

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 Al Abd-Al-Rahman
5 ("Ali 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 3
9 Tuesday, 5 December 2023
10 (The hearing starts in open session at 9.41 a.m.)
11 THE COURT USHER: [9:41:28] All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE KORNER: [9:41:50] Yes, good morning, all.
15 Appearances from the Defence, please.
16 MR LAUCCI: [9:41:56] (Microphone not activated)
17 THE INTERPRETER: [9:42:05] Microphone, please, Mr Laucci.
18 PRESIDING JUDGE KORNER: [9:42:09] Mr Laucci, your mic, apparently it's not
19 working.
20 MR LAUCCI: [9:42:12] It's on.
21 THE INTERPRETER: [9:42:15] Message from the English booth: We cannot hear
22 counsel's microphone, apologies.
23 MR LAUCCI: [9:42:21] Okay. I will try with this one. For the re-examination it
24 will not be easy. So I was saying --
25 (Interpretation) Good morning, Madam President. Good morning, your Honours.

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1 Good morning, dear colleagues. Good morning, Dr Gout. Good morning, people
2 in the public gallery. The composition of the Defence team this morning is the same
3 as yesterday with the addition of Thomas Chatelet, our intern, and our colleague
4 Iain Edwards, co-counsel.

5 PRESIDING JUDGE KORNER: [9:42:53] Thank you. And Prosecution.

6 MR JEREMY: [9:42:54] Good morning, Madam President, your Honours.

7 Diana Saba, Claire Sabatini and Edward Jeremy.

8 PRESIDING JUDGE KORNER: [9:42:59] Thank you.

9 And the representatives of the victims.

10 MR SHAH: [9:43:03] Good morning, Madam President, your Honours. Same
11 appearances as yesterday. Thank you.

12 PRESIDING JUDGE KORNER: [9:43:09] Although I see everybody has moved to the
13 front row.

14 MR SHAH: [09:43:10] Yes. Yes, indeed. Thank you.

15 PRESIDING JUDGE KORNER: [09:43:12] It's the last hearing before Christmas.

16 Yes.

17 Yes. Good morning, Dr Gout. And you will complete your evidence I would
18 anticipate by the first break at 11 o'clock.

19 And Mr Laucci is still re-examining.

20 MR LAUCCI: [9:43:37] Yes. Getting closer to you for the last hearing of the year.

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22 (The witness speaks French)

23 QUESTIONED BY MR LAUCCI: (Continuing)(Interpretation)

24 Q. [9:44:01] Good morning, Dr Gout. I'm going to resume my questioning, my
25 re-examination, in fact, where I left off yesterday.

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1 Could we please have up on the screen document number 4 in the OTP binder. That
2 is the Constitutional Decree No. 7, DAR-OTP-00007036.

3 PRESIDING JUDGE KORNER: [9:44:58] What tab did you say it was?

4 MR LAUCCI: [9:45:01](Interpretation) Tab number 4 in the OTP binder.

5 PRESIDING JUDGE KORNER: [9:45:15] Yes. And it's not wherever I put it is, it
6 isn't, number 4.

7 MR LAUCCI: [9:45:36](Interpretation)

8 Q. [9:45:38] Dr Gout, this is the document that my colleague from the OTP
9 indicated to you yesterday that the OTP was able to find it in the Peace Palace library
10 at the ICJ. I can see this at yesterday's (Speaks English) real-time transcript page 19,
11 lines 18 to 20.

12 (Interpretation) Now, have you had the opportunity to peruse this document between
13 yesterday and this morning?

14 A. [9:46:27] No, I have not, counsel.

15 Q. [9:46:30] Well, in that case, we shall have a look at it together. You can see the
16 first page on the screen, can you not?

17 A. [9:46:40] Yes.

18 Q. [9:46:42] Very well. So this is a document from the Deutsches Orient-Institut in
19 Hamburg?

20 A. [9:46:58] Yes.

21 Q. [9:47:00] Of whom the director is Peter Nyot Kok.

22 Could we please scroll down somewhat on this page.

23 Could we please move to the next page. In fact, two pages. So I'm looking for
24 page 2 -- page 3, please.

25 There we have it.

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1 Now, could we please stay at the top of the page. Thank you.

2 We can see here on the screen the appendix, appendix number 9, Constitutional
3 Decree No. 7, followed by a date. And you can see a source written just underneath
4 the title (Speaks English) "Summary of World Broadcasts, BBC, London, 18.10.1993."
5 (Interpretation) Could we please scroll down on the page, please. I'd like to go to a
6 chapter entitled "judiciary". It's a little bit further down the page. There we are,
7 thank you.

8 Can you see the paragraph -- well, firstly, I do apologise. Could we go back up the
9 page a little bit to the top of the provision. Stop. There we are.

10 Now, you can see that there is "Chapter 1" with its title (Speaks English) "The
11 principles guiding the policy of the government".

12 (Interpretation) Can you see that?

13 A. [9:49:21] Yes.

14 Q. [9:49:21] Can you see inside this chapter any numbers of articles or sections?

15 A. [9:49:28] No, I don't see any.

16 Q. [9:49:30] Very well. Could we please move once again down the page to the
17 paragraph commencing with the words "The judiciary".

18 And I'd like to draw your attention to what is written in this paragraph that I shall
19 read out in English.

20 (Speaks English) "The judiciary: The judiciary is evidence, judgment and the
21 observance of justice" *et donc suivi, entre crochets des mots* "[sentence as heard]".

22 (Interpretation) Could we please move up the page. I'd like to move to the second
23 column now, please, under "Foreign policy". There we are. Thank you very much.

24 So we have a chapter beginning with "Foreign policy", well, the last paragraph of
25 chapter 1, which I shall now read: (Speaks English) "It shall be fostered by living

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1 regional and international relations, for mutual understanding, cooperation and
2 human unity and in the spirit which guarantees justice and (?removes) injustice from
3 the international system."

4 (Interpretation) Could we please move to page 4, first column opposite number 12, so
5 I think it will be further down the page. Yes. Could we please go down. Thank
6 you.

7 Last paragraph of the left-hand column, I'm going to read it:

8 "Article 12" *crochet* "[as heard]" *fermez les crochets*, (Interpretation) and then the text
9 continues.

10 Could we please go to article 14 in the right-hand column, so I'm sure it's further up.
11 Yes, there it is. Thank you.

12 We have here number 14 in brackets followed with the words, in brackets again,
13 square brackets, "[as heard]", and then the word "Elections" followed by a colon.

14 And if we go further down the page to where we have the number 15 written. Stop.
15 Come back a little bit. Thank you.

16 (Speaks English) "The organisation of the national assembly and the elected state
17 councils:"

18 (Interpretation) Colon, open brackets, "(15)", close brackets, open square brackets,
19 "[as heard]", close square brackets.

20 And lastly, I'd like to draw your attention to the last paragraph of this column and of
21 the document that I shall read to you:

22 (Speaks English) "Issued by order of the RCC of the national salvation revolution and
23 so on" (Interpretation) open square bracket, "[as heard]", closed square brackets.

24 Dr Gout, what can you tell us about the source of the text that we've just perused?

25 PRESIDING JUDGE KORNER: [9:53:49] (Microphone not activated) I don't think

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1 that he needs to state the obvious, that it's actually reproduced, it would appear, from
2 a BBC broadcast. I did notice that at the time and wondered.

3 MR LAUCCI: [9:54:01] (Interpretation) Very well. Well, it might be obvious once
4 again, but I would like to have the viewpoint of Dr Gout in this regard.

5 Q. [9:54:12] Is it the original text of decree number 7 or not?

6 A. [9:54:20] Quite obviously not.

7 Q. [9:54:25] And would you be in a position to tell us whether this version, this
8 document, I shan't describe it, whether this document is the version of decree number
9 7 upon which you worked in the past and to which you referred in your -- in your
10 work?

11 A. [9:54:51] Well, as I explained yesterday, this was the very first time that I was
12 seeing the document that had been presented to me by the Office of the Prosecutor.

13 Q. [9:55:03] Yes, indeed, but without seeing a document that is being presented as
14 decree number 7 and which is obviously not, you referred to decree number 7 in your
15 report and in your previous work, and when you referred to this decree number 7,
16 was it on the basis of the document that you have before you that you worked?

17 A. [9:55:34] No, it was not on the basis of the document before me.

18 Q. [9:55:38] I thank you and I move on to the next document.

19 PRESIDING JUDGE KORNER: [9:55:41] It obviously wasn't that document because
20 he didn't have it.

21 But my understanding is that you didn't have any document in front of you, that you
22 put the footnote which you were being asked about, which is -- it's paragraph 14 of
23 your report and footnote number 7.

24 What you were being -- what was being pointed out to you was that it didn't talk
25 about the creation of a national assembly, and you agreed that that was right, it

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1 doesn't. But when you wrote your report, did you have anything in front of you?

2 THE WITNESS: [9:56:34](Interpretation) Madam President, as I said yesterday, I
3 provided the sources that I used. It was the site of the ILO, the International Labour
4 Organisation, academic articles which had a bearing on this decree in the main.

5 But I do note that on the last page of this re-transcription of the reading of the decree,
6 it is mentioned the organisation of the national assembly. That's the last page of the
7 document or the decree: "Constitutional decrees must be adopted in order to
8 organise the national assembly and the elections and councils of state."

9 THE INTERPRETER: [9:57:26] Reads the witness from the document.

10 PRESIDING JUDGE KORNER: [9:57:33] Right. Okay. So, I mean, we're back to
11 you can't remember what you had in front of you.

12 THE WITNESS: [9:57:45](Interpretation) No, Madam President. I've just said the
13 site of the ILO and academic articles that I used in order to verify what the decrees
14 we're talking about, which I quoted in my report. I do believe I said that yesterday.

15 PRESIDING JUDGE KORNER: [9:58:06] Yes, but why both? Why not one or the
16 other? If you said the site of the ILO has the decrees reprinted in full, why did you
17 want academic articles?

18 THE WITNESS: [9:58:25](Interpretation) I said that the ILO's site had a list of the
19 decrees and their main subject matter, but I wanted to verify the veracity of these
20 decrees in articles -- academic articles that I had access to.

21 PRESIDING JUDGE KORNER: [9:58:49] Okay. So what you found on the ILO site
22 was a list of the decrees, the title, I assume, but nothing else, not the content?

23 THE INTERPRETER: [9:59:01] Message from the English booth --

24 THE WITNESS: [9:59:05](Interpretation) Yes, Madam President, the document on
25 the screen now, something like that, but in a far more summarised version, let's say

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1 the sort of, you know, the bones of the decree, nothing more.

2 PRESIDING JUDGE KORNER: [9:59:19] Yes, thank you.

3 MR LAUCCI: [9:59:22] (Interpretation) Madam President, yes.

4 Q. [9:59:29] You made mention of paragraph (15) or section, if you like, of the
5 decree which is still up on the screen. It is entitled "The organisation of the national
6 assembly and the elected state councils". Is that correct?

7 A. [9:59:48] Yes, counsel.

8 Q. [9:59:50] Thank you.

9 The document can be withdrawn from the screen.

10 And I would now like to have the document at tab 2 of the OTP binder, (Speaks
11 English) Judgment (Basic Rules) Act of 1983, (Interpretation) DAR-OTP-00006858, and
12 this is a document that we only have in Arabic, your Honour. And for the needs of
13 this exercise and my questions, I would ask for your leave to carry out the following
14 procedure, namely, that the case manager of the team reads aloud in Arabic the
15 passages that I would like to be read, such that they can be interpreted by the court
16 interpreters into English, if that's acceptable for you.

17 MR JEREMY: [10:01:00] Madam President, the next document is an English
18 translation, not of this same Arabic document, but they -- I mean, they should be, they
19 should be the same. It's an English translation of the same act, but it came from a
20 different source. So I don't know if that assists Mr Laucci.

21 PRESIDING JUDGE KORNER: [10:01:17] I'm sorry, which document is this? It's
22 not in our binders so I have no idea.

23 Which document is this, Mr Laucci?

24 MR LAUCCI: [10:01:27] (Interpretation) Document number 4 in the -- it's just in
25 Arabic. It's in the binder.

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1 PRESIDING JUDGE KORNER: [10:01:37] 4 in whose binder? Yours or the
2 Prosecution?

3 MR LAUCCI: [10:01:40] (Interpretation) Sorry, it's not tab 4, it's tab 2, that was my
4 mistake, in the Office of the Prosecutor's binder.

5 PRESIDING JUDGE KORNER: [10:01:48] Yeah, we haven't got any because
6 we -- you say tab 3 is a translation?

7 MR JEREMY: [10:01:53] Correct, yeah. It's an English version of the act which came
8 as a different source, so it's not a direct translation of the document.

9 PRESIDING JUDGE KORNER: [10:02:06] Well, I haven't got -- I haven't got either
10 copied, so ...

11 MR JEREMY: [10:02:09] I've got hard copies here that I'm happy to share.

12 PRESIDING JUDGE KORNER: [10:02:14] Yes, please, if it's going to be ...

13 MR LAUCCI: [10:02:19] (Interpretation) We can use the English version proposed
14 by the Office of the Prosecutor. We are fine with that.

15 PRESIDING JUDGE KORNER: [10:02:27] Okay. Put that on the screen then, the
16 English version, if that's okay.

17 MR LAUCCI: [10:02:46] (Interpretation) Tab 3 I'm told, for the English version. I'll
18 read the ERN, DAR-OTP-00005140. I think that we have to go -- I don't know, is it
19 the second or third page? Third page, please.

20 Q. [10:03:33] In paragraph 16 of your report, you write the following:

21 "Sudanese state law doesn't present the custom" - and we're talking about Sudanese
22 customary law, the state - "Sudanese state law doesn't present the custom in its terms,
23 envisaging its status with regards to Sharia. And this is well illustrated by the
24 judgment of 1983, which places custom in the second-last position in the hierarchy of
25 interpretive sources in terms of legal jurisprudence."

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1 Now, we have the English version of the document which was provided to us by the
2 Office of the Prosecutor.

3 Perhaps, could we go to page 2 to have the exact title of the document so that it's
4 complete. That's it. If we could go to the title. Thank you.

5 I'm just going to read the title:

6 (Speaks English) "The Judicature (Origins of Judgements) Act, 1983" (Interpretation)
7 and there's a date, "(28/9/1983)".

8 If we could go back to page 3, if you would be so kind.

9 Would you be so kind as to read the subparagraph (vi) which is on the screen.

10 A. [10:05:55](Speaks English) "giving due regard to the prevailing custom in
11 transactions, in such as may not be inconsistent with the ordinances of Islamic Sharia,
12 or the principles of natural justice".

13 Q. [10:06:14] Could you indicate to us if what you read accords with what you
14 wrote in your report, or if there is a difference, could you shed light on that?

15 A. [10:06:23] No, it accords with what was said. In fact, it reinforces this
16 confirmation reading article 2 of the law, which also refers to Sharia.

17 Q. [10:06:37] Of the same law?

18 Is it possible to go to article 2, please. I think that that will be on page 2.

19 If you could guide us.

20 A. [10:06:58] Well, this article imposes on the Sudanese judges to guarantee the
21 accordance with the laws and legislation of Sharia and to carry out its interpretive
22 activity in accordance with Islamic law in the three paragraphs of this article.

23 Q. [10:07:25] Thank you.

24 The documents can be taken off the screen.

25 I now have another two points. I should have read them, but anyway, the questions

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1 which I'm going to put to you in re-examination are meant to go through the entire
2 body of your evidence and answers.

3 Well, the questions are quite simple and precise and they can give rise to short
4 answers, so what you've done so far is perfect.

5 Now, the subject -- or the second-last subject is on the competence of the special court
6 for the situation in Darfur for its jurisdiction. And that's in paragraph 102 of your
7 report. And my colleague from the Office of the Prosecutor asked you quite a few
8 questions about it. In -- by way of summary, this special court on the situation in
9 Darfur, does it have -- or does it prosecute international crimes?

10 A. [10:08:44] It hasn't done so, at least not to the best of my knowledge.

11 Q. [10:08:50] Could you explain to us why not, in your opinion?

12 A. [10:08:54] Because it wasn't in the interest of the Sudanese government to
13 prosecute the perpetrators for international crimes who participated in their
14 counter-insurrectionist plan.

15 Q. [10:09:13] Very well. And the fact that it didn't accord with the interests of the
16 Sudanese government, in what way does that have an impact on the activity of that
17 court?

18 A. [10:09:27] Well, it has subsidiary jurisdiction, subsidiary to the International
19 Criminal Court for the states which are subject to the Rome Statute.

20 Q. [10:09:38] I'll repeat the question, I think you didn't answer the question. What
21 I was asking is the fact that the government did not wish that the special court
22 prosecute international crimes, so how did that prevent the court from doing so, in
23 fact, if it has jurisdiction for that?

24 A. [10:10:01] Because to my mind there wasn't the legislative apparatus necessary
25 in order to prosecute Sudan for these crimes.

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1 Q. [10:10:13] And what legislative apparatus are you speaking about?

2 A. [10:10:18] Laws at that time which would make it possible to prosecute persons
3 for international crimes.

4 Q. [10:10:24] Could you be more precise with regard to what such laws had to
5 contain?

6 A. [10:10:35] Well, the classification of acts which related to crimes against
7 humanity or war crimes, genocide, that's what was reported, it would seem to me, by
8 the previous general prosecutor of the Court, by finding, at the time that al-Bashir's
9 regime fell, ultimately the weakness of Sudanese law which had been adopted in
10 order to transpose the criminalisation of these acts in Sudanese law.

11 Q. [10:11:11] Very well. So according to your analysis, there is this lack of this
12 criminalisation which is the obstacle?

13 A. [10:11:15] Yes.

14 PRESIDING JUDGE KORNER: [10:11:20] Mr Laucci, that's all very well, but I
15 thought you had given an answer that it did have the power but it didn't use it
16 because you were shown the decree which said that the special court could
17 prosecute -- shall be added -- sorry, perhaps we better have it up, tab 19, the
18 document there.

19 THE WITNESS: [10:12:15](Interpretation) I'm sorry, your Honour, you asked me a
20 question, did you?

21 PRESIDING JUDGE KORNER: [10:12:19] Yes. I'm waiting for the document.

22 THE WITNESS: [10:12:21](Interpretation) Very well.

23 PRESIDING JUDGE KORNER: [10:12:23] Because I don't understand what your
24 answer to Mr Laucci now means.

25 Okay. You were shown originally the order which established the special court, the

1 crimes for which it had jurisdiction were under 5(a), acts that are considered crimes
2 by the Sudanese penal code or any other penal codes and the decree, which we're
3 now looking at, adds to that international humanitarian law. Now, I thought you
4 agreed that they did have the power, they simply didn't use it?

5 THE WITNESS: [10:13:13](Interpretation) Yes, your Honour, I don't think that's a
6 contradiction. Yes, there is that jurisdiction, and particularly with the adoption of
7 this decree, but it's a general reference to international humanitarian law and how
8 should Sudanese judges appointed by this court apply this law if they do not know
9 the tenor of it, if there isn't national law which specifies the criminalisation thereof.
10 In principle, for the states that are parties to international humanitarian law have to
11 transpose it into national law.

12 PRESIDING JUDGE KORNER: [10:13:47] Yes, so you keep saying, and I want to
13 come back to that when everybody else is finished. But what you've just asserted is
14 that there was no ability for the Sudanese to prosecute for international crimes, but
15 that isn't correct, is it? You say that the judges wouldn't know how to apply it, but, I
16 mean, that's neither here nor there. In theory, they could do it.

17 THE WITNESS: [10:14:23](Interpretation) Yes, your Honour, in theory, but there are
18 a lot of missing practical elements which would enable them to do so.

19 PRESIDING JUDGE KORNER: [10:14:31] All right. Yes.

20 MR LAUCCI: [10:14:32] (Interpretation) Thank you, your Honour.

21 Q. [10:14:33] On this point and following up on the question of the Presiding Judge,
22 Dr Gout, to the best of your knowledge, in Sudanese law the definition of "criminal
23 act", does it come from the law or does it come from that of the regulations?

24 A. [10:15:00] To the best of my knowledge it comes from the law, the criminal code
25 of '91.

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1 Q. [10:15:07] Now, the document that you've got in front of you, is that from the
2 law or does it come from a regulation?

3 A. [10:15:16] Regulation.

4 Q. [10:15:17] Thank you. I'll go on to the last subject and the document can be
5 taken off the screen now and replaced by the document at tab 1 in the binder of the
6 Prosecutor and that is the Goldenburg judgment - we spoke about this a
7 lot - DAR-OTP-00006837, and I would like to go to page 5 thereof. This corresponds
8 with page 42 in the work itself. And I think that it is the left-hand page.

9 Dr Gout, I'm going to read in English a paragraph which is in front of you and it is the
10 one that starts with the words "Having carefully considered". I will therefore read it
11 (Speaks English):

12 "Having carefully considered all the relevant authorities with special regard to the
13 wording of section 5 of the Civil Justice Ordinance, I am definitely of opinion, as was
14 held by Gorman J in *Abdulla Chercheflia v Maria Bakryarellis*, that the word 'custom' in
15 section 5 includes the personal law and the customs of the religious community
16 concerned where the parties are domiciled in the Sudan. In the present case, both
17 plaintiff and first defendant have a Sudanese domicile, and their personal law, which
18 is the Jewish religious law, is clearly applicable."

19 (Interpretation) Dr Gout, in paragraph 16 of your report you indicated -- and this is at
20 the end of paragraph 16 that I'm going to read with regard to this judgment:

21 "The Supreme Sudanese Court operated this classification for the first time in the case
22 *Maurice Goldenburg v Rachel Goldenburg* in a 1958 judgment in which it held that, 'The
23 word 'custom' in Section 5 includes the personal law and religious customs of the
24 communities concerned [...]."

25 Now, thanks to our colleagues from the Office of the Prosecutor, you've been able to

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1 look and -- look at and read the original judgment. Would you like to go back on
2 what you wrote in your report?

3 A. [10:18:56] No, I think that the reading of the judgment confirms what I indicated
4 in my report.

5 Q. [10:19:01] Very well. And in a more general way, Dr Gout, with regards to the
6 sources which the Office of the Prosecutor showed you during the cross-examination
7 yesterday, does it have an effect of varying or amending the changing -- the
8 conclusions of your report relating to the application of international law in Sudanese
9 law?

10 A. [10:19:33] No, counsel. It doesn't go against my conclusions. I just recognise
11 the specific case of asylum law and the protection of refugees in Sudan. Once again,
12 I think that that relates to the particular character of Sudan in activities relating to the
13 protection of refugees.

14 Q. [10:19:54] Thank you. We covered this subject in my first questions of
15 re-examination yesterday, I don't insist on it.

16 MR LAUCCI: [10:20:03] Your Honour, I've finished with my re-examination.

17 PRESIDING JUDGE KORNER: [10:20:06] Thank you, Mr Laucci.

18 The judges do have some questions.

19 I will start with Judge Alexis-Windsor.

20 JUDGE ALEXIS-WINDSOR: [10:20:15] Good morning, Dr Gout.

21 THE WITNESS: [10:20:20](Interpretation) Good morning.

22 JUDGE ALEXIS-WINDSOR: [10:20:22] I have a few questions for you. In
23 international law are member states of the United Nations bound by the decisions and
24 resolutions of the United Nations Security Council?

25 THE WITNESS: [10:20:46](Interpretation) Yes. I'm sorry, I can hear the interpreting.

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1 The member states of the United Nations have to apply the provisions and resolutions
2 of the Security Council, in particular when they are adopted on the basis of chapter 7
3 and when the parts of the legislation contain an injunction. With regards to my
4 words, it's not necessarily the resolution as a whole that's obligatory; in some cases it
5 could be certain parts of it. But yes, in principle, the states are obliged to respect
6 these resolutions.

7 JUDGE ALEXIS-WINDSOR: [10:21:41] And for the record, doctor, is Sudan a
8 member state of the United Nations?

9 THE WITNESS: [10:21:51](Interpretation) Of course.

10 JUDGE ALEXIS-WINDSOR: [10:21:52] Of course. Is adherence to the United
11 Nations Security Council resolutions different in monist and dualist countries, or is it
12 the same?

13 THE WITNESS: [10:22:15](Interpretation) Your Honour, the obligation is that
14 irrespective of the relationship between national and international law in a particular
15 given country.

16 JUDGE ALEXIS-WINDSOR: [10:22:33] Thank you. I'm moving on to another topic,
17 that of Sharia law.

18 You stated that Sharia law is a primary source of Sudanese law, yes?

19 THE WITNESS: [10:22:53](Interpretation) Yes, your Honour.

20 JUDGE ALEXIS-WINDSOR: [10:22:55] Yes, so I have a few questions. In Sharia
21 law are there prescriptions in relation to the treatment of prisoners of war?

22 THE WITNESS: [10:23:13](Interpretation) For what I know in that question, yes,
23 there are prescriptions which set out a minimum treatment for such persons.

24 JUDGE ALEXIS-WINDSOR: [10:23:24] All right. In Sharia law are there
25 prescriptions in relation to the treatment of civilians who are not participating in war?

1 THE WITNESS: [10:23:43](Interpretation) I wouldn't be able to answer that question,
2 your Honour.

3 JUDGE ALEXIS-WINDSOR: [10:23:51] In Sharia law are armed forces permitted to
4 rape women and children?

5 THE WITNESS: [10:24:11](Interpretation) I would give you the same answer,
6 your Honour.

7 JUDGE ALEXIS-WINDSOR: [10:24:17] Which would be?

8 THE WITNESS: [10:24:20](Interpretation) I can't answer that question.
9 Nevertheless, I've obtained -- despite the fact that I've obtained information on that
10 subject during my studies in Sudan, but where it concerns these situations which are
11 subsequent to 2011, I think, when Sudan adopted a law which forbid recourse to rape
12 as a weapon of war, so I think that came from the supreme Sudanese council on that
13 subject. But with regards to Sharia itself, I'm not able to answer that.

14 JUDGE ALEXIS-WINDSOR: [10:25:00] All right. One last question. I'm going to
15 skip some of the questions I have in this regard but one last question on this: Would
16 it be fair to say that Sharia law predates the Geneva Conventions?

17 THE WITNESS: [10:25:20](Interpretation) Yes, necessarily, your Honour.

18 JUDGE ALEXIS-WINDSOR: [10:25:27] Actually, one last question on this topic.
19 I think I know the answer, but I'm still going to ask it. Are you able to say whether
20 Sharia law was known or well known in Sudan in 2004, 2005?

21 THE WITNESS: [10:25:57](Interpretation) Your Honour, that depends on how do
22 you mean, by whom? By judges? Yes. But by the Darfurians, well, in fact, this is
23 a question, if you like, that I asked myself with regard to asylum seekers. If they
24 don't have education, it's hardly probable that they know the principles of
25 Sharia -- applicable to this context of armed conflict, that's what I mean.

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1 JUDGE ALEXIS-WINDSOR: [10:26:32] All right, fair enough, but let me be more
2 particular then. Would military officers of the Sudanese army, would they
3 have -- from your research, would they be familiar with Sharia law?

4 THE WITNESS: [10:26:49](Interpretation) Your Honour, I can't answer that
5 question.

6 JUDGE ALEXIS-WINDSOR: [10:26:55] All right. So moving on to another topic,
7 that is *hiraba* and *ghanima*. I hope I am pronouncing them in a way that can be
8 understood. I saw from I think it was paragraph 99 of your report that you
9 mentioned that *hiraba* and *ghanima* are accepted as part of the culture of Sudan, is that
10 so?

11 THE WITNESS: [10:27:32](Interpretation) Your Honour, I'm not certain that I used
12 the word "culture", but I think that I tried to look at the place of these concepts in
13 Sudanese law.

14 JUDGE ALEXIS-WINDSOR: [10:27:44] All right. Am I correct in my understanding
15 that you have stated that *ghanima* -- if a soldier commits *ghanima* -- or practices, I
16 should say, *ghanima*, he cannot be prosecuted?

17 THE WITNESS: [10:28:13](Interpretation) The legislative provisions I can consult
18 made it seem that there wasn't criminalisation for the practice of *ghanima*.

19 JUDGE ALEXIS-WINDSOR: [10:28:24] All right. Is there such a thing -- well, first
20 of all, before I ask that, my understanding from your report is that *ghanima* involves
21 the spoils of war but it cannot be for individual consumption; is that so?

22 THE WITNESS: [10:28:47](Interpretation) Yes, your Honour. That's my
23 interpretation of it.

24 JUDGE ALEXIS-WINDSOR: [10:28:51] All right. Is there, for lack of a better
25 expression, is there illegal *ghanima*, is there a way in which a soldier can practice

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1 *ghanima* and it be seen as illegal and therefore capable of prosecution?

2 THE WITNESS: [10:29:17](Interpretation) I don't know, your Honour. I wouldn't
3 be able to answer that question. I think that the information is accessible, but I don't
4 have it.

5 JUDGE ALEXIS-WINDSOR: [10:29:29] I see. All right then, well, that puts the end
6 to my questions. Thank you very much, Dr Gout.

7 Thank you, Madam President.

8 JUDGE ALAPINI-GANSOU: [10:29:45] (Interpretation) Thank you,
9 Madam President.

10 Mr Gout, I would also like to put a number of questions to you seeking clarification.

11 THE WITNESS: [10:29:58](Interpretation) Indeed, your Honour.

12 JUDGE ALAPINI-GANSOU: [10:30:00] (Interpretation) Yesterday you talked about
13 the African Charter of Human and Peoples' Rights and you showed how the
14 obligations of the States Parties were implemented and you talked at length about the
15 report from Sudan that was presented to the committee, the African committee on
16 human rights. But what I would like to understand is the conclusions on the part of
17 the African states with regard to the respect of Sudan and in light of the treaties and
18 the conventions. What did those observations, those final observations actually say?

19 THE WITNESS: [10:30:58](Interpretation) Well, your Honour, to be quite honest, I
20 cannot recall all of the points mentioned in those final observations, but yesterday
21 I was able to rapidly peruse it and I looked at those final conclusions of the
22 commission. I specifically was looking for the provisions of the resolutions
23 pertaining to discrimination and, notably, discriminatory practices towards women
24 which were part of the conclusions of the commission. I believe that was contained
25 in the third report. So I'm not sure that this is of any use, but the conclusions will

1 thank the state for having cooperated, will thank the state for having made efforts in
2 certain areas in order to protect the rights and fundamental freedoms and then will go
3 on to talk about weaknesses and the enabling part of the resolution will encourage the
4 state to adopt certain measures or change certain practices in order to improve the
5 situation.

6 JUDGE ALAPINI-GANSOU: [10:32:31] (Interpretation) I would like to compare the
7 African commission of human rights to other treaty organisations on the -- in the
8 universal plane, if you like. I think that this is in line with the concerns of the
9 Prosecution and your counsel.

10 Now, the decisions that are taken at the level of these treaties, do they have executory
11 force, are they binding on the States Parties, yes or no?

12 THE WITNESS: [10:33:11](Interpretation) No, your Honour. In theory, they are not
13 binding upon the State Parties.

14 JUDGE ALAPINI-GANSOU: [10:33:18] (Interpretation) Now, before the domestic or
15 national courts, could they be mentioned or called upon?

16 THE WITNESS: [10:33:36](Interpretation) Yes, your Honour, that was done on a
17 number of occasions without even having to go to Sudan. France has done it, in fact.

18 JUDGE ALAPINI-GANSOU: [10:33:46] (Interpretation) Now, another concern that I
19 have with regards to positive law in Sudan, I understood, unless I am mistaken, that
20 in Sudan, as in number of African countries, there is this parallel legal system, we
21 would agree, would we not? Would you agree with me?

22 THE INTERPRETER: [10:34:11] No answer from the witness.

23 PRESIDING JUDGE KORNER: [10:34:16] He didn't answer.

24 JUDGE ALAPINI-GANSOU: [10:34:14] (Interpretation) Did you answer? We're
25 talking about the parallel system, legal system.

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1 THE WITNESS: [10:34:21](Interpretation) Yes, I do --

2 THE INTERPRETER: [10:34:22] Overlapping speakers.

3 THE WITNESS: [10:34:27](Interpretation) Yes, I do agree with you, your Honour.

4 JUDGE ALAPINI-GANSOU: [10:34:31] (Interpretation) It would seem that I'm
5 speaking too quickly.

6 Now, in several African states there is this notion of a parallel legal system. Would
7 you agree with me, because of course at least you have the experience of Sudan, do
8 you not?

9 THE WITNESS: [10:34:51](Interpretation) I am entirely in agreement with you,
10 your Honour.

11 JUDGE ALAPINI-GANSOU: [10:34:55](Interpretation) So we can say that in Sudan
12 we have customary law and we also have, I don't quite know how to describe it, let's
13 say it's modern law, all right?

14 THE WITNESS: [10:35:13](Interpretation) Yes, your Honour, we can describe it like
15 that, but to my mind, customary law is also law -- also as modern as state law.

16 JUDGE ALAPINI-GANSOU: [10:35:25] (Interpretation) Well, whether customary
17 law be as modern as state law, does that mean that the two legal systems are evolving,
18 are they evolving in the country, and in these conditions, what part of the population
19 does the customary law apply to and in what form -- and in what form does the state
20 law apply? Do you understand my concern?

21 THE WITNESS: [10:35:54](Interpretation) Yes, your Honour. I'm going to try to
22 answer as clearly as I possibly can.

23 These two forms of law are in constant evolution and they interact on many levels.

24 Now, a parenthesis, an entire chapter of my thesis is given over to looking into
25 situations where one might think that one is up against customary law, but in fact it is

1 law produced by the institutions of the state and they evolve constantly in parallel.
2 They are both modern as well, if you like. These two fields of law apply to situations
3 that sometimes are -- have everything in common. Everything to do with land will
4 be managed concurrently, and I'm using this term "concurrently" here, by these two
5 fields of law. So you're going to have forum shopping which are going to enable
6 individuals to have recourse to certain areas of law in order to fend their interests.
7 But this can be applied to facts that can be characterised as criminal offences, and
8 according to whatever means the Sudanese police has outside of the insurgency,
9 they're going to refer to customary law in order to settle these disputes in a peaceful
10 manner without having to have recourse to any form of punishment. So those are
11 examples that I can provide you with in these two fields where both fields of law
12 apply and they apply by adopting standards or norms by competent authorities and
13 there are procedures that are or have been already established.

14 JUDGE ALAPINI-GANSOU: [10:38:02] (Interpretation) Now, according to your
15 experience, do the Sudanese authorities envisage bringing these two fields of law
16 together?

17 THE WITNESS: [10:38:20](Interpretation) Yes, that is one of the recurrent challenges
18 of Sudanese law. I think it was 1971 when the native administration was officially
19 done away with by the Nimeiri government and this enabled people to exploit or
20 manipulate these customary institutions in an informal manner whenever they felt it
21 could do them good. But in order to answer your question, when I last went to
22 Sudan, I contacted individuals who organised *judiya* in the state of Khartoum, and the
23 project, this customary justice project in urban zones were supposed to be extended to
24 the -- the entire territory, that these customary institutions should be there to settle
25 disputes through these *judiya*. But of course it wasn't done because of the current

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1 situation in Sudan. But that was something that was an ambition, if you like.

2 JUDGE ALAPINI-GANSOU: [10:39:36] (Interpretation) Thank you very much.

3 Now my last concern is associated with what you said about decree number 7. I
4 thought I understood in your testimony yesterday, but there was a plan to put up a
5 transitional national assembly, but today you didn't make mention of that at all
6 during Mr Laucci's redirect.

7 Now would you like to say anything about that?

8 THE WITNESS: [10:40:16](Interpretation) No, your Honour, I wouldn't have much
9 more to say about that. I think today we focussed on the national assembly because
10 that was what was homed in on yesterday by the OTP, that's the transitional assembly.
11 So I don't really have much more to say about it. I don't have anything to say to you
12 about that.

13 JUDGE ALAPINI-GANSOU: [10:40:36] (Interpretation) Thank you very much.

14 And thank you for your cooperation.

15 Madam President, I am now finished.

16 PRESIDING JUDGE KORNER: [10:40:42] Yes, I want to go back to it, because I'm
17 afraid that it's not entirely clear, I don't think, to any of us what you're saying about
18 the position of IHL in Sudanese law.

19 Can you turn to paragraph 78 of your report. 78.

20 THE WITNESS: [10:41:41](Interpretation) I have found it, Madam President.

21 PRESIDING JUDGE KORNER: [10:41:44] I'm just saying for the -- it's come up on
22 the screen.

23 Your -- have we understood this correctly, your position is this: That because the
24 1998 constitution makes no direct reference to international humanitarian law or
25 international agreements, they therefore form no part of Sudanese law unless

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1 specifically enacted by a law passed by the Sudanese?

2 THE WITNESS: [10:42:34](Interpretation) Thank you, Madam President. Maybe

3 I can clarify my position. This will allow me to do so. To my mind, one must make

4 the distinction between recourse, direct recourse -- between direct recourse and direct

5 application. It is the international humanitarian law that can be used or referred to

6 by people in court before national courts, but we have to give those national courts

7 the means to make this law applicable, to apply this international humanitarian law.

8 And to the extent that we are talking here about a dual legal order - and I do maintain

9 my position on the basis of the documents presented by the OTP yesterday, I

10 maintain my position that transposition is necessary - these provisions, these

11 conventional provisions that have a legislative force must be, via decree or via a judge,

12 transposed, and if they do not do so, the direct applicability of this law has not been

13 implemented. We have what we would call a violation by the state and also by its

14 members, its working members of these international obligations that are imposed

15 upon Sudan.

16 So I distinguished --

17 THE INTERPRETER: [10:44:09] Could the witness please be requested to slow

18 down.

19 PRESIDING JUDGE KORNER: [10:44:15] You're going to have to say the last bit

20 again because the interpreter could not keep up with you.

21 THE WITNESS: [10:44:30](Interpretation) So, I make a distinction for the person

22 before the court to invoke their rights, which is valid, and from the capacity of the

23 organs of the state to validate these rights, which requires Sudan to have acts of

24 transposition. And it is for these reasons that we have litigious -- these rights are not

25 respected by the organs and by the agents of the state and that is why we have a

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1 lack -- this is another example, of course, but without talking about international
2 humanitarian law, I believe that this distinction is important.

3 THE INTERPRETER: [10:45:22] Message from the English booth: The witness is
4 speaking very, very fast, very, very densely and it's very difficult to follow.

5 PRESIDING JUDGE KORNER: [10:45:30] Right. Dr Gout, you have been warned
6 about this before, but you speak very, very fast, you use a lot of terms that are dense,
7 academic terms, and the interpreters are having difficulty. So perhaps you would
8 like to keep it as simple as possible.

9 All right. So your position remains, despite all the documents that the Office of the
10 Prosecutor showed you yesterday which suggests that particularly international
11 conventions don't need to be transposed into law, that unless they have been, they're
12 not applicable in Sudan. That's your position at the end?

13 THE WITNESS: [10:46:24](Interpretation) Yes, Madam President, and I believe that
14 these conventions have sometimes been transposed. There we are.

15 PRESIDING JUDGE KORNER: [10:46:31] Well, you see, the other thing that you
16 relied on is part of the -- I don't think anybody put the full constitution into the
17 documents, but it has been admitted before.

18 Can we have up on the screen the document which is DAR-OTP-0139-0003. Thank
19 you.

20 You referred to - I don't know exactly where it was - Article 73. Can we have that
21 up.

22 MR JEREMY: [10:47:55] I think it's paragraph 77 of the report.

23 PRESIDING JUDGE KORNER: [10:47:58] Oh, thank you very much. Yes.

24 And Article 73(1)(d) says "The National Assembly shall represent the popular will in
25 legislation", et cetera, et cetera and "perform the following tasks: Approve treaties

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1 and international agreements".

2 Is it your contention that that phrase "approve" means having to pass a law, as
3 opposed to simply giving assent through the assembly to the ratification of a
4 convention?

5 THE WITNESS: [10:48:56](No interpretation) (Overlapping speakers)

6 PRESIDING JUDGE KORNER: [10:48:57] Sorry?

7 THE WITNESS: [10:48:58](Interpretation) Yes, Madam President.

8 PRESIDING JUDGE KORNER: [10:49:01] Why do you say that? Why does
9 approving a treaty and international agreement presuppose that legislation has
10 been -- has to be passed as opposed to confirming that the treaty, as we've seen in the
11 other documents, is ratified?

12 THE WITNESS: [10:49:25](Interpretation) Yes, Madam President, the national
13 assembly cannot adopt any other acts apart from national legislation, so an act of
14 national legislation that approves a treaty is an act of legislation. To my mind. To
15 my mind. To my knowledge.

16 PRESIDING JUDGE KORNER: [10:49:52] I see. So although -- I think, I think I
17 follow what you're saying. Although a law is not passed, for example, if Sudan had
18 actually joined the International Criminal Court, as in the United Kingdom a law was
19 passed to incorporate the Rome Statute, even though something like that doesn't
20 happen, in your view, the -- agreeing to the ratification of an international convention
21 is in itself the passing of a law?

22 THE WITNESS: [10:50:51](Interpretation) Yes, Madam President, for me, that
23 procedure is the act that will allow to transpose into internal law the provisions of a
24 convention that has been signed by Sudan.

25 PRESIDING JUDGE KORNER: [10:51:07] Right. And so in your view, as you said

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1 yesterday, the document -- for some reason that you can't explain, Sudan made a
2 huge exception in terms of asylum and has actually specifically said that international
3 norms applied?

4 THE WITNESS: [10:51:35](Interpretation) I believe that I have explained, because
5 this is the specific domain of the rights of refugees, and I do understand the reason
6 why Sudan gave primacy to international rights of refugees, especially the provisions
7 of international law that might say the contrary. And I believe that the documents
8 provided by the OTP confirm my interpretation. And we could also wonder, in the
9 light of these documents, whether the adoption of the 1998 constitution was also a
10 means to rejig the relations between international law and Sudanese law. Any new
11 constitution will of course bring with it considerations of this type.

12 PRESIDING JUDGE KORNER: [10:52:39] All right. But I think the final point that I
13 want to try and understand is: Is it your contention that there, because there's no
14 specific reference in the constitution or any enabling acts that you can see, that none
15 of the Geneva Conventions, none of that are part of international law such as
16 genocide, crimes against humanity, war crimes, none of those are applicable to Sudan
17 during 2003 and 2004; is that your contention?

18 THE WITNESS: [10:53:32](Interpretation) No, that is not my position, Madam
19 President. Once again, I believe that the provisions of international humanitarian
20 law and international human rights law which give over laws for individuals are laws
21 that can be called upon by the national judge, but of course the problem is that we
22 find ourselves in a legal structure, a Sudanese legal structure that puts the brakes on
23 that, makes it impossible. That's why we have experienced these violations of
24 humanitarian law and in fact the existence of this trial itself.

25 PRESIDING JUDGE KORNER: [10:54:13] Well, you're not saying, are you, simply

1 because the judges, in your view, didn't have the power to implement these, that's
2 why the clear and undisputed breaches of international humanitarian -- international
3 humanitarian law took place are simply because of that?

4 THE WITNESS: [10:54:47](Interpretation) Of course all of these violations did
5 indeed take place, but the problem is the absence of a legal framework, the Sudanese
6 legal framework that will enable people to try those people responsible, to my mind,
7 but of course, I do not deny that these violations took place. The state ratified this
8 convention and is bound to respect it.

9 PRESIDING JUDGE KORNER: [10:55:21] All right. Finally this: Do I understand
10 from your answers to Judge Alexis-Windsor that you really haven't made a particular
11 study at all of Sharia law?

12 THE WITNESS: [10:55:40](Interpretation) It is not exactly that. I worked on the
13 protection of religious minorities under the Sharia. It is true that during my research
14 I did not work on the rules of the Sharia that apply, that apply to armed conflict. It is
15 true that I worked on some aspects of the Sharia, not all, Madam President.

16 PRESIDING JUDGE KORNER: [10:56:12] Well, you didn't think it was necessary for
17 your thesis, which was on peacekeeping?

18 THE WITNESS: [10:56:25](Interpretation) No, because my thesis was on the use of
19 customary law by international organisations. In fact, it was not on maintaining
20 peace, it was on building peace, my thesis.

21 PRESIDING JUDGE KORNER: [10:56:42] Well, I appreciate it. I was summarising
22 it as peacekeeping. Yes, all right.

23 Yes, thank you very much, Dr Gout. That does finally complete your evidence.
24 Thank you very much for coming back and for giving us the benefit of your opinion
25 on these matters. So thank you.

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1 THE WITNESS: [10:57:06](Interpretation) Thank you very much, Madam President.

2 May I thank the Court and all those who helped in producing my report. Thank you
3 very much.

4 PRESIDING JUDGE KORNER: [10:57:19] Yes. Thank you very much.

5 THE WITNESS: [10:57:21](Interpretation) And goodbye.

6 MR LAUCCI: [10:57:24] (Interpretation) Maybe for the court clerk, maybe it could be
7 possible to organise a courtesy visit with Dr Gout -- oh, I'm sorry, I've been told that it
8 has already been organised. Thank you.

9 PRESIDING JUDGE KORNER: [10:57:42] Well, if he wants a courtesy visit to the
10 Court, I would have thought he's seen enough of it, but ...

11 Yes, thank you, Dr Gout, you're free to go. The court officer will see you out.

12 THE WITNESS: [10:58:02](Interpretation) Thank you, Madam President.

13 (The witness is excused)

14 PRESIDING JUDGE KORNER: [10:58:12] All right. Can we turn to the various
15 housekeeping matters which I alluded to yesterday.

16 Right. The trial, as we said yesterday, will resume after the break on Monday,
17 15 January. There will -- it won't sit straight through because 19 January I think it is
18 the official opening of the legal year, or whatever it's called here. And there may be
19 other days that we may not be able to sit.

20 So, Mr Laucci, first of all, the missing witnesses, D-28 and 29, who were supposed to
21 testify, any resumption of contact?

22 MR LAUCCI: [10:59:09] No, that's a matter of -- actually, can we move in --

23 PRESIDING JUDGE KORNER: [10:59:15] Oh, yes, we better go into private session,
24 yes. Sorry.

25 (Private session at 10.59 a.m.)

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- 1 THE COURT OFFICER: [10:59:29] We are in private session, Madam President.
- 2 (Redacted)
- 3 (Redacted)
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Trial Hearing
WITNESS: DAR-D31-P-0023

(Private Session)

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Page redacted – Private session

Trial Hearing
WITNESS: DAR-D31-P-0023

(Private Session)

ICC-02/05-01/20

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19 (Open session at 11.17 a.m.)

20 THE COURT OFFICER: [11:17:38] We are back in open session, Madam President.

21 PRESIDING JUDGE KORNER: [11:17:40] All right. Well, as this is going to be the

22 last sitting before the Christmas break, this is, first of all, our opportunity on the

23 Bench to thank, first of all, the court staff on the basis that they don't get many thanks

24 for -- they get complaints about LiveNote not working, but obviously, and

25 particularly the staff who have been with this trial virtually throughout, have done, as

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1 I'm sure everybody will agree, a great job.
2 Second, the interpreters, again, sometimes the subject of some criticism, but they have
3 done a quite remarkable job given the variety of languages that we have had, the
4 variety of witnesses, ranging from those who have a low level of education or any
5 showing to those that have a very high level and a very complicated way of
6 expressing themselves, which we've rather seen. And it is really -- without them, I
7 mean, of course, these proceedings could not take place and nor could they be
8 broadcast. So we do thank them.
9 And last, but not least, the parties. And we are happy to see that the spirit of
10 cooperation, with the odd few blips, has continued throughout this case. It has
11 made for all three of us the case largely a real pleasure to deal with and we thank you
12 all very much and we know that cooperation will continue into next year.
13 So on that note, happy Christmas to all, and we'll see each other in the New Year.
14 THE COURT USHER: [11:19:53] All rise.
15 (The hearing ends in open session at 11.19 a.m.)