

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 Monday, 4 December 2023
10 (The hearing starts in open session at 9.32 a.m.)
11 THE COURT USHER: [9:32:41] All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE KORNER: [9:33:08] Yes, good morning, all.
15 Can we have the appearances, please, from the Defence.
16 MR LAUCCI: [9:33:15] Good morning, Madam President. Good morning, your
17 Honours. Good morning, dear colleagues. Together with Mr Ali Muhammad
18 Ali Abd-Al-Rahman present in the courtroom this morning, Madam Nina Guilloux,
19 assistance evidence reviewer; Mr Ahmad Issa, case manager; Madam Audrey Mateo,
20 legal adviser; and myself, Cyril Laucci, counsel.
21 PRESIDING JUDGE KORNER: [9:33:39] And where's Mr Edwards this morning?
22 MR LAUCCI: [9:33:42] He's not attending.
23 PRESIDING JUDGE KORNER: [9:33:44] Full stop. Yes.
24 Yes, the Prosecution, please.
25 MR NICHOLLS: [9:33:53] Good morning, Madam President. Good morning, your

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1 Honours. Good morning to everyone in the courtroom. Julian Nicholls with
2 Edward Jeremy, Diana Saba and Claire Sabatini. Thank you very much.

3 PRESIDING JUDGE KORNER: [9:34:04] Thank you, Mr Nicholls.

4 Yes, and the victims.

5 MR SHAH: [9:34:08] Good morning, Madam President. Good morning, your

6 Honours. And good morning to everyone in the courtroom. Anand Shah, associate
7 counsel, on behalf of the participating victims today, with our visiting professional,
8 Charlotte Imhof, and our new intern, Beatrice Carpani. Thank you.

9 PRESIDING JUDGE KORNER: [9:34:25] Yes, right.

10 And good morning to you, Dr Gout. And thank you very much -- and thank you
11 very much for coming back and giving us two days. Our best guess is you will
12 finish sometime by lunchtime tomorrow. So I hope that's okay.

13 All right, Mr Shah, we got a message saying that you wanted to ask some questions
14 on behalf of the victims.

15 MR SHAH: [9:34:53] That's correct, Madam President. Just two discrete subjects,
16 should not take very long, with your leave.

17 PRESIDING JUDGE KORNER: [9:34:59] That's fine, yes.

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

19 (The witness speaks French)

20 QUESTIONED BY MR SHAH:

21 Q. [09:35:04] Good morning, Dr Gout. I hope you're well.

22 A. [9:35:13] Good morning, counsel. I'm well, thank you.

23 Q. [9:35:16] We met briefly before you started your testimony, but for the record,
24 my name is Anand Shah, as you've just heard, and I'm one of the counsel representing
25 the participating victims in these proceedings.

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1 A. [9:35:32] Pleased to meet you.

2 Q. [9:35:42] And I have just a couple of subjects I would like to discuss with you.

3 Firstly, the impact of the conflict in 2003-2004 on the structure and functioning of the
4 *idara ahliya*, the tribal administration, and in particular I'm interested in the
5 communities that were displaced on a large scale, like the Fur community, from rural
6 areas to urban areas or into displaced persons camps.

7 Are you able to provide their Honours with any insight on how this displacement
8 impacted the functioning and structure of the tribal administration, the *sheikhs*,
9 *umdahs*, *shartays*, for example?

10 A. [9:36:40] To some extent, yes. That will depend on the questions put,
11 I suppose.

12 Q. [9:36:45] Was it the case that the leadership remained the same in these
13 displaced persons communities or were there, for example, new leaders that -- that
14 were appointed in displaced persons camps, for example.

15 A. [9:37:08] Generally speaking, new leaders were appointed, designated and they
16 were given various titles and customary duties. They were referred to as *umdahs*.
17 That was the case for all the displaced persons camps in the period under question.

18 PRESIDING JUDGE KORNER: [9:37:34] Just pause for a moment.

19 Is the live note working? There is a gap. I don't think it's working properly.

20 MR SHAH: [9:38:09] I think the booth is indicating it's functioning again,
21 Madam President.

22 PRESIDING JUDGE KORNER: [9:38:13] What about the missing bits, not that
23 I suppose it matters much. I suppose it can be filled in later. Yes, carry on,
24 Mr Shah.

25 MR SHAH: [9:38:27]

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1 Q. [9:38:27] And, Dr Gout, you mentioned the appointment of new individuals.

2 How were they appointed in comparison to the previous leadership?

3 PRESIDING JUDGE KORNER: [9:38:55] I'm told that we may need to pause. I see,

4 I gather it's going to be about five minutes to fix it, in which case we'll adjourn, I think,

5 until it is fixed. All right, yes, we'll rise until it's working again properly.

6 THE COURT USHER: [9:39:11] All rise.

7 (Recess taken at 9.39 a.m.)

8 (Upon resuming in open session at 9.49 a.m.)

9 THE COURT USHER: [9:49:31] All rise. Please be seated.

10 PRESIDING JUDGE KORNER: [9:49:43] Yes, well, it may or may not be working,

11 we're just going to have to carry on.

12 MR SHAH: [9:49:52] Thank you, Madam President.

13 Q. [9:49:53] Dr Gout, when we left off I'd asked you about the process of

14 appointment of the new leader's post -- post-conflict or during the conflict in IDP

15 camps, in particular.

16 A. [9:50:10] Yes. I would say that your question has two parts. First of all,

17 quality, was a particular quality needed to become or to occupy a position in the

18 customary administration; and then, secondly, the procedure. Have I understood

19 your question properly?

20 Q. [9:50:37] Yes, yes. That's correct. It would be great to hear from you on both

21 those points.

22 A. [9:50:49] Well, there were various cases, various situations when it came to

23 qualities required. For example, being close to a noble family, that was one quality.

24 But in most cases that criteria did not come into play and the person who would be

25 designated as a *umdah* or a *sheikh* would be the one who managed to set himself apart

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1 within the camp.

2 I also noticed when I was studying these matters in the camps, in some of the slums
3 or territories, in actual fact, in some cases for some groups it was affiliation to the
4 NCP, to become *sheikh* or *umdah*.

5 The local representatives of communities had to become a member of the NCP, to be
6 recognised as a representative of the community by the local communities, by the
7 people in Khartoum.

8 As for the procedure, I don't have as much information about that, to be honest, and
9 I'm not aware of a procedure or anything along the lines of an election. It was more
10 tacit and informal. The appointment of people was done tacitly, in an informal
11 manner.

12 Q. [9:52:36] Thank you, Dr Gout, and are you able to speak to what happened to
13 the prior leadership? Where did they go, those who survived the conflict, and why
14 was it that they could not continue to act in this capacity?

15 A. [9:53:00] Some died during the conflict, others remained in Darfur, and there are
16 a few anecdotes about the situation; namely, these leaders in Darfur did travel to
17 Khartoum and would found -- would find themselves squared off against these new
18 leaders in Khartoum, so that sort of situation led to some rather embarrassing
19 situations. Some did die in the conflict. Others remained in Darfur, and sometimes,
20 you see, it was not possible to coordinate the actions of these leaders. It was the
21 tribal councils, the tribal councils that coordinated the position of the community, the
22 tribe, the ethnic group, and when it came to some aspects of Sudanese politics.

23 Q. [9:54:20] Thank you very much, Dr Gout.

24 And the second subject I'd like to explore with you is something you did address in
25 your testimony when you were here, and that is the distribution of land between

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1 tribes or ethnicities arising from the 2003-2004 conflict and you did address this,
2 transcript 136 in pages 80 to 82. And I just wanted to know whether you are aware
3 of any specific *judiya* processes being convened between the Fur community and any
4 of the Arab tribes arising from the 2003-2004 conflict?

5 PRESIDING JUDGE KORNER: [9:55:16] Can you just remind us of what the *judiya*
6 process is?

7 MR SHAH: [9:55:25] (Microphone not activated)

8 PRESIDING JUDGE KORNER: [9:55:25] Mr Shah, you asked the question.

9 MR SHAH: [9:55:28] Yes, yes, of course. This is the customary arbitration process
10 to settle disputes between communities.

11 PRESIDING JUDGE KORNER: [9:55:40] Just before you answer, it isn't working at
12 all.

13 Now, Mr Shah, if you're happy to go on, but none of this is going to appear. I think
14 before the Prosecution start cross-examination, we're going to have to sort this out.
15 But if you're happy to continue with your questions without the live note working
16 properly...

17 MR SHAH: [9:56:02] I'm happy to continue, Madam President. This is my final
18 subject.

19 PRESIDING JUDGE KORNER: [9:56:06] Okay. All right. Thank you.

20 MR SHAH: [9:56:09] Thank you.

21 Q. [9:56:10] Dr Gout, would you like me to repeat the question?

22 A. [9:56:16] Well, in actual fact, I'd like to ask you to specify one thing. Are you
23 talking about the *judiya* that were organised afterwards, after the conflict ended, after
24 2005, or as of 2006? Are you talking about *judiya* organised during the conflict?

25 Q. [09:56:38] If you can address both, that would be appreciated. Any *judiya*

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1 processes between the Fur community and Arab tribes that may have taken place
2 during the conflict and anything that took place in the years preceding, the immediate
3 years preceding the conflict.

4 A. [9:57:05] Very well. Now, regarding the *judiya* that were organised during the
5 conflict, I'm afraid I have to disappoint you. I don't have any information.

6 As for other *judiya* that were organised, I know that they did occur, but I did not
7 really work on them. But other researchers working on Darfur did, and if the Court
8 wishes, I could provide some references to you, references to various publications
9 that speak to sentences, arbitral sentences that were passed by these *judiya*. But
10 I really don't have more information than that to provide you with.

11 Q. [9:57:57] That's no problem, Dr Gout. Those are the only subjects I wanted to
12 discuss with you. Thank you very much for your answers.

13 PRESIDING JUDGE KORNER: [9:58:05] Yes. I'm afraid I do think we're going to
14 have to sort this out. I think it may become important sometimes to go back over
15 what's said, so we will adjourn. I'm told it's going to take about, what, 15 minutes?
16 All right.

17 Mr Gout, I'm very -- Dr Gout, I'm very sorry, but as you can -- well, you probably
18 can't see, but live note is not working and we do need to have a record of what is
19 being said at the time and so we'll have to adjourn until that's fixed. Okay. We'll
20 say 15 minutes to start with and see where we go.

21 THE COURT USHER: [9:58:44] All rise.

22 (Recess taken at 9.58 a.m.)

23 (Upon resuming in open session at 10.18 a.m.)

24 THE COURT USHER: [10:18:41] All rise.

25 Please be seated.

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1 PRESIDING JUDGE KORNER: [10:19:01] Yes, I am told it's now fixed. What we'll
2 do is sit until 11:15, break then until quarter to 12, and then sit from 12 -- sorry, yes.
3 Sorry, start that again. We'll sit till 11:15, have the break till 11:45 and then sit till
4 1:15.

5 Yes, right, Mr Jeremy.

6 MR JEREMY: [10:19:38] Thank you, and good morning Madam President, your
7 Honours.

8 QUESTIONED BY MR JEREMY:

9 Q. [10:19:46] And good morning, Dr Gout.

10 A. [10:19:48] Good morning.

11 Q. [10:19:49] Okay, sir, I want to start by talking about your, your letter of
12 instruction. Now, this was dated 13 June 2023. It may be that we don't need to look
13 at it, but of course you can. It's number 6 in the Defence binder.

14 But in that letter of instruction, you are referred to various discussions that you had
15 had with the Defence, and so my question is: When were you -- when were you first
16 contacted by the Defence? When did you begin these discussions in relation to your
17 expert report?

18 A. [10:20:43] Counsel, I don't have the dates in mind, exactly, if that's what you're
19 asking for. But I received a first email from the members of the Defence where I was
20 proposed to have an exchange with them in a video conference on my work carried
21 out -- on my work carried out on Sudan.

22 Q. [10:21:07] Okay, but just in general terms, so the engagement letter, or the letter
23 of instruction is June of this year --

24 A. [10:21:10] Yeah.

25 Q. [10:21:11] -- so, you know, was this conference call, this meeting with -- you

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1 know, three months before that, six months before that? Was it in 2022, if you can
2 remember?

3 A. [10:21:30] No. It was a short time before, in spring 2023, I would say.

4 Q. [10:21:43] Okay. And so this first discussion, spring of 2023, and, if
5 I understand correctly, that's when you had a first understanding of the topics that
6 the Defence would ask you to write an expert report on; is that correct?

7 A. [10:22:06] Yes, I think so.

8 Q. [10:22:14] Okay. That's fine.

9 During your -- during the last time I was asking you questions and while you were
10 answering questions to Mr Edwards and Mr Laucci, we discussed a number of your
11 sources in your reports.

12 Now, you'll recall that we established that you cited two Sudanese court cases in your
13 expert report and one of them is this case of Goldenberg v Goldenberg; you
14 remember that?

15 A. [10:22:56] Of course. I couldn't forget it.

16 Q. [10:22:59] And just to remind us all, that case was from 1958; is that right?

17 A. [10:23:12] Indeed, it was.

18 Q. [10:23:14] And we can agree that you, you rely on it in various parts of your
19 report and you also referenced it at various parts of your testimony so far.

20 A. [10:23:34] Yes, with regards to the hierarchy of sources in Sudanese law.

21 Q. [10:23:45] That's right. And if I recall correctly, you also mentioned it in
22 relation to your dualist interpretation of the constitution, once in response to one of
23 Mr Laucci's questions I think.

24 A. [10:24:00] That's correct.

25 Q. [10:24:04] Okay. And you -- you told us that you didn't -- you didn't ever see a

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1 complete copy of this judgment, but you saw excerpts in a professor's office in
2 Khartoum in around 2012 or '13; is that right?

3 A. [10:24:26] Indeed, it is.

4 Q. [10:24:30] Okay. And you also mentioned that other lawyers, other researchers
5 were, at that time, not prepared to share a copy with you, you were just able to get a
6 glimpse of the case.

7 A. [10:24:54] Yes, they didn't consider me as a true colleague at the time. They'd
8 hardly met me.

9 Q. [10:25:04] Okay. And you also mentioned that you had some issues accessing
10 libraries in Khartoum, accessing law libraries; is that right?

11 A. [10:25:21] At the start of my doctoral research, that was true.

12 Q. [10:25:28] Okay, so, after the start of your research, was it easier to get access to
13 libraries in Khartoum?

14 A. [10:25:39] Yes, it was easier, indeed. But my research object had developed by
15 then.

16 Q. [10:25:54] Okay. And I take it you didn't try again to get a copy of this
17 Goldenburg v Goldenburg case when you cited it in your expert report before this
18 Court?

19 A. [10:26:11] Yes. You mean, for the -- for the purpose of this testimony here?

20 Q. [10:26:22] Exactly.

21 A. [10:26:25] I did. I tried to get this jurisprudence.

22 Q. [10:26:34] Okay. And what steps did you take, sir, to get that jurisprudence?

23 A. [10:26:43] I contacted the professor from the University of Khartoum again, the
24 one who I'd spoken to before and the one whom I'm in regular contact with for other
25 issues as well, and I asked him for several documents which I think had been asked

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1 for by the Office of the Prosecutor, and he himself said that he no longer had access to
2 these documents, which were in paper form, taking into account the fact that the
3 University of Khartoum was closed and it was impossible for him to access these
4 archives.

5 Q. [10:27:19] Okay. So after you've explained the difficulties that you had in
6 accessing this case, we made some inquiries ourselves. You'll be aware of the Peace
7 Palace?

8 A. [10:27:38] Yes. Yes, of course.

9 Q. [10:27:41] And you know that that has a library.

10 A. [10:27:47] Yes, I worked there myself in the past.

11 PRESIDING JUDGE KORNER: [10:27:51] You mean the International Court of
12 Justice, I take it, Mr Jeremy?

13 MR JEREMY: [10:27:56] Yes, that's correct, Madam President. The International
14 Court of Justice.

15 Q. [10:28:03] So you worked in that library yourself, sir?

16 A. [10:28:07] Well, these are old memories which go back to over 10 years ago
17 before my thesis.

18 Q. [10:28:15] Okay. Well, the day after your testimony, sir, we -- we contacted the
19 Peace Palace and I'm pleased to tell you that they have a copy of
20 Goldenburg v Goldenburg.

21 A. [10:28:30] Well, I congratulate you. I'm very pleased with this news.

22 Q. [10:28:34] And I take it you didn't -- you didn't make any of your own inquiries
23 in this library where you used to work?

24 A. [10:28:45] No, indeed. I don't have an account there anymore.

25 PRESIDING JUDGE KORNER: [10:28:49] Yes, by why -- I mean, Dr Gout, this is an

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1 important case, you've been telling us. Why didn't you make inquiries there even if
2 you're not a member?

3 THE WITNESS: [10:29:03](Interpretation) In fact, I didn't have access via the
4 university pass anymore, which hadn't paid for the subscription for the entire
5 database of the library of the Peace Palace, and, as such, I didn't have access to all of
6 that documentation. And as myself, I was based in Toulouse, I couldn't go there in
7 person when I wished to.

8 PRESIDING JUDGE KORNER: [10:29:34] Given -- sorry, Mr Jeremy.

9 Given the importance of this case, as you've been telling us, did you tell the Defence
10 that they might be able to obtain a copy through the library of the International Court
11 of Justice?

12 THE WITNESS: [10:29:53](Interpretation) No. I have to say I didn't even think that
13 it was possible.

14 PRESIDING JUDGE KORNER: [10:29:57] Okay. Thank you.

15 MR JEREMY: [10:30:01]

16 Q. [10:30:01] And just on Madam President's point, sir, did you ask the Defence
17 generally for assistance in obtaining this -- this case?

18 A. [10:30:17] I presumed that each time the Defence asked me for a document that
19 it did not have access to, it meant that it -- they had not been able to obtain it.

20 Q. [10:30:35] Okay. Well, I can also tell you, fortunately, there is also a copy of
21 Goldenburg v Goldenburg in the library at the International Criminal Court. So just
22 a short walk from here there's a -- there's a copy of that case as well.

23 A. [10:30:55] Do you think that I could get a copy of it?

24 Q. [10:31:00] Yes, sir. We can provide you with a copy.

25 A. [10:31:04] Thank you.

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1 Q. [10:31:10] Okay. Sir, you also referred to this 1983 Judgment (Basic Rule) Act,
2 you recall that? It's paragraph 16 of your report.

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

4 Q. [10:31:28] And, again, in relation to that -- that law, I think you also, sir, saw
5 excerpts in an office in Khartoum but you were also not able to get a complete copy; is
6 that -- is that correct?

7 A. [10:31:51] Exactly. It was the same situation, or scenario.

8 Q. [10:31:57] Okay. And you went on -- this is transcript page -- transcript 135,
9 pages 13 and 14. You said that you were "incapable of finding it myself
10 subsequently"; is that correct?

11 A. [10:32:19] That is correct, counsel.

12 Q. [10:32:22] Okay. And, again, just as with the Goldenburg case, sir, I take it you
13 made steps to try and obtain this law?

14 A. [10:32:38] You mean by contacting the same person?

15 Q. [10:32:43] I mean in any way, did you, since you cite this law, this act in your
16 report, did you -- did you try and obtain it for the purposes of providing this expert
17 report to this Court?

18 A. [10:32:59] Of course I tried. I didn't think of the library, though.

19 Q. [10:33:09] No, that's okay, sir. This one -- this one isn't in the Peace Palace
20 library. But what steps did you take to obtain it, just so I can understand?

21 A. [10:33:25] Well, the same, contacting that professor and doing research on the
22 internet which proved to be unsuccessful. Those were the only means I had at my
23 disposal to get the information.

24 Q. [10:33:48] Okay. And in terms of your internet research, I take it you know
25 that the ministry of justice has a -- has a website?

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1 PRESIDING JUDGE KORNER: [10:34:02] Which ministry? The Sudanese?

2 MR JEREMY: [10:34:05] Yes, Madam President, the Sudanese ministry of justice.

3 THE WITNESS: [10:34:13](Interpretation) Yes, I have visited the website on a
4 number of occasions in the past.

5 MR JEREMY: [10:34:20]

6 Q. [10:34:20] Okay, and for the purpose of the preparation of your expert report,
7 did you visit that website?

8 A. [10:34:31] No. I didn't think that the legislation would be there because the
9 documents that I was looking for were difficult to access on that site, so I didn't expect
10 them to be there.

11 Q. [10:34:47] Okay. Well, I can confirm, sir, that this 1983 act is there. It is
12 available.

13 PRESIDING JUDGE KORNER: [10:35:01] Mr Jeremy, I think you have to be a little
14 careful about confirming things. You're actually giving evidence. But I think you
15 can put it to him that if he checks the website, you'll find it.

16 MR JEREMY: [10:35:14]

17 Q. [10:35:15] Yes, I'll suggest that to you, sir. I am also happy to bring it up and
18 we take a look at it.

19 But yeah, I'll put it to you, sir, that if you -- if you did check the website, the website
20 you knew existed, then you would have found it in this case.

21 A. [10:35:35] Touché.

22 Q. [10:35:43] Sir, we can agree -- I'm not going to continue with this, but we can
23 agree that with this Goldenburg case, with this basic law, there were basic steps that
24 you could have taken, that you should have taken to obtain these sources that you
25 rely on in your report?

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1 A. [10:36:05] Yes, steps that I did not think of because I remained within my
2 paradigm of field research in Sudan under different circumstances.

3 Q. [10:36:23] Okay. I understand that, and I understand the focus of your field
4 research, but, nevertheless, you know, this is a case, this is the law that you do cite to
5 and that was accessible to you -- that were accessible to you.

6 A. [10:36:41] That is correct.

7 Q. [10:36:50] Okay, sir, and on the same -- on the same topic, you'll recall that we
8 were talking about the constitutional decrees. You referred to these 14 constitutional
9 decrees in, I think it's paragraphs 13 and 14 of your report. Okay.

10 A. [10:37:14] I remember.

11 Q. [10:37:16] Okay. And you'll remember that you confirmed that you didn't have
12 copies of any of those.

13 A. [10:37:30] Yes.

14 Q. [10:37:30] Okay. So, to short-circuit this, sir, I'm going to suggest to you that if
15 you had checked in the Peace Palace library, you would have found a book that has
16 copies of decrees 1 to 5, 7 to 9, and 13, so most of the decrees that you cite.

17 A. [10:37:56] Thank you, counsel.

18 Q. [10:38:02] Okay. I'll move forward.

19 Sir, I want to focus on section 3 of your report, paragraphs 73 to 96, and that relates to
20 the place of international law in Sudan.

21 A. [10:38:34] Will the report be up on the screen because I can't see anything right
22 now?

23 Q. [10:38:43] It's in your -- I think it's in the black binder, and it should be tab 1.
24 If you're ready, sir. Okay.

25 Okay, so I want to focus now on the 1998 constitution. Yes, you speak about two

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1 constitutions in your report, '98, 2005 and I'm asking questions now about the 1998
2 constitution.

3 So, in paragraph 78 of your report, you state your position that since the 1998
4 constitution doesn't contain a reference -- direct reference to international agreements,
5 then this means that these international treaties, these international agreements are
6 not part of Sudanese law without an implementing act. That's your position, yes?

7 A. [10:40:12] That is my general point of view, indeed.

8 Q. [10:40:20] Okay. And we've been through your sources for this section. We're
9 not going to dwell on those, but we established that this 1998 constitution, that
10 wasn't -- that wasn't a focus of your PhD thesis. I think we established there was one
11 reference to that constitution in your 800-page thesis.

12 A. [10:40:53] It wasn't the main constitutional instrument even though I did study
13 it upstream before turning to the 2005 constitution, which was of much greater
14 concern to me.

15 Q. [10:41:12] Okay. I want to talk about one of the constitutional decrees that you
16 reference. It's paragraph 78 of your report and it's the last sentence where you refer
17 to Constitutional Decree No. 7 of 1993. And you say that this "required international
18 rules and human rights to be in line with *Sharia* law". Do you recall saying that, sir?

19 A. [10:41:52] Yes, I remember.

20 Q. [10:41:54] Okay. So this Constitutional Decree No. 7 is one of the decrees that
21 we were able to find in the International Court of Justice Peace Palace library and
22 I want to take a look at that now. It's tab 4 of your red binder and it's
23 DAR-OTP-00007036.

24 And it should be page 3 of the electronic version.

25 Okay, sir, so you see this reference to Constitutional Decree No. 7 at the top.

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1 A. [10:43:20] Yes.

2 Q. [10:43:23] Okay. And I take it that that -- that's this Constitutional Decree No. 7
3 of 1993 that you were -- that you refer to in your report?

4 A. [10:43:39] It would appear so, yes.

5 Q. [10:43:45] Okay. So if we look at the document, sir, if we look at
6 chapter -- chapter 1, we see reference to these principles guiding the policy of the
7 government. And then it goes through the various principles, paragraph by
8 paragraph. So we see "religion" in the first paragraph, "national unity" in the second
9 paragraph, "system of governance" in the third paragraph, and so on.
10 Now, this is a short document, sir, and I see you're reading ahead, but -- but my
11 question is: I didn't see anywhere in this document a reference to international rules
12 on human rights and a requirement that those must be in line with sharia law. Do
13 you see that, sir?

14 A. [10:45:02] Actually I do see a reference. First paragraph, chapter 1, "religion":
15 "Islam is the religion guiding the overwhelming mass of society. It renews itself ..."
16 Et cetera, et cetera:

17 "It is the law which inspires and guides the government's laws, regulations and
18 policies."

19 So there's no direct reference to international law or human rights laws, but here we
20 do have a reference to sharia as the main source of Sudanese law.

21 Q. [10:45:51] Okay, I see that reference. I see the reference to religion, to sharia
22 law, but why is it that you specifically related international rules on human rights to
23 this Constitutional Decree No. 7?

24 A. [10:46:13] Because after the coup d'état in '89, this was the first constitutional
25 document that made reference to sharia that was to determine the structure of

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1 Sudanese law, so the later -- and the later report with international law.

2 Q. [10:46:42] Okay, so you -- sorry, what later report on international law are you
3 referring to?

4 A. [10:46:52] The 1998 constitution in particular.

5 Q. [10:47:02] I'm just reading your answer, sir.

6 A. [10:47:16] No, I'm not talking about a report. I'm talking about dealings or
7 relationships between international law and Sudanese law.

8 I'm sorry, I was speaking a bit quickly.

9 PRESIDING JUDGE KORNER: [10:47:35] Sorry, sir. I don't quite understand this.
10 In your report you say this decree required international rules on human rights to be
11 in line with sharia. The part that's been read to you says it guides the government's
12 laws, regulations and policies. So how do you read into that that's what you're being
13 asked, that it covers international rules on human rights?

14 THE WITNESS: [10:48:19](Interpretation) Your Honour, you have to consider the
15 provisions of chapters 1 and 2, in particular the first paragraph which has do with the
16 rights and freedoms of the Sudanese people. Paragraphs 1 and 2, chapter 1,
17 paragraph 3, there you see reference -- implicit references to fundamental rights and
18 freedoms.

19 PRESIDING JUDGE KORNER: [10:48:46] Which -- are you calling paragraph 3 the
20 one that begins "The system of governance"?

21 THE WITNESS: [10:48:54](Interpretation) No. I've moved on to chapter 2, your
22 Honour.

23 PRESIDING JUDGE KORNER: [10:49:09] What, the one that begins "It is the duty of
24 the adult citizen to bring out his opinion and express it for the public good"?

25 THE WITNESS: [10:49:20](Interpretation) Yes, for example.

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1 PRESIDING JUDGE KORNER: [10:49:23] But, I'm sorry, where does -- how does
2 that --

3 THE WITNESS: [10:49:29](Interpretation) Paragraph 2, principles of
4 nondiscrimination. Paragraph 1, religious freedom.

5 PRESIDING JUDGE KORNER: [10:49:40] I see. So although the words "IHL", or
6 whatever, don't actually -- or the words "international humanitarian law", or
7 whatever, don't appear anywhere, you say it has to be read into what's in there?

8 THE WITNESS: [10:50:00](Interpretation) That is my opinion in reading this
9 document, your Honour.

10 PRESIDING JUDGE KORNER: [10:50:03] Okay. And when you wrote the
11 paragraph in your report, you didn't have this in front of you so you were relying on
12 your recollection?

13 THE WITNESS: [10:50:17](Interpretation) I was basing myself on my discussions
14 with my colleagues and my scientific -- that is to say, academic reading that
15 I mentioned last time I was asked to clarify my sources of information.

16 PRESIDING JUDGE KORNER: [10:50:34] Yes, but, I mean, are you saying -- sorry.
17 Because I recall that and you said partly you had notes, some of which you can't find,
18 and partly you were relying on recollection. And so was this part, when you wrote
19 that part of your report, was that because you had notes of discussions or because you
20 were relying on your memory?

21 THE WITNESS: [10:51:03](Interpretation) Your Honour, I was basing myself
22 on -- how should I put this in French, on my memories that I reconfirmed by reading
23 academic articles that I mentioned earlier. And also I didn't consult the library at the
24 Peace Palace, but I did go to the site of the ILO which contains the list of decrees and
25 the various topics that they deal with. I remember going to that website, which

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1 provided information. So basically relying myself -- relying on memories and
2 academic information, academic articles published by specialists in Sudan.

3 MR JEREMY: [10:52:01]

4 Q. [10:52:01] Okay, sir. So -- I mean, now that we've looked at this decree, I mean,
5 you've -- you say that it makes implicit reference to fundamental freedoms. But
6 what you -- what you say in your report, you categorically state that this decree
7 required international rules on human rights to be in line with sharia law. And I'm
8 going to suggest to you that that's not what this decree says in those terms.

9 A. [10:52:35] Explicitly, you are correct, counsel, but I think it is a logical
10 consequence of the application.

11 Q. [10:52:53] Okay. We can move on, sir. So, in fact, at footnote 7 of your report,
12 and this is related to paragraph 14, you -- you also cite this decree number 7. I'll just
13 get to it.

14 You say -- yeah, you say that this decree number 7 created the national assembly.
15 Do you recall saying that, sir?

16 A. [10:53:37] Just a moment, if you will. If I could have a moment.

17 Q. [10:53:42] Sure.

18 PRESIDING JUDGE KORNER: [10:53:42] Which is paragraph 14 of the report.

19 MR JEREMY: [10:53:45] Yeah, paragraph 14, the penultimate line, you refer to the
20 creation of a national assembly, footnote 7 to Constitutional Decree No. 7.

21 A. [10:53:58] Yes, that's right.

22 Q. [10:54:00] But, again, when I look at this Constitutional Decree No. 7, I don't see
23 anything about creating a national assembly, some references to how a national
24 assembly should be organised. But I'm going to suggest to you, sir, I'm going to put
25 it to you that in fact it was Constitutional Decree No. 5 that created the national

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1 assembly, and we can look at it if you would like to.

2 A. [10:54:30] But there is a reference to an assembly in this decree.

3 Q. [10:54:36] Yes, I see a reference to certain parts of how the assembly should be
4 organised, but what you say is that this decree created the national assembly and I'm
5 putting it to you, sir, that that's not what this decree says.

6 A. [10:54:55] Very well.

7 PRESIDING JUDGE KORNER: [10:54:59] Well, "very well" can mean a number of
8 things. Are you accepting that you made a mistake when you said that this decree
9 created the assembly? Mr Jeremy is suggesting to you it was decree number 5.

10 THE WITNESS: [10:55:14](Interpretation) Actually, your Honour, it's more
11 ambiguous than that. That is why I said, "Very well", because this decree had to do
12 with the national -- the transitional national assembly, you see. And that's not the
13 same assembly as the one that has been mentioned by Mr Jeremy in the decree -- in
14 decree number 7. So, if we're talking about the national assembly, Mr Jeremy is
15 correct. All the same, this has to do with a transitional national assembly.

16 PRESIDING JUDGE KORNER: [10:56:01] Sorry, sir. What you actually said
17 without a -- without any qualification, in paragraph 14, you said that the government
18 also adopted 14 constitutional decrees. Then there was the appropriation of private
19 property, the division of Sudan into 26 administrative regions, and you said the
20 creation of a national assembly. And that, you said, was created by this decree.
21 Whereas, as you point out, and Mr Jeremy pointed out, there's a reference in
22 chapter 3 -- I'm not even sure -- it seems to be about appointments to a transitional
23 one.

24 THE WITNESS: [10:57:22](Interpretation) Your Honour, it seems to me that this is
25 about the status of the president of the republic within the transitional national

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1 assembly. Indeed, this is not a decree that creates the national assembly, so

2 Mr Jeremy is correct.

3 MR JEREMY: [10:57:51]

4 Q. [10:57:51] Okay, thank you, sir, and thank you for that.

5 So we can agree that your report would have been more accurate if you could have
6 obtained these constitutional decrees and read them yourself before you cite them in
7 your report?

8 A. [10:58:10] Yes. That is for sure.

9 Q. [10:58:14] Okay. Okay. And, let's go to paragraph 75, please, of your report.
10 And we're still focused on this issue of applicability of treaty law within Sudanese
11 law.

12 So in paragraph 75, sir, if you're there, you note that Sudan has ratified nine
13 international treaties on human rights law, one on international human rights law;
14 yes?

15 A. [10:58:59] Yes. Yes, counsel.

16 Q. [10:59:02] And you set those out on what is the next page of the English, in
17 table 3. And for the purposes of the 2003 and '04 period, the relevant period of the
18 charges in this case, the following conventions are relevant. So the international
19 convention on civil and political rights -- sorry, International Covenant on Civil and
20 Political Rights. You see that? That's the third one in your list, sir.

21 Do you see that, sir, the ICCPR?

22 A. [11:00:06] I'm sorry, counsel. Yes. Yes.

23 Q. [11:00:07] And then the second one of relevance for our charged period is the
24 International Convention on the Elimination of All Forms of Racial Discrimination.
25 That was 1977. Do you see that one? The International Covenant on Economic,

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1 Social and Cultural Rights?

2 A. [11:00:27] Yes, counsel.

3 Q. [11:00:28] And the Convention on the Rights of the Child.

4 A. [11:00:32] Yes, counsel.

5 Q. [11:00:35] Okay. Now, just in relation to this table you give the source as being
6 the "United Nations Treaty Body Database".

7 A. [11:00:50] Indeed.

8 Q. [11:00:52] Okay. And can we agree that this list of human rights instruments
9 basically reflects those instruments that created a treaty body to regulate compliance
10 with those different human rights instruments?

11 A. [11:01:12] Yes, of course. That's the case indeed.

12 Q. [11:01:15] Okay. So, sir, in fact Sudan is a party to more than just the nine
13 listed -- listed here because there are additional human rights agreements that it's
14 party to that doesn't have a treaty body that monitors implementation; would you
15 agree with that?

16 A. [11:01:38] I wouldn't be able to tell you for these conventions here. Well, you
17 also have to check whether there's a protocol which had been ratified by Sudan with
18 regards to the jurisdiction of the organ of the supervisory body, or the oversight body.
19 It depends on the conventions. But with regard to your question, I wouldn't be able
20 to answer it.

21 Q. [11:02:00] Okay. But for -- I'll just give an example. This is isn't a big point,
22 but the -- I mean, the Convention Relating to the Status of Refugees, for example, that
23 was 1951. Sudan ratified in 1974. That's a human rights treaty, but it's not one that
24 we see listed here. Would you agree with that?

25 A. [11:02:22] That's true. There's also the African convention on the protection of

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1 refugees.

2 Q. [11:02:29] Yes. That is -- that's -- that's understood, sir. But we can agree
3 when -- when you're looking to see which treaties are incorporated into Sudanese law,
4 step one is identifying all of the human rights treaties that Sudan has acceded to.
5 Would you accept that?

6 A. [11:02:52] Yes.

7 Q. [11:02:53] Okay.

8 Now, looking at paragraph 76 of your report, you refer to there being a state of
9 emergency in Sudan at various times. Do you recall that?

10 A. [11:03:14] Yes. I remember.

11 Q. [11:03:16] Okay. And you also say in paragraph 102, third sentence, that this
12 state of emergency was introduced in 1999, and then regularly extended, including in
13 2004. Do you recall that?

14 A. [11:03:37] Yes, I remember.

15 Q. [11:03:38] Okay. And in this paragraph 76 you refer to efforts made by Sudan
16 to derogate from the international convention on civil and political rights on the basis
17 of this state of emergency; yes?

18 A. [11:04:00] That's true.

19 Q. [11:04:01] Okay. You say in the first sentence of paragraph 76 that since
20 August 1991 the Sudanese federal government has regularly issued interpretive
21 statements on the ICCPR in view of the state of emergency in Sudan.

22 So if I understand correctly, you're saying that these interpretive statements made to
23 the ICCPR applied during the 2003 and '04 period; is that right?

24 A. [11:04:40] Yes, to the extent that the interpretive statements express reservations
25 by the Sudanese government in that they are put into international law --

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1 THE INTERPRETER: [11:04:59] To the extent that they are admitted into

2 international law, corrects the interpreter.

3 MR JEREMY: [11:05:10]

4 Q. [11:05:10] Okay. And we can agree that you don't -- you don't cite to any of
5 these interpretive statements.

6 A. [11:05:13] No.

7 Q. [11:05:15] You mention the same as in relation to articles 2 and 22.

8 A. [11:05:20] No, that's true. It's correct. I consulted them, but I didn't quote
9 them here.

10 Q. [11:05:29] Okay. And where -- how were you able to consult these interpretive
11 statements, sir?

12 A. [11:05:39] On the -- in the database which is mentioned. In table 3, you can
13 access all the interpretive statements, or at least the reservations that were presented
14 as interpretive statements by States Parties in general, and it's in that database that's
15 regularly updated.

16 Q. [11:06:02] Okay. And that's the ICCPR database, is it?

17 A. [11:06:07] In fact, it's the database -- I'm sorry I should wait a bit for the
18 translation.

19 It's the database of the United Nations for all the UN treaties, in particular treaties
20 related to human rights. So you would have this information for all these different
21 treaties in principle.

22 Q. [11:06:28] Okay. No, I think we're talking about the same database, so I want
23 to take a look at that database now, sir.

24 If we can go to -- you can look at tab 8 of your binder. It's DAR-OTP-00006661.

25 Okay. And just looking at the front page, sir, on your screen as well, do you

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1 recognise this document from the database?

2 A. [11:07:21] Well, this is a screenshot of a print, but it's the same information that
3 you have online.

4 Q. [11:07:28] Okay. If we just go quickly to page 7, please, just for the purposes of
5 seeing there that Sudan ratified the ICCPR on 18 March 1986, and you say the same in
6 your report. You see that, sir?

7 A. [11:07:57] Yes, I see it.

8 Q. [11:07:58] Okay. And if we go to the next page, please, page 8. Okay.

9 So focusing your attention, sir, on this heading "Declarations and Reservations". So
10 this is where the various signatories to the ICCPR set out their reservations and
11 derogations to the ICCPR, yes? You recognise this?

12 A. [11:08:24] Yes, that's correct.

13 Q. [11:08:28] Okay. So we begin at "A". We won't go through all of it. We can
14 jump ahead to page 241, please.

15 Okay.

16 So, there, sir, we see the entry for -- if we go down, please. Yeah. We see the entry
17 for Sudan and we see the first one. The entry on the right side is 14 February 1992,
18 but in the text it refers to 21 August 1991.

19 You also refer to August 1991 in paragraph 76 of your statement.

20 And in the second sentence we see that the articles of the covenant which have been
21 derogated from are articles 2 and 22(1), as subsequently indicated by the government
22 of Sudan. And those are the same articles you refer to in paragraph 76 of your report;
23 yes?

24 A. [11:09:35] Yes, that's correct.

25 Q. [11:09:37] Okay. If we go to the next page, please, to the second declaration.

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1 No, sorry. If we go up. Up, up. Yeah.

2 So, sir, the next one, 17 August 2001, and we see that:

3 "The Government of Sudan informed [the Secretary-General] that the state of
4 emergency in the Sudan has been extended until 31 December 2001."

5 A. [11:10:09] Yes.

6 Q. [11:10:10] And then if we go down a little bit, please, to the entry
7 20 December 2001:

8 "The Government of Sudan informed [the Secretary-General] that the state of
9 emergency in the Sudan has been extended until 31 December 2002."

10 Now, below that, sir, we see that the next entry is for 8 March 2019. So, between
11 1 January 2003 and 21 February 2019, there was no communication from Sudan
12 derogating from the ICCPR based on what we see here; yes?

13 A. [11:11:03] Yes, I think that's a good way of putting it.

14 Q. [11:11:06] Okay. So, you will agree then that, in fact, there was no derogation
15 from the ICCPR for this 2003 and '04 period based on what we see here?

16 A. [11:11:26] Counsel, I think it's a bit more complicated than that, to confirm that.
17 That's perhaps the case, but this derogation is only valid for Sudan as a whole, but
18 after the attack on Al-Fashir and the decree of 2004. We discussed this issue together
19 last time I was here, and it would seem that in derogatory or common law that it is
20 applied in Sudan, and it could organise derogations with regards to the dispositions
21 or provisions of the covenant. But it is true, at least here, we don't see other
22 declarations in or in respect of statements made by Sudan concerning the provisions
23 of the covenant.

24 Q. [11:12:23] Okay. But leaving aside common law and just focusing on what
25 your report says, paragraph 76, when you say in that second sentence that according

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1 to interpretive statements, articles 2 and 22 of the covenant are considered
2 non-enforceable for the duration of the state of emergency, based on what we see here
3 that -- that -- that's not, in fact, correct; would you agree with that?

4 A. [11:12:52] On the basis of what we see on the screen, this interpretation would
5 seem correct, counsel.

6 Q. [11:13:00] Okay. And --

7 PRESIDING JUDGE KORNER: [11:13:05] Sorry, isn't that what you yourself saw on
8 the screen when you were writing the report? You said you consulted the website.

9 THE WITNESS: [11:13:15](Interpretation) Yes, of course. But taking into account,
10 of course, the fact that you have armed counter-insurrections in 2004 and this clearly
11 led to regular breaches of the covenant. So I wouldn't like to talk about whether
12 these counter-insurrections made it possible to implement a derogatory law which
13 would be the equivalent of a state of emergency.

14 PRESIDING JUDGE KORNER: [11:13:58] What you just accepted -- sorry, sir. I'm
15 just trying to grasp what you are saying. What you've just accepted is that in 2003
16 and 2000 -- well, in between 2019 -- I'm sorry. Yes, 2019 -- 2000, sorry. Between
17 2001 and the end of the period we're talking about, 2004, there was no derogation put
18 in by Sudan?

19 THE WITNESS: [11:14:34](Interpretation) I think, your Honour, that it was between
20 December 2002 and March 2019. I think that was it. It was this period of time
21 which was mentioned by Mr Jeremy, it would seem to me.

22 PRESIDING JUDGE KORNER: [11:14:47] No.

23 MR JEREMY: [11:14:56] The last derogation extended until 31 December 2002, and
24 the next one began in March 2019. So between that period no derogation
25 (Overlapping speakers) --

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1 PRESIDING JUDGE KORNER: [11:15:07] Well, it can't have begun in 2000. It's an
2 after -- *ex post facto*. Oh, I see. It's going up. Yes, I see. No, sorry. No. It's
3 back to front, isn't it? That's the trouble with this website. Because we then go
4 back -- we go -- we've got the -- we've got the first one dated 14 February 1992,
5 correct?

6 MR JEREMY: [11:15:42] Yes.

7 PRESIDING JUDGE KORNER: [11:15:46] Then we've got 17 August 2001,
8 20 December 2001, and then what appears to be a retrospective -- oh no. I see. I'm
9 sorry. I'm going mad. You're quite right. Yes, it's much later. Yes.
10 So it's the period between December 2001 and -- well, the next one is 2019. So that's
11 the period when there's apparently no derogation at all made.

12 THE WITNESS: [11:16:25](Interpretation) Yes, your Honour. Mr Jeremy was right
13 when he said that during this time frame Sudan made no interpretive statement
14 relating to the provisions of the covenant, no new interpretive statements related
15 thereto.

16 PRESIDING JUDGE KORNER: [11:16:49] Well, so what did you mean by the word
17 "regularly"? Your paragraph 76 says that the Sudanese federal government has
18 "regularly" issued interpretive statements.

19 THE WITNESS: [11:17:09](Interpretation) Your Honour, this is a choice of words,
20 perhaps it's an unfortunate choice of words, but they adopted several of them.
21 That's what I wanted to say.

22 PRESIDING JUDGE KORNER: [11:17:17] All right. Yes, thank you.

23 MR JEREMY: [11:17:21]

24 Q. [11:17:22] Okay. But just a last point on this, sir, because I don't want it to get
25 lost. You accept that when you say according to the interpretive statements,

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1 "Articles 2 and 22(1) of the Covenant are considered non-enforceable in Sudan for the
2 duration of the state of emergency", based on what we have just seen, that that's,
3 in fact, not correct?

4 A. [11:17:51] No, I don't understand, Mr Jeremy. The interpretive statements are
5 in continuous application, so they weren't mentioned or modified.

6 Q. [11:18:01] Okay. But you've told us that the state of emergency was introduced
7 in 1999, and it was regularly extended, and you say, in particular, it was extended in
8 2004. We looked at that paragraph of your report, do you recall?

9 A. [11:18:18] Mm-hmm. Yes, counsel.

10 Q. [11:18:20] Okay. And these -- these derogations, these interpretive statements,
11 they give time limits there, from a certain date to a certain date. And we looked at
12 each of those. And we looked at the first one, at August 1991. Then we looked at
13 the next one, extending the state of emergency until 31 December 2001.

14 A. [11:18:46](Speaks English) Yeah, yeah.

15 Q. [11:18:50] Yes? And then after that, the state of emergency was extended until
16 31 December 2002, and then the next derogation that we see is 8 March 2019. So,
17 between the period after 31 December 2002 and 8 March 2019, there were no
18 derogations in effect from Sudan to the ICCPR; do you agree with that?

19 A. [11:19:21](Interpretation) Very well. Yes, that's correct.

20 Q. [11:19:23] Okay. Thank you.

21 PRESIDING JUDGE KORNER: [11:19:24] Well, that seems to be an appropriate time
22 to take the break. So we'll sit again at 10 to 12. And, as I say, we'll sit on till
23 1:15 today.

24 Yes, thank you.

25 THE COURT USHER: [11:19:41] All rise.

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1 (Recess taken at 11.19 a.m.)

2 (Upon resuming in open session at 11.51 a.m.)

3 THE COURT USHER: [11:51:59] All rise.

4 Please be seated.

5 PRESIDING JUDGE KORNER: [11:52:41] Mr Jeremy --

6 MR JEREMY: [11:52:42] I see Mr Laucci on his feet, Madam President.

7 MR LAUCCI: [11:52:47] Yes, thank you, and thank you, Madam President. I will
8 be short -- sorry.

9 PRESIDING JUDGE KORNER: [11:52:50] Yes, Mr Laucci.

10 MR LAUCCI: [11:52:53] I will be short. It's just about a small correction in the
11 transcript of today. I'm at page 35, line 12 to 15. The transcript of Mr Witness's
12 response reads:

13 "... interpretive statements are in continuous application so they weren't mentioned or
14 modified".

15 And I just wanted to correct that. The answer of the witness was different. It was
16 not, "so they were not mentioned or modified" but should be, instead, "until they get
17 recalled or modified".

18 If that can be -- maybe, Mr Witness, you can confirm and if that can be corrected.

19 THE WITNESS: [11:53:50](Interpretation) That's correct, counsel, and within the
20 framework of interpretive statements, in Sudan, at least, this specifies the duration of
21 application.

22 MR JEREMY: [11:54:10]

23 Q. [11:54:11] Okay, sir, so I'm going to talk now about the African Charter on
24 Human and Peoples' Rights --

25 Sorry.

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1 A. [11:54:24] If you would agree, Mr Jeremy, I just wanted to go back to what you
2 were saying before. Yes, you are completely right, I think there is no contradiction.
3 I think that it was perhaps an unfortunate drafting of my report on this part. I
4 referred to the first interpretive statement which referred to these two provisions of
5 the covenant, but whatever the case, if we read the end of the paragraph I would
6 consider that these statements aren't valid, because they are against the objectives and
7 aim of the treaty.

8 Perhaps I should repeat what I said: I consider that these interpretive statements are
9 not valid because they are against the aims and objectives of the covenant.

10 MR JEREMY: [11:55:12] Thank you, sir. That is understood.

11 Q. [11:55:13] Okay. So, you mentioned in paragraph 82, the fact that Sudan was
12 a party to the African Charter on Human and Peoples' Rights. You recall that?

13 A. [11:55:27] Yes, there was periodic reports.

14 Q. [11:55:35] Okay. Exactly. So, as part of the membership of this
15 African Charter on Human and Peoples' Rights, Sudan -- all member states are
16 required to submit these periodic reports?

17 A. [11:55:54] That's correct.

18 Q. [11:55:54] And you refer to the fourth and the fifth periodic reports in the
19 context of the 2005 constitution and you rely on those reports -- you rely on the
20 position that the Government of Sudan takes in that report in support of your dualist
21 argument in relation to the constitution, yes?

22 A. [11:56:22] Yes, that's correct.

23 Q. [11:56:25] Okay. And the report of Sudan in relation to this African Charter on
24 Human and Peoples' Rights -- this fourth and the fifth report, we can agree that there
25 were earlier reports, the first and second and third report?

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1 A. [11:56:49] Yes, indeed, counsel, it seemed that Sudan had a delay in the
2 dissemination of the report.

3 Q. [11:57:02] Okay, and leaving aside the delay, did you look at this first, second or
4 third report by Sudan to the African Charter on Human and Peoples' Rights?

5 A. [11:57:20] Yes, I consulted them at the time for my thesis.

6 Q. [11:57:29] And for the purposes of the expert report that you are providing to
7 the honourable judges, did you check those reports -- the first, second and third
8 reports?

9 A. [11:57:41] Nothing new. I wanted to stress the paragraph from -- from the 2005
10 constitution, namely Article 27(3) of the 2005 constitution.

11 Q. [11:58:06] Okay. I want to show you one of those reports. We are going to
12 look at the second periodic report. It's tab 9, sir, in your binder, the red one, and it's,
13 for the record, DAR-OTP-00005133.

14 Okay, so it's on the screen, you have it in front of you, sir. I take you recognise the
15 format of this report?

16 A. [11:58:38] Indeed.

17 Q. [11:58:38] Okay, so we read on its face it's the "Periodic Report of Sudan
18 Pursuant to Article 62 of the African Charter on Human and Peoples' Rights" and "It
19 comprises the required reports up to April 2003"?

20 A. [11:58:55] Mm-hmm. That's true.

21 Q. [11:58:58] Okay, and these reports are basically provided by member states to
22 indicate their compliance with the particular convention that they are a party to, yes?

23 A. [11:59:16] Indeed.

24 Q. [11:59:18] It's a long report so I'm going to skip forwards and if we can take
25 a look at page 16, and I'm focusing on halfway down the page where we see the

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1 reference to:

2 "Guarantees for the protection and implementation of Human Rights in Sudan".

3 Do you see that, sir?

4 A. [11:59:46] Yes, I see it.

5 Q. [11:59:47] Okay. So in the first paragraph, there is a reference to:

6 "The importance attached to the respect and protection of human rights in Sudan ..."

7 Then in the next paragraph we read that:

8 "Despite that, there are legal and regulatory guarantees which constitute a preventive
9 barrier for the protection of human rights as summarised below".

10 So, sir, if I -- at subparagraph (1), we see that one of these legal and regulatory
11 guarantees is the adoption of the comprehensive constitution - that is the 1998
12 constitution - and we agree that's the one that was in force during the 2003-2004
13 period, yes?

14 A. [12:00:42] Correct.

15 Q. [12:00:43] And at the bottom of the page, subparagraph (3), in relation to these
16 legal and regulatory guarantees of human rights in Sudan, we read, quote:

17 "The ratification of a number of conventions and regional and international
18 instruments which are considered as part of national legislation".

19 So here, sir, the Government of Sudan is taking an opposite position to the one that
20 you take; would you agree?

21 A. [12:01:23] Yes, counsel, that is interesting. You have a very British view of the
22 application of international law within domestic law. You'd also have to look at
23 page 4, "Fundamental freedoms and rights", which makes reference to the
24 constitution.

25 PRESIDING JUDGE KORNER: [12:01:47] I'm sorry, are you -- are you agreeing that

1 Mr Jeremy, whether British or not, has got the right point, that what this appears to
2 say is the opposite of what you're saying?

3 THE WITNESS: [12:02:10](Interpretation) Thank you, your Honour. I apologise, I
4 have the bad habit of a university professor who likes to debate matters and not
5 necessarily come to a definitive conclusion. But yes, indeed, this is -- well, but that's
6 not the practice when you look at the realities and also when you read page 4, namely,
7 the provisions about fundamental rights and freedoms. The -- it reads that the
8 constitution guarantees these rights and freedoms. This is the main source of
9 protection of these freedoms.

10 So at page 14, we may very well have a provision saying that rights and freedoms
11 under international covenants applicable to the -- applicable -- well, that -- it says that
12 the legislation has to be in accordance with the Sudanese constitution.

13 PRESIDING JUDGE KORNER: [12:03:16] Okay. Subparagraph (3) says:

14 "The ratification of a number of conventions and regional and international
15 instruments which are considered as part of national legislation."

16 What is it that you want to point to which you say gives it a different meaning from
17 the one we can read?

18 THE WITNESS: [12:03:49](Interpretation) Exactly the same effect as 27(3) of the 2005
19 constitution. Those treaties are transposed -- the provisions of those treaties are
20 transposed into Sudanese law and receive the status of legislation, and that must be
21 applied in accordance with the Sudanese constitution.

22 In any event, we find ourselves in the same circumstances. The value of the
23 provisions --

24 THE INTERPRETER: [12:04:32] Excessive speed.

25 THE WITNESS: [12:04:35](Interpretation) That is my opinion.

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1 PRESIDING JUDGE KORNER: [12:04:38] I'm sorry, the interpreter missed that.

2 You were going too quickly. Can you say that -- could you say that again slowly,
3 please.

4 THE WITNESS: [12:04:47](Interpretation) I apologise to the interpreters and the
5 Court.

6 To my mind, these provisions have the same effect as Article 27(3) of the 2005
7 constitution. Those provisions transpose. The international treaties are applied to
8 Sudan as legislation, they are deemed to be Sudanese legislation and that legislation
9 must be in accordance with the Sudanese constitution. It's a reception clause, what
10 we call a reception clause. The provisions of the ratified treaties are received in
11 Sudanese law.

12 PRESIDING JUDGE KORNER: [12:05:49] Right. Mr Jeremy.

13 MR JEREMY: [12:05:52]

14 Q. [12:05:52] So, sir, I'm a little confused. Are you disputing then, so when the
15 Government of Sudan says in this report plainly, very simply that the -- when
16 conventions in regional and international instruments are ratified, they are considered
17 as part of national legislation. So no reference to implementing acts. It's a very
18 plain statement.

19 Do you -- in your view, is that incorrect on your plain text reading of the 1998
20 constitution?

21 A. [12:06:33] These constitutional provisions give international treaties ratified by
22 Sudan a legislative value and when these fundamental rights and freedoms are to be
23 applied, what is one to do? If you are a Sudanese administrative agent or a judge,
24 you interpret these provisions in accordance with the constitution. It's all very well
25 to say that these provisions are within Sudanese law, but they are to be found within

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1 a hierarchy of sources. This is what I understand. To my mind there's no
2 difference between that and 2005, from that point of view.

3 Q. [12:07:28] But sir, your reading or your interpretation of the requirement of an
4 implementing act under the 1998 constitution is basically on the basis that you read it
5 and you don't see any reference to international laws, you don't see any reference to
6 the direct incorporation of international treaties, and you say, "So on that basis, I think
7 an implementing act is required"; is that correct?

8 A. [12:08:02] Could I specify something in my answer?

9 Q. [12:08:16] Please, if it's an answer to my question, please.

10 A. [12:08:20] I think it is an answer, yes, I think it is so. First of all, I'm happy to
11 read the provision and the meaning -- that is the meaning to be given to it in my
12 opinion. The second element is that it is confirmed by Sudanese practice and the
13 constitution of 2005 and the oversight organs for human rights treaties that are of the
14 view that Sudan does follow these practices. I'm referring to the report that I
15 mentioned when I last gave testimony here.

16 Q. (Overlapping speakers) That's the 2018 --

17 A. [11:54:15] To my mind --

18 Q. [12:09:02] -- report, yes?

19 PRESIDING JUDGE KORNER: [12:09:09] You interrupted him, Mr Jeremy.
20 Yes, finish your answer, sir.

21 THE WITNESS: [12:09:17](Interpretation) To my mind there is a continuity in
22 practice of application of international and Sudanese law, so this is part -- and this
23 part of the report confirms this.

24 PRESIDING JUDGE KORNER: [12:09:31] I'm as confused, I'm afraid, as Mr Jeremy,
25 sir.

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1 Nowhere in this report does it say the ratification -- that these conventions - whether
2 they are national, regional or international - are only part of Sudanese law as and
3 when there's enabling legislation passed.

4 THE WITNESS: [12:10:03](Interpretation) Perhaps, your Honour, to clarify the
5 meaning of these provisions, perhaps one could look at paragraph 4, the following
6 provision.

7 PRESIDING JUDGE KORNER: [12:10:18] What -- the one that begins: "The
8 statement of several provisions of these conventions in the very body of the laws of
9 Sudan"?

10 I'm sorry, to me that reads as though some of the provisions of the conventions are
11 already in the laws, but you're saying we should read that as meaning that in order
12 for these law -- conventions to become law, it must mean that there's been enabling
13 legislation passed?

14 THE WITNESS: [12:11:06](Interpretation) Thank you for the question, your Honour.
15 Indeed not necessarily. This provision from the report, paragraph 3, allows the
16 application under Sudanese law, direct application of these international conventions,
17 but with a special status, namely, legislation, a law.

18 What is more, if you read the following provision, paragraph 4, you will see that these
19 must apply as legislation, as a law. And that is already the case for some of them.

20 What does that mean in actual fact? Insofar as the provisions are not applied as
21 a conventional provision of international -- they are applied under domestic law and
22 so, when these provisions are applied and interpreted, they have to be in accordance
23 with the Sudanese constitution.

24 So there you have it.

25 PRESIDING JUDGE KORNER: [12:12:21](Microphone not activated)

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- 1 THE INTERPRETER: [12:12:24] Microphone, please.
- 2 PRESIDING JUDGE KORNER: [12:12:25] All right, I was saying I'm not entirely
3 sure that I follow that even now, but I'll leave it.
- 4 Yes, Mr Jeremy.
- 5 MR JEREMY: [12:12:36]
- 6 Q. [12:12:37] Okay, sir, I think we'll -- we can keep going, but we will stay with this
7 document and we will go to paragraph 28, please, page 24.
- 8 And, sir, just while it's coming up, I was told that we need to leave a bit of pause
9 between my question and your answer, and vice versa.
- 10 Okay. So sir, paragraph 28, here we read a reference to:
- 11 "... incorporating in its domestic legislation the international convention on the
12 elimination of all forms of discrimination which was adopted by the UN General
13 Assembly and entered into force on 4 November 1969 and to which Sudan [has]
14 acceded ..."
- 15 A. [12:13:51] Yes, that's right.
- 16 Q. [12:13:53] Okay, so again, not only do we have Sudan taking a position that once
17 ratified, treaties are automatically incorporated into Sudanese law, but also references
18 to particular examples of treaties actually being enacted into Sudanese law. Do you
19 see that?
- 20 A. [12:14:18] Yes. Yes.
- 21 Q. [12:14:24] And do I take it that you were not -- you were not aware of the
22 government's position in relation to this document -- to this agreement?
- 23 A. [12:14:36] For what reason? I don't understand, counsel.
- 24 Q. [12:14:42] Well, what you've said, sir, if I understand correctly, your position
25 again is that the international treaties do not take direct effect within Sudanese law

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1 without incorporating legislation. I have shown you a paragraph where the
2 government takes the opposite position and now I've shown you a paragraph with
3 a reference to incorporating into domestic legislation the international convention on
4 the elimination of all forms of discrimination.

5 Now, this isn't something that you refer to in your report, do you? You don't refer to
6 that incorporation of that treaty into Sudanese law?

7 A. [12:15:26] Counsel, I maintain my position. This paragraph does not say
8 anything else. I don't see how this paragraph contradicts what I've said. I think
9 that perhaps, I -- perhaps I'm not expressing myself clearly, but we are dealing with
10 the same situation.

11 If you don't mind, I'll reread the paragraph, counsel.

12 PRESIDING JUDGE KORNER: [12:16:05] While he's doing that, Mr Jeremy, isn't this
13 saying that it does have to -- it incorporated that into its own legislation.

14 MR JEREMY: [12:16:23] Yes, I accept this is an example of incorporation and I'm
15 asking the witness if he was aware of this additional example of a treaty being
16 incorporated.

17 PRESIDING JUDGE KORNER: [12:16:33] Oh, I see. Well, I think he's taking the
18 view that in some way you were challenging his assertions that in order for
19 international conventions to have effect, they had to be incorporated into domestic
20 legislation. But that's in fact what this paragraph says.

21 MR JEREMY: [12:16:54] That's what this paragraph says, but in relation -- the
22 Prosecution position is in relation to the paragraphs 3 and 4 that we looked at earlier,
23 there is this clear reference to once ratified, treaties become part of Sudanese law.
24 But, in addition, there are also examples of implementation of these laws and treaties.

25 PRESIDING JUDGE KORNER: [12:17:20] Yes, I see. So you're saying they operate

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1 both methods, is your position?

2 MR JEREMY: [12:17:25] That's our interpretation of this government report.

3 PRESIDING JUDGE KORNER: [12:17:27] Well, can we just ask that very simply.

4 Dr Gout, what is being put to you is that there were in fact, contrary to what you say,
5 two methods that the Sudanese used to implement international conventions.

6 First is ratification which meant they were in force without legislation having to
7 incorporate it, but they used also the second method of using legislation to
8 incorporate the international conventions.

9 So, in other words, they were using two systems; do you accept that?

10 THE WITNESS: [12:18:08](Interpretation) Your Honour, no, I reject the statement to
11 the effect that I was not aware because I developed that in my thesis. I wrote about
12 various modalities for the inclusion of international law. In actual fact, it's the same
13 thing, for example, regarding human rights and fundamental rights. It can be by
14 way of incorporation and then you have -- for some international conventions, you
15 have specific incorporation. These are classic methods that are not used only by
16 Sudan, they are used by doctrine in international law; so I am aware of these
17 methods.

18 MR JEREMY: [12:19:34]

19 Q. [12:19:34] Okay, so in terms of the various modalities for the inclusion of
20 international law within Sudanese law, if I understand your last answer correctly, you
21 are -- you are accepting when the Government of Sudan says that once ratified,
22 regional and international instruments can become part of Sudanese law? You
23 accept that?

24 A. [12:20:01] Yes, under the status of legislation.

25 PRESIDING JUDGE KORNER: [12:20:16] I suppose we had better try and sort this

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1 out.

2 When you say "under the status" or "status of legislation", you seem to be drawing
3 a distinction between a specific law and the implied use of, as you put it, Article 27(3).
4 Because it is clear that they are making a distinction themselves in this report between
5 conventions which are ratified and those for which specific legislation is passed.
6 But as I understand it, you're saying when they say ratified, they don't just mean
7 signing it and ratifying it, they mean they passed -- there's an implied adoption under
8 Article 27(3); is that what you are saying finally?

9 THE WITNESS: [12:21:28](Interpretation) Your Honour, to my mind, there's no
10 difference here, no distinction. Generally speaking, the -- a constitutional provision
11 such as the one -- such as 27(3) will play retroactively on conventions that have
12 already been ratified. They are part of Sudanese law as legislation and have the
13 value of legislative standards or acts. For conventions that are ratified later, it is
14 possible -- well, it depends on the scope, but in some cases a specific act is required
15 and a ratification and -- and a ratification legislation will perhaps be necessary for
16 a treaty, so one transposes the conventional act into domestic law.

17 But I think we are dealing with -- I didn't think this was the case anymore, but I think
18 these are different viewpoints of law. One is Romano-Germanic view and then the
19 other is the view of common law. To my mind, there's no inconsistency here, Sudan
20 is just saying the same thing in the report.

21 MR JEREMY: [12:23:23]

22 Q. [12:23:24] Okay, sir, but I showed you this paragraph, this third paragraph on
23 page 16. We have been over it a number of times. There is no reference to Sudan
24 saying that treaties once ratified only become part of national legislation once there
25 has been an implementing act in Sudan.

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1 So that additional requirement, according to the position that the Government of
2 Sudan takes in this report, is not required?

3 A. [12:23:58] I'm sorry, counsel, I really have to stick by this point. No, I don't
4 agree with you. The ratification -- the act of ratification is the act of transposition
5 into Sudanese law. That is my opinion.

6 PRESIDING JUDGE KORNER: [12:24:14] Sorry, Mr Jeremy, I suppose it may be of
7 some importance.

8 Then why do they feel it necessary in paragraph 28, if you say the act of ratification in
9 itself -- why do they feel it necessary in paragraph 28 to explain that it had to -- it had
10 to incorporate this particular convention into its domestic legislation?

11 THE WITNESS: [12:24:53](Interpretation) Your Honour, I don't think we should
12 look at this report out of its context. This is a report to the African Union regarding
13 Sudan's compliance with the Charter of Human and Peoples' Rights. Perhaps Sudan
14 is responding to criticisms, so -- well, I can't answer that question. I stand by my
15 position. I can't answer that question without reading the report from the African
16 Commission on Human and Peoples' Rights.

17 PRESIDING JUDGE KORNER: [12:25:35] I would suggest you do this at some
18 stage - you will have an hour and a quarter over lunch - because it maybe of some
19 importance and if this is what you are going to adhere to, then you ought to be given
20 the opportunity to have a look.

21 THE WITNESS: [12:25:57](Interpretation) Thank you, your Honour.

22 PRESIDING JUDGE KORNER: [12:26:00] Can we move to a different topic then,
23 Mr Jeremy, until -- or have you got more on this?

24 MR JEREMY: [12:26:04] I have more on this but I think it's a slightly different point
25 and it may even help illuminate things.

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1 Q. [12:26:15] If we can go, please, to page 37, paragraph 109. So here we see

2 a reference to:

3 "The Sudanese law of 1974 relating to the organisation of refuge[es] contains several

4 articles found in conventions and international charters such as, for example, the 1951

5 Geneva Convention ..."

6 And it goes on. Were you aware of this 1974 act relating to refugees, sir?

7 A. [12:27:12] Yes, but for reasons that don't have to do with my academic research;

8 rather, this has to do with refugee law.

9 Q. [12:27:25] Okay. Nevertheless, I want to take a look at that act. It's available
10 on the UNHCR website, it's at tab 10 of the binder, DAR-OTP-00007037.

11 And, okay, if we just scroll down slightly.

12 You said you are familiar with this law. Do you recognise on its face?

13 Can we scroll down, please. Next page.

14 A. [12:28:24] I would like to specify, counsel, I know this legislation, but I did not
15 study it. This had to do actually with my work as an asylum seeker's judge. I had
16 to acquaint myself with certain provisions, but I haven't studied this. It's not one of
17 my topics of study or research.

18 Q. [12:28:52] Okay. I'm going to ask you a focussed question on a part of it that I
19 hope will relate to your area of study. Sir, if we look at Article 7, please. It's on
20 page 3. Next page.

21 So there, sir, we read:

22 "Priority of application of treaties".

23 We read:

24 "The Minister, the Commissioner and any competent authority shall give due

25 consideration in the exercise of his powers under this Act, to any treaty or convention

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1 regulating the subject of asylum to which the Sudan is a party, and such treaty or
2 convention shall be given priority in the application of the provisions of this Act."

3 So this provision of this act is an example of Sudanese law giving priority to
4 international treaties and conventions over domestic law. Do you agree with that?

5 A. [12:30:07] Yes, I quite agree with you. This is a rather interesting exception.

6 Q. [12:30:13] Okay, and in one of your answers to Mr Laucci you said that
7 you'd -- this is transcript page 135, line 25, you said:

8 "I never saw any legislative provisions from Sudan making direct reference to
9 international legal instruments before I was able to access the armed forces act of
10 2007".

11 But now I understand you to be saying that you are familiar with this particular act, is
12 that -- and I'm suggesting to you that that would have been one relevant to mention
13 in your report?

14 A. [12:30:51] No, counsel. I clarified that I was aware of the existence of this law,
15 that some of the provisions therein were relevant in the dispute on asylum in France
16 and I wasn't aware of the existence of this particular provision, Article 7, which is
17 interesting.

18 So, obviously, if I had been advised of that, I would have stated that in the report.
19 But, in my opinion, it is an exception.

20 Q. [12:31:31] Okay, and if you had been aware of it, sir, would that have changed
21 the content of your report in relation to what you write about the 1998 constitution?

22 A. [12:31:50] As I said a moment ago, counsel, I would have indeed mentioned it,
23 yes, to present it as an exception, so it would've made it possible to perhaps moderate
24 my statement saying, you have look at certain cases where it is possible that
25 international law or international conventions have primacy over national law.

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1 Q. [12:32:14] Okay, sir, but the problem is you're telling us this is an exception.
2 I've shown you this law you say is an exception. But on your side all that we have is
3 your reading of the 1998 constitution, a plain reading, you don't cite any cases, you
4 don't cite to any laws, you don't cite to any academic literature, and when I show you
5 a case suggesting the primacy of treaty in international law within Sudan, you
6 immediately dismiss it as an exception.

7 A. [12:32:59] Counsel, this is my opinion. All the presentation of the Sudan report
8 concerning the African Charter of Human Rights for the moment means that as far
9 I'm confirmed -- it confirms my interpretation. So I cannot -- well, all I can see here
10 is an exception.

11 PRESIDING JUDGE KORNER: [12:33:26] But I'm sorry, sir, what you said at line 19
12 of page 53 was:

13 "So obviously if I had been advised [...] I would have stated it in the report, but it's in
14 my opinion an exception."

15 Advised by whom? I mean you're supposed to be doing the research.

16 THE WITNESS: [12:34:05](Interpretation) Your Honour, I base myself on the
17 documents that I obtained and what I think is relevant and, furthermore, this law was
18 never presented to me as being related to international law. I didn't have access to it
19 furthermore, and these provisions of article 7 are not relevant for the activities
20 referring to asylum in France; so I didn't think of referring to that.

21 Now -- now it's been presented to me, I would -- I'm telling you what I think about it.
22 It is asylum law in particular, and international human rights law and fundamental
23 freedoms is much wider than asylum law.

24 MR JEREMY: [12:34:57]

25 Q. [12:34:58] Okay, so you say you weren't aware of this law. I mean, all that we

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1 have done is follow your methodology. So you cited one of these reports -- the
2 fourth and fifth reports in relation to the 2005 constitution because you believed it
3 supported your argument. So on that basis, we looked at the earlier reports, we
4 looked at this third report, we saw a reference to a law. We went to the UNHCR
5 website and obtained that law which has a different, again, interpretation than your
6 expert opinion.

7 So I'm suggesting to you, sir, that all of this is readily accessible to you as an academic,
8 as an expert?

9 A. [12:35:44] Yes, counsel, I think the report that you presented says nothing
10 different to what I confirm and this law -- yes, that's it. This law indeed on the other
11 hand, doesn't suggest that international law is not -- does not have primacy over
12 national law.

13 Q. [12:36:12] Okay, thank you, sir. We'll move forward.

14 Now a short time ago, you mentioned one of the ICCPR reports I think from the 2018
15 period. You've referred to that today, you've referred to it in your previous
16 testimony. I think that was the fifth periodic report, is that right?

17 It's not important if you can't remember.

18 A. [12:36:46] I no longer remember, but I think it must be that.

19 Q. [12:36:44] Okay.

20 A. [12:36:45] 2019 or 2018, I no longer recall.

21 Q. [12:36:56] Okay. Did you look at all of the reports to the ICCPR from the
22 Government of Sudan, including for the period relevant to this case?

23 A. [12:37:14] I only looked at a few of them. I can't remember exactly which ones
24 they were, but all of those relating to the reports or at least which were
25 contemporaneous with the fourth or fifth Sudan report on the application of the

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1 African Charter on Human Rights, so subsequent thereto. So if you ask me -- or if I
2 look at the report for the years 2003, 2004, 2005, then no.

3 Q. [12:37:47] Okay. It's a slightly earlier report, sir. If we could go to tab 12,
4 please. It's DAR-OTP-00006615 and this is the second periodic report from the
5 Government of Sudan regarding its compliance with the International Covenant on
6 Civil and Political Rights.

7 So, again, sir, you're familiar with reports of this type?

8 A. [12:38:20] Not this one, but before the adoption of the constitution of 2005 -- or
9 at least the one of 2003 and 2006, but I haven't consulted this one. But this is before
10 the adoption of the constitution of 1998.

11 Q. [12:38:40] Well, we will take a look at it, sir, and I will ask you some questions.
12 If we go, please, to page 18, paragraph 57.

13 Okay, so, I won't read this paragraph out, sir, but in the last sentence we see that there
14 is a reference to Sudan notifying the Secretary-General of the United Nations of
15 articles of the covenant that Sudan has derogated from. We discussed that earlier.
16 If we go to the next page, paragraph 60, towards the bottom of the page, in that
17 paragraph we see reference to emergency decrees that are in place, and then in
18 relation to those decrees there is a list below of safeguards. Okay?

19 A. [12:39:57] Yes.

20 Q. [12:39:58] It takes us to the safeguards. And on the next page, paragraph 61,
21 we read, quote:

22 "Furthermore, the national law makes the Covenant prevail over all national laws."

23 So again -- so we see the Government of Sudan taking the position that the ICCPR
24 prevails over all national law within Sudan?

25 A. [12:40:37] Yes. Now in this report, yes, before the adoption of the constitution

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1 of 1996 -- 1998.

2 Q. [12:40:48] Okay, so but -- so this isn't something that you spell out in your report,
3 but are you saying the adoption of the 1998 constitution somehow changes the
4 position of the implementation of international treaties in Sudanese law prior to that?

5 A. [12:41:11] Well, I don't see how the 1998 constitution would have effects on this
6 report. That's the reason why we checked it together. If the regime was there in '98
7 and after 2005 -- if the regime is the same in '98 and after 2005, for this reason that we
8 questioned the continuity of the report -- or the reports and the relationship between
9 international law and national law under the constitution and under the constitution
10 of 2005. So the question arises once again, when we look at the issue of national law
11 and international law in 1998 and 2005.

12 PRESIDING JUDGE KORNER: [12:42:01] The question was a simple one, could we
13 have a simple answer. Does -- are you saying that the constitution of the -- the 1998
14 constitution had the effect of negating this statement; namely, that the covenant
15 prevails over all national law?

16 THE WITNESS: [12:42:31](Interpretation) So, Madam, your Honour, not necessarily,
17 but when we refer to the report -- the Sudan report relating to the application of the
18 African Charter of human rights and peoples, it would seem to be the case in my
19 opinion. I understand that this interpretation is not shared by every member of the
20 Court or by the Office of the Prosecutor, but yes, I think this is the case.

21 PRESIDING JUDGE KORNER: [12:42:56] Yes, the answer is you do -- in your
22 opinion, the constitution did revoke this aspect?

23 THE WITNESS: [12:43:13](Interpretation) Yes, your Honour, in my opinion, yes.

24 PRESIDING JUDGE KORNER: [12:43:17] Thank you. That's all I wanted to know.

25 MR JEREMY: [12:43:20]

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1 Q. [12:43:20] Okay, sir, but the Government of Sudan is essentially take the same
2 position in this report as it takes in the report that I just showed to the -- in relation to
3 the African Charter of Human and Peoples' Rights?

4 A. [12:43:34] No, counsel, I wouldn't agree with that. I think that there, you have
5 the same position as where it concerns the right of refugees, but not for the
6 African Charter of human rights and peoples.

7 Q. [12:43:50] Okay, but that paragraph (3) I showed you, and I'll quote it, says:
8 "The ratification of a number of conventions and regional and international
9 instruments which are considered as part of national legislation."
10 And then in this report to the ICCPR, we read that national law makes the covenant
11 prevail over all national laws.

12 You're saying they're different positions?

13 A. [12:44:18] Counsel, for me, these are two provisions which don't have the same
14 meaning. You have one provision which clarifies the report about the different
15 norms and values and, in the other, it -- you are being told that international law is
16 applied as legislation in Sudanese law.

17 But here, that's not the sense to be given to this provision in my opinion on page 19.
18 It's about primacy.

19 Q. [12:44:53] Okay, so is it your position that prior to the 1998 constitution that, in
20 fact, national law did make international agreements prevail over all national laws, is
21 that your position?

22 PRESIDING JUDGE KORNER: [12:45:11] He said it to me, I think.

23 MR JEREMY: [12:45:14] Okay.

24 THE WITNESS: [12:45:17](Interpretation) Just one moment, I would like to clarify,
25 on the basis of this document here?

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1 MR JEREMY: [12:45:23]

2 Q. [12:45:23] On the basis of your expertise, sir?

3 A. [12:45:26] No, on the basis of this document, yes, but can it be extended to all
4 international law applicable to Sudan? I don't know if it would follow this rule and,
5 there, we're talking about the international convention on civil and political rights on
6 the basis of my expert report or expertise.

7 Q. [12:45:50] Okay, so what was it about the 1998 constitution then that would have
8 changed this provision, which would have meant that national law would no longer
9 mean that international treaties would prevail over national laws in Sudan? What
10 particular part of the 1998 constitution -- forget about the 2005 constitution, what part
11 of the 1998 constitution would change this statement?

12 A. [12:46:17] Well, it would seem that I mentioned it in my report, I'd have to find
13 the part of my report which refers to this particular point on the one hand and, in my
14 opinion, your reference about -- to the Sudan report relating to the application of the
15 African Charter of human and peoples, in my opinion only confirms that we are
16 under the constitution of 1998.

17 PRESIDING JUDGE KORNER: [12:46:51] I think if we go back to your paragraph
18 77 of your own report, where you deal with the 1998 constitution.

19 THE WITNESS: [12:47:23](Interpretation) Very well. It's rather in paragraph 78,
20 first sentence, there is no reference -- no direct reference to the international
21 commitments in the constitution of 1998 -- or, at least I haven't found them. Very
22 well. So the only thing that we have is paragraph 77 and these are references to
23 rights and fundamental freedoms, which are sometimes formulated in terms which
24 are different or they move away from conventional provisions.

25 PRESIDING JUDGE KORNER: [12:48:01] Well, sir, what you say at paragraph 78,

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1 you say, there is an "absence of any direct reference".

2 And then you go on to say in the second sentence:

3 "In other words, these rules are not directly applicable in Sudan without prior
4 transposition."

5 And "This has an effect on the place of public international law in [...] Sudan."

6 So you're saying because there is no direct reference in the 1998 constitution, the
7 position therefore that expressed earlier -- as Mr Jeremy has shown you, that it did in
8 fact override domestic legislation no longer applies?

9 THE WITNESS: [12:49:04](Interpretation) Yes, your Honour, this is my opinion and
10 it is exemplified by the end of this paragraph on the place of Sharia, and it speaks
11 about the Sudanese report on the application report on the African Charter of rights
12 and peoples and --

13 THE INTERPRETER: [12:49:13] Could the witness be asked to repeat the last bit.
14 The interpreter didn't catch it.

15 PRESIDING JUDGE KORNER: [12:49:26] Sir, can you repeat. You spoke very
16 quickly again. Could you repeat the end of your answer.

17 THE WITNESS: [12:49:32](Interpretation) I confirm -- I confirm, Madam President,
18 this is indeed what I state on the basis of the demonstration made by paragraph 77,
19 and on the basis of the report on Sudan relating to the application of the
20 African Charter of human rights and peoples, as mentioned myself -- that this is
21 mentioned by the Office of the Prosecutor. That's my opinion.

22 MR JEREMY: [12:50:22]

23 Q. [12:50:22] Sir, when you are referring to the African Charter on Human and
24 Peoples' Rights, are you referring to the fourth and the fifth report that you cite or the
25 one that I showed you?

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1 A. [12:50:39] I'm sorry for the interpreters. I was mentioning both reports. In my
2 opinion, the report that you showed me confirms the -- my interpretation.

3 Q. [12:50:58] Okay.

4 A. [12:51:01] But all this, well, I would nevertheless like to highlight that all of this
5 does not mean that Sudan is not bound to respect and apply the provisions of
6 conventions that it ratifies. It has to do that. I'm not saying that Sudan has no
7 international obligations.

8 Q. [12:51:24] Yes, that's understood, sir, we are not talking about that. I'm simply
9 focused on the basis for which you are saying that the 1998 constitution would
10 somehow change the position of the status of international treaties in Sudanese law
11 prior to 1998, and, I must say, sir, it's still not clear to me. If -- you've taken a look
12 now I think at the relevant paragraphs of your report, if there's a particular provision
13 of the 1998 constitution that you would refer us to, that would be helpful.

14 A. [12:52:25] Other than the fact that the 1998 constitution does not at all make
15 reference to international law applicable in Sudan, I would also refer you to articles in
16 the declaration, 21, 23, 24, 26, 27, 30, 33, and 29 as well, which are the only cases
17 where you have a reference, perhaps an indirect reference, a mention of international
18 conventions relating to human rights and the convention of '67 -- of '66.

19 Q. [12:53:15] Okay, so -- but again, the argument is basically because there's no
20 reference to international treaties, then in my mind, they are not directly incorporated
21 into Sudanese law without implementing legislation?

22 A. [12:53:41] By a law which transposes it or of a provision which -- a constitutional
23 provision which would do so, but I don't know about that. I have not seen a
24 constitution which has provisions relating to the relationship between international or
25 national law; so this is very specific. 1998 is specific. We don't have provisions

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1 which clarify what the position is of international law in national law or which specify
2 its application.

3 Q. [12:54:15] Okay, and because there are no provisions which clarify the status of
4 international treaties, it's your conclusion -- you go further than that and say because I
5 don't see any clarifying provisions, then in my mind implementing legislation is
6 required under the 1998 constitution?

7 A. [12:54:40] No, counsel. I'd like to give an analogy. If you look at the 1998
8 situation in 2005, in 2005 --

9 Q. [12:54:57] Sir, sir -- okay, if this relates to 1998, the 2005 example, but otherwise
10 if it's 2005, 27(3), then it's of limited relevance to the 1998 constitution.

11 But please, I interrupted you.

12 A. [12:55:13] No problem, I don't want to get into a description of 2005. What you
13 asked me to do was to say what method I adopted to come to this conclusion, and
14 that is the reading of the provisions and it was a comparison of the work that I carried
15 out, which -- it was analogous reflection which made it possible for me to make that
16 finding. So looking at the 1998 regime and that of 2005, which seems to be
17 confirmed by the report that you showed me.

18 Q. [12:55:48] Okay. And of course you didn't look at the regime prior to 1998?

19 A. [12:55:58] No, counsel. I was interested in the period related to the
20 conflict -- the armed conflict.

21 Q. [12:56:06] Okay. But where we're discussing the reception of international
22 treaties within Sudanese law, is it your position that it's not relevant to see how those
23 treaties were implemented, whether they needed implementing legislation prior to
24 1998? You think that's irrelevant?

25 A. [12:56:28] Counsel, it depends to what ends. It wasn't relevant for me. I

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1 didn't think that it was relevant for this case, which doesn't look at the facts or acts
2 before 1998.

3 Q. [12:56:51] Okay, but what you're doing, sir, is you're reasoning by analogy.
4 You're comparing the 1998 constitution to the 2005 constitution and on that basis, you
5 are making -- you're taking a position in relation to the 1998 constitution. And I'm
6 suggesting to you that it would've also have made sense for you to look at what
7 happened prior to the 1998 constitution and, had you done so, I'm suggesting to you
8 that your opinion -- your conclusions would have been more reliable?

9 A. [12:57:21] Very well, counsel. That's noted.

10 Q. [12:57:32] Okay.

11 PRESIDING JUDGE KORNER: [12:57:35] Sorry, I know it's not something you've
12 done before but saying you've noted Mr Jeremy's point isn't quite an answer.
13 His suggestion to you is that you would have come to a different conclusion had you
14 looked at some of the legislation prior to the 1998 constitution. Do you agree?

15 THE WITNESS: [12:58:00](Interpretation) Your Honour, for 10 minutes I've said I
16 don't agree with that and I understand the Office of the Prosecutor is -- wants to show
17 that my analysis isn't valid, but I hold my position. I think the documents that were
18 presented actually confirm that and I think that this report with 00019, page 19, that is,
19 is not -- well, it doesn't change the fact of the matter. It doesn't change the state of
20 law applicable after 1998.

21 MR JEREMY: [12:58:52]

22 Q. [12:58:52] Okay, sir, I want to move to another document now and it's related to
23 this ICCPR report you've just been looking at. And yeah, first of all, I'll show you
24 the document at tab 30, it's DAR-OTP-00007049.

25 Oh, perhaps you don't -- forgive me, you don't have a copy in your binder.

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1 If the court officer could assist, please.

2 PRESIDING JUDGE KORNER: [12:59:42](Microphone not activated)

3 MR JEREMY: [12:59:44] This is one that we added just this morning.

4 PRESIDING JUDGE KORNER: [12:59:49] The 2nd of February 1998?

5 MR JEREMY: [12:59:52] Correct.

6 PRESIDING JUDGE KORNER: [12:59:53] Yes.

7 MR JEREMY: [12:59:54] If the court officer could help us deliver the physical

8 version.

9 Q. [13:00:09] And sir, just while we're waiting, basically this is the meeting where
10 the report is discussed. So for this first document I'm just using it for a very specific
11 purpose, sir.

12 But just while it's coming up, you've got the hard copy there, we see it relates to
13 a meeting of the Human Rights Committee held in Geneva on 28 October 1997. We
14 see that it's the -- discussing the second periodic report of Sudan.

15 And if we can just go to page 7, I just want to show you this entry in relation to one of
16 the members of the delegation on the Sudanese side and then I will move on to
17 a second document, which is the afternoon discussion of this report.

18 So sir, just focussing at paragraph 21, we see that one of the members of the Sudan
19 delegation is Mr El Radi, Sudan. He says that he's been a judge in Sudan for 25 years,
20 is currently a member of the Permanent Court of Arbitration at the Hague and in his
21 country, President of the Technical Committee of the Constitutional Commission.

22 Is that a name familiar to you maybe? Maybe not?

23 A. [13:01:49] It's a well-known name, but I'm not so sure that it is the name of
24 a person I know.

25 Q. [13:01:59] No, that's fine, sir.

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- 1 So I want to go to the afternoon session now of this meeting and that's at tab 13. You
2 do have that one, sir. Tab 13 of the red binder and that's DAR-OTP-00006616.
3 So, sir, this is the afternoon session of the report that we just looked at. Okay, and if
4 we look at the -- if we look at the second page, sir, we see at number 1:
5 "At the invitation of the Chairperson" --
6 And then three individuals from Sudan take their place at the committee table,
7 including Mr Radi.
8 Now I just want to direct you to one focus part of this report, sir. It's paragraph 68,
9 on page -- it should be 12.
10 Okay, so the person speaking here, sir, is not Mr Radi who we just looked at, but I
11 wanted to make the point that we had this person as part of this delegation. It's
12 another member of the committee.
13 And I want to direct your attention to paragraph 68, where we read:
14 "On question 14, he said that under the Sudanese legal [order] once an international
15 instrument was ratified, it became part of domestic law. The Covenant did have
16 precedence over domestic legislation because the Sudan was a party to the 1969
17 Vienna Convention on the Law of Treaties."
18 So sir, do you agree with the position that is taken by this representative of Sudan in
19 this 1997 report?
20 A. [13:04:26] Yes, counsel, I agree.
21 Q. [13:04:29] Okay. So you agree with that position, but you say the position
22 changed with the new 1998 constitution?
23 A. [13:04:40] Yes, counsel, that's what I think.
24 Q. [13:04:42] Okay. And we agree that that's not a point that you make in your
25 report?

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1 A. [13:04:53] Yes, counsel, I did stress that I did not work particularly on matters
2 preceding 1998 concerning the relationship between international law and domestic
3 law. I only made a few references to decrees.

4 Q. [13:05:11] Okay. I think we can move forward, sir. Madam President, are we
5 taking the break at quarter past 1?

6 PRESIDING JUDGE KORNER: [13:05:24] Yes.

7 MR JEREMY: [13:05:25] Yes.

8 Q. [13:05:27] Okay. Sir, I would like to show you another report, just before I do,
9 we mentioned it earlier, but you agree that Sudan ratified the convention on the
10 elimination of all forms of racial discrimination?

11 A. [13:05:55] Yes, counsel.

12 Q. [13:05:56] *And it's in table 3 or your report, which is at paragraph -- before or
13 just after paragraph 75.. Okay. So did you look at any reports by Sudan in relation
14 to their compliance with this particular convention -- this elimination on all forms of
15 racial discrimination?

16 A. [13:06:26] Counsel, I looked at that during my thesis, I didn't use it.

17 Q. [13:06:40] Okay, sorry I should have been clearer. So for the purposes of the
18 report that you're providing to the judges, did you look at any reports from Sudan in
19 relation to this particular convention?

20 A. [13:06:52] No, counsel.

21 Q. [13:06:57] Okay. I want to show you one of those reports, it dates to the year
22 2000 and it's Sudan's 11th periodic report. And it is at tab 14 of your binder, ERN
23 DAR-OTP-00006618.

24 Okay, sir, if we just look at the front page, sir, on top left, we see this reference to
25 International Convention on the Elimination of all Forms of Racial Discrimination.

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1 We see it's the eleventh report of Sudan and you see the date there, 9 March 2000 in
2 the body below the line.

3 Do you see that?

4 A. [13:08:09] Yes, counsel.

5 Q. [13:08:15] Okay. If we go please to page 4. Okay, that's just the basic
6 introduction. Actually we can -- let's skip forward to page 10, please. Okay, so
7 halfway down the page, sir, "Human rights safeguards in the Sudan".

8 If we scroll down please.

9 Keep going down, please, I want to focus on paragraph 47 and 48. Thank you, that's
10 great.

11 Do you see that subheading there, sir? It says "Human rights safeguards in the
12 Sudan"?

13 A. [13:09:11] Yes, counsel.

14 Q. [13:09:12] Okay, so again, 48(a), we see this reference to the 1998 constitution
15 and then 48(c), again, we see this formulation --

16 "The ratification by the Sudan of a number of international and regional [bodies] and
17 the consideration thereof as part of the national legislation".

18 So again, sir, we again see the government taking the position that once ratified, these
19 treaties become part of Sudanese law; do you agree with that?

20 A. [13:09:48] Yes, counsel, exactly. As is for the case of the provisions of the
21 African Charter of Human and Peoples' Rights, I make reference to the report that
22 you showed me.

23 Q. [13:10:07] Okay, and in relation to this report, do you -- do you also -- do you
24 accept that these treaties become part of Sudanese law on their ratification?

25 A. [13:10:22] Counsel, I don't think I ever claimed that that was *not the case. What

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1 interests me is the status of these conventional provisions. These conventional
2 provisions will apply in Sudanese law as law, as legislation. They will have
3 legislative value. So yes, I agree with you, counsel.

4 Q. [13:10:49] Okay, thank you, sir.

5 PRESIDING JUDGE KORNER: [13:10:52] What about the part -- what about the
6 part (a), Mr Jeremy? You haven't put that to him, 48 (a).

7 MR JEREMY: [13:11:09] Yes.

8 Q. [13:11:10] Did you see 48(a), sir, which refers to "The proclamation of a new
9 comprehensive Constitution", which guarantees fundamental freedoms and rights?

10 A. [13:11:23] Yes, they seem to be inalienable according to this provision, save by
11 general popular referendum.

12 PRESIDING JUDGE KORNER: [13:11:37] Yes, but sir, as I understand it, you were
13 saying that the 1998 constitution made no reference at all either impliedly or -- well,
14 expressly or impliedly to any of the international conventions, humanitarian
15 law -- anything. But this is all under a heading of "Human rights safeguards in the
16 Sudan"?

17 THE WITNESS: [13:12:14](Interpretation) Which document are we speaking about?
18 The constitution or this report?

19 PRESIDING JUDGE KORNER: [13:12:19] Well, we are talking about what this
20 report says about human rights safeguards in the Sudan, in which it refers to the
21 new safeguards for the protection of human rights, the new constitution, independent
22 judiciary and the ratification by Sudan of a number of international and regional
23 treaties.

24 So it's suggesting that the constitution does not alter the fundamental principles, if
25 you like, of human rights.

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1 THE WITNESS: [13:13:09](Interpretation) Your Honour, two responses. First of all,
2 paragraph 48(a) does not refer to international law specifically; secondly, in my report
3 I am upholding the same position as you. The constitution does not contain any
4 provision with the specific or an explicit reference to international law. There is
5 a general mention of international law and I have cited this in a number of footnotes.

6 MR JEREMY: [13:13:59]

7 Q. [13:14:00] Okay, thank you, sir.

8 I'm done with that document and I'm actually moving to a new topic now.

9 (Discussion between the Chamber and the court officer)

10 PRESIDING JUDGE KORNER: [13:14:22](Microphone not activated) We are
11 adjourning because live note stopped working again.

12 So hopefully in the one and a quarter hours this can be put right. I really, really do
13 think that the technicians ought to be to able deal with this and should have dealt
14 with it before.

15 Right, yes, okay, we'll adjourn until half past 2, 2.30.

16 THE COURT USHER: [13:14:53] All rise.

17 (Recess taken at 1.14 p.m.)

18 (Upon resuming in open session at 2.34 p.m.)

19 THE COURT USHER: [14:34:18] All rise.

20 Please be seated.

21 PRESIDING JUDGE KORNER: [14:34:39] Mr Jeremy, do you know how much
22 longer you are going to be? The only reason is that I was reminded I'd said we sit at
23 9 if you were going to go into tomorrow. I mean, there is no time pressure at all,
24 but --

25 MR JEREMY: [14:34:55] I'm going to try and finish this session, Madam President.

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1 PRESIDING JUDGE KORNER: [14:35:01] All right. As I say, you don't have to bust
2 a gut. I think in that case, if you think it will be either this session or early tomorrow
3 morning, then we'll stick to the normal timetable of 9.30.

4 I gather that Dr Gout has read whatever it was he was going to read over the
5 luncheon adjournment. Is that right?

6 THE WITNESS: [14:35:31](Interpretation) Yes, your Honour, I was able to read the
7 judgment of 1983 and the observations of the African Commission on the report.

8 MR JEREMY: [14:35:56]

9 Q. [14:36:00] Okay, thank you, sir.

10 I'm going to talk now about -- still we are going to focus on treaties, but we'll -- I'll ask
11 you some brief questions about international humanitarian law treaties, which you
12 mention in your report.

13 So here I'm looking at table 4, which appears above paragraph 77 in your report.

14 And we can agree, sir, that that table refers to the Geneva Conventions I to IV of 1949,
15 which were then ratified on 23 September 1957, yes?

16 A. [14:36:49] Yes, that is correct, counsel.

17 Q. [14:36:51] Okay. Now, in your report, for example, paragraph 10, paragraph 92,
18 you reference various peace agreements that Sudan entered into. Do you recall that?

19 A. [14:37:07] Yes, of course.

20 Q. [14:37:14] Okay. So, for example, you mention the comprehensive peace
21 agreement of May 2004 between the Government of Sudan and the Sudan People's
22 Liberation Movement; do you recall that?

23 A. [14:37:36] I don't remember, but it certainly must be there.

24 Q. [14:37:43] Yes, it's paragraph 10, sir, probably about the third sentence from the
25 end.

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1 Now, this peace agreement, sir, with the SPLM, that related to the long-running
2 conflict in the south of Sudan; yes?

3 A. [14:38:08] That is correct, counsel.

4 Q. [14:38:15] Okay. I want to show you a different document relating to that same
5 conflict. It's at tab 15 of your binder, and if we can see, please, DAR-OTP-00005576.

6 You may or may not have seen this agreement before. Are you familiar with it?

7 A. [14:38:51] I can't confirm, but I have the impression I've seen it before.

8 Q. [14:39:01] Okay. So it's dated 31 March 2002. We see that it's headed,
9 "Agreement between the Government of the Republic of Sudan and the Sudan
10 People's Liberation Movement to Protect Non-Combatant Civilians and Civilian
11 Facilities from Military Attack."

12 I want to refer you to this first paragraph where we see the parties who I've just
13 referred to "reconfirm their obligations under international law, including common
14 Article 3 of the 1949 Geneva Conventions, to take care to protect the civilian
15 population, civilians and civilian objects against dangers arising from military
16 operations."

17 So, a simple question, sir: You will agree that this agreement reflects an intention by
18 the parties to abide by their obligations under international law, including the Geneva
19 Conventions, within Sudan?

20 A. [14:40:14] Yes, counsel, but actually -- I do remember, I have read this document.

21 I believe it was shown to me by the Defence, and indeed I was wondering to
22 myself -- I was wondering about the territorial scope. So, in principle, yes.

23 PRESIDING JUDGE KORNER: [14:40:47] In principle, yes to what?

24 THE WITNESS: [14:40:52](Interpretation) Thank you, your Honour. I was
25 hesitating a bit about going into further detail, but it could be -- it would be hoped

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1 that, yes, the application of international law, in particular humanitarian law within
2 the entire country. When I saw this document, immediately I asked myself a
3 question, namely: What is the territorial applicability insofar as the policy - and this
4 is a policy - of the federal government, has always been to divide, to split up armed
5 conflicts, for example, the 2005 agreement and then the peace agreement between the
6 north and the south, in south Kordofan and the Blue Nile. And we saw that - how
7 should I put this - there was a division of the applicable legal system between that
8 situation at that time and the previous. But that's a supposition, it's not an
9 affirmation; it is a possibility. But there --

10 PRESIDING JUDGE KORNER: [14:42:08] I'm sorry, can we stop there.

11 The question that -- I just wanted to make sure that you were answering the question
12 you were asked, the simple question put by Mr Jeremy that this agreement reflects an
13 intention to abide by their obligations under international law. Do you agree with
14 that?

15 THE WITNESS: [14:42:29](Interpretation) Yes, your Honour. That wasn't exactly
16 the question, but in response to your question, I would answer yes.

17 MR JEREMY: [14:42:44]

18 Q. [14:42:45] Okay, sir. And this reference to obligations under international law,
19 it's a general reference, but you'll agree that it would include customary international
20 law?

21 A. [14:43:00] Yes, of course, counsel.

22 Q. [14:43:07] Okay. Thank you, sir.

23 I'm done with that document. We can move forward.

24 Okay, sir, I just want to make sure -- special courts, sir, which you refer to in your
25 report, section 4.2, I'm looking at paragraph 102. Okay. So we went over your sort

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1 of prior knowledge and experience of those -- the various different types of special
2 courts during the voir dire process, so we are not going to go through that again in
3 detail, but there are just a few specific parts of this section of your report that I'd like
4 to focus on.

5 So, paragraph 102 is a long paragraph, but probably five or six sentences from the
6 bottom, in reference to this special criminal court on the events in Darfur you say that
7 it was reported that this SCCED had no special jurisdiction. Can you clarify what
8 you meant by "special jurisdiction" there?

9 A. [14:45:02] A specific jurisdiction to judge the international crimes in Darfur.

10 Q. [14:45:20] Okay. And based on your sources for this paragraph, am I correct in
11 thinking that it's the Human Rights Watch report -- yes, you cite, sir, footnote 130, this
12 Human Rights Watch report. I take it that's the basis for that assertion in your report;
13 is that right?

14 A. [14:45:46] Yes, counsel.

15 Q. [14:45:55] Okay. And -- okay. I want to show you another exhibit now, sir, if
16 I may. If we can go to tab 17, and it's DAR-OTP-0066-0470.

17 Okay. So, sir, I'm going to show you two related documents now. So this
18 document, I'm not sure if you've seen it before.

19 A. [14:46:46] I don't believe so.

20 Q. [14:46:48] So we read that it's an "Order of Establishment of the Special Criminal
21 Court on Events in Darfur". If we go to the last page, please, page 5, with the date,
22 and we see at the bottom of the page, sir, that the date is 7 June 2005. Okay.

23 If we go back, please, to the first page, and it's just on this issue of jurisdiction, sir, so I
24 want to focus your attention on the bottom of the page, we see "Chapter Two: The
25 Court has jurisdiction to decide on the following". And then we go to the next page.

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1 Okay, so I won't read them out, sir, you can read them, we can all see them on the
2 screen. But please, please just take a quick look and then I'm going to show you
3 another document and ask you a question.

4 Could we see the document at tab 19, please, that's DAR-OTP-00006622.

5 Okay, sir, so this document relates to the first, on its face, it's "Amending the Decree
6 Establishing the Special Criminal Court on the Events in Darfur". We see in the first
7 paragraph the chief Justice, having reviewed the decree establishing the special court
8 on the events in Darfur issued on 7 June 2005, has delivered the decree below.

9 I just want to focus on this first part, it says, "Firstly: The following text shall be
10 added to the end of paragraph 5(a)", which is the paragraph we just looked at, quote,
11 "and International Humanitarian Law".

12 So, sir, my question is on the basis of this decree, I appreciate you haven't seen it
13 before, but we can agree that that special court did in fact have jurisdiction over
14 international humanitarian law within Sudan.

15 A. [14:49:34] Of course, counsel.

16 Q. [14:49:35] Okay. So we can revise that part of your report?

17 A. [14:49:42] No, counsel. No, counsel. That's not the same thing, counsel.

18 Perhaps you should have another look at the sentence and I think you should read the
19 entire passage, actually. This court was established to convince the international
20 community of the ability of Sudan to deal with the crimes and it says that the court
21 perhaps was not in a position to do so, but I apologise to the Court, but the wording
22 of this particular passage was not clear enough, was not sufficiently clear.

23 PRESIDING JUDGE KORNER: [14:50:24] I'm sorry, which -- first of all, which bit of
24 his report, Mr Jeremy, are you --

25 MR JEREMY: [14:50:30] It's paragraph 102, Madam President. So --

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- 1 PRESIDING JUDGE KORNER: [14:50:36] But which sentence?
- 2 MR JEREMY: [14:50:37] It's five sentences from the end, saying:
- 3 "However, it was reported that the SCCED had no special jurisdiction, and in practice,
- 4 tried ordinary [crimes] not specifically related to international crimes."
- 5 PRESIDING JUDGE KORNER: [14:50:51] Oh, I-- yes, yes.
- 6 MR JEREMY: [14:50:53] And I asked Mr Gout what he meant by "no special
- 7 jurisdiction" and he confirmed no jurisdiction over international crimes.
- 8 THE WITNESS: [14:51:03] In practice.
- 9 PRESIDING JUDGE KORNER: [14:51:13] So what are you saying, sir? That's what
- 10 you said in your report, but now you've seen a document that appears it does apply
- 11 IHL, so what are you saying, why is there no difference between what your report
- 12 says and what we can see ourselves?
- 13 THE WITNESS: [14:51:40](Interpretation) Your Honour, I fear that the OTP has -- is
- 14 not understanding what I've said. I speak about the principle followed to set up the
- 15 court and I also made reference to a Human Rights Watch report and I made the
- 16 observation that, in practice, it was not the case. Everyone was aware. Everyone
- 17 knew that the court was set up to judge international crimes. No one can claim the
- 18 contrary.
- 19 PRESIDING JUDGE KORNER: [14:52:21] I see. So -- but -- sorry, that's not what
- 20 you say in your report. You say:
- 21 "... it was reported that the [special court] had no special jurisdiction ..."
- 22 And then you go on to say:
- 23 "... and in practice, tried ordinary criminal offences".
- 24 But whether it did or not in practice, it did have the capacity to try international
- 25 crimes.

1 THE WITNESS: [14:53:02](Interpretation) I entirely agree, your Honour. Of course
2 it had jurisdiction. This is an unfortunate choice of words or drafting, but I'm
3 referring to the Human Rights Watch report that spoke to the practice, the actual
4 practice, of that court. That was one of the first things that I heard when I got to
5 Sudan, namely, that the arrest warrants and the jurisdiction -- about the arrest
6 warrants, and I heard about the special court set up in 2005.

7 PRESIDING JUDGE KORNER: [14:53:37] Yes, but you hadn't, as I understand it, at
8 the time you wrote your report, seen this particular amendment, the one at tab 19 - or
9 is it 18?

10 THE WITNESS: [14:53:57](Interpretation) That is entirely correct, your Honour.

11 PRESIDING JUDGE KORNER: [14:53:59] Had you seen that, would you have
12 worded your report differently?

13 THE WITNESS: [14:54:06](Interpretation) No. Once again, your Honour, I
14 confirm -- I confirm that I know that the court had jurisdiction in principle to judge
15 international crimes in Darfur. That was general knowledge. I can see here how
16 the wording here, or the phrasing might lead one to conclude the opposite. If you
17 look at the previous sentence, I believe -- perhaps I can clarify what I meant.

18 PRESIDING JUDGE KORNER: [14:55:04] I'm sorry, do you mean you want to -- you
19 can say whatever -- you can say whatever you like.

20 THE WITNESS: [14:55:12](Interpretation) Your Honour, I can see how the wording
21 might be confusing and I'm sorry about that, but I insist, I am perfectly aware that the
22 court was set up specifically to block the opening of a situation in Darfur. There's no
23 debate about that. It's obvious that this court was set up for trying international
24 crimes. I'm sorry if the wording gives the impression or creates the confusion, but
25 everyone knows, everyone knows this.

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1 MR JEREMY: [14:56:01]

2 Q. [14:56:05] Okay, sir, I'm just going to go back to it, though. I pointed you to
3 that sentence and I quoted it to you. I said, "However, it was reported that the
4 SCCED had no special jurisdiction". Okay. I asked you what you meant by "special
5 jurisdiction" and you said, quote, "a specific jurisdiction to judge the international
6 crimes in Darfur", okay? I've now shown you a document saying that, in fact, the
7 special court did have jurisdiction over international humanitarian law and, if I
8 understand what you're saying correctly, is "Yes, that's what I said all along"?

9 A. [14:56:54] No, counsel. What I'm saying is that -- well, you asked me to clarify
10 this passage from my report and you said, "What law are you talking about?" And
11 my answer was, "International crimes" and you didn't go any further than that. In
12 practice, this special court was not able to do so.

13 Q. [14:57:21] Okay. So the sentence should read:
14 "However, it was reported that the SCCED did have special jurisdiction over
15 international humanitarian law, but in practice tried ordinary criminal offences not
16 specifically related to international crimes."
17 Is that your position?

18 A. [14:57:43] If I'd wanted to say that the court did not have special jurisdiction, I
19 would have left it at that. I'm -- then I specify what I meant by the sentence in the
20 second proposal. This -- this -- "and in practice, tried ordinary criminal offences".

21 Q. [14:58:12] Okay. But we can agree, sir, that in principle - leave aside the
22 practice - in principle, a court within Sudan had the ability to apply international
23 humanitarian law within Sudan? We can agree?

24 A. [14:58:33] Of course. Of course.

25 Q. [14:58:39] Okay, thank you, sir. We will move on.

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1 I want now to discuss your evidence in relation to *hiraba* and *ghanima*, so if I can direct
2 you to paragraph 97 of your report.

3 So, sir, we established during your previous testimony that you're not fluent in
4 reading or writing or speaking Arabic; yes?

5 A. [14:59:40] Yes, yes, I acknowledged that quite quickly at the beginning of --

6 Q. [14:59:47] Yes, that's accepted, sir. And you've never read the Koran?

7 A. [14:59:56] No, counsel.

8 Q. [14:59:58] And you've never studied at any Islamic schools?

9 A. [15:00:07] I heard the translation without wanting to in my headphones, and I
10 do not really know whether you were trying to ascertain whether I studied in an
11 Islamist school or whether I was studying the Islamist schools themselves -- the
12 Islamic schools themselves.

13 Q. [15:00:33] Well, I was focused on the former, sir. So I take it you haven't
14 previously studied in any Islamic schools?

15 A. [15:00:50] No, no, not personally, no.

16 Q. [15:00:57] Okay, not personally. And you've never studied Islamic law? I
17 think we established that.

18 A. [15:01:05] Not at university, no.

19 Q. [15:01:11] Now, we can agree that *hiraba* and *ghanima* are Islamic law concepts;
20 yes?

21 A. [15:01:22] Yes.

22 Q. [15:01:26] Now, in relation to *hiraba*, in paragraph 97 you say that -- in the first
23 sentence:

24 "The *hiraba* formalised in the *fiqh* is subdivided into a series of offences of varying
25 severity depending on the materiality of the facts and their legal characterisation."

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1 First question, sir, *fiqh*, that just means Islamic jurisprudence; is that right? And
2 forgive my pronunciation.

3 A. [15:02:04] Yes, but it has a rather wider significance than in Romano-Germanic
4 law, or common law. It is the legal manner of thinking, if you like.

5 Q. [15:02:24] Okay. And in relation to this *fiqh*, this legal manner of thinking, we
6 can agree that you don't specify what particular jurisprudence you had in mind when
7 you wrote this part of your paragraph 97?

8 A. [15:02:49] If you are talking about Islamic schools, Islamic schools of law, then
9 no. I relied upon what I was told and on additional reading that I mentioned before.

10 Q. [15:03:09] Okay. Told by whom, sir?

11 A. [15:03:14] You have those references in the footnotes. Footnotes to paragraph
12 97.

13 Q. [15:03:25] Okay. This was the interview with the lawyer at footnote 119. I
14 won't mention his name, but that's the interview that you no longer have the notes of;
15 yes?

16 A. [15:03:37] It is an individual whom I met on several occasions for multiple
17 interviews. And, yes, I do not have those notes with me. I went on to complete
18 those notes with academic reading which do not appear here. I think we've already
19 talked about this.

20 Q. [15:04:02] Maybe we've touched on it, sir.

21 So the Islamic schools that you mentioned, are there any particular schools that you
22 had in mind, any that you can mention?

23 A. [15:04:15] Well, there are several Islamic schools in Sudan which are all affiliated
24 with Sufi sects, or many of them. There's the Hatmiyya, for example, there's the
25 Madariyya - no, that's not it. I just remember Hatmiyya. And I have a colleague,

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1 doctor or research colleague, who was specialised on these matters of Islamic law, but
2 he did not work on Sudanese contemporary law at all.

3 Q. [15:04:56] Okay. Thank you, sir.

4 Now, in relation to *ghanima*, you cite to the same source that we've just mentioned,
5 yes, this interview with this lawyer in February 2019?

6 A. [15:05:28] Yes, counsel.

7 Q. [15:05:34] Okay. And you relate this concept of *ghanima* to the 1986 Armed
8 Forces Act and, as you explained when I asked questions when you were last here,
9 you'd heard about that act but you hadn't previously seen it; yes?

10 A. [15:05:57] Yes, counsel.

11 Q. [15:06:02] Okay. And you nevertheless say, though, at the end of
12 paragraph 100:

13 "In view of all these factors, *Ghanima* was not prohibited by the 1986 Act, and its
14 practice was generally accepted."

15 Do you recall saying that, sir?

16 A. [15:06:30] Are you talking about the Armed Forces Act of 1996?

17 Q. [15:06:36] 1986, sir.

18 A. [15:06:42] Well, I did not have that law available to me during my doctoral
19 thesis. It was provided to me, I think, if I'm not mistaken, by the Defence for the
20 preparation of the report.

21 Q. [15:06:56] Okay. But as part of the expert report that you provided to the
22 Chamber, you comment on provisions of the 1986 act. Do you remember
23 commenting on those?

24 A. [15:07:08] You can see it in paragraph 100.

25 Q. [15:07:15] Okay. So you do -- you remember commenting on those parts of the

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1 1986 act?

2 A. [15:07:24] Well, not before the preparation of the report itself. Not at the time
3 when I was conducting those interviews in Sudan in 2019. I don't really understand
4 the thrust of your question, counsel.

5 Q. [15:07:44] We are getting there, sir.

6 But if I understand correctly, what you write about *ghanima* is basically it's based on
7 this interview from 2019 and it's based on your review of the 1986 act; yes?

8 A. [15:07:57] Yes, that is correct, and on additional reading, as I said, that I
9 provided to the Court, to the Defence.

10 Q. [15:08:10] Okay. Can you recall off the top of your head what that additional
11 reading was?

12 A. [15:08:18] I no longer recall the name of the author, but it is a work on Islamic
13 law in Sudan, published by Brille publishing house -- B-R-I-L-L-E -- that I consulted
14 with a view to completing and verifying my knowledge of those institutions, because
15 they were rather -- you know, they had been rather peppered throughout those
16 interviews conducted in Sudan.

17 PRESIDING JUDGE KORNER: [15:08:57] I'm sorry, again, to interrupt, Dr Gout.

18 Are you saying that paragraph 100 was based -- your interview with this lawyer, the
19 1986 act and this textbook on Islamic law?

20 A. [15:09:21] Yes, Madam President, I think I've already been specific in that regard
21 during my last testimony here.

22 PRESIDING JUDGE KORNER: [15:09:30] Okay, well -- all right. I'm sorry, but why
23 don't you footnote that, then? Why don't you footnote the textbook that you refer
24 to?

25 THE WITNESS: [15:09:41](Interpretation) Yes, indeed. It is an error on my part. It

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1 is something that I forgot to do.

2 PRESIDING JUDGE KORNER: [15:09:48] And you say you gave it to the Defence?

3 THE WITNESS: [15:09:53](Interpretation) I handed it over to the Defence with a
4 view to clarifying what I was saying, because it was too late for it to be added as a
5 footnote.

6 PRESIDING JUDGE KORNER: [15:10:07] Right.

7 MR JEREMY: [15:10:10]

8 Q. [15:10:12] Yes, sir, and I -- I'm getting French translation -- interpretation,
9 because I'm on the French channel.

10 Yeah. And, sir, that -- I think it's this Olaf Köndgen, "The Codification of Islamic
11 Criminal Law in the Sudan", that's the book I think you are referring to, that you
12 subsequently provided us with, or provided the Defence with, when we asked for
13 your sources?

14 A. [15:10:46] Yes, counsel, indeed. That is correct.

15 Q. [15:10:51] Yes. Now, sir, you mentioned a couple of provisions of the 1986 act
16 in relation to *ghanima*, and I just wanted to look at those briefly with you.

17 If we can take a look, please, it's tab 18 of the Defence binder, so it's the black binder,
18 and the ERN is DAR-OTP-00006136.

19 Okay. So, I want to look at section 53 - article 53, and you mention that in your
20 paragraph 100. You say article 53 refers to *ghanima* without covering the concept in
21 its entirety. And you refer to a potential penalty, "ten years' imprisonment, for any
22 person under the authority of the armed forces who obstructs the sequestration of
23 public property seized from the enemy." Do you remember writing that?

24 A. [15:12:38] Yes, counsel.

25 Q. [15:12:39] So we have before us and on our screens this article 53 negligence and

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1 safeguarding captured equipment. And we read:

2 "Any persons subject to the provisions of this Act who are negligent in protecting or
3 safeguarding public property captured from the enemy ..."

4 And I want to focus on this word "enemy". Did you look at the definition of that
5 word "enemy" within this act when you commented on it in your report?

6 A. [15:13:19] I do not recall, counsel.

7 Q. [15:13:21] Let's take a look at that now, please. It's page 6. Okay. So we see
8 there, sir:

9 "Enemy" includes external enemies, outlaw rebels and armed gangs in a state of
10 readiness for combat operations."

11 Seeing that definition now, sir, do you recall if you did or didn't look at it?

12 A. [15:13:57] Yes, I think I've seen it before. I did read this act, so certainly I did
13 read it.

14 Q. [15:14:07] Okay. And we can agree that this definition of "enemy", that
15 wouldn't include, for example, civilian men, women or children?

16 A. [15:14:18] In principle, no, you're right in so saying. In principle, no.

17 PRESIDING JUDGE KORNER: [15:14:27] (Microphone not activated) Sorry,

18 Mr Jeremy. Why "in principle"? Are you saying that in some circumstances it
19 could?

20 THE WITNESS: [15:14:42](Interpretation) No. I'm always sensitive to the
21 interpretation of legal provisions and I wonder how one could define outlaw rebels or
22 armed gangs. But as regards women and children, of course, they do not have their
23 place in such a definition.

24 MR JEREMY: [15:15:05]

25 Q. [15:15:05] Okay, thank you for that clarification, sir.

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1 I'm finished with that document, thank you.

2 Okay, sir, for my next topic I want to refer you to a discussion you had with

3 Mr Laucci about what you described as a decree from 2003 relating to

4 counterinsurgency; do you recall that?

5 A. [15:15:55] Yes, I do.

6 Q. [15:15:56] Okay.

7 PRESIDING JUDGE KORNER: [15:15:57] (Microphone not activated) Can you

8 remind me, Mr Jeremy, so which day, in which -- (Overlapping speakers)

9 MR JEREMY: [15:16:02] It's transcript page 136 -- sorry, transcript 136, page 18, line
10 6.

11 PRESIDING JUDGE KORNER: [15:16:10] Thank you.

12 MR JEREMY: [15:16:11]

13 Q. [15:16:13] Sir, I'm just going to -- it's a short exchange, so I'm going to read it out
14 just to refresh all of our recollections.

15 So, you said that:

16 "Late in 2003, I believe it was a decree -- a decree, rather, that had to do with the
17 counterinsurgency strategy after an attack."

18 Question from Mr Laucci:

19 "Did the Defence show you this?"

20 Answer:

21 "Yes."

22 Presiding Judge Korner:

23 "Do you mean you hadn't seen it before the Defence showed it to you?"

24 You say:

25 "No, your Honour. I had mentioned it, but I didn't have a chance to actually look at

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1 it. I was later very happy to have the chance to look at it."

2 So you recall that exchange, sir?

3 A. [15:16:57] Yes, I do.

4 Q. [15:17:03] Okay. And you went on to say in response to some questions from
5 the Presiding Judge that while this didn't form part of your thesis, you, quote, "looked
6 at [the] freedom of religion of non-Muslims in Khartoum and actually Muslims too in
7 Khartoum. This is what I was looking at, and reference was made to the 2003
8 decree." Do you recall saying that?

9 A. [15:17:28] Well, I haven't really understood what you've said, I'm sorry.

10 Q. [15:17:40] Okay. So what I've said is you in your testimony, you drew a link
11 between your previous research on non-Muslims in Khartoum and this 2003 decree.
12 So you drew that link. Should you have done? Was that right? And if you think
13 they are not related, then -- then feel free to clarify.

14 A. [15:18:08] Well, yes, it's not a very relevant link unless it's referring to the *Ouma*,
15 and, in principle, Muslim law, but it's true that it's not the same context.

16 Q. [15:18:27] Okay. Then, you will recall, you went on to -- Mr Laucci showed
17 you this document and you interpreted a number of the provisions over a number of
18 transcript pages. I won't -- I won't quote all of that back to you, but you recall that?

19 A. [15:18:45] Yes, I do recall, counsel.

20 Q. [15:18:49] Okay. So, if I understand correctly, the first time you saw a copy of
21 this document it was during your preparation session before your testimony; is that
22 right? Your preparation session with my colleagues in the Defence.

23 A. [15:19:06] It would seem that, yes, that's right, if my memory serves my
24 correctly.

25 Q. [15:19:12] Okay. Well, this was about three -- I think it was about three weeks

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1 ago.

2 A. [15:19:20] No, I think we had a number of discussions with the Defence, and so
3 it was during a previous session before I came to The Hague, in fact.

4 Q. [15:19:33] Okay. So what I'm focused on is the first time you saw this, this,
5 what you call a decree. So, my understanding is that the first time you saw it was
6 during your preparation session, which I think, yes, it was shortly before your
7 testimony, in November?

8 A. [15:19:57] Yes, that is true. Yes, true. That is true, counsel. That was just
9 before I travelled to The Hague.

10 Q. [15:20:05] Okay, yes, that's right. So in relation to that document, you said that,
11 you know, in your words, when you saw it, you were very happy to see a copy. So
12 did you give the Defence essentially the same description that you gave the Court
13 about that document, or did you say something different?

14 A. [15:20:31] Well, in far more succinct terms, in fact. We didn't talk about that
15 document in so much detail, but it was this general idea, yes, indeed.

16 Q. [15:20:49] Okay. All right, let's take a look at an exhibit, it's
17 DAR-OTP-00007047. It's tab 25 of the binder.

18 PRESIDING JUDGE KORNER: [15:21:38] Sorry, we seem to have an email. Oh, yes,
19 I see.

20 MR JEREMY: [15:21:43] Yes.

21 Q. [15:21:43] So this is just something I want to clarify with you. So, this is an
22 email from my colleague in the Defence to the Prosecution and -- actually, sorry, if we
23 go down to the first email. If we go up a little bit.

24 So, sir, quite -- quite simply, following your preparation session, the Prosecution
25 asked the Defence if you had any comments to make on certain documents. The

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1 fifth document is this document that we're discussing, the document that you call a
2 decree. And if we go up, what we're told is that you never saw the document at
3 number 5, and you've made that clear, but that you had no comment to make about
4 the document. So is that accurate, sir, or did you, as you've told me today, have
5 some comments to make?

6 A. [15:22:58] Well, what I said, counsel, was that we had a very brief exchange on it.
7 It was presented to me. What I remember is that it made me think of the fatwa that
8 had been adopted with regard to the southern Sudanese in the context of the conflict
9 in the region of the south of Sudan. So that is an older document.
10 But that's all that I said.

11 Q. [15:23:32] Okay. So earlier you said to me that you spoke about it in more
12 succinct terms, you didn't talk about the document in much detail, but it was this
13 general idea. Okay. And now you say you -- you related a fatwa to this document?

14 A. [15:23:55] In fact, it is this general idea, this analogy with the fatwa of 1992 that,
15 in equivalent terms, well, designates, if you like, particular targets, people or
16 individuals who are suspected of having been involved in an armed insurgency. It
17 doesn't go any further than that. I just made mention of that fatwa. There were no
18 other questions.

19 Q. [15:24:30] Okay. So you did in fact have a comment to make, but it's limited in
20 the way that you've just told me. Okay. Well, thank you for that clarification, sir.

21 A. [15:24:42] Yes, counsel.

22 Q. [15:24:44] But what's not entirely clear to me, though, sir, is that during the
23 preparation session you see this document, you have limited comments to make
24 about the fatwa, but then during your testimony you spoke for around three
25 transcript pages interpreting various parts of that document. So, I mean, how were

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1 you able to do that during your testimony to the Court but during your preparation
2 session you had very little to say about it?

3 A. [15:25:16] To be honest, counsel, I didn't expect that I would receive so many
4 questions on the subject of that document, and in the interim I had read it so I
5 answered the questions, taking the time to look at the document, if you recall. We
6 all looked at the document, read it and I stopped at each passage that seemed relevant
7 to me to illustrate the point that I was mentioning. So, there we have it. But, to be
8 honest, I didn't expect to have to answer so many questions on that document.

9 Q. [15:25:52] Okay. But we can agree, sir, that you've no experience in Sudanese
10 military or security issues?

11 A. [15:26:07] Yes, counsel, it would seem to me that that is what the Court retained.
12 Well, that's what I thought I understood, because part of the report has not been taken
13 into account, if I recall correctly.

14 Q. [15:26:22] Yes, that's right. The part of your report where you speak about
15 national security issues, that the Defence are no longer relying on you for that.

16 PRESIDING JUDGE KORNER: [15:26:32] I know, but that -- okay. But that's
17 not -- that wasn't the question you asked, Mr Jeremy. The question you asked
18 was -- well, you asked him to agree, which is a somewhat doubtful way of asking
19 questions, but still, that you've no experience in Sudanese military or security issues.
20 He said, yes, that's what we the Court found.

21 But what do you say, sir?

22 THE WITNESS: [15:27:00](Interpretation) Well, I believe it's true. I didn't think
23 before I testified – maybe I was a little bit naive on that point. There we are. I think
24 the Court is right and, yes, I shall bow to their interpretation on my level of
25 competence. I do have a limited knowledge, but of course it does not seem to be

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1 useful or of use to the Court.

2 MR JEREMY: [15:27:37]

3 Q. [15:27:39] Okay. (Microphone not activated)

4 THE INTERPRETER: [15:27:41] Microphone, please, counsel.

5 MR JEREMY: [15:27:44] Thank you.

6 Q. [15:27:45] You've said yourself that you are a little naive on that point, but I'm
7 going to suggest to you that when you started interpreting parts of this plan, this was
8 another attempt by you to give expert testimony on matters that are simply beyond
9 your expertise.

10 MR LAUCCI: [15:28:09](Interpretation) Well, excuse me, but if there had been an
11 objection to that part of the examination-in-chief of the witness, should it not have
12 been done at the time, rather than now?

13 MR JEREMY: [15:28:24] I -- is this in relation to the expertise or the plan?

14 MR LAUCCI: [15:28:32](Interpretation) His capacity to be able to comment on the
15 plan.

16 MR JEREMY: [15:28:39] Madam President, what I would say on that is that when
17 the witness started commenting on the plan, I rose to my feet and I pointed out that
18 subsequently to the preparation log, there was an email exchange that hadn't been
19 shared with the Chamber and I requested that that was shared with the Chamber. I
20 don't think it was, but I certainly did challenge that at the time and I can -- there's no
21 problem for me doing it in cross-examination, either. There's nothing that stops me
22 doing it now.

23 PRESIDING JUDGE KORNER: [15:29:12] Which paragraph? Because we excluded
24 the whole of part 5 of this report on the basis he didn't have the required -- which
25 paragraph are we now on?

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1 MR JEREMY: [15:29:28] What we are talking about is the witness's testimony in
2 relation to what the witness calls a decree and what, up to this point, everyone else
3 has called the National Security Council plan of 2004.

4 PRESIDING JUDGE KORNER: [15:29:43] All right, yes. All right.

5 MR JEREMY: [15:29:44] And that -- Madam President, that's not in the report at all.

6 PRESIDING JUDGE KORNER: [15:29:48] At all, that's right.

7 MR JEREMY: [15:29:50] As you've seen during the preparation session, the witness
8 was shown the document and he had no comment to make --

9 PRESIDING JUDGE KORNER: That's right. I'm now with you.

10 MR JEREMY: [15:29:54] -- and during testimony we heard about it extensively.

11 PRESIDING JUDGE KORNER: [15:30:05] Well, I mean, are you asking for a ruling,
12 Mr Laucci, having objected? The fact that there wasn't an objection taken when you
13 asked the questions doesn't stop anybody cross-examining.

14 MR LAUCCI: [15:30:15] If that is the opinion of my President, I will sit down and
15 listen.

16 PRESIDING JUDGE KORNER: [15:30:21] Okay, thank you.

17 MR JEREMY: [15:30:42]

18 Q. [15:30:44] Okay, sir, I'm going to -- I'm going to suggest to you that an expert,
19 someone with specialist skill and knowledge, firstly, knows how to make clear which
20 sources he had access to when he wrote a report and which he cites, and which
21 sources he didn't; would you agree with that?

22 A. [15:31:12] Yes, counsel.

23 Q. [15:31:17] Okay. I'm going to suggest to you that someone with specialist skill
24 and knowledge knows how to find relevant material for an expert report?

25 A. [15:31:33] Yes, within the limits of his --

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1 MR LAUCCI: [15:31:41] (Interpretation) I rise once again. Are we still within a voir
2 dire? I believe that the limits of the witness's expertise had been clearly defined and
3 established by the Chamber.

4 PRESIDING JUDGE KORNER: [15:32:01] Yes. Mr Laucci, the fact that we rule on
5 the basis of a report, and the voir dire doesn't stop the Prosecution having again laid a
6 basis for it, suggesting that in actual fact an expert is not an expert at all in anything.
7 It's for the Chamber then to decide whether there's any merit in that suggestion. We
8 ruled, as far as we went, on the basis of, as I say, the questions asked in the voir dire
9 and the report.

10 MR LAUCCI: [15:32:33] Okay. But do I understand that this specific question is
11 still under determination by the Chamber?

12 PRESIDING JUDGE KORNER: [15:32:41] We have to decide. We have decided for
13 the purposes of the admitting of opinion evidence that he qualifies, in our view, as an
14 expert.

15 The actual weight to attach to it is a matter for us at the end, having heard all the
16 cross-examination. And the Prosecution are entitled to say, "Well, are you really an
17 expert at all?" They are still entitled to say that, if they can lay a basis for it, and
18 Mr Jeremy is laying a basis for it by saying that, firstly, there are insufficient sources
19 and, secondly, he hasn't even bothered to try and look up some of the sources.
20 That's what he's been putting.

21 MR JEREMY: [15:33:34]

22 Q. [15:33:36] So, sir, to repeat my last question, I'm going to suggest to you that
23 someone with specialised skill and knowledge knows how to find relevant sources
24 and material, and include them in a report; would you agree with that?

25 A. [15:33:47] Yes, within his or her field of skill, competence.

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1 Q. [15:33:57] Yes, indeed. And an expert knows how to be objective; you agree
2 with that?

3 A. [15:34:03] Yes, counsel.

4 Q. [15:34:06] Okay. And an expert knows when to admit topics of
5 expertise -- topics of -- which topics are well beyond his expertise?

6 A. [15:34:21] Yes, counsel.

7 Q. [15:34:26] Okay. And I'm going to suggest to you, sir, that with the exception
8 of the Sudanese native administration and aspects of the customary tribunals, you're
9 not an expert in anything in this report, are you?

10 A. [15:34:43] I beg your pardon? You're talking about the questions asked by the
11 Defence in relation to the 2003 report or are you talking about my report?

12 Q. [15:34:57] I'm saying that this report, with the exception of the information in
13 relation to the Sudanese native administration, I'm saying that you're not an expert in
14 anything else in this report?

15 A. [15:35:12] That is not so, counsel. For the report -- for the dealing -- the
16 relationship between international law and -- well, I don't agree with you.

17 What is more, as for the 2003 document, I did not answer as an expert on military
18 matters. I acknowledged that I was not an expert. I focused on my competencies
19 regarding Muslim law applicable in Sudan and my participation in research
20 programs and my research into Islamic identity and the whole notion of *Arabicité*.

21 Q. [15:36:09] Thank you, sir. Thank you for your answers. I have no further
22 questions, Madam President.

23 PRESIDING JUDGE KORNER: [15:36:13] Yes, re-examination, Mr Laucci?

24 QUESTIONED BY MR LAUCCI:

25 MR LAUCCI: [15:36:24] Thank you, Madam President. I have, I think, five topics

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1 for re-examination.

2 (Interpretation) And I will switch to French.

3 Q. [15:36:44] First topic, communications by Sudan to the Secretariat of the United
4 Nations regarding the state of emergency.

5 The fact that Sudan did not communicate with the UN Secretariat, did not
6 communicate some statements regarding the application of the state of emergency
7 beyond 31 December 2002, does that mean that the enjoyment of rights under the
8 covenant were re-established in Sudan?

9 A. [15:37:43] No. It's a matter of the application of domestic law, provisions of
10 international law. These are practical matters.

11 Q. [15:37:54] How could one verify -- how could one verify if these rights had been
12 re-established?

13 A. [15:38:02] Well, several ways. One could study legislative practices, study
14 judicial practices, regulatory and consult NGO reports, NGOs specialising in the
15 protection of human rights, or reports from the UN, from UN specialised agencies.

16 Q. [15:38:40] And as of 1 January 2003, were those rights re-established, in your
17 opinion?

18 A. [15:38:49] I don't have a totally clear answer, but I don't think so, judging by all
19 the various reports. In practice, they were not respected.

20 Q. [15:39:06] Thank you. Could we please call up document -- which tab
21 number -- DAR-OTP-00007037. We are looking for the document in the -- reference
22 number ending in 7037, tab 15 in the OTP binder.

23 And I would like us to go to the third page, Article 7, and this is a document that was
24 shown to the witness during cross-examination.

25 Page 3, please. Article 7.

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1 I believe this is not the right document.

2 (Microphone not activated)

3 THE INTERPRETER: [15:40:52] Microphone, please, counsel.

4 MR LAUCCI: [15:40:57](Interpretation) Tab 10. Tab 10, and the reference number
5 ends in 7037. Page 3, please. Article 7, page 3. Yes.

6 Q. [15:41:27] Doctor, do you remember discussing this provision with my
7 colleague?

8 A. [15:41:34] Yes, counsel.

9 Q. [15:41:38] You concluded that this provision was an exception. Could you
10 explain to us what the exception is in this particular case?

11 A. [15:41:55] Yes. It's a spontaneous interpretation. That's the first thing that
12 came to my mind when I read this provision. This way of looking at the application
13 of international law within domestic law is exceptional in relation to what is set out in
14 the Sudanese constitution.

15 Q. [15:42:20] And why is it an exception? Why is it unusual?

16 A. [15:42:25] Because the principle is to be applicable under domestic law, the
17 provisions have to be transposed into acts of legislative value. They have to be
18 placed into law, put into law.

19 Q. [15:42:44] Very well. And if there is no transposition, in that case, if there is no
20 specific transposition, as you have just mentioned, is the same -- could the same
21 solution as the one we see here on the screen be applied to other treaties or
22 conventions?

23 A. [15:43:10] Yes, of course.

24 PRESIDING JUDGE KORNER: [15:43:13] What do you mean by "the same
25 solution"?

1 MR LAUCCI: [15:43:22](Interpretation) A solution that would allow to give
2 direct -- well, what we have up on the screen. That is to say, other treaties or
3 conventions would be applied on a priority basis in relation to Sudanese domestic
4 legislation, so it would take precedence.

5 THE WITNESS: [15:43:50](Interpretation) Yes, that could be considered. That
6 would be on a case-by-case basis and I would point out that this is a matter of asylum
7 law and Sudan is very much confronted with these issues relating to asylum and the
8 UNHCR is active.

9 MR LAUCCI: [15:44:15](Interpretation)

10 Q. [15:44:15] You say it would be on a case-by-case basis -- case-by-case basis.
11 What do you mean by that?

12 A. [15:44:23] It's not provided for by a constitutional provision. That's not the
13 main solution.

14 Q. [15:44:35] And so what would be necessary?

15 A. [15:44:39] A solution equivalent to this one -- a legislative provision that
16 specifically recognises the primacy of the international law over Sudanese law.

17 PRESIDING JUDGE KORNER: [15:45:01] How do you know? I mean, as you
18 didn't know about this, and despite the fact that I gather you knew about what is
19 quite a short law, because of your French work, how do you know there are not other
20 laws that say exactly the same thing?

21 THE WITNESS: [15:45:24](Interpretation) Your Honour, I'm not saying the contrary.
22 Indeed, I'm saying that it's quite possible.

23 PRESIDING JUDGE KORNER: [15:45:30] In which case it may not be an exception.

24 THE WITNESS: [15:45:39](Interpretation) Why would that have to be -- why would
25 that have to be provided for specifically under Article 7?

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1 PRESIDING JUDGE KORNER: [15:45:48] Well, all right. Yes. You carry on,

2 Mr Laucci. Sorry, I interrupted.

3 MR LAUCCI: [15:45:53](Interpretation) No. I do want to explore your question.

4 Q. [15:45:59] Now, the Presiding Judge has just said it wouldn't be an exception, so
5 what makes this specific provision from a Sudanese piece of legislation -- for example,
6 asylum law, what would make a specific provision from Sudanese law an exception?

7 A. [15:46:22] Well, for the reason that I mentioned in my report; namely, the
8 reasons that have to do with the relationship between international law and Sudanese
9 domestic law. In my opinion, under the 2005 constitution and the 1998 constitution,
10 I would say that this system is dualistic in nature and does not recognise the
11 application as conventional provisions in domestic law and -- well, under the 1998
12 constitution, yes, that law would be applicable in domestic law, but the legislator
13 would have to transpose the provision and the primacy would not be guaranteed.

14 Q. [15:47:32] So, can one conclude that in the absence of specific legislation
15 equivalent to this one, the conclusion would be that it is the constitutional provisions
16 that apply and, thus, the conventions -- I will leave it at that. Constitutional
17 provisions would apply.

18 A. [15:48:05] In any event -- (Overlapping speakers) --

19 THE INTERPRETER: [15:48:05] Overlapping.

20 THE WITNESS: [15:48:05](Interpretation) In any event, that is the case. If you read
21 the 2005 constitution, only certain international conventions are applied in Sudan
22 with the status of legislative act, and they are the provisions that have to do with
23 human rights ratified by Sudan. Everything else has to be transposed by way of
24 special legislation -- Article 27, paragraph 3.

25 MR LAUCCI: [15:48:47]

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1 Q. [15:48:47] That being the case, if there is no special legislation, are international
2 provisions applicable, yes or no?

3 A. [15:48:59] Well, the answer will be ambiguous, but --

4 Q. [15:49:18] Would you like to explain further?

5 A. [15:49:20] No. Sudan is bound by its international obligations to apply its
6 conventional obligations under domestic law, and to do so it must find a way to make
7 the legislation operative in domestic law.

8 Q. [15:49:41] I'd like to move on to the next topic: Sudan's observations before the
9 various committees established under international conventions relating to human
10 rights. Do they constitute a source of Sudanese domestic law?

11 A. [15:50:12] I beg your pardon? What were you saying? The reports?

12 Q. [15:50:18] My question -- my question has to do with the observations made by
13 Sudan before the various committees set up under these conventions.

14 A. [15:50:32] No, absolutely not. They are observations intended to justify
15 Sudan's respect or compliance with its international obligations.

16 Q. [15:50:45] Are these observations applicable before Sudanese courts? Could
17 someone before the court avail themselves of such observations?

18 A. [15:50:59] I have no answer to that question, counsel.

19 PRESIDING JUDGE KORNER: [15:51:06] However, what you are saying, Dr Gout,
20 are you saying that the assertions that we see, for example, in the report to the African
21 council -- the African Commission, are simply untrue? So when they say that they
22 are bound by the international conventions that they have ratified, whether or not
23 they follow them in reality is another matter, but are you saying they are telling an
24 outright lie? Is that your assertion?

25 THE WITNESS: [15:51:53](Interpretation) No, your Honour. I'm sorry, I beg your

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1 pardon, I wouldn't say that, but it is well known that all states that file observations
2 before these organs try to improve their image, to some extent, and in return you have
3 to look at the final observations from the committee -- the Commission, rather,
4 regarding the report, that stress the various points that need to be improved in
5 relation to compliance with certain rights. But they are very sure, they are not
6 shameless lies.

7 PRESIDING JUDGE KORNER: [15:52:37] Right. So whether or not the government
8 in fact- or indeed the independent judiciary they say they had - put them into effect,
9 Sudan, after the 1998 constitution, still had obligations to comply with human rights
10 law and international conventions which it had ratified?

11 THE WITNESS: [15:53:11](Interpretation) Of course, your Honour. I stressed a few
12 moments ago in response to a question from the OTP -- I stressed that.

13 PRESIDING JUDGE KORNER: [15:53:27] I just wanted to make sure that we all
14 understood what you were saying. Yes.

15 MR LAUCCI: [15:53:33](Interpretation)

16 Q. [15:53:34] And to continue in the same vein as you, Madam President: Dr Gout,
17 the information provided by Sudan in their observations to these commissions, is this
18 information cross-checked in the slightest before being mentioned in the kind of
19 reports that you were shown by the OTP?

20 A. [15:54:09] In actual fact, that's an interesting point, because practices diverge
21 from one commission to the next, from one organ to the next. Yes, conventional
22 organs are supposed to be -- are supposed to cross-check information by way of in
23 situ research, if possible. That's what the African commission did. On some points,
24 however -- and that is why, because I wanted to compare, you see, the verifications by
25 the African commission to those -- the UN committee and I was able to see that the

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1 Human Rights Commission did have different remarks to make about Sudan's
2 compliance with human rights and they stressed the dualistic nature of the system
3 and the need to transpose international provisions with a view to making them
4 operative.

5 So, yes, there are checks, but they are worth what they are worth, depending on the
6 interests of the classic or conventional organs and their abilities to conduct
7 investigations.

8 MR JEREMY: [15:55:26] Sorry for the interruption. The witness has referred to a
9 report. I think it would make sense on the transcript for us to have a date of that
10 report.

11 THE WITNESS: [15:55:43](Interpretation) Counsel, I'm talking about the report
12 in -- oh, for the comparison? I was referring to the fifth and six report to illustrate
13 what I was saying, of the Sudan's report to -- or, rather, observations to the African
14 commission.

15 MR LAUCCI: [15:56:02](Interpretation)

16 Q. [15:56:04] These cross-checks or verifications that you mentioned, do they
17 appear in the same document, in the same report?

18 A. [15:56:14] No, counsel. That is a resolution adopted by the organ in question,
19 in this case the African commission.

20 Q. [15:56:31] And is there a different document for this particular resolution?

21 A. [15:56:34] Yes, counsel.

22 Q. [15:56:45] What is the ultimate point of Sudan's observations about its own
23 compliance to human rights?

24 A. [15:56:53]

25 MR JEREMY: [15:56:59] I will say that I don't know how the witness can answer that

1 question. I think it calls for speculation. The witness is not the Government of
2 Sudan writing these reports.

3 THE WITNESS: [15:57:07] I was about to say the same. (Interpretation) It's a
4 somewhat broad question.

5 MR LAUCCI: [15:57:18](Interpretation)

6 Q. [15:57:19] Well, then, I'll just drop my last question and I will ask another
7 question instead. Now, Sudan's observations before these commissions, are these
8 observations evidence of Sudan's true practices in relation to human rights?

9 A. [15:57:39]

10 PRESIDING JUDGE KORNER: [15:57:43] Well, you're going to have to say based on
11 what he himself has heard, read or studied, as opposed to a general opinion on
12 Sudan's record.

13 MR LAUCCI: [15:57:55](Interpretation) Naturally, that is the presupposition of all
14 my questions, your Honour.

15 THE WITNESS: [15:58:05](Interpretation) That is a broad question. It does happen
16 that reports like this are used as proof, particularly in legal cases - for example, UN
17 organs - to protect human rights, conventional human rights. Organs do rely on
18 these reports and these observations made by committees and commissions to
19 determine practices, existing practices in the state, and that is an essential element
20 that can be used as proof. Other than that case, I really couldn't -- other than that
21 particular circumstance, I really couldn't say.

22 Q. [15:58:58]

23 PRESIDING JUDGE KORNER: [15:59:00] (Microphone not activated)

24 THE INTERPRETER: [15:59:05] Microphone, please.

25 PRESIDING JUDGE KORNER: [15:59:10] Mr Laucci, have you got quite a number of

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1 other questions? Because, if so, we will adjourn here. Otherwise, if not many, then
2 we might try and plough through.

3 MR LAUCCI: [15:59:20] How much time can I have? How much additional time
4 can I have?

5 PRESIDING JUDGE KORNER: [15:59:22] Okay, Mr Laucci, we'll stop here for today
6 and we'll finish it off tomorrow morning.

7 MR LAUCCI: [15:59:29](Interpretation) Perhaps just one last question in relation to
8 what the witness just said so as to finish this topic.

9 Q. [15:59:39] You mentioned these observations and you said they could be used as
10 proof. Proof of what?

11 A. [15:59:48] Not as criminal evidence; as proof of a violation of human rights. In
12 the case of individual complaints to conventional committees and commissions, UN
13 commissions, Human Rights Commissions, proof of violations.

14 Q. [16:00:09] Very well. So when these observations establish the existence of
15 violations they can be used?

16 A. [16:00:23] Yes. I don't know if there's a rule, but they are used for that purpose,
17 yes.

18 MR LAUCCI: [16:00:31] Thank you, that will be all for this afternoon, your Honour.

19 PRESIDING JUDGE KORNER: [16:00:34] Yes.

20 Before we do adjourn, Dr Gout – and, as I say, you will be finished before 11 o'clock
21 tomorrow morning at the rate we are going - two things: Was there something
22 you -- the document that I said you should have over lunch, was there something you
23 wanted to say about it, having reread it?

24 THE WITNESS: [16:00:56](Interpretation) Well, there are two documents,

25 Madam President, that I consulted. The basic rule act of 1983 that does indeed

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1 contain the provisions that I mentioned in my report, that is Article 3, and then the
2 final observations of the African commission on the two previous reports on Sudan,
3 which make mention of discriminatory practices, and they do so in the enabling part
4 of that act.

5 But those are the only elements that I have at any disposal.

6 PRESIDING JUDGE KORNER: [16:01:37] And the OTP provided you, or there was
7 in your bundle a copy – although it is rather oddly copied, but a copy – of the
8 Goldenburg v Goldenburg case, which you say you didn't have at the time you did
9 your report. Did you look at that?

10 THE WITNESS: [16:02:04](Interpretation) No, I didn't have the time to look at that.

11 PRESIDING JUDGE KORNER: [16:02:10] Well, you may want to have a look at it
12 overnight again just to see if there is anything you want to alter, having seen it.

13 THE WITNESS: [16:02:20] Thank you, Madam President. Does that mean that I can
14 take the document home with me -- outside of the court, that is?

15 PRESIDING JUDGE KORNER: [16:02:28] Is there any objection? Yes, that's fine.

16 MR JEREMY: [16:02:30] No objection. Home to France as well.

17 THE WITNESS: [16:02:34] Thank you.

18 PRESIDING JUDGE KORNER: [16:02:35] Yes, you can take them with you, yes.
19 Yes, all right. We'll sit again then tomorrow morning at 9.30.

20 MR NICHOLLS: [16:02:43] Your Honour, very sorry, I thought we would be done
21 today. I have an engagement tomorrow morning. Impossible for me to be here, I
22 apologise.

23 PRESIDING JUDGE KORNER: [16:02:52] That's all right, Mr Nicholls.

24 What I want to discuss -- so whoever is standing in for you, I take it it will be
25 Mr Jeremy -- is effectively, firstly, the witnesses Defence are going to call, or hope to

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1 call, and then some idea -- some submissions on when and if the Defence case is over,
2 whether the OTP anticipates calling any kind of rebuttal evidence. At present,
3 obviously, you can't say until you've heard all the evidence. And how long after the
4 close of the evidence final briefs should be submitted.

5 I'll say straightaway we have it in mind to have, as they did in Ongwen, both sets of
6 final briefs at the same time, not the Prosecution first and then the Defence, and then
7 any further rebuttal, as it were, can be done in oral argument.

8 All right, yes. Anyhow, that's what we'll be asking for tomorrow, so we can get
9 some idea.

10 Yes, all right. 9.30, then.

11 THE COURT USHER: [16:04:11] All right.

12 (The hearing ends in open session at 4.04 p.m.)

13 CORRECTIONS REPORT

14 The following interpretation corrections, marked with an asterisk are brought into the
15 transcript.

16 Page 58 line 12:

17 "And it's in table 3 or your report, which is at paragraph 4 or just after"

18 is corrected to:

19 "And it's in table 3 or your report, which is at paragraph -- before or just after
20 paragraph 75."

21 Page 59 line 25

22 "I don't think I ever claimed that that was the case."

23 is corrected to:

24 "I don't think I ever claimed that that was not the case."