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**No. ICC-02/05-01/20
Date: 30 November 2023**

TRIAL CHAMBER I

**Before: Judge Joanna Korner, Presiding Judge
Judge Reine Alapini-Gansou
Judge Althea Violet Alexis-Windsor**

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
*THE PROSECUTOR v. ALI MUHAMMAD ALI ABD-AL-RAHMAN ('ALI
KUSHAYB')***

Public

**Decision on the Defence Request to admit Dr Philippe Gout
as an Expert Witness**

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

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I. Procedural history

1. On 22 August 2023, the Defence requested the admission of Dr Philippe Gout as an expert witness, as well as his report (the ‘Report’) (the ‘Request’).¹
2. On 15 September 2023, the Prosecution challenged Dr Gout’s qualifications as well as the admissibility of his report and related material (the ‘Prosecution’s Challenge’).²
3. On 29 September 2023, the Defence responded to the Prosecution’s Challenge (the ‘Defence’s Response’).³
4. During the status conference held on 16 October 2023, the Chamber scheduled a *voir dire* hearing.⁴
5. On 18 October 2023, upon request by the Defence,⁵ the Prosecution provided a table indicating which paragraphs of Dr Gout’s Report are challenged.⁶
6. On 3 November 2023, the Defence notified the Prosecution and the Chamber of its intention to submit an application under Rule 68(3) of the Rules of Procedure and Evidence (the ‘Rules’), should the Request be granted.⁷
7. The *voir dire* hearing was held on 13 and 14 November 2023.⁸

¹ Defence Request to admit Mr Philippe Gout as an Expert Witness, ICC-02/05-01/20-1004 (hereinafter: ‘Request’).

² Prosecution’s challenge to the qualifications of Witness D-0023 and to the admissibility of the report and related material, ICC-02/05-01/20-1018-Conf A public redacted version was notified on 26 September 2023, ICC-02/05-01/20-1018-Red (hereinafter: ‘Prosecution’s Challenge’).

³ Réponse de la Défense à la contestation préliminaire de l’expert proposé D-23, ICC-02/05-01/20-1021 (hereinafter : ‘Defence’s Response’).

⁴ Transcript of hearing, ICC-02/05-01/20-T-126-CONF-ENG, p. 18, lines 6 to 11.

⁵ Transcript of hearing, 16 October 2023, ICC-02/05-01/20-T-126-CONF-ENG, p. 20, lines 4-12.

⁶ Email from the Prosecution, 18 October 2023, at 10:44.

⁷ Email from the Defence, 3 November 2023, at 14:53. The request was subsequently granted by oral decision: Transcript of hearing, 15 November 2023, ICC-02/05-01/20-T-136-CONF-ENG, p. 10, line 14 to p.11, line 6.

⁸ Transcript of hearing, ICC-02/05-01/20-T-134-CONF-ENG; Transcript of hearing, ICC-02/05-01/20-T-135-CONF-ENG.

8. On 14 November 2023, the Chamber accepted Dr Gout's qualifications as an expert witness, with the exception of the matters referred to in Section 5 of his Report.⁹ The Chamber hereby provides the reasoning for this decision.

II. Applicable law

9. According to the Court's jurisprudence, an expert witness is 'a person who, by virtue of some specialised knowledge, skill or training can assist the Chamber in understanding or determining an issue of a technical nature that is in dispute'.¹⁰

10. For a witness and their report and supporting material to be admitted, the following requirements must be met: (i) the witness is an expert as defined above; (ii) the testimony in the subject area of expertise would be of assistance to the Chamber; (iii) the content of the report and/or the anticipated testimony falls within the area of expertise of the witness; and (iv) the content of the report and/or the anticipated testimony does not usurp the functions of the Chamber as the ultimate arbiter of fact and law.¹¹

11. Finally, the trial chamber in *Ntaganda* has held that '[e]xpert witnesses are ordinarily afforded wide latitude to offer opinions within their expertise and their views need not be based upon first-hand knowledge or experience. It is, however, for the Chamber to assess whether the witness has sufficient expertise in a relevant subject area such that the Chamber may benefit from hearing his or her opinion. At all times, the expert is obliged to testify with the utmost neutrality and objectivity'.¹²

⁹ Email from the Chamber, 14 November 2023, at 17:41.

¹⁰ Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on Defence's proposed expert witnesses and related applications seeking to introduce their prior recorded testimony under Rule 68(3) of the Rules, 28 April 2022, ICC-01/12-01/18-2206, para. 9 (hereinafter: '*Al Hassan* Decision on expert witnesses').

¹¹ *Al Hassan* Decision on expert witnesses, ICC-01/12-01/18-2206, para. 9. See also, Trial Chamber VII, *The Prosecutor v. Bemba et al.*, Decision on Prosecution Request to Exclude Defence Witness D22-0004, 24 February 2016, ICC-01/05-01/13-1653, para. 11 (hereinafter: '*Bemba et al.* Decision on Exclusion of Defence Witness D22-0004'); Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on Defence preliminary challenges to Prosecution's expert witnesses, 9 February 2016, ICC-01/04-02/06-1159, para. 8 (hereinafter: '*Ntaganda* Decision on expert witnesses'); Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Sang Defence Application to exclude Expert Report of Mr Hervé Maupéu, 7 August 2013, ICC-01/09-01/11-844, para. 12 (hereinafter: '*Ruto and Sang* Decision to Exclude the Expert Report of Mr Hervé Maupéu').

¹² *Ntaganda* Decision on expert witnesses, ICC-01/04-02/06-1159, para. 9.

III. Submissions

12. The Defence requests the Chamber to admit Dr Gout as an expert witness and allow the introduction of his expert report, documentation establishing his qualifications and other materials in support of his report.¹³

13. The Defence avers that Dr Gout is qualified to provide relevant expertise on Sudanese law,¹⁴ and that his area of expertise is relevant to the case and will assist the Chamber.¹⁵

14. The Prosecution challenges the qualifications of Dr Gout as an expert, as well as the admissibility of his report and related material. The Prosecution contends that the Report addresses topics which: (i) fall outside his area of expertise; (ii) are not of assistance to the Chamber; and/or (iii) usurp the Chamber's functions as the ultimate arbiter of fact and law.¹⁶

15. The Prosecution contends that Dr Gout has no demonstrated expertise to deal with some of the topics included in the Report. More specifically, the Prosecution argues that he does not appear to have any formal training in Sudanese law, Sudanese military legislation, or Islamic law.¹⁷

16. The Prosecution also submits that the Report covers topics that are not of assistance to the Chamber and that there is no justification to hear duplicative evidence on topics already covered by the Joint Expert, Professor de Waal.¹⁸

17. The Prosecution further avers that the Report covers topics that seek to usurp the Chamber's function as the ultimate arbiter of law. Notably, the hierarchy and application of international law in Sudan, and the applicability of the United Nations Security Council Resolution 1593, should be decided exclusively by the Chamber.¹⁹

¹³ Request, ICC-02/05-01/20-1004, para. 2. See confidential annexes to the Request: ICC-02/05-01/20-1004-Conf-Anx1, ICC-02/05-01/20-1004-Conf-Anx2, ICC-02/05-01/20-1004-Conf-Anx3 and ICC-02/05-01/20-1004-Conf-Anx4.

¹⁴ Request, ICC-02/05-01/20-1004, paras 5-7.

¹⁵ Request, ICC-02/05-01/20-1004, paras 8-11.

¹⁶ Prosecution's Challenge, ICC-02/05-01/20-1018-Red, para. 1.

¹⁷ Prosecution's Challenge, ICC-02/05-01/20-1018-Red, paras 6-15.

¹⁸ Prosecution's Challenge, ICC-02/05-01/20-1018-Red, paras 16-23.

¹⁹ Prosecution's Challenge, ICC-02/05-01/20-1018-Red, paras 24-26.

18. Finally, the Prosecution submits that the Report has methodological flaws, notably a lack of sources and record-keeping of interviews and informal discussions which are indicated as the sole source for assertions made in the Report.²⁰

19. In its Response, the Defence submits in relation to the Prosecution's objection to lack of sources and deficient methodology, that nothing in the Court's case law requires a minimum number of references or specific methodology.²¹ The Defence further recalls that all sources have been or will be disclosed to the Prosecution. Moreover, the Defence argues that issues of methodology do not prevent the admission of expert evidence, but rather relate to the probative value thereof.²²

20. In relation to the relevance of the Report, the Defence responds that even if the Report may appear to be dealing with some issues that are not related to the case, they are important to understand customary law in Sudan.²³

21. In respect of the usurpation of the Chamber's competence, the Defence contends that Dr Gout will clarify, and assist the Chamber with, issues of Sudanese law, insofar as none of the judges on the bench have been judges in Sudan and therefore do not possess particular knowledge of Sudanese law. Moreover, Dr Gout will not draw conclusions on the application of international law and the Chamber is experienced enough to disregard any opinion that may, inadvertently, relate to issues that must be determined by it.²⁴

IV. Analysis

22. At the outset, the Chamber recalls that, at this stage, the present assessments are conducted on a preliminary basis. Accordingly, the Chamber will 'only rule on those aspects of the challenges raised that it considers necessary to ensure a fair and expeditious trial, and in order to avoid unnecessary litigation during trial and in the course of the proposed experts' testimony'.²⁵

²⁰ Prosecution's Challenge, ICC-02/05-01/20-1018-Red, paras 27-30.

²¹ Defence's Response, ICC-02/05-01/20-1021, para. 13.

²² Defence's Response, ICC-02/05-01/20-1021, para. 23.

²³ Defence's Response, ICC-02/05-01/20-1021, paras 17, 19.

²⁴ Defence's Response, ICC-02/05-01/20-1021, para. 21.

²⁵ *Al Hassan* Decision on expert witnesses, ICC-01/12-01/18-2206, para. 11.

23. In respect of Dr Gout's qualification as an expert, the Chamber accepts that it is not necessary for Dr Gout to have received formal training in Sudanese law to be admitted as an expert witness on the proposed areas of testimony.²⁶ The Chamber accepts the Defence's submissions that it would be extremely restrictive not to consider Dr Gout an expert due to his lack of formal training in Sudanese or Islamic law.²⁷ As suggested by the Defence, Dr Gout appears to be neutral and objective.²⁸

24. The Chamber has considered Dr Gout's *curriculum vitae*, scholarly articles, publications and awards,²⁹ and is satisfied that he has the academic background in public international law and its implementation in the Sudanese legal system and sufficient knowledge of Sudanese law, to qualify as an expert.³⁰ The Chamber is therefore satisfied that he is sufficiently qualified to be considered an expert witness.

25. Having assessed whether the topics covered in the Report fall within Dr Gout's areas of expertise, the Chamber finds that paragraphs 106-122 do not concern a legal matter.³¹ The Chamber is not satisfied that Dr Gout's research or academic background provide him with the expertise necessary to opine on the consequences of the state of emergency, particularly in Darfur, during the charged period of 2003-2004.³² The Chamber further notes that, during the *voir dire* hearing, the Defence stated that it no longer sought to rely on paragraphs 123-134 of Dr Gout's Report.³³ Consequently, the Chamber finds that the entirety of Section 5 (paragraphs 106-134) falls outside of the scope of Dr Gout's expertise and is thus excluded from his testimony.

26. With regard to the rest of the Report, the Chamber is satisfied that the topics of the sources of Sudanese law; intertribal coordination structures; the place of public

²⁶ Defence's Response, ICC-02/05-01/20-1021, para. 10; Prosecution's Challenge, ICC-02/05-01/20-1018-Red, para. 6; Transcription of hearing, 14 November 2023, ICC-02/05-01/20-T-134-CONF-ENG, p. 77, lines 12-20.

²⁷ Defence's Response, ICC-02/05-01/20-1021, para. 10.

²⁸ Defence's Response, ICC-02/05-01/20-1021, para. 10.

²⁹ DAR-OTP-00005971; Transcript of hearing, 13 November 2023, ICC-02/05-01/20-T-134-CONF-ENG, p. 25, lines 1-11. See also ICTY, Trial Chamber, *The Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Written reasons for the Trial Chamber's oral decision accepting Dorothea Hanson as an expert witness, 5 November 2009, IT-08-91-T, para. 9.

³⁰ Request, ICC-02/05-01/20-1004, para.8.

³¹ Transcript of hearing, 13 November 2023, ICC-02/05-01/20-T-134-CONF-ENG, p. 87, line 9 to p. 88, line 2.

³² See Transcript of hearing, 13 November 2023, ICC-02/05-01/20-T-134-CONF-ENG, p. 84, line 3 to p. 93, line 11.

³³ Transcript of hearing, 14 November 2023, ICC-02/05-01/20-T-135-CONF-ENG, p. 44, line 13 to p. 45, line 8.

international law in Sudan; and the existence of *hiraba*, *ghanima* and spoils of war,³⁴ appear to fall within Dr Gout's expertise. Consequently, the Chamber finds that Sections 1-4 of Dr Gout's Report are within the permissible scope of expert opinion.

27. In respect of whether Dr Gout's evidence would be of assistance to the Chamber, the Chamber accepts the Defence's argument that it would be assisted in receiving 'expert evidence on the sources of law applicable in Sudan and on the way international law conventions, international customary law and UN resolutions can or cannot be applicable in Sudan [*sic*] domestic system'³⁵ in order to assess the Defence's case.

28. The Chamber rejects the Prosecution's argument that Dr Gout's testimony is duplicative of topics already covered by Professor de Waal.³⁶ To the contrary, and as argued by the Defence,³⁷ the Chamber finds that Dr Gout's Report and Professor de Waal's evidence are complementary, as Professor de Waal's expert evidence gives his views from an anthropological perspective, while Dr Gout does so more from a legal one.³⁸ Overall, the Chamber does not find Dr Gout's Report to be so clearly irrelevant as to preclude the Defence from presenting this evidence.³⁹

29. The alleged flaws in methodology and lack of sources are of some concern to the Chamber, however, the Chamber accepts the Defence's argument that 'any issues surrounding the sources used, or the referencing, structure or methodology of the report, are matters that can be addressed during cross-examination and taken into consideration in evaluating the weight of the report, should it be admitted.'⁴⁰

³⁴ Expert Report of Philippe Gout, DAR-OTP-00005970, paras 1-105.

³⁵ Transcript of hearing, 13 November 2023, ICC-02/05-01/20-T-134-CONF-ENG, p. 8, lines 22-25.

³⁶ Prosecution's Challenge, ICC-02/05-01/20-1018-Red, para. 16.

³⁷ Defence's Response, ICC-02/05-01/20-1021, para. 17.

³⁸ Defence's Response, ICC-02/05-01/20-1021, para. 18; Transcript of hearing, 14 November 2023, ICC-02/05-01/20-T-135-CONF-ENG, p. 69, line 14 to p. 70, line 3.

³⁹ *Bemba et al.* Decision on Exclusion of Defence Witness D22-0004, ICC-01/05-01/13-1653, para. 17.

⁴⁰ *Ntaganda* Decision on expert witnesses, ICC-01/04-02/06-1159, para. 16. See Defence's Response, ICC-02/05-01/20-1021, para. 17; Transcript of hearing, 14 November 2023, ICC-02/05-01/20-T-135-CONF-ENG, p. 64, line 25 to p. 65, line 3.

30. Moreover, the Chamber finds, as rightly argued by the Defence,⁴¹ that the sources and referencing in Mr Gout's report cannot be deemed 'so lacking in reliability so as to render it inadmissible at this time.'⁴²

31. Finally, the Chamber recalls that 'expert testimony which would qualify as usurping the functions of the Chamber by going into the "ultimate issues" at trial would include, for example, opinions as to an accused's guilt or innocence, or whether the contextual, material or mental elements of the crimes charged are satisfied.'⁴³ The Chamber holds that Dr Gout's evidence cannot be qualified as such and therefore rejects the Prosecution's contention that the Report covers topics that seek to usurp the Chamber's function as the ultimate arbiter of law.⁴⁴ In any case, the Chamber possesses the technical knowledge to distinguish between the areas in which Dr Gout's expert opinion can be heard and the ones which fall under the sole prerogative of the Chamber.

32. The Chamber stresses that the above findings are *prima facie*. The reliability, relevance and probative value of Dr Gout's testimony will be duly considered as part of the Chamber's holistic evaluation of the evidence at the end of the trial.⁴⁵ Moreover, the Chamber emphasises that accepting Dr Gout as an expert and calling him to give evidence does not necessarily entail that his reports will be relied on by the Chamber in its Article 74 judgment.⁴⁶

33. For the foregoing reasons, the Chamber accepts Dr Gout's qualifications as an expert witness, with the exception of the matters referred to in Section 5 of his Report.⁴⁷

⁴¹ Transcript of hearing, 14 November 2023, ICC-02/05-01/20-T-135-CONF-ENG, p. 71, lines 14-22.

⁴² *Ruto and Sang* Decision to Exclude the Expert Report of Mr Hervé Maupéu, ICC-01/09-01/11-844, para. 27.

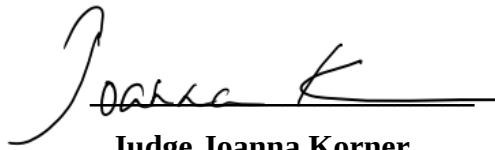
⁴³ *Ruto and Sang* Decision to Exclude the Expert Report of Mr Hervé Maupéu, ICC-01/09-01/11-844, para. 27, para. 13, referring to ICTR, Appeals Chamber, *The Prosecutor v. Ferdinand Nahimana et al.*, Judgement, 28 November 2007, Case No. ICTR-99-52-A, para. 212.

⁴⁴ Prosecution's Challenge, ICC-02/05-01/20-1018-Red, paras 24-26.

⁴⁵ *Al Hassan* Decision on expert witnesses, ICC-01/12-01/18-2206, para. 17.

⁴⁶ ICTY, Trial Chamber, *The Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Written reasons for the Trial Chamber's oral decision accepting Dorothea Hanson as an expert witness, 5 November 2009, IT-08-91-T, para. 9, referring to ICTY, Appeals Chamber, *The Prosecutor v. Vujadin Popović et al.*, Decision on joint Defence interlocutory appeal concerning the status of Richard Butler as an expert witness, 30 Jan 2008, IT-05-SS-AR73.2, para. 31.

⁴⁷ Expert Report of Philippe Gout, DAR-OTP-00005970, paras 106-134.

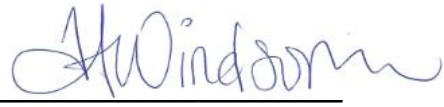


Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 30 November 2023

At The Hague, The Netherlands