was necessary to have a telephone conversation to clarify
22 the analysis from my colleague regarding the certain armed groups, pro-government
23 armed groups in Sudan. It had to do with an article she had published for ECEM.

24 Q. [9:47:56] Okay. But just to go back to my question, I understood that that was a
25 brief telephone conversation of which you have no notes; is that correct?

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 PRESIDING JUDGE KORNER: [9:48:15] I'm sorry -- yes, if you answer first.

2 THE WITNESS: [9:48:21](Interpretation) A telephone conversation that was brief?

3 Well, I don't know, but, yes, I didn't need to take notes; I just needed to check a few
4 points that she had made in her article so I did not take any notes.

5 PRESIDING JUDGE KORNER: [9:48:39] I'm sorry. You said it was about some
6 armed groups in Sudan.

7 THE WITNESS: [9:48:55](Interpretation) Yes, your Honour. It was a bit of a
8 generic answer. It was a conversation that had to do with the PDFs and the border
9 guards and Rapid Support Forces. But, in actual fact, I don't know -- well, she
10 merely confirmed what she had written in her article. I didn't learn anything new
11 during the discussion.

12 MR JEREMY: [9:49:43]

13 Q. [9:49:45] Okay, thank you, sir. So, we agree that you relied on these interviews
14 that you conducted during 2012 to 2016 for the preparation of your thesis; correct?

15 A. [9:50:02] Yes, that's true, partly. Some of the interviews that are mentioned in
16 the report were conducted after my doctoral research. My doctoral research indeed
17 was done between 2012 and 2016, but I did go back to Sudan later on at a later date,
18 2019/2020. Some of the interviews mentioned in the report go back to that period of
19 time.

20 Q. [9:50:45] And we can agree that when you wrote your report that we're talking
21 about today, you didn't have copies of those interviews in front of you -- you didn't
22 have access to those at the time you wrote your report?

23 A. [9:51:07] Are you talking about the interviews that I conducted during my
24 doctoral research?

25 Q. [9:51:23] So, I'm talking about the interviews, a number of which you cite in

1 your report. The Prosecution asked the Defence to ask you for copies of those
2 interviews. You then informed the Defence that you didn't have the copies of those
3 interviews, they were located in another location and you would need to travel to
4 obtain those; is that accurate?

5 A. [9:52:00] Yes, that is accurate and that's what I did, to get some of those notes.

6 Q. [9:52:17] Okay. So we can agree that when you wrote your report, you didn't
7 have access to those notes which you had to subsequently retrieve?

8 A. [9:52:29] Yes, I relied primarily on the elements that I had retained from those
9 interviews for my thesis.

10 PRESIDING JUDGE KORNER: [9:52:53] If you didn't have your notes, do you mean
11 you just went back to your thesis and took the information from that?

12 THE WITNESS: [9:53:08](Interpretation) I took the information confirmed in my
13 thesis, indeed. The interviews that I conducted in Sudan were used in my thesis and
14 I took the elements from that.

15 Now, there were other additional interviews, but many of the interviews were the
16 ones that were used for my thesis.

17 MR JEREMY: [9:53:35]

18 Q. [9:53:36] Okay, thank you, sir.

19 Still in terms of your instructions that you received from the Defence, you were
20 provided with some Sudanese laws which the Defence asked you to look at; correct?

21 A. [9:53:58] That is correct.

22 Q. [9:54:08] You were provided with the People's Armed Forces Act of 1986, yes?

23 A. [9:54:15] Yes.

24 Q. [9:54:25] Also the Criminal Law Act of 1991?

25 A. [9:54:36] Yes.

1 Q. [9:54:39] The Police Forces Act of 1999?

2 A. [9:54:45] I think so, yes.

3 Q. [9:54:55] And the People's Defence Forces Act of 1989?

4 A. [9:55:07] Yes.

5 Q. [9:55:10] And we can agree that you didn't previously have copies of those acts
6 which is why the Defence provided them to you?

7 A. [9:55:18] That is correct, but I'd like to specify, as I did yesterday, I had already
8 consulted the 1991 criminal act and I was very happy to be able to review this, and
9 I'm speaking of the '96 act. I'd heard a great deal about that legislation, but I had not
10 been able to see it with my own eyes.

11 Q. [9:55:56] Okay, that's understood, sir.

12 We move forward now into the content of your -- or of your expertise relating to the
13 content of your report, and I'd like to focus first on the sources of Sudanese law; so
14 that's paragraph 10, and in the Defence folder it's tab 1 in the French and tab 2 in the
15 English.

16 Yesterday, we established that your PhD research in Sudan focused on the 2012-2016
17 period and it had an emphasis on the peacebuilding experience post-conflict; yes?

18 A. [9:57:09] Sorry, I'll just wait for a moment or two. I would like to specify a few
19 things. That period, 2012 to 2016, that was the period during which I was working
20 in the field. If you read -- well, there's one paragraph in my thesis that has to do
21 with the temporal and geographical scope of my work. My thesis has to do with the
22 period from 2005 to 2019, and so, necessarily, I took into account some contextual
23 elements from before 2005 so that I could present the Sudanese context that was
24 relevant to my research.

25 Q. [9:58:05] Okay. We can agree, irrespective of the time period, that your thesis

1 did not focus on the 1998 constitution; that wasn't the focus of the thesis, yes?

2 A. [9:58:24] No, it wasn't the main focus of the thesis. Indeed.

3 Q. [9:58:40] And I think I saw one reference to the 1998 constitution in the thesis.

4 Does that sound about right?

5 A. [9:58:52] I haven't checked. It's quite possible but, in any event, to my mind it
6 shows that I did read that constitution and I did have questions about its provisions.

7 For my thesis, I mean, for my PhD research.

8 Q. [9:59:19] Okay, sir. You never wrote about the 1998 constitution in any other
9 publications; correct?

10 A. [9:59:30] No, I don't believe so.

11 Q. [9:59:42] And, as you clarified yesterday, you've never had any legal training in
12 Sudanese constitutional law; is that fair?

13 A. [9:59:56] In terms of university training at the masters level, indeed, I have not
14 taken any such training.

15 Q. [10:00:12] Now, I take it you read an English or French translation of the 1998
16 constitution rather than the Arabic original for the purposes of your report?

17 A. [10:00:27] For the report, yes. I read the English version, sorry.

18 PRESIDING JUDGE KORNER: [10:00:59] Sorry, does that mean you hadn't read it in
19 full before? The first time you read it was for the purposes of the report?

20 THE WITNESS: [10:01:15](Interpretation) No, your Honour, I read that constitution
21 during the first months of my field work. I had that constitution in Arabic. As
22 Mr Jeremy said, of the OTP, I did not particularly use that constitution for my thesis,
23 but I had consulted it as soon as I went to Khartoum during the first months there.
24 There is a reference to that constitution in my thesis.

25 PRESIDING JUDGE KORNER: [10:01:51] Yes. I'm sorry, you said you'd looked at

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 it, but what I asked you was whether, when you got the OTP's translation of it, was
2 that the first time you'd read -- you, yourself, had read the document in full as
3 opposed to getting someone to tell you what it said in Arabic?

4 THE WITNESS: [10:02:22](Interpretation) No, your Honour.

5 I read that constitution several times during my thesis research, even before the
6 Prosecutor decided to provide that document to me.

7 PRESIDING JUDGE KORNER: [10:02:39] Yes, thank you.

8 MR JEREMY: [10:02:40]

9 Q. [10:02:42] And if it helps to refresh your memory, sir, the reference to the 1998
10 constitution in your thesis is where you make the point that federalism in Sudan was
11 reinforced in the 1993 and the 1998 constitutions. That's the sole reference?

12 A. [10:03:09] In my thesis?

13 Q. [10:03:18] Exactly right, in your thesis.

14 A. [10:03:24] Yes, it seems coherent to me because we talked about the temporal
15 scope, the relevant temporal scope for my thesis.

16 Q. [10:03:41] Okay, that's clear. Now, looking at your sources in this section, sir,
17 it's fair to say that you refer to the provisions of the plain text of the constitution
18 itself?

19 PRESIDING JUDGE KORNER: [10:04:03] What paragraph are you on?

20 MR JEREMY: [10:04:07] Paragraphs 13 to 15.

21 THE WITNESS: [10:04:31](Interpretation) Yes, that is correct.

22 MR JEREMY: [10:04:34]

23 Q. [10:04:35] And in interpreting these provisions in the 1998 constitution, we can
24 therefore agree you don't cite any academic texts in support of your interpretation?

25 A. [10:04:49] I did not rely on a complementary or supplementary text, but on my

1 general information, my background knowledge that I had accumulated. I believe
2 that I did in fact consult articles to draft that paragraph. I think there was an article
3 published in Egypt, Arab World, which was in my former library in Khartoum. It
4 was published by an author. I think it was called Doebbler (phon). He was called
5 Doebbler (phon), but in fact I did not mention him in the list of sources.

6 Q. [10:05:53] Okay, so you didn't consider it important enough to cite it here in this
7 report?

8 A. [10:05:59] You are correct, because the idea was to give an overview of the
9 various constitutional acts that had been adopted in the 90s.

10 Q. [10:06:23] Okay. And also as part of this overview that you provide, we can
11 agree that you don't cite any Sudanese jurisprudence that supports your
12 interpretation?

13 A. [10:06:36] That is correct.

14 Q. [10:06:45] Focusing on paragraph 14, the entirety of that paragraph relates to
15 constitutional decrees. You refer to 14 of them. You didn't have copies of any of
16 these constitutional decrees, did you, sir, when you wrote this report?

17 A. [10:07:15] I do not think so. No, I don't think so.

18 Q. [10:07:27] When the Prosecution asked our colleagues in the Defence for these
19 decrees, you commented that they are widely commented on by the doctrine in social
20 sciences and humanities; do you recall that?

21 A. [10:07:52] Certainly, yes. I don't quite recall, but it seems to me to be correct
22 overall. You mean to say, in doing the exchanges, you mean to say?

23 Q. [10:08:11] That's right.

24 A. [10:08:17] But I think it was that article in particular that I talked about a short
25 while ago, and I used it without citing it because I did not think it was essential.

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 Let me point out that the idea was to list the constitutional acts that had been adopted
2 prior to 1998, so I did in fact do research on the doctrine to be able to identify these
3 acts, these decrees.

4 PRESIDING JUDGE KORNER: [10:09:07] I'm really sorry, Mr Jeremy. This is
5 paragraph 14 you are asking about, is it?

6 MR JEREMY: [10:09:12] Yes, Madam President.

7 PRESIDING JUDGE KORNER: [10:09:14] Dr Gout, you say the most emblematic of
8 the decrees were the following, and you list them in paragraph 14; do you see that?

9 A. [10:09:31] Yes, I can see them, your Honour.

10 Q. [10:09:33] How did you know they were the most emblematic, if you hadn't
11 actually seen the decrees?

12 A. [10:09:46] Well, the consultation of supplementary doctrine, and that is the
13 purpose of the decree. When you see an error, decree number 12, '95, 26, I think
14 that's an error that I made. The division of Sudan into 26 administrative regions, I
15 think that was a mistake. I think it was a prior decree of '91, and then it was
16 amended a few years later in '93 or '94. So it was the object -- the subject of the
17 decrees themselves, in answer to your Honour, which was determinant for my
18 interpretation. The scope of the laws, Sharia and decentralisation, that is the way I
19 understood it.

20 PRESIDING JUDGE KORNER: [10:11:03] I see, thank you.

21 MR JEREMY: [10:11:20]

22 Q. [10:11:21] Okay. So, sir, if I understand correctly, you read an article, which
23 you don't cite in your report. That article refers to these constitutional decrees, and
24 it's on the basis of that article and the commentary on these decrees that you write
25 what you write in paragraph 14 of the report; is that an accurate summary?

1 A. [10:11:49] Let me add, yes, there was this article, but there were other articles
2 that I read. I mentioned that one spontaneously. There was another one. I made
3 research on the site of the international level organisation, which had a list of
4 constitutional decrees and had a summary on the study of those decrees.

5 Q. [10:12:30] Okay, so this is a second article --

6 A. [10:12:42] A short while ago I remembered an article written by Doebbler (phon),
7 I believe, I can cross-check. I read other articles on these issues, but especially I
8 verified the dates and numbers of constitutional decrees on the site of the
9 international level organisation. And I cross-checked to decree which of -- to decide
10 which of those decrees that I could mention. But in paragraph 14, I don't claim to
11 carry out an analysis of those decrees.

12 Q. [10:13:34] In your work, sir, the academic sphere, if you refer to an article or a
13 journal, do you not traditionally cite that reference?

14 A. [10:13:48] Yes, of course. In an academic work, especially if there was a
15 scientific analysis there, I simply wanted a list and that is why it was relevant. But
16 since I was just writing out a list, I really am not even sure that paragraph 14 really
17 brings anything much to my report, since I was only talking about a list.

18 Q. [10:14:24] Okay, sir, but what I'm talking about is paragraph 14 of what is being
19 presented as an expert report before the International Criminal Court, and I'm saying
20 that if you consult a source in relation to that paragraph, would you not ordinarily
21 make a cite to that source if you considered it relevant?

22 A. [10:14:46] Yes, of course. If I had deemed the reference important, I would
23 have included it in the footnotes without any problem at all, and it was in fact
24 paragraph 14.

25 Q. [10:15:07] Okay. So, again, the references were important enough -- in fact,

1 they were your sole source for the content for these constitutional decrees -- they were
2 the basis upon which you make the comments about these decrees in your report, but
3 they were not important enough for you to cite here; is that fair?

4 A. [10:15:28] Yes. Put yourself in the shoes of a researcher who spent 2012-2013 in
5 Sudan who studied those decrees, who knows about them, but who was simply
6 looking for -- to identify some of them to include in a report without necessarily
7 analysing them.

8 Q. [10:16:03] Okay, thank you, sir. I think we can move forward.

9 Let's go to paragraph 16 of your report, which relates to the place of Sudanese
10 customary law in the jurisprudential theory of the hierarchy of sources of law.

11 Okay, sir, so, in this paragraph 16 you refer to some Sudanese laws and cases in order
12 to demonstrate that, among other things, a custom is a subsidiary source or
13 subsidiary formal source of Sudanese law; yes?

14 A. [10:16:56] Yes, that is correct.

15 Q. [10:17:06] And in that context, sir, within this paragraph you refer to the case of
16 Maurice Goldenburg v Rachel Goldenburg, a 1958 judgment, which you also quote
17 from. I think we established yesterday you didn't have a copy of that case when you
18 wrote your reports; yes?

19 A. [10:17:38] This is -- I'm happy that you read paragraph 16. It is an illustration
20 of the method in which I carried out my research in Sudan. For article 83, I found
21 myself in a situation to look at elements like this, and it was shown to me, but it was
22 not given to me, so I was able to consult those documents but I did not have a copy.
23 And then I relied on an article of that professor who published on those topics so as to
24 be able to corroborate the elements. This was the beginning of my research in my
25 doctoral thesis in the University of Khartoum.

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 Q. [10:18:40] Okay. So, to break that down, you're saying you did read a copy of
2 the case in 2012; is that right?

3 A. [10:18:47] I read a copy of the law, and the judgment was shown to me by the
4 professor of the University of Khartoum. He showed me excerpts that he used in his
5 articles, but I did not have access to the judgment itself as a whole.

6 Should I repeat?

7 Q. [10:19:24] That's clear, sir. And when was this that you saw the extracts of the
8 judgment?

9 A. [10:19:32] It was in the office of this professor in the faculty of law, University of
10 Khartoum. I met with him shortly after my arrival. I don't remember. This was in
11 2012, and he presented to me his sources on this case, but especially on the law of '83.
12 And that law, in fact, I was incapable of finding it myself subsequently.

13 PRESIDING JUDGE KORNER: [10:20:11] (Microphone not activated) Mr Jeremy,
14 I'm sorry, I tried to grasp this.

15 You met this professor when you arrived, he told you about this case; is that right?

16 Let's break this down.

17 THE WITNESS: [10:20:35](Interpretation) He talked to me about this case and he
18 showed me his notes and excerpts of the case, then articles of this law of '83.

19 I asked for copies but he said he would give me copies after he had published his
20 article on that subject, but he never gave me any copies. He should have done that at
21 that time, but he didn't do it, and he was a colleague.

22 PRESIDING JUDGE KORNER: [10:21:14] Then the information that you give at the
23 end of the paragraph that the Sudanese Supreme Court first implemented this
24 characterisation in this case, from where did that information come? From the
25 professor?

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 THE WITNESS: [10:21:40](Interpretation) Yes, it came from the professor and from
2 his publications on that particular subject. He had access to the documents and I do
3 not have any reason to doubt what he said because he showed me a part or parts of
4 those documents.

5 PRESIDING JUDGE KORNER: [10:22:01] But if you don't say that in the report, and
6 in your thesis - I take it this is where you got it from - how is anybody to assess
7 whether that information is accurate or not?

8 THE WITNESS: [10:22:24](Interpretation) *A priori*, in the thesis, you will have
9 references to the articles of that professor and clarifications on agreements on some
10 certain points that were raised. We talked about it, and since these elements were
11 mentioned in the thesis, and I mentioned the thesis in the report, I did not think it was
12 necessary to include them.

13 It was validated by the doctoral procedure, the defence of the thesis, by the
14 council -- the National Council of Universities. I never hid my sources of my
15 research in Sudan. I told you yesterday that, in the translation of my thesis, I say
16 where the primary sources are and the secondary sources, so there is no confusion on
17 those issues.

18 PRESIDING JUDGE KORNER: [10:23:54] So does that mean that in your thesis, as
19 opposed to in this report, it was clear from that that this was a secondary source that
20 you were using?

21 THE WITNESS: [10:24:13](Interpretation) Yes, *a priori*, I can verify, but I think so,
22 yes.

23 PRESIDING JUDGE KORNER: [10:24:19] Okay, thank you.
24 Sorry, Mr Jeremy.

25 MR JEREMY: [10:24:28]

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 Q. [10:24:28] You have your thesis there, so I think maybe -- not right now, but I
2 think in -- well, we can -- actually, we can take you to the relevant page and perhaps
3 you can verify now. So I think it's page 89 of your thesis?

4 A. [10:25:31] Yes.

5 Q. [10:25:34] So if I understand correctly, sir, here with this reference, you're
6 just -- you're referring to this basic -- the Judgment (Basic Rule) Act of 1983. You also
7 refer to the Goldenburg case, but you don't refer to any academic writing about those
8 cases? You don't refer to any conversations with professors about those -- about that
9 case or that act; is that accurate?

10 A. [10:26:12] It does not appear there, but I think it appears in the article that I
11 mentioned yesterday, published in the Brill editions and he himself published an
12 article, but there are other passages in this thesis where I directly quote that professor.
13 I'm looking --

14 Q. [10:26:48] We're focused on your PhD thesis and we're focused on this particular
15 act in 1983 and this particular case, that's our focus.

16 A. [10:27:04] Very well.

17 Q. [10:27:05] So, if I understand correctly, there are no -- in relation to that act, that
18 case, there are no additional references to a conversation with a professor or to any
19 secondary text?

20 A. [10:27:17] Not there, no.

21 Q. [10:27:23] Okay, let's move forward, sir. It's the same topic, paragraph 16, and
22 you refer there to Sudanese laws on civil and criminal proceedings. You mention it
23 at the start of the paragraph and you go on to refer to the Civil Procedure Act of 1974.
24 You refer to a section of it. And then the 1983 and 2003 amendments to that act.
25 Can we agree that you didn't have copies of those acts when you wrote your report?

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 A. [10:28:28] When I wrote the report, yes, that's okay.

2 Q. [10:28:34] So you didn't -- just to clarify, you didn't have copies of those acts
3 when you wrote this report?

4 A. [10:28:42] Yes, that is what I said, yes.

5 Q. [10:28:49] Okay. So can I take it that what you write about those acts in the
6 report is based on what others have written about them? Is that fair?

7 A. [10:29:01] No, it's not like it was for the constitutional decrees. This is
8 information that I had from my exchanges in Sudan with academics from their
9 articles, and in certain cases the possibility of actually looking at certain provisions of
10 those laws. But that was during the period when I was in Sudan, because it also
11 appears in my thesis.

12 Q. [10:29:50] Okay, so, based on exchanges with academics. But we can agree in
13 this section you don't cite any of those interviews in the way you do in other sections?

14 A. [10:30:05] Yes, that is correct.

15 Q. [10:30:20] Okay. Let's move forward, please, to paragraph 18, sir. So there
16 you refer to the constitutions of the federated states of Sudan. Can we agree that
17 you didn't have access to any of the states' constitutions for Darfur prior to 2005?

18 A. [10:31:03] Yes, yes, that's quite so, quite true.

19 Q. [10:31:10] Okay, moving forward, paragraph 19, you refer to two laws -- the
20 Local Government Act of 1971, Regional Government Act of 1981. We can agree that
21 you didn't have copies of those acts when you wrote about them in this report?

22 A. [10:31:40] No, indeed. Those were texts that I informed myself about, they
23 were historical texts, and I also read some reports from researchers working on
24 Darfur who published in NGO publications, in NGO reports. There was no quote of
25 those sources in the report, no.

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 Q. [10:32:15] Okay, that's clear, thank you, sir.

2 Focusing on the 2003 and '04 period, can we agree that you don't cite any records
3 from local government or state parliament in the former West Darfur state for 2003
4 and '04 in your report?

5 A. [10:32:56] That is correct.

6 Q. [10:33:00] Okay. So, earlier we discussed the notes of the interviews that you
7 took during your field work in Darfur between -- sorry, in Sudan for this two-year
8 period between 2012 and 2016.

9 A. [10:33:27] Yes.

10 Q. [10:33:30] And, as we've agreed, you rely on those interviews for a number of
11 the assertions in this report. I want to refer you to footnote 18 of your report of
12 paragraph 20, and this relates to the territorial organisation of Sudan. So I'm just
13 interested in the very first part of that footnote 18 where you say:

14 "Information on the territorial organisation of Sudan was gathered during various
15 interviews, the most instructive of which on this point were: interviews with
16 representatives of the SCE [...]" which I understand is the Sudanese council of
17 churches, and an interview with an individual who perhaps -- I'm not sure if I can
18 name him, but I -- I won't name him for now, but we can all see the name of that
19 individual.

20 Do you see that?

21 A. [10:34:57] (Speaks English) Yeah.

22 Q. Okay. So --

23 PRESIDING JUDGE KORNER: [10:34:58] Sorry, what was the place of the
24 organisation -- association, sorry.

25 THE WITNESS: [10:35:10](Interpretation) It is an organisation that provides

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 assistance to Sudanese IDPs who live in the slums of Khartoum, who face the hostility
2 of state authorities. So there you have it. It's an association managed by Sudanese
3 lawyers.

4 MR JEREMY: [10:35:49]

5 Q. [10:35:47] Okay, sir, so, as I mentioned at the start of my questioning, you kindly
6 provided us with the notebooks of your -- of the interviews that you carried out and
7 you also provided us with an itemised list of the interviews within those notebooks,
8 breaking down the names of the individuals you interviewed. I didn't see any
9 interview with this particular individual referenced in the footnote.

10 A. [10:36:32] I can guarantee you I did meet with that person. On the other hand,
11 the notebooks that I provided you with were not all the networks. They are the ones
12 that I found in a box in a barn in a region of France. I've moved house many times in
13 recent years and I don't know where the missing notebooks are, and I'm sorry about
14 that, because the missing notebooks are much more in number than the actual
15 notebooks I have provided to you, but I do remember taking notes during this
16 interview. In some cases, I did not take notes, but I am quite sure that I did take
17 notes during that particular interview.

18 I provided you with some notebooks; other notebooks, no.

19 Q. [10:37:25] Okay. No, no, that's well understood, sir. For the other source, this
20 Sudan church council, this is the one that you were discussing yesterday, I think, in
21 the context of the expropriation and destruction of churches in the greater Khartoum
22 area; is that right?

23 A. [10:37:49] To some extent, but in actual fact the members of this church are
24 members of the Nuba group and I was trying to get information these people when I
25 interviewed them. And thanks to them, I was able to understand the organisation,

1 the territorial organisation of Sudan. I should add that the members of the SCE, I
2 met with them on several occasions, and when I contacted them, that is when I
3 learned how to modify my interview techniques, and rather than putting specific
4 predetermined questions, instead I changed my methods somewhat and did not
5 necessarily take notes.

6 Q. [10:38:59] What was the particular specialism of those individuals in Sudanese
7 territorial organisations?

8 A. [10:39:08] No, no, no. They weren't people from the Sudanese territorial
9 administration; they were community representatives, members of the IDP
10 community.

11 In actual fact, they were religious people and this council of churches of Sudan was
12 developing common strategies with a view to securing their interests. But those
13 people all came from South Kordofan and many of them had experienced armed
14 conflict.

15 Q. [10:39:57] Okay, it may be that I wasn't clear enough, and that's my fault, but
16 you cite this church body in support of your opinion in relation to the territorial
17 organisation of Sudan. So my question is what was -- just give us a brief overview of
18 their relevance, their expertise on this particular issue?

19 A. [10:40:32] With them I was able to discuss the recent history, the division of
20 territory in Kordofan between 2011 -- well, between 2005 and then 2011 when warfare
21 resumed in that area, so I was able to talk to them about a number of concepts that I'd
22 become aware of in academic publications, *malihayat muhafazat waliyat*. General
23 information that made it possible to clarify their understanding -- to better
24 understand these people who were on a day-to-day basis confronted with the
25 Sudanese administration. Oh, just a moment. Wait.

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 I should have -- I should check, but I believe I know that they provided me with an
2 academic publication - this goes back a while - and it's quite possible that one of those
3 articles had to do with those issues. It was an article written by one of their
4 colleagues, a university person. I would have to double-check. I can't confirm that.
5 Beyond those discussions, I mean. I'm taking note of that point.

6 Q. [10:42:09] Okay. But I take it we won't be able to confirm that by looking at
7 your report because that article, if it exists, isn't referenced in the report; is that
8 correct?

9 MR EDWARDS: [10:42:24] Your Honour, perhaps if that sort of assertion is going to
10 be made by my learned friend, it would be fair to allow the witness to have a look at
11 footnote 16 in his report, because, in addition to the interview that is referenced that
12 my learned friend has been asking the witness about, is a myriad of articles. So to be
13 fair, I think, for the witness to be able to look at those articles to see if he can satisfy
14 my learned friend.

15 PRESIDING JUDGE KORNER: [10:42:53] The articles or just -- or the footnote?

16 MR EDWARDS: [10:42:56] Well, the articles cited in the footnote.

17 PRESIDING JUDGE KORNER: [10:43:00] Right. Yes, well, it seems fairly fair.

18 MR JEREMY: [10:43:05] Absolutely. I'd welcome that, Madam President.

19 MR EDWARDS: [10:43:24] So in terms of what is on the screen, what we have on the
20 screen are footnotes 12 to 16 of the expert report.

21 The footnote that the witness needs to look at will be on the -- at the bottom of the
22 next page, page 12 of 59, I think.

23 MR JEREMY: [10:44:20]

24 Q. [10:44:21] So, sir, do you see the article that you had in mind here in footnote 18?

25 A. [10:44:28] No. Those are articles that were published in -- by various European

1 publishing houses. The article in question was a university article from Sudan that
2 was circulated from one person to the next. It's not the same kind of publication.

3 Q. [10:44:56] That's clear, sir. That was also my understanding.

4 Let's move forward to paragraph -- well, to the subject at "The Place of Public
5 International Law in Sudan", paragraph 73.

6 Okay, sir, so, in terms of your interpretation of the 1998 act - I'm not going to go
7 through that now - we can agree that you don't cite to any academic sources here to
8 support your argument?

9 A. [10:46:04] Well, that's the argument of my thesis. You'd have to look at the
10 chapters in my thesis, the last two chapters of my thesis.

11 Q. [10:46:32] Okay.

12 A. [10:46:34] You'll find many academic references there.

13 Q. [10:46:36] Okay, but there wasn't a specific academic article that you cited in
14 support of your arguments, just relating to the 1998 constitution I'm focused on now.
15 So we established that was mentioned once in your 700-page thesis. And I just want
16 to make -- I want to give you the opportunity just to confirm that there are no -- you
17 don't cite to any academic sources in relation to your interpretation of that 1998
18 thesis -- or constitution?

19 A. [10:47:12] No. That is -- that is correct.

20 Q. [10:47:23] And we can also agree that you don't cite to any case law relating to
21 the interpretation or supporting your interpretation of this 1998 constitution?

22 A. [10:47:40] 1998? No. Previous? Yes. You mentioned the case a few
23 moments ago.

24 Q. [10:47:59] Okay, but I'm focused on the 1998 constitution, since, as you make
25 clear in your report, that was the relevant one for the acts charged in this case for 2003

1 and 2004.

2 Moving forward to paragraph 84 in relation to international custom, you take the
3 position that this is not directly contemplated by states jurisprudence. Can we agree
4 that you don't cite to any jurisprudence for that assertion?

5 A. [10:48:49] For '98? No, indeed.

6 Q. [10:48:55] Sorry, for paragraph -- yes, paragraph 84, yes, and in relation to the
7 1998 constitution. Yes, thank you.

8 Also in paragraph 84, sir, you say that according to available sources, there's no
9 indication that the Sudanese state has systematically transposed the rules of
10 customary international law. And, again, we can agree you don't cite any sources,
11 any academic sources, any case law to support that?

12 A. [10:49:53] I'm trying to locate exactly which part of paragraph 84 you're
13 referring to.

14 Q. [10:50:04] Forgive me, sir. It's halfway down, about the fifth sentencing
15 beginning:

16 "However, according to the available sources, there is no indication that the Sudanese
17 state has systematically transposed the rules of customary international law".

18 A. [10:50:43] Yes, I don't have a source. I don't have a source that would allow me
19 to confirm that. That's correct.

20 PRESIDING JUDGE KORNER: [10:50:50] Who are the available sources for the
21 purposes of this assertion?

22 THE WITNESS: [10:51:01](Interpretation) It's the contrary, your Honour. I'm
23 specifying that I don't have sources about this matter; namely, the transposition. I
24 don't have information that allows me to observe that there has been transposal of
25 international law into Sudanese domestic law. I'm saying that I don't have any

1 sources that indicate that there was a transposal.

2 PRESIDING JUDGE KORNER: [10:51:35] No, you say the opposite, but the sentence
3 begins, "However" - I suppose I ought to look at the French as well - "according to the
4 available sources". No, it doesn't begin like that in the French? Let me have a look,
5 okay.

6 THE WITNESS: [10:52:02](Interpretation) If I could quote from the French text
7 slowly, I will begin with the previous: It is, therefore, on the basis of transposition
8 practices that the application of customary international law, whether humanitarian
9 or human rights law, can be determined. However, according to the available
10 sources, namely the resources that I have at my disposal, nothing indicates -- there is
11 no indication that the Sudanese state has systematically transposed.
12 Then I go on to say -- well, I observe that there's only transposal for the armed forces.
13 No, I don't see any direct reference.

14 PRESIDING JUDGE KORNER: [10:52:58] I'm sorry, it's the same in French as it in
15 English. I may be losing the plot, which is perfectly possible, but you are saying
16 there isn't any indication that there -- that the Sudanese had systematically transposed
17 the rules of customary international law.

18 But the sentence begins -- and in French and in English -- "according to available
19 sources".

20 So, does that mean that having discussed this with people, they said there isn't any
21 indication that it's been systematically transposed, or was this discussion, was this
22 articles? What? As you hadn't read the actual acts themselves.

23 THE WITNESS: [10:54:13](Interpretation) All of that, indeed. On the basis of
24 discussions with university people and academic reading and, your Honour, also in
25 some cases I did have access -- I said this yesterday, I did have access to certain laws.

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 I never saw any legislative provisions from Sudan making direct reference to
2 international legal instruments before I was able to access the armed forces act of 2007.
3 It is quite clearly set out there. Going by the information that I had, your Honour, if
4 I could put it that way.

5 PRESIDING JUDGE KORNER: [10:55:01] Yes, but are you actually saying in this
6 paragraph that until 2007, there had been no transposition or that you didn't know
7 one way or the other from your sources?

8 THE WITNESS: [10:55:22](Interpretation) It is rather -- it's rather that, your Honour.
9 I can see that part of my report as something cautious. According to my information,
10 I never saw any practices of transposing -- I'm not saying that it never happened. To
11 my knowledge, in light of the information that I had available, I did not see any such
12 thing. So I'm not pre-judging.

13 PRESIDING JUDGE KORNER: [10:56:00] Then why don't you say so? That's what
14 I'm trying to -- why don't you say, "I never saw any indication that the Sudanese state,
15 until 2007, actually incorporated rules of customary international law into its
16 legislation"? Why not say something as simple and straightforward as that?

17 THE WITNESS: [10:56:32](Interpretation) Your Honour, I have understood how the
18 report -- well, the language may be a bit convoluted but, according to available
19 sources, according to the information I had available, that is what I mean, your
20 Honour. I'm not saying anything else than that, your Honour.

21 PRESIDING JUDGE KORNER: [10:56:58] Right.

22 MR JEREMY: [10:57:09] Okay, thank you, sir.

23 I think we can move forward and we'll go to *ghanima* and *hiraba*, which Mr Edwards
24 discussed with you yesterday.

25 PRESIDING JUDGE KORNER: [10:57:31] In that case, Mr Jeremy, we'll take the

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 break at this stage, yes.

2 So we'll take the break now until 11.30. Thank you.

3 THE COURT USHER: [10:57:41] All rise.

4 (Recess taken at 10.57 a.m.)

5 (Upon resuming in open session at 11.34 a.m.)

6 THE COURT USHER: [11:35:00] All rise.

7 Please be seated.

8 PRESIDING JUDGE KORNER: [11:35:16] Just before we go on, just on questions of
9 timing, Mr Jeremy, how much longer do you think you're going to be?

10 MR JEREMY: [11:35:30] I would estimate half an hour to 45 minutes.

11 PRESIDING JUDGE KORNER: [11:35:35] Right.

12 Do you know if you're going to have re-examination, Mr Edwards?

13 MR EDWARDS: [11:35:39] (Microphone not activated)

14 PRESIDING JUDGE KORNER: [11:35:40] All right, well, in that case -- and then

15 we'll deal with the legal submissions. I think you object -- who's the onus on then?

16 I'm trying to think. If there was -- in a voir dire it would be -- the onus would be on
17 the person wanting to call them. So, yes, I think you go first, Mr Edwards. And

18 then you go second, Mr Jeremy. And if we can complete legal argument by the
19 lunch adjournment, we won't sit this afternoon and we'll give you a ruling by email.

20 As I said, if we're against you, or partly against you, I think we'll say that, but we'll
21 give full reasons later.

22 MR EDWARDS: [11:36:40] Yes.

23 PRESIDING JUDGE KORNER: [11:36:41] I'm taking -- if we accede to your
24 application in full, then you won't require reasons.

25 MR EDWARDS: [11:36:46] We won't, no.

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 PRESIDING JUDGE KORNER: [11:36:48] Will the Prosecution require reasons? I'm
2 you're entitled to them, so if you want them, Mr Jeremy --

3 MR JEREMY: [11:37:02] Yes, Madam President.

4 PRESIDING JUDGE KORNER: You do? You do?

5 MR JEREMY: Please.

6 PRESIDING JUDGE KORNER: [11:37:03] All right. Well, then, as I said when we
7 discussed this originally, we'll give the ruling, but we'll give full reasons, I would
8 hope, by next week.

9 MR EDWARDS: [11:37:13] Thank you.

10 We've just received copies of the edited versions of the transcripts.

11 PRESIDING JUDGE KORNER: [11:37:19] Oh, good.

12 MR EDWARDS: [11:37:20] I'm not going to have an opportunity to look through
13 those before I'm on my feet making submissions, but your Honours will have the
14 advantage of the edited transcripts -- not corrected and certainly not corrected in
15 terms of accuracy of translation at this stage. But I think I can make my submissions
16 without -- without the need for our having made those corrections to the transcript.
17 I think -- I think I have enough to go on without exercising the process in that regard.

18 PRESIDING JUDGE KORNER: [11:37:55] Well, obviously, if you can look at it
19 overnight so that if Dr Gout then gives evidence, as it were, in the main trial, then it's
20 probably just as well to check that what's done there is accurate.

21 MR EDWARDS: [11:38:18] Yes.

22 PRESIDING JUDGE KORNER: [11:38:19] As I say, if we do accede to your
23 application in whole or in part, then we don't need to go through everything that
24 we've already covered. It's not like having a jury.

25 MR EDWARDS: [11:38:32] No.

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 PRESIDING JUDGE KORNER: [11:38:33] All right, yes. Thank you.

2 Yes, Mr Jeremy.

3 MR JEREMY: [11:38:38] Thank you, Madam President, your Honours.

4 Q. [11:38:43] So, Dr Gout, we finished the last session with my introduction of the
5 topic of *ghanima* and *hiraba*.

6 A. [11:38:58] With the agreement of the Court, if you can remind me of your
7 observations before the break.

8 Q. [11:39:12] Yes. So I think I didn't get to the point of making any observations;
9 rather, I just announced that topic, that we would begin to discuss *ghanima* and *hiraba*,
10 which I will now proceed to do.

11 A. [11:39:30] I wanted to contest one of the observations that you made this
12 morning on my thesis.

13 PRESIDING JUDGE KORNER: [11:39:39] Yes, all right. You mean you want to
14 correct something you said?

15 THE WITNESS: [11:39:44](Interpretation) No, something that the OTP said.

16 PRESIDING JUDGE KORNER: Okay.

17 THE WITNESS: [11:39:52] (Interpretation) During the break I did not have the time
18 to verify at length, but I do not understand why you referred me to page 80 -- 93 of
19 my -- of my thesis, whereas the article in question is mentioned before that, not on
20 page -- I think page 74. You sent me to page 89 and that article was mentioned
21 several times on page 74, footnote 78.

22 MR JEREMY: [11:40:36]

23 Q. [11:40:33] Okay. Thank you for that clarification, sir.

24 Okay, so, turning to *hiraba* and *ghanima*, yesterday, you explained to my colleague the
25 extent of your experience in Islamic law. We won't revisit that now.

1 We can agree that your PhD thesis doesn't reference the terms *hiraba* or *ghanima*.

2 A. [11:41:23] You are absolutely correct, and I specifically avoided using these
3 terms because they do not -- they're not in alignment with the practical laws that
4 I dealt with in my thesis.

5 Q. [11:41:48] Okay, and I'm correct in thinking that you've never written any
6 academic articles on those concepts of *hiraba* and *ghanima*?

7 A. [11:42:03] That is absolutely correct.

8 Q. [11:42:09] Okay, I want to look at some of your sources in this section, if I may,
9 focusing on paragraph 97. The main source I see for these concepts of *hiraba* and
10 *ghanima* is this 2019 interview with a Sudanese lawyer; is that right?

11 A. [11:42:47] Yes, I confirm that and I can give clarification.

12 Q. [11:42:55] Okay, well, I'll ask a couple of question, sir, and then maybe you can
13 give the clarification.

14 Just in relation to that particular interview, we can agree that you didn't provide any
15 copy of that interview to the Office of the Prosecutor?

16 A. [11:43:17] That is correct.

17 Q. [11:43:22] And for that 2019, 20 February interview I didn't see any reference to
18 it in your -- in your thesis; is that -- that's correct?

19 A. [11:43:37] Yes, it was in the fieldwork and it was linked to my defence.

20 Q. [11:43:52] So, just for my understanding, if you think --

21 THE INTERPRETER: [11:43:55] It was before my defence -- correction.

22 MR JEREMY: [11:44:01]

23 Q. [11:44:02] So when you -- when you prepared this report and you included these
24 cites, if you didn't have notes of the interview and that interview wasn't referenced in
25 your thesis, then on what basis do you include these citations in your report?

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 A. [11:44:24] Knowledge that I had during the interviews were the first -- the first
2 information that I had on those particular points on the state -- on the state laws.

3 And, in fact, I cross-checked those information with scientific articles, and the Defence
4 asked me to produce those articles mentioned in the footnotes and I produced them.

5 So, in principle, you should have access to those articles.

6 Q. [11:45:07] Okay, but --

7 PRESIDING JUDGE KORNER: [11:45:07] (Microphone not activated) Can you just
8 say that again? I don't follow that.

9 THE WITNESS: [11:45:20](Interpretation) I cross-checked my information of 2019 by
10 looking at scientific articles of Islamic experts, not scientific experts, Islamic experts

11 working on the Islamisation of law in Sudan and I believe that the Court is in
12 possession of those articles and they were in the Brill publication, B-R-I-L-L.

13 PRESIDING JUDGE KORNER: [11:46:11] Okay, just so I clearly understand this,
14 although you weren't -- although you didn't include anything about these concepts in
15 your thesis, you had notes of the interview you had had with the Sudanese lawyer in
16 2019, and you used those as a basis for your assertions in paragraphs 97 onwards,
17 having cross-checked the information he gave you with articles by other academics; is
18 that the situation?

19 THE WITNESS: [11:47:08](Interpretation) Yes, that is correct. I would like to point
20 out that that Sudanese lawyer is also an academic, I provided his thesis to the Court,
21 it would appear to me, your Honour.

22 PRESIDING JUDGE KORNER: [11:47:26] Yes, all right, Mr Jeremy.

23 MR JEREMY: [11:47:30]

24 Q. [11:47:31] I think I'm a bit confused, sir, because I thought you told us that you
25 didn't have the notes of this 20 February 2019 interview when you wrote the report

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 and that's why you didn't provide a copy of those notes; is that accurate?

2 A. [11:47:57] I misunderstood. I do not have the notes. It was during my
3 exchanges with his lawyer that I know, that I saw frequently in Sudan, and I verified
4 by reading academic articles from -- by Islamic specialists, Islamologists.

5 PRESIDING JUDGE KORNER: [11:48:27] Are you saying, therefore, that you
6 started -- you didn't -- I thought you were saying you had the interview even though
7 you haven't got it now. But you started with your recollection of a conversation that
8 you had had four years before in -- on 20 February of what he had told you; is that
9 how -- is that what you're saying?

10 THE WITNESS: [11:48:55](Interpretation) I saw that lawyer on 20 February 2019,
11 and I introduced a young PhD student who needed legal information, so I did that
12 and I --

13 PRESIDING JUDGE KORNER: [11:49:12] Please just answer my question. I don't
14 want the full history.

15 The question was: Is it your evidence that you started with your recollection of a
16 conversation that you had in 2019 because you did not have any notes with you?

17 THE WITNESS: [11:49:36](Interpretation) Yes, I complemented it with the articles
18 that I provided, your Honour.

19 MR JEREMY: [11:49:52]

20 Q. [11:49:53] Okay. Thank you, sir.

21 Moving on, the next paragraph, 98, this penal code of 1983, I think we've established
22 you didn't have a copy of that when you wrote the report.

23 A. [11:50:11] Mm-hmm. Yes, that is correct.

24 Q. [11:50:20] Okay. And moving down the same paragraph, 98, we see the
25 reference to a case, the Government of Sudan v Mubarak Yunis Hamad et al, 1997.

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 We can agree that you also didn't have a copy of that case when you -- when you
2 quoted it here in your report?

3 A. [11:50:48] No. I never had a copy of that judgment. I heard about it and saw
4 it dealt with in the scientific article that I provided to you, but I have no copy.

5 MR EDWARDS: [11:51:07] Your Honour, forgive me, and it might not be a
6 very -- might not be the most important point, but we keep having a translation of the
7 word "*scientifique*", scientific, as "scientific". It's been explained that that is an
8 incorrect translation of what the witness is saying.

9 PRESIDING JUDGE KORNER: [11:51:27] So what -- I-- it's -- I mean, for these
10 purposes, Mr Edwards, you can rest assured that I now understand, and as do my
11 colleagues, that scientific means academic.

12 MR JEREMY: [11:51:49]

13 Q. [11:51:49] Okay, sir, so also in this section we can agree that you -- you don't cite
14 to any other case law, any Islamic jurisprudence on these issues of *hiraba* and *ghanima*?

15 A. [11:52:13] You are correct. By re-reading that article, that case mentioned is a
16 core case in the Sudanese law and is characteristic of certain legislation in Sudan; yes,
17 that's correct. Certain institutions.

18 Q. [11:52:44] Okay, thank you, sir.

19 I'm also right in suggesting that you didn't -- you didn't consult any Sudanese
20 military experts on these concepts of *ghanima* or *hiraba*; yes?

21 A. [11:53:07] Maybe I should clarify something. It is true that I had very little
22 contact with Sudanese soldiers or ministers; but, on the other hand, when it came to
23 confirm things in Darfur, my main sources were members of rebel movements or
24 former rebel -- members of rebel movements who were able to provide information,
25 at least on certain points.

1 Q. [11:53:43] Okay, so, if I understand correctly, the answer is no, you didn't
2 consult any Sudanese military experts on the concepts of *hiraba* and *ghanima*?

3 A. [11:53:59] No, it did not correspond to the subject of my doctoral research, so
4 there was no reason for me to do that.

5 Q. [11:54:09] That's -- that's clear, sir.

6 Okay. Let's move forward, please, to topic 5.1. And that relates, sir, to this state of
7 emergency, some of the special courts that you were asked about yesterday.
8 So if I understood correctly, yesterday you confirmed that the special courts,
9 specialised courts, by which I mean the courts operating in Darfur, you know,
10 between 2001, '05, '06, they didn't feature in your PhD thesis?

11 A. [11:55:09] That is correct.

12 Q. [11:55:12] And my understanding, having read the academic articles that you
13 cite in your CV, was that you would also not written specifically about those courts
14 during that period. Yesterday, you were shown one article, I think, relating to 2020.
15 It was this tribulations of the international criminal law: a chronicle of legal
16 proceedings targeting the former Darfur president; do you recall that?

17 A. [11:56:07] Yes, I remember that.

18 Q. [11:56:12] And just to clarify, in relation to that article, you thought it may
19 mention a special court, and it does. It relates to the possibility of a special court in
20 relation to Omar Al-Bashir in this 2019 period; does that sound correct?

21 A. [11:56:38] Yes, it seems to me that I was mentioning a court set up in 2005, a
22 special court for Darfur, but it is not that court set up in 2001 or 2003, which is in that
23 article, it seems to me.

24 Q. [11:57:00] Okay, I don't think it's worth doing now, but we -- I read that article
25 last night. I couldn't see any reference to any special court other than for this later

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 2019 period. I don't think we need to look at it now, but, I mean, we can if you'd like
2 to.

3 PRESIDING JUDGE KORNER: [11:57:20] I rather think we should, Mr Jeremy, I'm
4 sorry. Has he got the article there?

5 THE WITNESS: [11:57:28](Interpretation) Very well.

6 MR JEREMY: [11:57:32] If it's not in that binder, we'll email a copy right now for you,
7 court officer.

8 PRESIDING JUDGE KORNER: [11:57:29] Right, yes.

9 THE WITNESS: [11:57:39](Interpretation) I would like to point out that it is exactly
10 what I said yesterday, that that article did not refer to a special court or specialised
11 courts.

12 MR JEREMY: [11:57:52]

13 Q. [11:57:53] Okay, I mean, if we can agree the article doesn't refer to those courts
14 for the 2001 to '06 period, then I don't think it's necessary to look at the article, unless
15 your Honours would like to.

16 PRESIDING JUDGE KORNER: [11:58:04] But I thought there was a disagreement.

17 MR JEREMY: [11:58:08] So did I.

18 PRESIDING JUDGE KORNER: [11:58:10] So you agree, you don't -- in that article
19 there's no mention of the special or the specialised court?

20 THE WITNESS: [11:58:16](Interpretation) I think maybe I was very fast yesterday
21 for translation, but that's what I said. There was no reference to special or
22 specialised court, but only to the court established in 2005. So we agree on that.

23 MR EDWARDS: [11:58:47] If I'm given two or three minutes, I might be able to come
24 to some sort of admission about it.

25 MR JEREMY: [11:58:57] Okay. Then we'll move forward and maybe we'll come

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 back.

2 And for Mr Edwards, the last couple of pages of that report I think are the relevant
3 ones. Sorry, the article.

4 Q. [11:59:31] Okay, staying with this topic, sir. At paragraph 102, you refer to the
5 application of the national state of emergency in Darfur. You say this was clarified
6 in 2001 by decrees adopted by the governors of the three former federal states of
7 Darfur.

8 You don't cite to those decrees and I think we can agree that you don't have copies
9 of those decrees; yes?

10 A. [12:00:19] It seems to me that I have a copy of one of those decrees. I can verify.
11 I believe I provided the Defence with one of those decrees -- 2001 -- having realised in
12 the NGO reports that the various decrees were substantially similar. I can verify
13 that.

14 Q. [12:00:50] Okay. We can check that.

15 (Counsel confers)

16 MR JEREMY: [12:00:55]

17 Q. [12:00:56] Our understanding, sir, is that you did provide a decree relating to
18 the establishment of the special court at Al Fasher.

19 A. [12:01:14] Yes.

20 Q. [12:01:15] Which I understand to be different to the state of emergency decrees.

21 MR EDWARDS: [12:01:24] Your Honour, if it assists, this constitutional decree of
22 2001 is item 15, at tab 15 of our bundle.

23 MR JEREMY: [12:01:43]

24 Q. [12:01:43] Okay, sir, and we agree that that decree doesn't relate to any of the
25 states of emergency decrees you're discussing in this paragraph?

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 A. [12:01:53] Yes, you're correct. The decree of 1991, declaring the state of
2 emergency.

3 THE INTERPRETER: [12:02:10] Interpreter correction: These are not the decrees of
4 1999.

5 MR JEREMY: [12:02:19] Thank you.

6 Q. [12:02:19] Okay. I want to look at another source, please, sir, in this section,
7 paragraph 102, where you refer to an interview with an individual -- I'm not sure if
8 I can mention him, but an individual from the University of Khartoum; that's in
9 footnote 127.

10 Again, we can agree that you didn't provide the Prosecution with any notes of that
11 interview?

12 A. [12:03:06] No. That is correct.

13 Q. [12:03:07] And in relation to this particular interview with this professor, which
14 you date as 15 April 2014, I also didn't see any reference to that in your PhD thesis.

15 A. [12:03:30] Obviously, you're completely correct. To my mind, that's not a
16 contradiction. My thesis didn't have to do with such issues, so I had no reason to
17 refer to that element from the interview.

18 Q. [12:03:47] To be clear --

19 PRESIDING JUDGE KORNER: [12:03:50] Did you have the interview with you
20 when you wrote this report?

21 THE WITNESS: [12:03:59](Interpretation) No, I didn't have the notes from the
22 interview with me, but this is a colleague that I have worked with and I know that we
23 talked about it at the time when we met one another to work in Khartoum. It's based
24 on my professional dealings with him. I don't have all my notes for all my
25 interviews, as I've mentioned this morning, your Honour.

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 PRESIDING JUDGE KORNER: [12:04:31] I fully understand that. But are you
2 telling the Court that in -- between June and August of this year, you were able to
3 recall the exact date -- that is, 15 April 2014, when you had a conversation with this
4 man -- and that you recalled you had a conversation in which he told you that the
5 trial bench in the special court in North Darfur was one civilian judge and two
6 military, the latter of whom were not required to have any legal training?

7 You were able to recall all of that effectively nine-and-a-bit years later, without it
8 appearing in your thesis either?

9 THE WITNESS: [12:05:41](Interpretation) I remember quite well discussing this with
10 him. Obviously, I checked the information that I remembered and I-- I remember
11 speaking to him about that in April 2014. I met with him at that time. We
12 discussed it at the time. I needed that information to determine whether or not it
13 was relevant for my work. And perhaps my recollections are not quite as accurate as
14 that, but I do remember he talked about the make-up of that particular court, and
15 I remember...

16 PRESIDING JUDGE KORNER: [12:06:33] Remembered what? Sorry.

17 THE INTERPRETER: [12:06:40] Apologies from the booth. The last sentence was:
18 Since he was shocked, your Honour.

19 THE WITNESS: [12:06:48](Interpretation) I'm sorry. He talked to me about the
20 make-up of the court and he was shocked by it. Shocked. Shocked.

21 PRESIDING JUDGE KORNER: [12:07:04] Again --

22 THE WITNESS: [12:07:06](Interpretation) The lack of legal training, you see. That
23 was shocking to him.

24 PRESIDING JUDGE KORNER: [12:07:11] Okay. How were you able to so
25 accurately to remember the exact date? Did you have a note of that somewhere?

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 THE WITNESS: [12:07:29](Interpretation) In principle, either I have notes with me or
2 I check my mails to see when we met. That's how I was determine -- that's how
3 I was able to determine exactly when I had contact with a particular person to discuss
4 a particular matter. So I check with the information that I have at hand.
5 I met him at that time, in 2014, and we talked about these issues briefly.

6 It seems to me that it wasn't the only source I gave for this paragraph.

7 PRESIDING JUDGE KORNER: [12:08:13] Okay. Yes, thank you.

8 THE WITNESS: [12:08:19](Interpretation) If I could add something, counsel.

9 The same holds true for footnote 125. I-- I can provide a date by looking in my mails
10 or checking my notebooks to see whether the interview was recorded in my
11 notebooks.

12 MR JEREMY: [12:08:43]

13 Q. [12:08:44] Okay. Thank you for that, sir. Actually I also want to look at
14 footnote 134. This is the footnote to paragraph 103. You refer to a case in Ed-Daein,
15 E-D hyphen D-A-E-I-N, and specifically you refer to an interview with a member of a
16 diplomatic mission. That's in footnote 134.

17 So, again, sir, same question. We can agree you didn't provide the notes of any of
18 those interviews, or that interview?

19 A. [12:09:42] Sir, it wasn't just an interview. It was direct testimony, because
20 I attended the *judiya* proceedings that came to that conclusion. Thanks to the contact
21 that is mentioned in footnote 134, I was able to attend the proceedings and I also,
22 during the discussion with him, understand the scope thereof.

23 Q. [12:10:14] Okay, but the citation here, this refers to "Interview with {ICR:
24 (Redacted)}," and my question is: Did you or did you not provide us with a copy of
25 that interview?

15.11.2023

Page 38

The in-court redactions are identified with {ICR: text to be redacted}

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 A. [12:10:34] I don't have a copy of the interview. I have dozens of pages of direct
2 sources and they are appended to my thesis -- dozens of pages of direct sources that
3 he provided to me.

4 Q. [12:10:54] Okay, but also in relation to your thesis, we took a look at that and
5 I couldn't see any reference to this particular interview in your thesis either; does that
6 sound right?

7 A. [12:11:13] Sir, in the thesis I analysed directly the documents gathered. It's an
8 analysis of primary sources. I didn't rely on this interview.

9 Q. [12:11:26] Okay.

10 MR EDWARDS: [12:11:30] Forgive me, your Honour, this isn't an objection but
11 there's a name that was cited at page 47, line 8 of the transcript that I think needs to be
12 redacted.

13 MR JEREMY: [12:11:42] I think we sent the request. We sent the redaction request.

14 PRESIDING JUDGE KORNER: [12:11:53] (Microphone not activated) Sorry, can
15 I interrupt on that, footnote 133 is -- you cite an interview with the same lawyer in
16 February 2019 that you were asked about before, so this is -- it comes from the same
17 conversation, because in -- you were asked about footnote 116 and it seems to be the
18 same date and the same name.

19 THE WITNESS: [12:12:33](Interpretation) No. It's another person, unless I'm
20 mistaken. The person mentioned by the OTP is to be found at 134, footnote 134; isn't
21 that so? I haven't understood.

22 PRESIDING JUDGE KORNER: [12:12:51] Sorry, I'm just asking about the footnote
23 above, which is 133. It's the same person as in footnote, if you go back one page, 116,
24 and the same date.

25 THE WITNESS: [12:13:15](Interpretation) Yes, your Honour.

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 PRESIDING JUDGE KORNER: [12:13:18] So is that right, that the information in that
2 paragraph, which is footnoted as coming from him, all of that came from your
3 recollection as well, the 35-year-old man being sentenced to six weeks'
4 imprisonment -- sorry, six years' imprisonment, et cetera?

5 THE WITNESS: [12:14:05](Interpretation) I believe I somewhat regret, slightly regret
6 omitting information that would have avoided misunderstandings -- that is to say, the
7 assembly -- well, that the -- that the Court would be interested in my directed sources
8 and my interviews.

9 What I remember was -- I remember the Zalingei special court and, you see,
10 I corroborate my information, and I did find information in NGO reports and I did
11 not think you would be interested in that, and this is an error of methodology that is
12 attributable to me and perhaps is the source of the misunderstanding, your Honour.

13 PRESIDING JUDGE KORNER: [12:14:59] Well, you've raised this and obviously it's
14 become apparent to you, but I imagine you've never prepared an expert report for
15 court before; is that right?

16 THE WITNESS: [12:15:16](Interpretation) Yes, your Honour.

17 PRESIDING JUDGE KORNER: [12:15:18] Wasn't it explained to you -- and if you
18 think this is privileged, no, because it's a letter of instruction. Wasn't it explained to
19 you, sir, that it's important for everybody that -- that you actually cite properly your
20 references for assertions that you make so that people can check them?

21 THE WITNESS: [12:15:56](Interpretation) Yes, I entirely understand, your Honour.
22 It seems -- I believe that I have shared some of the reports with the Defence and the
23 reports are found in other parts. The NGO reports are to be found elsewhere, and
24 when I had the interview information, I thought that is what they were interested in,
25 because as an expert witness, I thought they would be interested in my sources, not

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 necessarily sources that are available to the general public. I do share your
2 viewpoint.

3 PRESIDING JUDGE KORNER: [12:16:44] Yes, Mr Edwards.

4 MR EDWARDS: [12:16:46] Yes, I think to be entirely fair to the witness, the letter of
5 instructions went out, the -- the issues relating to how and when and if the witness
6 ever actually had in his hands a given article, a given legislative provision, or what
7 have you, has only very recently become apparent. It is certainly since the receipt of
8 his report, and the submission of the report, the issue relating to sources has only
9 recently -- and I see my friend is --

10 PRESIDING JUDGE KORNER: [12:17:40] (Microphone not activated) I think you
11 are giving evidence actually, rather, Mr Edwards.

12 MR EDWARDS: [12:17:45] No, it's important, your Honour, because a criticism is
13 being made and being picked up upon.

14 MR NICHOLLS: [12:17:51] This is argument for later, if anything.

15 PRESIDING JUDGE KORNER: [12:17:56] (Microphone not activated)

16 MR EDWARDS: [12:17:57] The only thing I'm interested -- the only thing I'm
17 concerned about, if I may, your Honour, is fairness to the witness.

18 PRESIDING JUDGE KORNER: [12:18:01] Well, I think if you're going to pursue this,
19 then the witness ought to leave court.

20 MR EDWARDS: [12:18:08] I'm happy to, but there are a couple of -- I certainly will
21 pick up on it in submissions. But there is a line of questioning coming from my
22 learned friend and it is being, not improperly, I hasten to add, by the bench -- with a
23 suggestion of criticism that isn't warranted in all the circumstances.

24 PRESIDING JUDGE KORNER: [12:18:35] Well, I think that that is argument,
25 Mr Edwards.

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 MR EDWARDS: [12:18:40] Yes.

2 PRESIDING JUDGE KORNER: [12:18:41] And we'll carry on and then you can deal
3 with it.

4 MR JEREMY: [12:18:46] Just on this point, the need for the sources couldn't have
5 been anticipated. I mean, Mr Edwards will recall with his witness, I think 1062, he
6 emphasised the importance of underlying notes. To quote him, he referred to
7 conclusions not being subjected to adequate and appropriate scrutiny and
8 consequently being unreliable.

9 So the idea that it couldn't have been anticipated that sources to an expert report or a
10 purported expert report being presented to this tribunal, the significance of those
11 sources couldn't have been anticipated, is little ridiculous, Madam President.

12 PRESIDING JUDGE KORNER: [12:19:28] No. No, I should have stopped you,
13 Mr Jeremy.

14 This is argument and it can be dealt with at a later stage. Let's conclude the
15 examination of this witness, or cross-examination.

16 MR JEREMY: [12:19:44]

17 Q. [12:19:44] Sir, in relation to another one of your sources, footnote 140, same
18 section. It's -- it relates to paragraph 105 and it's an interview with a political analyst
19 from a diplomatic mission in Khartoum.

20 Again, same question: You didn't provide the notes of that interview; correct?

21 A. [12:20:22] I have some reservations about speaking about that contact and the
22 Defence knows why. I don't know whether -- I'm not very comfortable with giving
23 details about this person. This was one of my main contacts in Sudan who I met
24 with almost on a daily basis who provided me with quite a bit of information for my
25 thesis.

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 Q. [12:20:51] Okay, sir, but just -- I can tell you, you have provided the name of that
2 individual, we have it, but I just want you to confirm you didn't provide the content
3 of any interview with {ICR: (Redacted)} to -- to us, as part of your sources.

4 A. [12:21:15] No. No, indeed.

5 Q. [12:21:18] Okay. Thank you, sir.

6 We can move forward -- okay, 5.1.2, "Right to security", I think we've discussed the
7 sources there earlier.

8 Yeah. Okay. The last section, sir, 5.2.1, where you refer to the People's Armed
9 Forces Act (1986) and the People's Defence Act (1989). As you mentioned yesterday,
10 you've clarified you don't have any training in any military legislation, military laws?

11 A. [12:22:24] Could you -- I didn't quite hear the translation. Which provision are
12 you speaking about? Could you refresh my memory?

13 Q. [12:22:37] Sir, I think I spoke too fast but my question, just to -- oh, well, for the
14 provisions, we are in 5.2.1, paragraph 124, so it's the People's Armed Forces Act (1986),
15 Popular Defences Act (1989). And I'm shortly going to ask you some questions
16 about those, sir, but before I do that, I just wanted to clarify that you -- you've indeed
17 not had any training in any Sudanese military law.

18 A. [12:23:17] That is correct.

19 PRESIDING JUDGE KORNER: [12:23:21] Well, it's not just training, is it? Have
20 you studied Sudanese military law in any sort of depth?

21 THE WITNESS: [12:23:38](Interpretation) No, your Honour. I was led to
22 familiarising myself with Sudanese legislation, but not -- I didn't study it specifically.
23 It was not the topic of my research.

24 MR JEREMY: [12:23:56]

25 Q. [12:23:56] Okay, that's understood, sir. And for that reason you also haven't

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 written any academic articles about any Sudanese military laws; correct?

2 A. [12:24:13] Yes, that is correct.

3 Q. [12:24:19] And as we discussed at the start of today, the Defence provided you
4 with the various acts that they wanted you to read and comment on; yes?

5 A. [12:24:41] Indeed.

6 Q. [12:24:49] Okay, and if we look at paragraph 125, you refer to reading the
7 provisions of this 1986 act. And can we agree that your analysis of that act is
8 basically based on what you -- what you read within it?

9 PRESIDING JUDGE KORNER: [12:25:16] (Microphone not activated) Well, it isn't an
10 analysis, is it, really? It's just repeating what's in the various sections. It's not an
11 analysis, except maybe for the last sentence of that paragraph.

12 THE WITNESS: [12:25:40](Interpretation) I confirm.

13 MR EDWARDS: [12:25:45] Your Honour, forgive me. I certainly -- I certainly
14 intended, your Honour, to make this clear yesterday during -- or before my
15 examination-in-chief. But in terms of 5.2, paragraphs 123 to 134 --

16 PRESIDING JUDGE KORNER: [12:26:07] (Microphone not activated)

17 MR EDWARDS: [12:26:08] -- through -- through to paragraph 134, we don't, we
18 don't rely on Dr Gout for the contents of his report in those paragraphs. The whole
19 immunity regime, I didn't take him to it in-chief yesterday, and if I hadn't --

20 PRESIDING JUDGE KORNER: [12:26:29] (Microphone not activated)

21 MR EDWARDS: [12:26:30] -- made that clear, then I apologise. I ought to have
22 done. But I certainly didn't take him to those parts and ask him about his expertise.

23 PRESIDING JUDGE KORNER: [12:26:38] (Microphone not activated)

24 THE INTERPRETER: [12:26:45] Microphone, please.

25 PRESIDING JUDGE KORNER: [12:26:47] Mr Edwards, one of your applications is to
15.11.2023

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 have this report admitted. If you don't rely on it, you're going to have to make that
2 clear as -- if you don't rely on certain parts of it, you'll have to make that clear
3 somewhere.

4 MR EDWARDS: [12:27:02] Yes. Well, I can make it clear now --

5 PRESIDING JUDGE KORNER: [12:27:04] Right.

6 MR EDWARDS: [12:27:05] -- that in respect of paragraphs 123 to 134 we don't seek
7 to have it admitted under Rule 68(3). And once again, I apologise, I ought to have
8 made that clear yesterday, but I didn't.

9 PRESIDING JUDGE KORNER: [12:27:23] All right. Thank you.

10 MR JEREMY: [12:27:46] Madam President, I think with -- with that clarification, then,
11 on that basis, I don't need to explore those paragraphs further as part of this voir dire,
12 and that concludes my questions for Dr Gout.

13 PRESIDING JUDGE KORNER: [12:27:58] Yes.

14 Mr Edwards, re-examination?

15 MR EDWARDS: [12:28:02] Yes. I don't think it will take very long.

16 Could we please have up on the screen -- sorry.

17 (Counsel confers)

18 (Trial Chamber confers)

19 MR EDWARDS: [12:29:59] Sorry; I thought your Honours were discussing matters.

20 PRESIDING JUDGE KORNER: [12:30:06] I'm sorry, we wouldn't have conferred

21 (Microphone not activated).

22 MR EDWARDS: [12:30:08] My apologies.

23 PRESIDING JUDGE KORNER: [12:30:10] (Microphone not activated)

24 MR EDWARDS: [12:30:12] Sorry, yeah. It's the constitution of 1998, which is at
25 tab 22, please.

15.11.2023

Page 45

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 Q. [12:30:27] At paragraph 13 of your report, Dr Gout, you reference article 65 of
2 the 1998 constitution that provides that the two sources of Sudanese law are Islamic
3 law and national consensus expressed through referendum. You gave evidence that
4 your familiarity during your -- the preparation of your -- your thesis focused more on
5 the 2005 interim constitution. Could we go down to article 5 of that constitution,
6 which is -- no, it's not article 5, is it?

7 A. [12:31:25] Constitution of '98 or 2005?

8 Q. [12:31:33] Oh, this is the -- okay, all right. Well, let's go to -- okay, this is the
9 1998. Let's go to article 65, please, which is at page-- page 14, yeah.

10 Yeah, 0014, please. Thank you. All right, next -- one page up, please. Okay, so go
11 down to the very bottom, we've got the beginning of article 65 and if we go down one
12 page.

13 So this is the 1998 constitution, which provides for the sources of the constitution.

14 Do you see that? And you refer to that in paragraph 13 of your report.

15 Now, was that -- were the sources of the constitution as stated in the 2005 interim
16 constitution the same or different?

17 A. [12:32:57] The same sources.

18 Q. [12:33:02] Can we now please bring up the document -- the document at tab 21.

19 MR JEREMY: [12:33:19] Sorry, just as this is coming up, I take it that all these
20 questions relate to the expertise of the witness rather than an examination of the
21 documents he comments on?

22 MR EDWARDS: [12:33:29] No, it goes to expertise and it goes to -- it goes to rebut
23 the points made by my learned friend in cross-examination. Or to deal with.

24 Q. [12:33:43] Article 5, please. I think it's the next... yeah.

25 Now let's have a look at article 5(1). The northern states of Sudan, the sources of

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 legislation Islamic Sharia and the consensus of the people.

2 Now, the point is that even if -- well, the point is this: Your research focused -- in
3 your -- in your thesis focused on the 2005 constitution.

4 A. [12:34:32] Yes.

5 Q. [12:34:35] Was your analysis and your study of the sources and the hierarchy of
6 Sudanese law in 2005 any different to the situation under the 1998 constitution?

7 A. [12:35:03] No. And that's my opinion, and I think I say it specifically in the
8 report.

9 Q. [12:35:14] Do you have paragraph 15 of your report in front of you?

10 Can we bring up paragraph 15 of the expert report at page 9. Tab 2.

11 Just read the first couple of lines of paragraph 15, sir.

12 A. [12:36:18] Yes, it's clear.

13 Q. [12:36:21] Is that -- you just told us that that's the point you made in your -- that
14 was precisely the point you made in your expert report. Is that the paragraph you
15 were thinking of?

16 A. [12:36:37] Yes.

17 Q. [12:36:39] You were also asked in cross-examination about the case of
18 Goldenburg.

19 Could we please bring up the witness's thesis at tab 12. And I want to take the
20 witness to page 89 of his thesis which is PDF page 107. Thank you.

21 Now, do you see at the -- at the end of the first paragraph on the page, there's the
22 same citation in the Goldenburg v Goldenburg case that you cite in your -- that you
23 cite in your expert report, sir?

24 A. [12:37:59] Yes, that is correct.

25 Q. [12:38:02] My question is this. It's not a summary. It's a citation of actual

1 words, albeit in French, from the case. At the time when you learned of this report
2 and -- this case and were told about this case, did you have cite of the actual judgment?

3 Even if you didn't take it away with you, did you actually see and read the judgment?

4 A. [12:38:34] That is what I was explaining a short while ago. I saw the judgment.

5 I consulted the translations of certain passages from my colleague and I read his
6 article.

7 Q. [12:38:51] So just tell the judges as clearly as you can how is it you have, albeit in
8 French, the citation from the judgment in inverted commas word for word?

9 A. [12:39:07] When I was in Sudan, when I was in the office of that professor, I was
10 taking notes, which I no longer have today, but I took notes and those are the notes
11 that I used for that article in English, published in the Brill publications. Now, if
12 I want to cite jurisprudence, I cannot invent it.

13 THE INTERPRETER: [12:39:39] Counsel is overlapping.

14 MR EDWARDS: [12:39:44] (Overlapping speakers) You were also asked about notes
15 relating to an interview with a person whose name I won't now pronounce, and I'm
16 looking at footnote 18 of your report.

17 Can we please bring that back up.

18 Actually no, it's okay. We don't need to do that. I don't need it on the screen.

19 Let's go back to the thesis, please. And what I want to do is have a look at
20 pages -- well, let's go to page 96, first, in the report -- of the thesis. Forgive me.

21 And that's PDF page 114, yep. Thank you.

22 So just have a look on the screen, right. Yep.

23 Obviously this is, this is not for public broadcast, but is the name of the person in the
24 paragraph underneath a subtitle 2, is that the person you were referring to in

25 footnote 18 of your thesis?

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 A. [12:41:24] Yes, indeed.

2 Q. [12:41:25] Okay, and if you can move forward to page 98, so two pages further
3 on please.

4 Actually it's the -- it's footnote 240 that I'm interested in, not so much the substance of
5 what's in your thesis, but at footnote 240. I think it's page -- it's PDF page 116,
6 please.

7 Okay.

8 Do you see the -- the citation 240 relating to an interview with this individual on
9 15 March 2014?

10 A. [12:43:01] Yes, I can see it.

11 Q. [12:43:05] One final one, let's go to two pages along, to page 100, PDF page 118.
12 Footnote 245.

13 Are those notes from the same interview?

14 A. [12:43:28] Yes, precisely, the same.

15 Q. [12:43:31] (Overlapping speakers) You were --

16 Thank you. I'm just going to pause.

17 You were asked about paragraph 73 of your report. Yes, can we go back to the
18 report now, please, and bring up paragraph 73, which is at ERN ending 0038.

19 Now, paragraph -- it's not coming up. Yep. It's paragraph 73. Your starting by
20 saying:

21 "Sudanese law does not reserve a privileged place for international law in the
22 Sudanese hierarchy of norms."

23 Were you referring to the Sudanese constitution in that sentence or Sudanese law
24 more broadly?

25 A. [12:45:12] I would say to the two, but mainly the constitution.

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 Q. [12:45:20] (Overlapping speakers) And did the Sudanese interim constitution of
2 2005 differ in any way from the Sudanese constitution?

3 MR JEREMY: [12:45:28] Sorry, Madam President. I'm not sure how this arises from
4 my voir dire and I'm not sure how it goes directly to his expertise. It seems very
5 much like a direct or a re-examination.

6 MR EDWARDS: [12:45:43] It is a re-examination. It's exactly what it is.

7 PRESIDING JUDGE KORNER: [12:45:44] Yes, but a re-examination, as Mr Jeremy
8 points out, is supposed to be limited to, firstly, the issue which is under discussion,
9 which is his expertise; and, second, actual questions that Mr Jeremy was asking.
10 I mean, it does seem to me there's a lot of detail being given about the content.

11 MR EDWARDS: [12:46:05] Well, he was being asked about, if my memory serves me,
12 he was being asked in cross-examination about how he was able to, at the time when
13 he was writing his thesis and now, on the basis of what laws was he -- on the basis of
14 his understanding of which laws did he --

15 PRESIDING JUDGE KORNER: [12:46:22] No, he was asked --

16 MR EDWARDS: [12:46:23] -- arrive at the conclusion as set out in paragraph 73.

17 PRESIDING JUDGE KORNER: [12:46:35] I understood him to be asked about what
18 were his sources for giving these conclusions.

19 MR EDWARDS: [12:46:46] And the -- yes.

20 MR JEREMY: [12:46:47] And in response, Madam President, those were indeed the
21 basis of the questioning.

22 PRESIDING JUDGE KORNER: [12:46:51] Yes, so why is this dealing with what his
23 sources were?

24 MR EDWARDS: [12:46:56] At the time of his thesis, he was focusing, and this was
25 explored in cross-examination, at the time of his researching his thesis, his principle

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 source of constitutional law was the interim constitution of 2005. We -- and
2 I understand why my learned friend pressed him on what he knew of the constitution
3 of 1998, being the constitution of relevance for the period 2003-2004. And I think I'm
4 entitled to explore whether his understanding as a source, the situation was any
5 different in --

6 PRESIDING JUDGE KORNER: [12:47:33] Yes. All right, as usual I think the
7 interruption and the discussion takes more time than your definitive questions; so, all
8 right, go on, Mr Edwards.

9 MR EDWARDS: [12:47:42]

10 Q. [12:47:42] So, constitutionally, was there any difference between the constitution
11 of 1998 and the interim constitution of 2005 in terms of its absence of providing a
12 privileged place for international law in the Sudanese hierarchy of norms?

13 A. [12:48:11] No difference from the point of view of the two constitutions, despite
14 the provisions of article 27 of the 2005 constitution.

15 Q. [12:48:190] (Overlapping speakers)

16 THE INTERPRETER: [12:48:26] If counsel could wait for interpretation to finish,
17 please.

18 PRESIDING JUDGE KORNER: [12:48:30](Microphone not activated)

19 MR EDWARDS: [12:48:35](Microphone not activated)

20 PRESIDING JUDGE KORNER: [12:48:41] Now I'm responsible for it.

21 MR EDWARDS: [12:48:46] Okay, I've moved to the English channel so I'll follow
22 better. My apologies.

23 Q. [12:48:57] Yes, you were asked about any writings of yours, any published
24 writings of yours, in which you made a reference to the -- the specialist courts, and
25 Mr Jeremy asked you about an article that you wrote, which is in your list of

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 publications, called "*Les tribulations*" or something like that. Yeah, okay.

2 MR EDWARDS: [12:49:46] Your Honours, we have that document and a hard copy
3 has been passed up to your Honours. It's going to be added to our list. But our
4 case manager very helpfully emailed it around. And Mr Jeremy, of course, referred
5 to something at the very end of this article.

6 Can we please bring that document up on the screen. It'll be ERN-ed in due course,
7 your Honours.

8 In French it's *Les tribulations de la justice pénale internationale: chronique des poursuites*
9 *judiciaires inquiétant* -- (Interpretation) The tribulations --

10 THE INTERPRETER: [12:50:34] If counsel can read it out again.

11 PRESIDING JUDGE KORNER: [12:50:37] (Microphone not activated)

12 MR EDWARDS: [12:50:42](Interpretation) Tribulations of international criminal
13 justice: Chronicle of legal prosecutions worrying the former Sudanese president.
14 (Speaks English) My apologies to the interpreters.

15 Can we go to page 21 of this document, the penultimate page. And focus on a
16 sentence that begins in French "*Ainsi les déclarations officielles soudanaises ...*"

17 Q. [12:51:37] Just read that sentence, please.

18 A. [12:51:51] And so the official --

19 THE INTERPRETER: [12:51:57] Could --

20 PRESIDING JUDGE KORNER: [12:51:58] (Microphone not activated)

21 THE INTERPRETER: [12:52:01] Could the line number -- or, rather, could it be
22 clearly identified?

23 MR EDWARDS: [12:52:13] It's almost exactly halfway down the page. It's a
24 sentence that begins with "*Ainsi les déclarations officielles...*"

25 THE INTERPRETER: [12:52:24] Very well.

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 MR EDWARDS: [12:52:26]

2 Q. [12:52:23] Dr Gout, please read that sentence very slowly.

3 A. [12:52:45] "This way the Sudanese official statements of February 2020
4 underscore that several parts of law are available outside of the ICC to try the
5 indicted persons, amongst which the special court for crimes perpetrated in Darfur or
6 the transitional justice mechanisms provided for by the peace accords for Darfur."

7 Q. [12:53:34] Thank you.

8 The reference to 20 February 2020 there, is that a reference to the special court or a
9 special court that was established in February 2020, or is it a reference to
10 official -- statements of Sudanese officials of February 2020?

11 A. [12:54:06] It is the declarations or statements of Sudanese officials 2020.

12 Q. [12:54:14] And just so that we're very clear, when you were -- when you wrote
13 about these declarations referring to the special court for crimes committed in Darfur,
14 what was the -- what was the -- what was the date of the special court that you're
15 referring to in your article, approximately?

16 A. [12:54:41] The date of institution of the court? That is, as far as I can remember,
17 a special court was established for the opening of the investigations in Darfur. That
18 means in the course of 2005 -- that is the opening of investigations.

19 Q. [12:55:12] Thank you very much.

20 MR EDWARDS: [12:55:13] Those are my questions in re-examination. Unless your
21 Honours have any questions.

22 PRESIDING JUDGE KORNER: [12:55:18] Yes. Well, we've got a few questions.
23 We'll start with Judge Alexis-Windsor.

24 JUDGE ALEXIS-WINDSOR: [12:55:27] Good afternoon, Dr Gout.

25 THE WITNESS: [12:55:34](Interpretation) Good afternoon, your Honour.

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 JUDGE ALEXIS-WINDSOR: [12:55:37] Tell me if I'm wrong, but you had said,
2 I believe, that — that was yesterday — you had said that it is normal for academics to
3 have differing opinions on the same topic. I have paraphrased, but is that what you
4 said yesterday?

5 THE WITNESS: [12:56:00](Interpretation) Yes, your Honour, I believe that is exactly
6 that.

7 JUDGE ALEXIS-WINDSOR: [12:56:07] All right. Does each academic consider an
8 issue, based on his or her own opinion of -- own prism of knowledge, whether it is
9 legal, whether it is law, anthropology, psychology, sociology, that sort of thing?

10 THE WITNESS: [12:56:41](Interpretation) It seems to me to be inevitable, your
11 Honour, whether it is voluntary or not. Someone is always best placed with their
12 own interpretation to consider the elements they are analysing.

13 JUDGE ALEXIS-WINDSOR: [12:57:03] All right. Fair enough. Thank you, doctor.
14 So let me ask you this then: When you received information from — I won't name
15 them — academics or lawyers on Islamic or Sharia law, were you able -- how were
16 you able to form a view as to the reliability of the information given?

17 THE WITNESS: [12:57:36](Interpretation) Yes, your Honour, I think I talked about
18 that yesterday. I did not limit myself to the opinion of a single lawyer or academic.
19 Regarding Islamic law, I talked about discussing with people involved in the
20 implementation of the rights and which made it possible for me to cross-check what
21 I had been told, so in reality I was not necessarily in agreement with what had been
22 said.

23 If you look at the article published at Brill on discrimination, you will realise that I'm
24 not in agreement with one of my teachers in Khartoum. In fact, I subscribed to the
25 opinion of a practitioner who is {ICR: (Redacted)} there,

15.11.2023

Page 54

The in-court redactions are identified with {ICR: text to be redacted}

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 and his analysis was more convincing to me in light of the elements that I heard.

2 JUDGE ALEXIS-WINDSOR: [12:58:54] Thank you, doctor. One last question; it's
3 unrelated. What are anthropological theories of law. I saw that in your CV?

4 THE WITNESS: [12:59:15](Interpretation) These are not legal studies per se. Those
5 are anthropological approaches that look at legal aspects of certain things. And in
6 my analysis, I looked at those approaches and thought that I could borrow some
7 methodological aspects, including the conduct of interviews and -- as well as passive
8 participation in proceedings, particularly the *judiya* proceedings. But the analytical
9 framework is legal, sufficiently legal for me.

10 JUDGE ALEXIS-WINDSOR: [13:00:26] Doctor, give me one moment, please. Let
11 me have a look at that answer.

12 All right. I'm trying to understand your response.

13 Is -- are you saying that you considered theories of law with an anthropological lens
14 or methodology?

15 THE WITNESS: [13:01:13](Interpretation) Indeed, your Honour. There is a
16 methodological aspect, but also, at least in my thesis, you can see the traces of some
17 theories from the world of contemporary anthropology. I could mention them if
18 necessary.

19 JUDGE ALEXIS-WINDSOR: [13:01:35] Is it a recognised field of study?

20 THE WITNESS: [13:01:41](Interpretation) Legal anthropology, you mean?

21 JUDGE ALEXIS-WINDSOR: [13:01:43] Yes. Yes.

22 THE WITNESS: [13:01:45] Yes, of course. There are masters programmes in the
23 anthropology of law, for example, at the Pantheon-Sorbonne University. And, as
24 I was saying yesterday, when I spent some time in Germany, I worked within a social
25 anthropology department, more specifically legal anthropology, in Halle in Germany.

WITNESS: DAR-D31-P-0023

1 So this is a field of endeavour that is institutionalised within the world of academics,
2 and within academia rather.

3 JUDGE ALEXIS-WINDSOR: [13:02:23] Thank you, doctor. Those are all my
4 questions.

5 PRESIDING JUDGE KORNER: [13:02:30] (Microphone not activated) ...was going to
6 ask.

7 JUDGE ALAPINI-GANSOU: [13:02:39](Interpretation) Thank you, your Honour.
8 I'm very pleased to be part of this exercise, and I would like to begin by saying hello
9 to you.

10 THE WITNESS: [13:02:55](Interpretation) Hello.

11 JUDGE ALAPINI-GANSOU: [13:02:56](Interpretation) I greet you and I would just
12 like to say that you have reminded us that law is -- has many dimensions. You can
13 study the anthropology of law, you can study positive law, and I'm very grateful to
14 you. My concern -- and if you could just help me with one point.

15 Could you tell us about your developments regarding the sources of law? I quickly
16 read your report and I noticed that you mention several sources.

17 First of all, my concern has to do with positive law. Could you quickly remind us
18 what is meant by this expression "positive law"? It seems to me that there might
19 have been some misinterpretation of that concept. If you could return to that
20 concept for us and then after that we will turn to sources of law.

21 THE WITNESS: [13:04:23](Interpretation) Thank you, your Honour.

22 The expression positive law means, in French, the law that is placed or set down; that
23 is to say, a group of standards, norms, legal norms produced by legal institutions
24 through procedures that are also legal in nature. The typical example is, of
25 course -- the typical examples would be for the -- a constitutional act by a constitutive

1 assembly, the production of legislation by a bicameral or single chamber of
2 parliament. These are judicial organs that produce law. That is what is meant by
3 positive law, no matter what its source -- moral or ethic or religious source.

4 JUDGE ALAPINI-GANSOU: [13:05:58](Interpretation) Could I merely add, in
5 simple terms that -- could we say that this is the law that is -- that is exercised in a
6 particular land or --

7 THE WITNESS: [13:06:23](Interpretation) Yes, indeed, I quite agree with that. It
8 seems to me that we have touched upon that definition yesterday when there were a
9 number of questions in that regard.

10 JUDGE ALAPINI-GANSOU: [13:06:33](Interpretation) Thank you very much.

11 Now, my second concern is related to the sources of law. You mentioned in your
12 report several sources, sources of law. What interests me is the issue of customary
13 law.

14 Are you telling us in relation to the documents that you provided that in Sudan one
15 can speak of national customary law that falls within the positive law of Sudan and
16 one can also speak of international customary law that Sudan should include in its
17 legislation?

18 THE WITNESS: [13:07:24](Interpretation) Your Honour, those are two different
19 concepts. International customary law is one of the sources of international law, just
20 as international treaties and conventions are. The doctrine presents -- suggests
21 several definitions, but that is international law, just like treaties.

22 Customary Sudanese law are rules that are produced by local communities that
23 indeed may be part of positive law of the state or could be distinct, separate, and may
24 operate in an autonomous fashion in some cases.

25 JUDGE ALAPINI-GANSOU: [13:08:10](Interpretation) Thank you. That is all for

WITNESS: DAR-D31-P-0023

1 the time being, your Honour. I don't want to delve into the very details in this
2 particular case.

3 Thank you very much, Mr Witness.

4 THE WITNESS: [13:08:25](Interpretation) Thank you, your Honour.

5 PRESIDING JUDGE KORNER: [13:08:27] Just to pick up on that last point, so how
6 would you describe the English common law then?

7 THE WITNESS: [13:08:40](Interpretation) My feeling is that British common law is
8 not all that customary actually. It is formalised in written legislation. Some aspects
9 are not written despite the fact that the constitution is not written.

10 THE INTERPRETER: [13:09:07] Says the witness.

11 THE WITNESS: [13:09:09](Interpretation) This is the viewpoint of a civil law person,
12 your Honour.

13 PRESIDING JUDGE KORNER: [13:09:13] Well, I mean, if you don't know anything
14 about how the English common law operates, say so. This is a complete aside;
15 nothing to do with, at this stage anyhow, nothing to do with your evidence. If you
16 have never studied it, then say so.

17 THE WITNESS: [13:09:39](Interpretation) Yes, your Honour. I did study it in
18 London. In 2008, I studied comparative law and during that time the lecturers tried
19 to break down that distinction between the common law system and the civil law
20 system to demonstrate in actual fact that one may very well say that British law is
21 customary and not written, but it actually is because you have parliamentary
22 sovereignty in Britain. You have legislation in Britain, so.

23 PRESIDING JUDGE KORNER: [13:10:24] Yeah. Okay. Well, it may be -- actually
24 it may be relevant. So you wouldn't accept that -- that in the -- in England and Wales,
25 leave aside Scotland which is different, we have a dualist system?

1 THE WITNESS: [13:10:49](Interpretation) Why wouldn't I accept that?

2 PRESIDING JUDGE KORNER: [13:10:52] So you do accept it? I thought you were
3 quarrelling with that.

4 THE WITNESS: [13:11:00](Interpretation) No, no. The distinction between the
5 monarchist, royalist is... The dealings between state law and international law, I'm
6 aware of that.

7 PRESIDING JUDGE KORNER: [13:11:18] All right.

8 THE WITNESS: [13:11:20] The -- the interpretation is incorrect I believe.

9 THE INTERPRETER: [13:11:31] Says the witness.

10 PRESIDING JUDGE KORNER: [13:11:32] Okay. I don't want to keep you, and it
11 isn't for these purposes particularly relevant.

12 I just want to check one thing, though.

13 Is it your evidence in respect of *ghanima* and *hiraba* that it wasn't relevant for the
14 purposes of your thesis, but you had become familiar before you were asked to
15 prepare this report?

16 THE WITNESS: [13:12:18](Interpretation) Yes, your Honour. That is completely
17 correct, and I asked myself for quite a long time. I asked myself about these
18 practices that I was working on in Darfur were related to *ghanima* or *hiraba*. And in
19 actual fact, by studying customary law and the institutions of customary law in Sudan,
20 I came to the conclusion that they were two different things, and to avoid confusion,
21 I preferred not to rely on those concepts.

22 But it was -- it was complicated.

23 PRESIDING JUDGE KORNER: [13:13:05] All right. I just want to make sure that
24 I understood, because I looked back at what you said yesterday and, although they're
25 not mentioned in your report at all, you said you had discussions, interactions with

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 internationally renowned experts, whom you named, and that was before you wrote
2 your thesis; is that right?

3 THE WITNESS: [13:13:38](Interpretation) Yes, your Honour. That was indeed
4 during my doctoral research in Sudan, it was.

5 PRESIDING JUDGE KORNER: [13:13:50] Yes, thank you. Thank you very much.

6 All right, Dr Gout. What's going to happen is that after -- after lunch, we are going
7 to -- I'm going -- we're going to listen to submissions from the lawyers. You won't be
8 required, so you're free for the rest of the day.

9 I think I'm obviously going to say, Mr Nicholls, unless there's any objection, that once
10 arguments are completed, he's free to talk to the lawyers again. I mean, that would
11 normally happen if you have a voir dire, and particularly if we make certain rulings.

12 MR EDWARDS: [13:14:51] We have no intention of speaking with Dr Gout.

13 PRESIDING JUDGE KORNER: [13:14:55] You don't -- you're not -- well, I think the
14 only thing will be, though, if there's a partial.

15 MR EDWARDS: [13:15:04] If there's a partial, then, okay, then we may have to
16 explain why we're only going to take him to certain aspects of his evidence.

17 We also want to speak to him about scheduling, but we're not going to talk about the
18 substance of his forthcoming evidence at all.

19 PRESIDING JUDGE KORNER: [13:15:21] No. Well, that's why I say, unless there's
20 an objection, Mr Nicholls, it seems to me that...

21 MR NICHOLLS: [13:15:27] No; I was thinking about it. No, that's fine. If it's to
22 inform the doctor of what the contours are going to be, what's included, what's not,
23 then no; no objection.

24 PRESIDING JUDGE KORNER: [13:15:38] All right. Okay, well, we'll sit again at,
25 yeah, well at 2:30. I know it's cutting it down slightly, but, obviously, I'm anxious to

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 hear the submissions.

2 All right, yep, 2:30.

3 THE COURT USHER: [13:15:57] All rise.

4 (Recess taken at 1.15 p.m.)

5 (Upon resuming in open session at 2.32 p.m.)

6 THE COURT USHER: [14:32:20] All rise. Please be seated.

7 PRESIDING JUDGE KORNER: [14:32:42] Mr Edwards.

8 MR EDWARDS: [14:32:49] Thank you, your Honours.

9 PRESIDING JUDGE KORNER: [14:32:50] Thank you, we have got the authorities
10 that you --

11 MR EDWARDS: [14:32:53] Thank you.

12 Well, I'll start by referring to the test of what an expert is and there's a short, sharp
13 accurate summary of the situation in the Sang decision of 7 August 2013, it's over 10
14 years old now. It's filing 844 in Ruto and Sang:

15 "The Chamber considers an expert to be a person who, by virtue of some specialised
16 knowledge, skill or training can assist the Chamber to understand an issue of
17 a technical nature ..."

18 PRESIDING JUDGE KORNER: [14:33:37] I don't think -- I mean, that's the standard
19 definition, isn't it?

20 MR EDWARDS: [14:33:46] It's the standard definition.

21 Ah, there may be a dispute about that.

22 MR JEREMY: [14:33:52] There's not a dispute, but you mentioned a list of authorities.
23 I don't see that we received a copy of those -- if you've only just sent them?

24 MR EDWARDS: [14:34:06] They're authorities in our reply.

25 I just gave you hard copies of them.

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 MR JEREMY: [14:34:07] Okay. In your reply to our challenge?

2 MR EDWARDS: [14:34:10] Yes.

3 MR JEREMY: [14:34:11] Okay.

4 MR EDWARDS: [14:34:13] It's the Ntaganda and Sang --

5 PRESIDING JUDGE KORNER: [14:34:16] I don't think -- Mr Jeremy, you need not
6 worry. All they do is restate what everybody knows anyhow, or should know.

7 MR EDWARDS: [14:34:26] But not inelegantly, I hope. Your Honour, there are
8 many ways one can obtain expertise. One can obtain expertise by way of a formal
9 study in a classroom, you sit in an amphitheatre and are talked at by a lecturer for
10 hours on end, after which you regurgitate what you have been told during exams.
11 Expertise knowledge can be obtained in an autodidactic way, through self-learning.
12 And there is nothing in the case law, there's nothing in the text of this Court, there's
13 nothing in the case law of the ad hoc tribunals that places one way in which one
14 obtains that expertise, that specialised knowledge in some sort of a hierarchy, so that
15 the best way to obtain specialised knowledge is from having been taught it in some
16 formal environment.

17 Here, we have an excellent example of the autodidact. He has obtained his highly
18 specialised knowledge - and I'll come on to just how specialised that is in a
19 moment - but he has obtained his highly specialised knowledge that amounts to
20 expertise through having taught himself, through his research and through years and
21 years of experience, both in the field in Sudan and outside of Sudan, and by reading
22 and reading and reading --
23 by reading articles, studying legislation, texts -- and yes, by meeting and discussing
24 and interviewing other experts.

25 Persons who knew what they were talking about, they are professors at a centre of

1 higher education in Sudan, or what have you, he told you about that, and over
2 a period where you add it all together of two years, living and working and
3 researching and meeting with people and studying and analysing in Sudan, he has
4 obtained - Dr Gout - specialised knowledge. Specialised knowledge that
5 your Honours now have in his expert report - synthesised in his expert
6 report - specialised knowledge that is contained in that report in spades. And there
7 is nothing more or less valid in terms of how he obtained that knowledge, we say.
8 It doesn't matter one iota that he has had no formal legal training in Sudan.
9 For the research, for the purposes of what he needed, the information, the knowledge
10 that he needed for his PhD, he didn't need that.
11 So, time and time again, Dr Gout explained -- time and time again, Dr Gout explained
12 to you how he carried out his research, a great deal of which is meeting and speaking
13 with those who were well placed to answer his questions.
14 Now, I pause here because I think it's important for us to revisit the quite specific
15 research working environment that he was confronted with in Sudan, and it may
16 seem atypical when compared to the kind of research environment many western
17 researchers are fortunate enough to have.
18 No law library to speak of in Sudan -- well, there was one that it seems existed for
19 a fairly short time before it was either closed down or the materials were taken away.
20 PRESIDING JUDGE KORNER: [14:39:30] Mr Edwards, I found that answer very
21 surprising because the witness that we heard from who was -- was a lawyer, certainly
22 gave us the impression that law was well taught and that there were all sorts of
23 sources of law.

24 MR EDWARDS: [14:39:57] Yes.

25 PRESIDING JUDGE KORNER: [14:39:58] So I was very surprised when we got the
15.11.2023

1 answer we did.

2 MR EDWARDS: [14:40:01] Well, bear in mind when it was that the other witness
3 that we heard from was studying to become a lawyer, consider his age.

4 PRESIDING JUDGE KORNER: [14:40:12] Yes.

5 MR EDWARDS: [14:40:13] Consider when he was studying.

6 PRESIDING JUDGE KORNER: [14:40:19] Yes, all right, that's a fair point. Yes.

7 MR EDWARDS: [14:40:23] Dr Gout was doing his research between 2012 and 2016
8 when the regime was as we know it to be.

9 There's that. We have situations -- we have a situation where those who were trying
10 to carry out research - academics - would, you know, perhaps allow him a glimpse at
11 articles or texts that were otherwise hard to come by, case law, with all kinds of
12 promises that, "We'll pass it on to you, we will make a copy, we'll give it to you," but
13 the sense is a certain jealousy -- jealousy in the sense of jealously guarding their
14 material, not wanting it out of their sight. A degree of competition, perhaps,
15 amongst researchers and other academics in Sudan.

16 So very, very difficult circumstances in which to carry out this research and, given
17 those circumstances, the meetings, the discussions, the -- you know, in a more or less
18 formal way was if not the only way to obtain the specialised knowledge that Dr Gout
19 did manage to obtain, but certainly a very important one.

20 And he did take notes of his meetings. He did record what was told to him, and you
21 know that a number of his workbooks, his notebooks, have been kept or he's had easy
22 access to them and a number have been passed on to the Prosecution - not all - and
23 you heard something about the difficulties, the practical difficulties that he had in
24 obtaining them.

25 But I'm going to come on to methodology in a moment, but that only goes to the issue

1 of methodology, I would submit, and methodology and criticisms of methodology go
2 to the issue of weight eventually. Methodology does not go to the issue of
3 admissibility and -- well, admissibility as an expert.

4 PRESIDING JUDGE KORNER: [14:42:55] Well, yes and no. I mean, I just want you
5 to consider this, Mr Edwards. If he's done his best in circumstances, the reasons for
6 which are explicable, but because of those circumstances he's unable to obtain the
7 depth of knowledge that is required for someone to say, "I am an expert in this field",
8 doesn't that -- it's not just methodology, is it? It also goes to whether he has been
9 able to actually get sufficient knowledge to make himself an expert.

10 MR EDWARDS: [14:43:38] I take your Honour's point.

11 I will pause.

12 I very much take your Honour's point. And there were areas -- there are aspects of
13 Dr Gout's report, and there are, in fact, things that we asked Dr Gout to look at, such
14 as, the role of the *agid al-ogada*, issues relating to the Ta'aisha tribe, where he simply
15 didn't have the depth of or indeed any knowledge to allow him to be comfortable
16 enough to say, "Yes, all right, I'll tackle that".

17 But where he has addressed issues, where he has incorporated areas of expertise in
18 his report, where he has tackled questions that we've asked him, he's done so because
19 he himself has felt comfortable enough to do it. He hasn't, rather maverick style,
20 said, "Well, I'll give it a go".

21 And in my submission, it's important for your Honours to take that into account
22 because plenty -- plenty of academics, potentially would. "I don't know too much
23 about that, but I'll give it a go, give me a few weeks, I'll do some reading and I'll
24 knock something up for you", he hasn't done that.

25 I would submit -- we would submit that a testament to the depth of the specialised

1 knowledge that he has acquired in a number of the topics that we asked him to
2 consider, a testament to the depth of that specialised knowledge is found in his thesis
3 itself, the voluminous, the monster of a thesis, 700-odd pages long, not counting the
4 annexes, that not only allowed a jury to award him his PhD - richly deserved you
5 may think - but it was recognised. And he -- it was recognised by publishing houses;
6 he has received prizes for it.

7 You'll see in his CV that reference is made to the fact that he got a distinction from the
8 jury for his PhD and the congratulations of the panel. These are all important things
9 to take into account, I would submit. And, most recently, the prize from the
10 European Commission just last week.

11 PRESIDING JUDGE KORNER: [14:46:40] (Microphone not activated) accepting all
12 that, Mr Edwards --

13 MR EDWARDS: [14:46:42] Yes.

14 PRESIDING JUDGE KORNER: [14:46:43] -- what about the topics that simply don't
15 figure in his thesis at all because they weren't important enough or they didn't -- they
16 didn't fit particularly what he was trying to do?

17 MR EDWARDS: [14:46:58] Yes, no, I take that on board. Can I -- can I start then
18 with the question of *hiraba* and *ghanima*. Didn't -- they didn't find their way into
19 his thesis because his evidence today was -- I'm only paraphrasing, but his evidence
20 was he spent a lot of time thinking and analysing whether the issues that he was most
21 interested in for his thesis -- it's in the report, the concepts of retaliation, whether that
22 fell within what is meant in Islamic law and within the Sudanese legal context *hiraba*
23 and *ghanima*.

24 And having studied the concepts, having read about the concepts, having spoken
25 with people about these concepts - as he told you did - *ghanima* and *hiraba*, he

1 took -- he came to the conclusion, ultimately, that this was not the same thing and he
2 deliberately, he purposefully decided not to include it in his thesis.

3 But simply because something -- simply because a topic hasn't found its way into the
4 thesis doesn't mean that he hasn't obtained a specialised knowledge in it. The thesis
5 does not represent the sum totality, it is a not comprehensive account of the contents
6 of his brain in terms of the Sudanese legal context.

7 It is -- it will be every PhD -- every doctoral student's experience that a PhD thesis is
8 necessarily a much slimmed down version of everything that he or she could have
9 written about. So just because it's not in the thesis is by no means fatal, we would
10 submit, to your Honours accepting him as having that specialised knowledge
11 anyway.

12 And despite the --

13 PRESIDING JUDGE KORNER: [14:49:35](Microphone not activated)...special courts,
14 for example, which hardly figured at all and indeed actually don't figure very
15 strongly in his present report.

16 MR EDWARDS: [14:49:45] No. Look, I would -- it doesn't feature to a great extent
17 in his -- or at all in his thesis. There's a mention of it in a later article that was
18 published in a peer-reviewed journal. And I take -- I take your Honour's point, there
19 are other aspects of his report that treat that topic in much greater depth, but
20 nevertheless, he explained to you -- I'm not going to concede that he doesn't have
21 specialised knowledge in it, but -- and he explained how he obtained that specialised
22 knowledge, and your Honours will take on board that when he wrote about the
23 specialised -- or the specialist court in his -- in that article that we were taken to -- that
24 I took him to in re-examination, he wasn't talking about a court that was established
25 in 2000. He was talking about a court that was established much, much earlier but

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 was simply referred to in governmental statements.

2 Can I -- can I address your Honours very briefly -- I don't necessarily have to go
3 through them one by one, but for example, and I'm looking at paragraph 7, the first
4 point in the Prosecution's response, where it's suggested that there's no demonstrated
5 expertise in "the hierarchy of sources and the place of international treaties and
6 international customary law" - international customary law - "according to Sudanese
7 constitutions" - constitutions plural, 1989 and then 2005.

8 It's -- I'm looking forward to hearing how the Prosecution will defend that position,
9 because the place of international treaties, the place of international customary law,
10 the place of -- yes, international law within the Sudanese context, is the whole -- it is
11 such an enormous part of his thesis.

12 To say he doesn't have expertise in that subject is, I would venture to suggest, with
13 great respect, rather absurd. And to suggest that he doesn't have an expertise in the
14 hierarchy of sources is also quite untenable.

15 I'd urge your Honours to bear in mind the fact that the Prosecution don't contest that
16 he has expertise in the matters raised in paragraphs 22 to 25. They don't even
17 contest that those points are irrelevant or overlap with other evidence that
18 your Honours have heard.

19 It's not contested, that evidence, at all. But then from paragraphs 25 down to
20 72 - that's an enormous chunk of his report - the Prosecution don't argue that he
21 doesn't have the requisite expertise to give that evidence.

22 And the evidence that you've heard yesterday and today amply demonstrates that he
23 knows what he is talking about.

24 But there's a rather -- yes, your Honour?

25 PRESIDING JUDGE KORNER: [14:53:26] (Microphone not activated)

15.11.2023

Page 68

1 MR EDWARDS: [14:53:27] I was just going to say that there is -- there's a slightly
2 jarring disconnect, in my submission, between, on the one hand, the Prosecution not
3 contesting his expertise in respect of that chunk of his report, and then the contention
4 that he isn't an expert on the hierarchy of sources according to the Sudanese
5 constitution. The latter is so foundational for an understanding and expertise in -- in
6 the latter.

7 PRESIDING JUDGE KORNER: [14:53:59] Before you go on to that, Mr Edwards,
8 what slightly concerns us about -- about this, is, we've really had all this evidence in
9 one form or another about the sheikhs and the *umdahs* and the tribal -- what is it -- I'm
10 not saying -- maybe at this stage relevance is not the decisive point, but it is
11 something that -- what is supposed to be the relevance of this?

12 I heard Mr Laucci on this, saying he's giving it from a lawyer's point of view, but
13 what is it he's saying that's different to what anybody else has said?

14 MR EDWARDS: [14:54:43] Well, it's exactly that, your Honour. I mean, de Waal
15 gave evidence from the perspective of an anthropologist in the context -- he was the
16 first witness because all parties considered that it was right that we hear expert
17 evidence in order to give us an overview of the historical and social realities in
18 Darfur.

19 Look, I'm not suggesting that there is no overlap with de Waal. There is some,
20 but nevertheless where Dr -- Dr Gout is coming at things from a quite different
21 perspective. He's coming at it from a legal perspective, rather than a social,
22 historical, anthropological --

23 PRESIDING JUDGE KORNER: [14:55:31] Well, he's not actually, is he? He's
24 coming from it -- he himself says he's coming from a legal anthropologist - what's the
25 word I want - viewpoint.

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 MR EDWARDS: [14:55:45] Yes. Well, there's an element of anthropology, but
2 fundamentally he's coming at it from the perspective of a student of -- a scholar of
3 international law.

4 PRESIDING JUDGE KORNER: [14:56:03] All right.

5 MR EDWARDS: [14:56:04] But even if there is some overlap, it is not, in my
6 submission, extensive. And even if there is, that is not a reason not to admit him as
7 an expert. Your Honours, at the end of the day, when all the arguments are said and
8 done and finished with and you're deliberating, you can, amongst yourselves, decide,
9 "Well, that's fine, we heard -- we heard from two experts about this and we didn't
10 consider it necessary, for example, to spend a great amount of time considering what
11 Dr Gout had to say about X, Y or Z because we heard it from de Waal."

12 There's not a reason to exclude Gout at all. It would be shocking and, if I can digress
13 for a moment, it would be a rather depressing day when one hears a parent saying to
14 a child, "You don't need to learn anything more. Your knowledge about this -- that's
15 fine. A waste of time to be taught anything -- anything new."

16 You may be surprised after hearing Dr Gout's evidence that you do learn something
17 new.

18 PRESIDING JUDGE KORNER: [14:57:22] But the evidence has to be relevant to -- at
19 issue in the case. The point about the two of you agreeing on an expert was to avoid
20 this being repeated. One of the major problems with cases in this tribunal is the
21 endless repetition of evidence on the basis that if I say it 10 times, then it must be right,
22 it seems to me.

23 And what I'm trying to get at -- and it may be that it's a point for later, I think you're
24 probably right, Mr Edwards, it's a point later whether -- when we decide whether or
25 not we accept him as an expert; so let us leave it for that.

15.11.2023

Page 70

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 MR EDWARDS: [14:58:13] The Prosecution spent almost, almost all of their time
2 cross-examining Dr Gout by nit-picking sources and how he -- on whether or not Dr
3 Gout cited a given source or not. That is classically -- that is so firmly within the
4 purview of methodology that it is utterly irrelevant to your deliberations on whether
5 he should be -- Dr Gout should be accepted as an expert or not. And here, I refer to
6 paragraph -- firstly, paragraph 27 in Sang, 7 August 2013. The Chamber agreed with
7 the Prosecution's submissions because here is the Defence having a moan:
8 "As stated by the Prosecution, concerns as to an expert's methodology or the sources
9 he/she has relied upon more commonly go to an expert report's weight, rather than its
10 admissibility."

11 PRESIDING JUDGE KORNER: [14:59:39] It can in extreme cases go to admissibility,
12 but it's clear it has to be extreme.

13 MR EDWARDS: [14:59:46] And it's not extreme here.

14 Paragraph 16 in Ntaganda which we cite, the -- I seem to have lost it, but, yes, in one
15 of these decisions, the Chamber says words to -- the Trial Chamber -- I've lost it now.
16 But the Chamber says something to the effect of: The concerns about -- about his
17 sources are not so grave as to outright refuse his being admitted. I can't find it now.
18 Well, yes, there it is. Yes:

19 "The Chamber does not consider the source's reference in the report to be so lacking
20 in reliability ..."

21 And here we are a million miles away from Dr Gout's sources being so unreliable that
22 he should not be admitted.

23 And he, of course, very candidly said, "Well, perhaps, I ought to have been more
24 careful. I should have been fuller in my citations".

25 But if there is any criticism to be levelled -- if there's criticism to be levelled at anyone,
15.11.2023

1 it's a criticism that should be levelled at this Defence team, not at Dr Gout himself.

2 If it wasn't made clear in the original letter of instruction just how the Trial Chamber
3 would expect to receive an expert report, and sourced as would be ideal, that's down
4 to us, it's not down to him.

5 PRESIDING JUDGE KORNER: [15:01:54](Microphone not activated) You say that,
6 Mr Edwards, and to a certain extent I suppose you should have given him -- given
7 that he is a tyro at this -- not a tyro, the opposite actually. But nonetheless, he's an
8 academic or a scientist, whichever is the right word, and he should know that if you
9 are going to make an assertion, then you are obliged to give the basis for making that
10 assertion.

11 MR EDWARDS: [15:02:28] Yes. No, I take that on board, but where the -- for the
12 most part, where the Prosecution criticised him, it wasn't for not having cited at
13 all -- for example, he would cite a provision of a decree or this law or that law. Where
14 he was being criticised was, "Well, you didn't say that you didn't have that law
15 directly in your hands at the time when you were writing up your report or writing
16 your thesis. You didn't footnote that you saw that report or were told about that
17 report from somebody who you interviewed in Sudan".
18 For the most part, that was their criticism.

19 Now, if he hadn't footnoted any kind of reference at all, then perhaps the
20 Prosecution's and your Honour's point would have more weight, with respect.
21 But he didn't just throw in a 60-page document with no references at all, just "My
22 opinion is this, that and the other and there we are". His report is a very heavily
23 sourced report and his PhD thesis is heavily sourced and referenced with an extensive
24 methodology section to it in which he explains this chapter and verse.

25 PRESIDING JUDGE KORNER: [15:04:02] Yes, but he -- Mr Edwards, certainly in my
15.11.2023

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 opinion - and I haven't consulted my colleagues on this - what would have been more
2 upfront, to use the slang expression, would have been to make it clear in his
3 introduction when he was talking about his methodology that for some of the cites in
4 the footnotes, he hadn't actually read the original documents. Nor did he have to
5 hand any of the notes that he had taken of his conversations and he was doing this
6 from memory. That only emerged in his evidence.

7 MR EDWARDS: [15:04:40] In respect of one or two examples. And those one or
8 two examples, yes, unfortunate, but that not ought not damn the entire report, that
9 ought not damn his entire expertise.

10 And you have now heard him, and it's our submission that there cannot be any doubt
11 at all that he is an expert in respect of -- well, we say everything that's in his report,
12 and he will -- if when your Honours decide that he can be heard as an expert, you will
13 learn a great deal and that can only be a good thing.

14 PRESIDING JUDGE KORNER: [15:05:26] Yes, so as regards the report, with the
15 exception of the part that you indicated before -- or, rather, with regard to the
16 admission of not the report, so much, but the evidence he can give as an expert, you
17 rely on him as an expert for everything, bar that last part?

18 MR EDWARDS: [15:05:48] We do. We are not going to formally concede anything.

19 PRESIDING JUDGE KORNER: [15:05:52] No. That's all I wanted to know.
20 Thank you, yes.

21 JUDGE ALEXIS-WINDSOR: [15:06:00] Mr Edwards, military law.

22 Can you please assist us what is the expertise of Dr Gout in relation to military law,
23 specifically Sudanese?

24 MR EDWARDS: [15:06:10] Yes. I mean, he doesn't have the same expertise in
25 military legislation as he does in the majority of the rest of his report, but as, I think,

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 the point that her Honour -- the presiding judge made, where he does talk about
2 military law, he is essentially just citing the provisions of the laws that we all have.
3 So I take your Honour's point, and he didn't seek to pull the wool over anyone's eyes
4 and say, "Yeah, of course, I'm an expert in military law".
5 I think that is probably the fairest way of putting it.

6 JUDGE ALEXIS-WINDSOR: [15:07:00] Thank you. Agreed.

7 PRESIDING JUDGE KORNER: [15:07:02](Microphone not activated) Yes. Is that it,
8 Mr Edwards or?

9 MR EDWARDS: [15:07:10] Yes. No, that's it.

10 PRESIDING JUDGE KORNER: [15:07:16] Thank you very much.

11 Yes, Mr Jeremy (Microphone not activated)

12 MR JEREMY: [15:07:18](Microphone not activated) Thank you, Madam President,
13 your Honours. I --

14 PRESIDING JUDGE KORNER: [15:07:24] Microphone.

15 MR JEREMY: [15:07:26] I won't spend too long, but I will make a few points.

16 So in general, setting the context for this, so Mr Gout was clear that the bases of his
17 expertise for the writing of his expert report were his thesis and his postgraduate
18 work.

19 We heard from Mr Gout that the focus of his thesis, dissertation was on peace
20 building and local customary law in Sudan for the 2010 period.

21 I'm sure that that thesis was a very good one, it's 700 pages, as Mr Edwards has told
22 us, it received many, many awards, we have been told, but the problem is it doesn't
23 really seem to overlap with the core issues in this case.

24 The focus -- the method of Mr Gout's work seems to be very anthropological in his
25 approach insofar as he went to Khartoum, he spoke to people, he had conversations,

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 casual conversations, or formal conversations, he took notes of those conversations,
2 sometimes rarely, if ever, does he consult primary sources, does he consult legislation,
3 does he consult case law of the nature that you would expect an academic inquiry to
4 function.

5 Mr Edwards makes the point that, therefore, when we question Mr Gout's sources in
6 his report, and he suggests that though that question goes to weight rather than
7 admissibility, it raises the question that if those sources are not relevant to the work
8 and to the opinion that he gives in his expert report, then what is, because it doesn't
9 appear to be the thesis for the majority of his expert report, so then we do need to
10 look at those sources.

11 And, as we have heard, there are fundamental issues with the sourcing of this report,
12 and this is a report that is provided to judges of the International Criminal Court and
13 it's serious, it should be taken seriously.

14 Mr Edwards has spoken about the difficulty of operating in Sudan between the 2012
15 and 2016 period. I don't -- we don't accept during that period that libraries were not
16 accessible. Mr Gout was there being sponsored by an NGO that had an office in
17 Khartoum; he was able to go for a two-year period over four years.

18 But it may well be that despite Mr Gout's very best efforts, he wasn't able to obtain the
19 kind of information that you now need -- that you're being asked to rely on to make
20 legal findings in this case and that's unfortunate but that doesn't make the report
21 reliable.

22 And what is not a difficult operating environment is France, and Mr Gout received
23 his instruction letter in June -- in June of this year, he was told what he would like the
24 Defence -- what the Defence would like him to address, and what did he do? He
25 wrote a report based on his PhD thesis. He didn't go to another location in France to

1 obtain notebooks of the various interviews that he carried out that he says are
2 important to the thesis. He simply either referred to -- sorry, that he says are
3 important to the report.

4 What he did is he simply referred to his PhD thesis and if the interviews that he was
5 interested in were not covered in that thesis, then he referred to his memory. And
6 on occasion, he had to think very far back.

7 And what he also didn't do, is conduct any additional interviews after that June
8 period, between June and when the report was provided in August, other than
9 a single conversation with a researcher in a university in London where he confirmed
10 a point. He didn't carry out any additional inquiry in relation to the issues that he
11 was being asked to comment on in his report.

12 Turning to some of the more substantive matters of his expertise, we have established
13 that Mr Gout has received no legal training in Sudanese law. Rather, his knowledge
14 of the legal system is based on interactions that he has had with others.

15 In relation to legal cases that he cites, we have heard that for the main, he didn't read
16 those cases. He read one case, he read an extract of that case that Mr Edwards took
17 him to in redirect, but never the whole case. Never had copies of those.

18 On this issue of Mr Gout being discerning in terms of what topics he did opine on and
19 which ones he didn't - and we've heard a lot about the fact that he drew the line at
20 really not being able to say anything about the *agid al-ogada* - well, he was prepared to
21 have a go at the National Security Forces Act or the Armed Forces Act and how they
22 interacted with the state of emergency. Subsequently, even the Defence had decided
23 that actually they don't think he's an expert in that so they're not going to pursue it.

24 But he certainly was prepared to have a go at that.

25 In relation to this issue of hierarchy of sources and public international law, and again,

1 this -- this goes to why his sources are important because what he basically did is he
2 read the 1998 constitution - and, as we've heard, there was a single reference to that
3 1998 constitution in his 700-page PhD thesis - he read it and he said, "Based on what I
4 read, I don't see a reference to international treaties, I don't see a reference to
5 customary international law, therefore I don't think they are directly effective in
6 Sudanese law."

7 Mr Edwards in redirect then took him to the 2005 constitution and he said, "Well, you
8 did look at that, though, you looked carefully at that and they're not different, are
9 they? They're very similar." So essentially Defence are asking you -- or suggesting
10 that because Mr Gout did focus on the 2005 constitution in his thesis, then you should
11 consider him an expert on the 1998 constitution.

12 In relation to the principles of Islamic law, *hiraba* and *ghanima*, the Defence have -- the
13 Defence have presented an expert who, we've heard, has testified very clearly on that
14 issue. That may be by the by for this discussion right now, but it's -- but it's
15 nevertheless important to consider.

16 But more importantly, Mr Gout has no formal training -- no training in Islamic law;
17 he has never written about those concepts in his PhD thesis. He has never written
18 about them in any academic literature. He doesn't cite us to any case law in support
19 of his assertions in his report; similarly no case law in support of his assertions in
20 relation to the 1998 constitution. He --

21 PRESIDING JUDGE KORNER: [15:17:08] But can I stop you for a moment,
22 Mr Jeremy, accepting all of that, his evidence about this has been - much as his
23 evidence about every other part of his report, which he says he can opine - is that he
24 did consider these principles for a possible inclusion in his thesis, but decided not to,
25 in the end.

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 So he had actually, in his method of research, which is chats of -- sorry, talking to
2 people and looking at secondary sources, he said he did consider that.

3 MR JEREMY: [15:17:51] Okay, then I would say, Madam President, then all the more
4 reason for him to refer to relevant case law and academic articles which he did
5 consider but didn't decide to include his thesis. I mean, where are they? They are
6 not in his report.

7 What is his specialised knowledge and skill that you are being asked to rely on on
8 these issues? And to the extent he discussed these things, he told us he discussed
9 them with anthropologists. Not lawyers.

10 PRESIDING JUDGE KORNER: [15:18:33] (Microphone not activated) Sorry, I think
11 he said Sudanese lawyers, as well, Mr Jeremy.

12 MR JEREMY: [15:18:41] That's -- that's true, there was reference to the conversation
13 with the Sudanese lawyer and --

14 MR EDWARDS: [15:18:46] And academics, to be fair.

15 MR JEREMY: [15:18:50] And this conversation with the Sudanese lawyer,
16 Madam President, your Honours, you will remember that that was the conversation
17 that we don't have notes for, it's not referred to in his PhD thesis, that he -- that he
18 simply, we learned today, remembers.

19 And also in relation to those principles of *ghanima* and *hiraba*, we also heard that he
20 didn't discuss with persons with direct experience from the military operating in this
21 2003-2004 period of the operationalisation of those principles.

22 Finally in relation to special courts, specialised courts, I mean, we can all read what
23 the sources are in the reports, Human Right Watch, UN Commission of Inquiry,
24 Amnesty International. We've heard from Mr Edwards and the witness that there is
25 this report that Mr Edwards showed in redirect with a reference to a special court,

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 specialised court, not cited in his expert report; so, I mean, the relevance or
2 importance of that is -- remains extremely unclear.

3 PRESIDING JUDGE KORNER: [15:20:28] Well, it's not -- it's not so much the
4 relevance or importance -- well, you mean as to make him an expert? Yes. Right.

5 MR JEREMY: [15:20:40] There were other reasons that we gave -- (Microphone not
6 activated)

7 Excuse me. There were other reasons that we gave in our filing, 1018, for why he is
8 not an expert, but we also gave other reasons for why the report shouldn't be
9 admitted and we've touched on some of those, the duplicative nature not being of
10 assistance to the Chamber and, in some ways, falling -- opinions that fall within the
11 remit of this Chamber's prerogative on legal issues, which I won't repeat now.

12 PRESIDING JUDGE KORNER: [15:21:21](Microphone not activated) You're not
13 maintaining, are you, your -- under paragraph 15 of your objections that his alleged
14 expertise in international criminal law was only based on his internship? Because
15 that doesn't seem to me to be right. Internships.

16 MR JEREMY: [15:21:55] I think there's evidence about his knowledge of
17 international law largely part of the peacebuilding, peacekeeping (Overlapping
18 speakers)

19 PRESIDING JUDGE KORNER: [15:22:01] But that necessarily, doesn't it, involves --

20 MR JEREMY: [15:22:14] Yeah, I'll agree with you.

21 PRESIDING JUDGE KORNER: [15:22:15] Right.

22 MR JEREMY: [14:23:16] Those are -- those are my submissions, Madam President.

23 PRESIDING JUDGE KORNER: [15:22:17] Yes. Mr Edwards, do you want to
24 respond?

25 MR EDWARDS: [15:22:22] Four points very briefly. The first thing is that

1 Mr Jeremy has just told you we don't accept that libraries were not accessible in 2012
2 to 2016. It's rather outrageous that that point is made now after cross-examination
3 has ended. If that was going to be the Prosecution's case, that ought to have been
4 put to Dr Gout. He wasn't even challenged. The subject wasn't even raised in
5 cross-examination. So to say now, "We don't accept that that's true", to suggest that
6 Dr Gout has somehow misled the Court is quite outrageous.

7 Secondly, the Prosecution make the point that in cross-examination Dr Gout
8 said -- your Honours will remember he said, "I see no evidence that international
9 law...", and it may be an unfortunate turn of phrase. But the substance of what he is
10 saying is -- and this is a man who has done a great deal of research, he spent a lot of
11 time in Sudan, and the fact is he has, according to the sources that he has seen,
12 according to sources, because he can only refer to the sources that he has seen, right,
13 international law has not been -- I can't remember exactly -- hasn't been incorporated
14 into the Sudanese constitution or in Sudanese law.

15 PRESIDING JUDGE KORNER: [15:24:12] Well, that's why I picked it up, it was an
16 odd turn of -- the whole thing was not very clear.

17 MR EDWARDS: [15:24:18] Not very clear, perhaps. But really my point is -- and I
18 know that this is only a voir dire and so the Prosecution weren't obliged to, but I
19 would say this, if they have evidence to the contrary that international law was
20 systematically incorporated into positive Sudanese law, let them cross-examine him
21 on it tomorrow or the day after and prove him wrong.

22 I can tell you, your Honours, they won't be able to.

23 Thirdly, the report that Dr Gout was taken to in re-examination - report, in inverted
24 commas, because that's what my learned friend described it as - it wasn't a random
25 report, it was an article written by the witness himself. And it wasn't just plucked

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 out of thin air today, it's cited in his CV. And the Prosecution, it seems, had it as
2 well. Even if we hadn't served it on them, they'd found it, so they were aware of it.
3 And my last point really is that he -- Dr Gout is -- was questioned and criticised about
4 having to search in his memory about conversations that he had back in 2012. I trust
5 the Prosecution will acknowledge exactly the same point when discussing the
6 memory of witnesses who have been telling you about what they saw and heard back
7 in 2003 and 2004. I doubt they will --

8 PRESIDING JUDGE KORNER: [15:26:05] I know -- I know this is -- that those
9 are - what's the favourite expression - oranges and apples. They are totally different
10 things.

11 MR EDWARDS: [15:26:15] Well, maybe, maybe not.

12 Anyway, those are my submissions.

13 PRESIDING JUDGE KORNER: Yes, thank you very much.

14 All right. Mr Jeremy, yes.

15 MR JEREMY: [15:26:21] Sorry, Madam President, I'd just like to respond on one
16 point where it was suggested I was being misleading.

17 So Mr Edwards says there is no law library to speak of in Sudan. Okay, now, that's
18 what I took issue with. He now has shifted that to the witness. So if -- and it may
19 be there, but if it was the witness that said there's no law library in Sudan, then I'd
20 invite Mr Edwards to point me to that reference.

21 MR EDWARDS: [15:26:51] He did.

22 PRESIDING JUDGE KORNER: [15:26:53] He did, Mr Jeremy, I think it was
23 earlier -- I was asking him why he hadn't gone to -- I think I asked him that, and I
24 think he said there was only one law library and it was shut most of the time.

25 JUDGE ALEXIS-WINDSOR: [15:26:57] And it didn't last long.

1 PRESIDING JUDGE KORNER: [15:26:58] Or it didn't last long or something, yes.

2 MR JEREMY: [15:27:10] He said it was -- at one point it was locked. So
3 international law library in Sudan - and this is an international law library in Sudan,
4 not just a law library - which was managed by a professor of Sudanese law and at one
5 point it was locked.

6 PRESIDING JUDGE KORNER: [15:27:32] Right. Well, anyhow, I mean, these are
7 all matters that can be clarified during -- if we agree that he can be an expert, at least
8 on some things.

9 All right, as we said earlier, we will adjourn now. We will give a short written
10 ruling without reasons by, I would think around five o'clock, this afternoon. We will
11 send it out by email. And we'll give full reasons in the -- I'm not going to give a date
12 because we never manage to do it, but in the not too distant future.

13 Right, and so if Dr Gout could be ready to start, if necessary, at 9.30 tomorrow
14 morning.

15 And there was some talk about not sitting Thursday, but we will definitely be sitting
16 Thursday. If, as I rather suspect, Dr Gout is not going to finish in two days, mainly
17 because the evidence he gives is quite dense and we hadn't really gone into the detail
18 yet - and as I said to Mr Laucci right at the beginning -- or was it you, Mr Edwards,
19 calling him again?

20 It's you, Mr Laucci, isn't it?

21 MR LAUCCI: [15:29:05] The examination-in-chief is with me.

22 PRESIDING JUDGE KORNER: [15:29:06] Yes. You know, some of the concepts
23 you're going to have explain - even if the report goes in - because it's just not clear.

24 So on that basis what I am wondering is, clearly, your next witness has to give
25 evidence I think on the Friday; otherwise, we are going to be in real problems, are we

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 not?

2 MR LAUCCI: [15:29:25] Yes.

3 MR EDWARDS: [15:29:27] Yes, but what I can --

4 PRESIDING JUDGE KORNER: [15:29:30] I'm simply wondering whether she could
5 be interposed because it's a short point, and if Mr Gout can come back on Monday.

6 MR LAUCCI: [15:29:40] That will raise issues about the availability of Mr Gout and
7 that we will have to check obviously. What I can say on this, is that regarding the
8 witnesses who are scheduled for next week, we have total flexibility.

9 PRESIDING JUDGE KORNER: [15:29:46] Right.

10 MR LAUCCI: [15:29:50] They can come later. They are available and they will
11 remain available.

12 PRESIDING JUDGE KORNER: [15:30:02] All right. Well, that's very helpful.

13 MR EDWARDS: [15:30:03] And I can make enquiries of Ms Marsh as well and see if
14 her professional obligations might allow her to come for Monday instead of Friday.

15 PRESIDING JUDGE KORNER: [15:30:17] Yes, well, I mean, I think --

16 MR EDWARDS: [15:30:18] That's a possibility --

17 PRESIDING JUDGE KORNER: [15:30:19] -- on the face of it, I don't know. I simply
18 don't know.

19 How long do you think you would be in chief? Well, you can't tell me -- tell you
20 what you can lead on --

21 MR LAUCCI: [15:30:27] I miss too information, Madam President. One, the topics
22 and two, 68(3).

23 PRESIDING JUDGE KORNER: [15:30:35] Yes. All right, yes, as I say, we will let
24 you know by five.

25 Oh, sorry, yes, Mr Nicholls.

15.11.2023

Page 83

Trial Hearing

(Open Session)

ICC-02/05-01/20

WITNESS: DAR-D31-P-0023

1 MR NICHOLLS: [15:30:45] Sorry -- sorry, your Honour. Thank you for raising
2 those points. I know it's not easy. My impression of this witness is -- and not
3 jumping ahead of your decision, but maybe on -- that it will not go very quickly
4 should he testify on these points.

5 So -- and I understand that there's -- that this scheduling is difficult, but -- and this is
6 obvious, but I would really make a plea to know as soon as possible what is going on
7 for our planning. We need to know because of our internal processes, what people
8 are working on.

9 PRESIDING JUDGE KORNER: [15:31:22] It seems to me that there is no doubt even
10 if -- let's say for the sake of argument, he does give evidence as an expert on some of
11 the topics, because of the way the report is written, because of the difficulties in
12 getting the translation accurate, which we found out yesterday, it seems to me this
13 witness will go into Friday, whatever happens.

14 And it's a question of whether or not Ms Marsh - who I know is much demand in
15 other courts - can come or could start Friday afternoon and stay the weekend. But it
16 seems to be more sensible -- yes, to put her off until Monday at the moment; that's
17 what it seems to me.

18 Right, yes, thank you very much.

19 Tomorrow morning at 9.30, please.

20 THE COURT USHER: [15:32:23] All rise.

21 (The hearing ends in open session at 3.32 p.m.)