

IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL  
CONSTITUTED IN ACCORDANCE WITH ARTICLE 5 OF  
THE ARBITRATION AGREEMENT BETWEEN THE GOVERNMENT OF SUDAN  
AND THE SUDAN PEOPLE'S LIBERATION MOVEMENT/ARMY  
ON DELIMITING ABYEI AREA

-and-

THE PERMANENT COURT OF ARBITRATION OPTIONAL RULES  
FOR ARBITRATING DISPUTES BETWEEN TWO PARTIES  
OF WHICH ONLY ONE IS A STATE  
Peace Palace, The Hague

Monday, 20th April 2009

Before:

PROFESSOR PIERRE-MARIE DUPUY  
JUDGE AWN AL-KHASAWNEH  
PROFESSOR DR GERHARD HAFNER  
JUDGE STEPHEN M SCHWEBEL  
PROFESSOR W MICHAEL REISMAN

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BETWEEN:

THE GOVERNMENT OF SUDAN  
and  
THE SUDAN PEOPLE'S LIBERATION MOVEMENT/ARMY

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AMBASSADOR MOHAMED AHMED DIRDEIRY of Dirdeiry & Co,  
PROFESSOR JAMES CRAWFORD SC of Matrix Chambers,  
PROFESSOR ALAIN PELLET of University of Paris Ouest,  
MR RODMAN BUNDY and MS LORETTA MALINTOPPI of Eversheds LLP  
appeared on behalf of the Government of Sudan.

DR RIEK MACHAR TENY, GARY BORN, WENDY MILES, of Wilmer  
Cutler Pickering Hale & Dorr LLP, PAUL R WILLIAMS and  
VANESSA JIMÉNEZ of Public International Law & Policy Group  
appeared on behalf of the SPLM/A.

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REGISTRY: JUDITH LEVINE, Registrar and legal  
counsel, ALOYSIUS LLAMZON, acting Registrar and legal  
counsel, PAUL-JEAN LE CANNU, legal counsel, appeared for  
the Permanent Court of Arbitration.

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<p>09:33 1 Monday, 20th April 2009 2 (9.30 am) 3 THE CHAIRMAN: Good morning, ladies and gentlemen. This 4 morning we are here for the second round, the reply of 5 the two parties dealing with the issue of excess of 6 mandate. Each party is provided with 80 minutes. It 7 will be first for the Government to present its 8 arguments, and then after the break it will be for the 9 SPLM/A. 10 I thank you very much. 11 PROFESSOR PELLET: Thank you. 12 (9.31 am) 13 Submissions by PROFESSOR PELLET 14 PROFESSOR PELLET: Mr President, members of the Tribunal, 15 in his yesterday's presentation Mr Born has first made 16 some general remarks on excess of mandate before 17 coming to the individual complaints of the Government 18 of Sudan concerning the excesses of mandate committed 19 by the ABC experts. We will follow this scheme, 20 except that we have decided to play it in a trio, 21 better than offer a one-man or one-woman show. 22 Like during the first round, I will answer our 23 opponent's general remarks and his defence on the 24 substantive grounds, while Ms Malintoppi, who will 25 follow me, will deal with the procedural excesses, and</p> <p style="text-align: center;">Page 1</p>	<p>09:34 1 between mandatory, which I would think relates to the 2 mandate and means nothing more than compulsory for the 3 addressee of a rule, on the one hand, and peremptory, 4 which is just another word for jus cogens in 5 international jargon. 6 In the present case the fact is that the parties 7 have agreed to partly set aside those principles by 8 entrusting this Tribunal to change the decision, in 9 principle final and binding, made by the experts if it 10 determines that the ABC experts exceeded their mandate. 11 This agreement is binding upon the parties and must be 12 given effect. 13 Therefore, our opponents may well use their, for me, 14 unclimbable mountain of paper in order to prove the 15 existence of principles that by no means we deny; the 16 inescapable fact would remain: if the report is vitiated 17 by an excess of mandate, its presumptive validity, its 18 finality, its res judicata character can/will not stand 19 any more in front of the finding of this Tribunal which, 20 basing itself on the submissions of the parties, will 21 have to substitute its own definition of the boundaries 22 of the area of the nine Ngok Dinka chiefdoms transferred 23 to Kordofan in 1905 to the definition given or omitted 24 to be given by the experts. 25 If Mr Born does not like the expression "legal</p> <p style="text-align: center;">Page 3</p>
<p>09:32 1 Professor Crawford will make some final remarks. 2 So first five general remarks. 3 First remark: the legal niceties. 4 In his yesterday's statement counsel for the SPLM/A 5 took issue with my mention of their dealing with "legal 6 niceties", an expression he used not less than five 7 times, and he showed some irritation that I could refer 8 in this manner to such important rules as presumptive 9 finality or res judicata. 10 Mr President, nothing could be further from my mind 11 than rejecting the fundamental importance of those 12 rules; and certainly as a teacher I would never insist 13 enough on their paramount importance in any society 14 governed by law. But we are not in a classroom and, as 15 very aptly recalled by Professor Kaikobad, whom I quoted 16 in my speech on Saturday: 17 "Res judicata cannot be seen in vacuo; it has to be 18 read and applied with respect to the facts applicable to 19 a particular situation." 20 Important as the principles discussed again and 21 again by the SPLM/A may be, they are not peremptory and 22 cannot be deemed to prevail over an express agreement to 23 the contrary. 24 If I may mention it in passing, Mr President, I'm 25 afraid that my learned opponent makes a little confusion</p> <p style="text-align: center;">Page 2</p>	<p>09:36 1 niceties", he might prefer "tout le reste est 2 littérature"; everything else is just academic. Instead 3 of discussing general principles in vacuo, let's apply 4 the Arbitration Agreement; it is the law both of the 5 parties and of the Tribunal, and that law establishes 6 the mandate of this Tribunal in relation with that of 7 the ABC. 8 Second general remark: mandate v excess of mandate. 9 I'm afraid, Mr President, that our adversaries have 10 a problem with making the distinction between the notion 11 of mandate on the one hand and of an excess of mandate 12 on the other hand; even though I certainly agree that 13 the latter, common in private law, is not usually 14 received in international law or, more generally, in 15 public law. 16 Now, we seem to agree at least on one point: the 17 mandate of this Tribunal is defined by Article 2 of the 18 2008 Arbitration Agreement. It must first determine 19 whether or not the experts exceeded their own mandate. 20 Then, if and only if -- we agree on that too -- you find 21 that they did exceed their mandate, you will have in 22 return to define not the area of the nine Ngok Dinka 23 chiefdoms transferred to Kordofan in 1905, but its 24 boundaries. And this second part of your mandate was 25 also the ABC experts' mandate.</p> <p style="text-align: center;">Page 4</p>

<p>09:37 1 It is in this respect that, first, the formula is 2 crucial; and second, I am absolutely ready to accept 3 that the excess of mandate must be defined by reference 4 to the category of issues that the experts were charged 5 with deciding. 6 But even though counsel for the SPLM/A contented 7 itself with strong and repeated allegations that 8 Article 2 "does define an excess of mandate", Article 2 9 tells us absolutely nothing in respect to the definition 10 of what would be an excess of the mandate in question. 11 Therefore the notion can only be defined on the basis of 12 the Abyei Protocol and other related agreements, as well 13 as precedents and/or common sense. 14 As for the precedents, they are rare, and I note 15 that all the distinctions made yesterday morning by 16 Mr Born between excess of mandate on the one hand and 17 other grounds for annulment of arbitral awards on the 18 other hand did not relate to excess of mandate properly 19 said, but to excess of jurisdiction or excess of power. 20 Thus Mr Born referred to the ICSID Convention and 21 explained that: 22 "There is a difference between an excess of 23 substantive mandate in Article 52(1)(b) as compared to 24 52(1)(d)." 25 But it happens that Article 52(1)(b) is not about</p> <p style="text-align: center;">Page 5</p>	<p>09:41 1 As recalled again in Article 2 of the Arbitration 2 Agreement, it was: 3 "... to define (i.e. delimit) and demarcate the area 4 of the nine Ngok Dinka chiefdoms transferred to Kordofan 5 in 1905." 6 Moreover, as Mr Born has insistently and rightly 7 noted, Article 1 of the Abyei Protocol provided 8 an agreed definition of the Abyei Area. This provision 9 reads: 10 "The territory is defined as the area of the nine 11 Ngok Dinka chiefdoms transferred to Kordofan in 1905." 12 But then the mandate of the ABC, or the experts 13 acting in lieu of them, could not have been, as Mr Born 14 has said repeatedly, to define the Abyei Area. 15 Mr President, I have been involved in international 16 litigation for more than a quarter of a century and 17 I have lost any hope that my, say, non-Latin colleagues 18 be Cartesian; but I must say that I have some difficulty 19 to understand how, at one and the same time, the Abyei 20 Area could have been defined by the Protocol and its 21 definition be the object of the mandate of the ABC, or 22 secondarily of this Tribunal. 23 There is no need for a very long reasoning to see 24 that the answer to the question asked to the experts 25 could not have been given in advance in the Protocol.</p> <p style="text-align: center;">Page 7</p>
<p>09:39 1 an excess of substantive mandate, as he put it, but 2 an excess of power. 3 Similarly, neither the New York Convention nor the 4 UNCITRAL Model Law, which he also mentioned, used the 5 unusual expression "excess of mandate". 6 Mr President, the context and the circumstances in 7 which both the mandate of the experts and that of this 8 Tribunal were drafted and, as recorded by Mr Born 9 himself, very carefully drafted and repeated in five 10 different instruments, this confirms without any doubt 11 that the intention was to have the ABC and its experts 12 to comply very strictly with their mandate and this 13 Tribunal to carefully check whether or not it has been 14 the case. 15 We do not accept the general proposition that 16 "tribunals possess very broad procedural discretion", 17 but it is in the circumstances all the more acceptable 18 that, first, the mandate of the experts had been 19 meticulously negotiated and drafted, and second, the 20 object of their mandate was so sensitive that they could 21 only strictly and completely adhere to it without 22 exercising any kind of so-called "discretion". 23 Third general remark: the number of excesses. 24 Mr President, leaving aside for a moment the mandate 25 of this Tribunal, I now focus on the mandate of the ABC.</p> <p style="text-align: center;">Page 6</p>	<p>09:43 1 Therefore the mandate was much more precise than what 2 the SPLM/A alleges: it was only to find the limits of 3 the territory thus defined, that of the Ngok Dinka 4 territory transferred to Kordofan in 1905, in accordance 5 with the wording of the formula. 6 By the way, it was certainly not open to the experts 7 "in defining the Abyei Area to define it in terms of 8 both territorial boundaries and land usage in defined 9 territories". In all the measure that the experts did 10 not answer that only question, they acted <i>infra petita</i>. 11 All they did in surplus, including of course 12 defining anew the Abyei Area or the respective land 13 usages of the local tribes, was <i>ultra petita</i>, under 14 which qualification can also be included the fact that 15 they did not base themselves on any kind of scientific 16 analysis, as required by Article 4 of the Abyei Annex 17 and paragraph 3.4 of the Terms of Reference; 18 a requirement on which counsel for the SPLM/A has been 19 rather silent when he came to the question of 20 motivation. 21 Fourth general remark: excess of mandate or 22 difference of interpretation? 23 I will be brief, Mr President, with my fourth 24 general remark, since I had already stressed in my 25 Saturday's second speech that a careful distinction must</p> <p style="text-align: center;">Page 8</p>

<p>09:45 1 be made between the erroneous interpretation of their 2 mandate by the experts and a disagreement with them on 3 the way they have implemented their mandate. 4 The first aspect relates to the first part of your 5 own mandate as announced in Article 2(a) of the 6 Arbitration Agreement, the excess of mandate part of 7 these proceedings; the second aspect is related to the 8 delimitation phase, that is to Article 2(c) of the 9 Arbitration Agreement. But once again 10 a misinterpretation of their mandate by the experts 11 necessarily results in an excess of mandate, whether 12 ultra or infra petita. 13 Fifth and last general remark: the Government's 14 complaints. 15 The SPLM/A gloats over my apparently imprudent 16 admission according to which whether the excesses of 17 mandate the Government complains of are 10, 11 or 12 18 does not really matter. But really, Mr President, it 19 does not. 20 Does it really matter whether we sustain that the 21 fact that the experts were inspired by improper 22 oil-oriented motivations is an autonomous excess of 23 mandate or part of the discussion of the illegal 24 ex aequo et bono decision? Does it really matter 25 whether the illegal motivation of the report constitutes</p> <p style="text-align: center;">Page 9</p>	<p>09:49 1 "It is now a nearly universal principle that 2 international arbitral awards must set forth the reasons 3 for the Tribunal's decision." 4 I know that being counsel imposes duties, but in the 5 present case I strongly suggest that the learned author 6 is more convincing than the devoted counsel. 7 May I add, just to take another example, that 8 another, indeed lesser authority, in French, Daillier 9 and others, entirely concurs with the quote I just read. 10 What is true for international arbitral awards in 11 general is evidently even more true when boards are at 12 stake. Territorial delimitation cannot be left 13 unmotivated, and with due respect I do not need to refer 14 to a mountain of paper to make this common-sense remark. 15 Law is not necessarily inimical to common sense, but 16 state sovereignty is certainly inimical to deciding 17 borders by drawing lots. 18 But there is another reason why climbing the 19 mountain of paper where Mr Born wants to take us is in 20 any case superfluous. The experts were mandatorily -- 21 that is according to their express mandate -- instructed 22 to base themselves on specific sources and to follow 23 a specific method. 24 Even accepting that they could have left their 25 decision unexplained -- which is, I maintain, more than</p> <p style="text-align: center;">Page 11</p>
<p>09:47 1 one or two or three excesses of mandate? It does not. 2 Similarly, there is no ground for counsel's 3 righteous indignation that the Government's case has 4 changed between the memorial and Saturday's pleading. 5 It is a virtue of the adversarial principle that each 6 party is supposed to answer the other's argument. 7 Moreover, as the SPLM/A had noted in its rejoinder, in 8 most respects the changes we made are more -- I would 9 not say cosmetic, but rather formal -- in the hope that 10 our argument would be easier to follow. 11 With respect, I must add that the SPLM/A for its 12 part has not at all followed our good example. Not only 13 has Mr Born in substance purely and simply repeated 14 yesterday the argument already made by the SPLM/A's 15 reply, but also -- and this is even more debatable -- 16 far from answering the argument of our oral presentation 17 or even our rejoinder, he has mainly limited himself to 18 answering the Government's memorial. 19 Mr President, members of the Tribunal, I will now 20 briefly discuss the SPLM/A's challenge to our claims 21 concerning the substantive excesses of mandate which 22 tainted the experts' report. First, the issue of the 23 failure to motivate. 24 According to an authority on international 25 arbitration, a certain Mr Gary Born:</p> <p style="text-align: center;">Page 10</p>	<p>09:51 1 ever absurd -- they had to base their decision on 2 scientific analysis and research. Had the report 3 consisted in the final and binding decision alone, it 4 might have been more difficult for the Government to 5 show that this mandatory requirement had not been 6 fulfilled, but the excess of mandate would nonetheless 7 have been averred. 8 Anyway, things being what they are, suffice it to 9 read the report to ascertain that on crucial points it 10 is not based on any kind of reasoning. 11 I'm afraid it is difficult to globally share our 12 opponents' enthusiasm for the experts' masterpiece, 13 which it holds out as, and I quote among others, 14 "a thoughtful, impressive, well-reasoned piece of work 15 that deserves our respect". 16 But, Mr President, as is well-known, the devil is in 17 the detail, and so too the excess of mandate. When 18 I speak of detail I do not mean minor defects, but 19 a succession of serious losses of sight of the experts' 20 mandate, which was -- I recall it again -- "to define 21 (i.e. delimit) and demarcate the area of the nine Ngok 22 Dinka chiefdoms transferred to Kordofan in 1905", based 23 on a scientific analysis of the available relevant 24 archives. 25 I will not repeat my Saturday's presentation; I will</p> <p style="text-align: center;">Page 12</p>

<p>09:53 1 simply point out in telegraphic style some of the most 2 untenable arguments made yesterday in respect of the two 3 most striking unreasoned points made by the experts, 4 points which clearly are at the very heart of the 5 question which was before the ABC. 6 First, contrary to what counsel for the SPLM/A said 7 yesterday, the experts did not conclude that: 8 "... the Ragaba ez Zarga/Ngol rather than the 9 River Kiir, which is now known as the Bahr el Arab, was 10 treated as a province boundary in practice by some of 11 the Condominium officials." 12 They much more straightforwardly wrote: 13 "The Ragaba ez Zarga/Ngol rather than the 14 River Kiir, which is now known as the Bahr el Arab, was 15 treated as the province boundary." 16 Full stop, without "in practice by some of the 17 Condominium officials". 18 Ergo the experts in effect accept that there was 19 a province boundary, treated as such by the coloniser, 20 and this, erroneous as it was, was a necessary and 21 sufficient answer to the question. 22 However, the experts pushed it aside. Why? The 23 SPLM/A's explanation: 24 "Applying this definition, the location of the 25 putative Kordofan/Bahr el Ghazal boundary was irrelevant</p> <p style="text-align: center;">Page 13</p>	<p>09:57 1 erroneously -- but again, not our problem this morning, 2 it will be this afternoon -- well, since the experts had 3 recognised that the boundary was situated on the 4 Ragaba ez Zarga, there was no need, not the slightest 5 reason, no motive for researching another limit; and 6 second, because they do not give the slightest beginning 7 of an explanation for it. 8 Mr Born says it was the southern limit of the goz. 9 Fair enough. Then the experts' mandate was to determine 10 the limit of the territory transferred from one province 11 to another in 1905, not to go into a maybe scholarly 12 analysis of tribal rights, although I have doubts 13 whether these rights are dominant or secondary. 14 I note in passing that Mr Born has left unanswered 15 two of the points I made at some length in this respect 16 last Saturday. First, how can it be explained that the 17 experts based themselves exclusively on the Ngok Dinka's 18 so-called "rights", and did not treat equally those of 19 the Dinka on the one hand and the Messiriya on the other 20 hand? And second, how can the proposition that the 21 Messiriya had secondary rights south of the shared area 22 be reconciled with the so-called "equal division" of the 23 "shared area"? 24 I accept, Mr President, that these questions might 25 be seen prima facie more as a disagreement with the</p> <p style="text-align: center;">Page 15</p>
<p>09:55 1 to defining the Abyei Area. The decisive issue which 2 the experts referred to as what they were doing was the 3 extent of the territory of the nine Ngok Dinka chiefdoms 4 as it stood in 1905, not the location of the putative 5 provincial boundary." 6 It might have been irrelevant to the question of the 7 territory of the nine Dinka chiefdoms, but it was indeed 8 relevant to answer the question asked to the experts, or 9 to the ABC, which was not the question of the territory 10 of the nine Dinka chiefdoms but that of the delimitation 11 of the territory of the nine Ngok Dinka chiefdoms 12 transferred from the province of Bahr el Ghazal to that 13 of Kordofan in 1905. 14 This shift made by the experts from one question 15 corresponding to the mandate of the experts, and to 16 which they acknowledged that they had the answer, to 17 another question to which they had to invent an entirely 18 new, artificial answer, is not a substantive error. It 19 is by all means an excess of mandate. 20 The Government is simply not in disagreement with 21 the substance of the experts' finding; it notes that 22 their finding is outside their mandate. 23 The same holds true concerning the 10°10' north 24 parallel, for two reasons: first because since, as 25 I have just said, the experts had recognised</p> <p style="text-align: center;">Page 14</p>	<p>09:59 1 experts' finding than a ground for an excess of mandate. 2 But these points point at an obvious excess of mandate: 3 the substitution of the problematic based on the 4 respective rights of the local tribes to that clearly 5 implied by the formula and so in conformity with the 6 colonial approach of a territorial transfer. 7 Next, the ex aequo et bono issue. According to the 8 other side's counsel, the Government "does not, of 9 course, suggest that the entire ABC report was 10 a ex aequo et bono decision". No matter the description 11 of the entire report; the fact is that the final 12 decision is exclusively a decision based on 13 reasonableness and fairness, mixed with a legal 14 principle dictating recourse to "the equitable division 15 of shared secondary rights". 16 No matter what comes first and what is the 17 respective weight or one or another justification, the 18 fact is that: first, the decision is not based on 19 a scientific analysis of documents, and could not be, 20 since the result of the scientific analysis, the 21 Ragaba ez Zarga, had been deliberately ruled out without 22 giving any reason; and second, with all due respect for 23 the experts' knowledge in African or even maybe more 24 precisely Sudanese traditional legal principles, the 25 1905 transfer was obviously not made on the basis of</p> <p style="text-align: center;">Page 16</p>

<p>10:02 1 these principles but according to the purely territorial 2 logic of the coloniser. Once again the ABC's mandate 3 was the transfer or, more precisely, the result thereof. 4 Last on this aspect of the excess of mandate, the 5 oil ulterior motive. 6 Is it the case, Mr President, that we have not had 7 the "courage to make an impartiality challenge"? We 8 think that the decision is motivated by this dominant 9 consideration. 10 Let me just say, Mr President, that of course this 11 is not the kind of thing arbitrators or commissioners 12 would readily and explicitly recognise. Always think of 13 it; never speak of it. Interesting the oil issue is 14 mentioned as early as page 1, paragraph 6, of the 15 SPLM/A's rejoinder. 16 But when one considers together the absence of 17 jurisdiction for the line arrived at with this aspect of 18 the case, there is ground for perplexity as to the real 19 motives of the experts' position. In this respect we 20 deemed it appropriate to mention this troubling 21 circumstance, together with the non-motivation of the 22 experts' decision. 23 I now come to the extra petita decisions. 24 To end this part of our rebuttal, some quick remarks 25 on what could be called the extra petita decisions made</p> <p style="text-align: center;">Page 17</p>	<p>10:06 1 in the report at page 4, and read by Mr Born, reads as 2 follows -- I read it in my turn: 3 "... to determine as accurately as possible the area 4 of the nine Ngok Dinka chiefdoms as it was in 1905." 5 Still this was simply not the mandate, and surely 6 the experts cannot simply have ignored a key phrase in 7 their substantive mandate, the phrase "transferred to 8 Kordofan", and they cannot be held to have complied with 9 their mandate or not exceeded it if they have just 10 swallowed this phrase. 11 Again, in spite of our opponent's mantra in this 12 case, this is not a disagreement by the Government on 13 the definition of the Abyei Area, which is already given 14 in Article 1.1.2 of the Abyei Protocol; it is a strong 15 and categorical disagreement of the Government with the 16 experts on the interpretation of their mandate, which is 17 defined in Article 5.1 of the Abyei Protocol and 18 reiterated in Article 1 of the Abyei Annex, in 19 Articles 1.1 and 1.2 of the Terms of Reference and in 20 Rules of Procedure Nos. 1.1 and 1.2. But this has not 21 discouraged them to redefine this agreed and repeated 22 mandate essentially by subtraction. 23 Since the SPLM/A has advanced no new argument on the 24 other aspects of our infra petita complaint -- and 25 indeed virtually no argument at all -- I can deal</p> <p style="text-align: center;">Page 19</p>
<p>10:04 1 by the Tribunal, whether because they go beyond the 2 mandate, in which case they are ultra petita, or because 3 they do not answer the question asked to the ABC, in 4 which case the decisions are infra petita. But in both 5 cases they constituted excesses or abuses of mandate. 6 Just five minutes before the end of his lengthy 7 presentation Mr Born made an interesting and most 8 revealing lapsus linguae, I suppose this is what it was. 9 He had to admit that having artificially decided the 10 position of the northern boundary, the experts then had 11 "to create an eastern boundary". Yes, Mr President, "to 12 create". 13 In fact this is exactly what they did, not only in 14 the east but also in the north, and by no means was this 15 their mandate, which was to define the boundary 16 resulting from an already operated transfer. 17 Counsel for the SPLM/A has made a series of quotes 18 from the experts' report together with "the 19 interpretation of the Abyei Area that the experts had 20 uniformly provided to the parties during the preceding 21 months", describing their interpretation of their 22 mandate. 23 The Government has shown in its counter-memorial 24 that these presentations were anything but uniform, but 25 in any case the final interpretation, the one appearing</p> <p style="text-align: center;">Page 18</p>	<p>10:09 1 directly and finally with the ultra petita issue which, 2 by contrast, was dealt with at great length by Mr Born. 3 But let me reiterate for the sake of clarity, 4 Mr President, that, first, this is not a minor issue, 5 but it is clearly not the core issue of the present 6 case, the ultra petita problem; and second, nevertheless 7 if, as we confidently think, the Tribunal recognises 8 that by deciding on the respective grazing rights of the 9 Ngok Dinka on the one hand and the Messiriya on the 10 other hand the experts have exceeded their mandate, this 11 will be a sufficient ground for entering into phase 2, 12 that of the delimitation. 13 Just as a reminder, in paragraph 5 of the operative 14 part of their report, the experts stated: 15 "The Ngok and the Misseriya shall retain their 16 established secondary rights to the use of land north 17 and south of this boundary." 18 By various formulas counsel for the SPLM/A contends 19 that this does not imply any granting or conferment or 20 limitation of rights. Even if it were so, it would 21 nevertheless be part of a final and binding decision; 22 and not only in words, but also on the map which is 23 annexed to the report and illustrates the decision. 24 This is what could be called a declaratory decision 25 and, as is well-known, such a decision -- including, for</p> <p style="text-align: center;">Page 20</p>

<p>10:10 1 example, a declaratory judgment by the ICJ -- is binding 2 upon the parties. In other words, this part of the 3 decision could perfectly have been the subject of 4 an autonomous binding pronouncement if the experts had 5 been asked to take a decision on this point. They were 6 not, and this alone establishes that in deciding on this 7 point they exceeded their mandate. 8 Moreover, the justification for this finding made by 9 the experts in flagrant excess of their mandate is also 10 another -- distinct or common, it doesn't matter -- 11 excess of mandate, in that it confirms that the decision 12 is based not on the territorial transfer operated in 13 1905, on which the ABC was called to decide, but on the 14 arbitrary or equitable -- for the present discussion it 15 does not matter -- division of tribal rights. 16 As apparently accepted by counsel for the other 17 party, this decision was made as a follow-up to a global 18 approach based on the dominant and secondary rights of 19 the Ngok Dinka. For their part the Messiriya are only 20 recognised secondary rights, and only in the measure 21 that they are shared with those of the Ngok, even though 22 elsewhere in the report the experts accept that the 23 secondary rights of the Messiriya extended further to 24 the south. 25 These findings are doubly in excess of the experts'</p> <p style="text-align: center;">Page 21</p>	<p>10:14 1 legal principles, and probably inspired by less 2 respectable motives. 3 2. Linked with this irrelevant approach, the 4 experts evidently decided ultra petita, by pronouncing 5 on the respective extent of the traditional rights of 6 the Ngok and the Messiriya and by limiting those of the 7 latter. 8 3. Last, but probably most importantly, the experts 9 have completely distorted their mandate by concentrating 10 exclusively on the question of the extent of the area of 11 the nine Ngok Dinka chiefdoms as it was in 1905, without 12 fulfilling their mandate, which was -- I quote again 13 just in the unlikely case that you might have forgotten, 14 Mr President, and members of the Tribunal: 15 "... to define (i.e. delimit) and demarcate the area 16 of the nine Ngok Dinka chiefdoms transferred to Kordofan 17 in 1905." 18 In making these claims the Government of Sudan does 19 not merely disagree with the substance of the decisions 20 of the experts -- it does, but on other grounds; it 21 submits that the experts have misinterpreted, and indeed 22 entirely set aside, their mandate. 23 It belongs to you, members of the Tribunal, to 24 declare this, and consequently to at last give the right 25 answer to the only question included in the formula on</p> <p style="text-align: center;">Page 23</p>
<p>10:12 1 mandate. First, the experts were mandated to decide on 2 an area, a territory, transferred from one province to 3 another, not to allocate territories on the basis of 4 tribal rights. And second, the limitation of the 5 Messiriya's secondary rights, a limitation which is 6 crystal-clear if you just cast an eye at the map annexed 7 to the report, is in evident contradiction with 8 Article 1.1.3 of the Abyei Protocol, which provides 9 that: 10 "The Messiriya and other nomadic peoples retain 11 their traditional rights to graze cattle and move across 12 the territory of the Abyei." 13 According to the decision, and very clearly to the 14 map decision, the rights of the Messiriya would be 15 limited to the parallel 10°10' north. 16 Mr President, this brings me to the end of my 17 presentation for this morning. I have not answered all 18 the arguments made yesterday by the SPLM/A. Even full 19 working nights are short. However, I hope that I have 20 touched upon the main deficiencies in the experts' 21 approach. They are: 22 1. That the report is not based on a scientific 23 analysis, as demanded by their mandate, but on the 24 entirely subjective and highly debatable judgment of the 25 experts based on equity and/or irrelevant inter-tribal</p> <p style="text-align: center;">Page 22</p>	<p>10:16 1 the basis of the submissions of the parties. 2 Mr President, members of the Tribunal, I thank you 3 for your attention. And I would ask you, Mr President, 4 to give the floor to Ms Malintoppi. 5 THE CHAIRMAN: I thank you, Professor Pellet, and I give 6 the floor to Ms Malintoppi. 7 (10.17 am) 8 Submissions by MS MALINTOPPI 9 MS MALINTOPPI: Thank you, Mr President. 10 Mr President, members of the Tribunal, the SPLM/A's 11 position is that a failure of the experts to respect the 12 Rules of Procedure or to adhere to the work programme 13 set out in the Terms of Reference does not represent 14 an excess of mandate under Article 2(a) of the 15 Arbitration Agreement, and that the Government's 16 procedural complaints are inadmissible. 17 The SPLM/A argued that the references to the 18 Abyei Protocol, the Abyei Appendix, the Terms of 19 Reference and the Rules of Procedure in Article 2(a) of 20 the Arbitration Agreement only appear because each of 21 these instruments sets forth the substantive mandate of 22 the experts, and not because they otherwise form a part 23 of that mandate. 24 Let me respond by noting the following points which 25 the SPLM/A chose not to focus on.</p> <p style="text-align: center;">Page 24</p>



<p>10:18 1 Article 3 of the Arbitration Agreement relating to 2 the applicable law states that this Tribunal: 3 "... shall apply and resolve the disputes before it 4 in accordance with the provisions of the CPA, 5 particularly the Abyei Protocol and the Abyei Appendix, 6 [the 2005 interim constitution], and general principles 7 of law and practices." 8 In particular the applicable law clause contains 9 an express reference to the Abyei Appendix which this 10 Tribunal shall apply. The SPLM/A ignored this point 11 yesterday, and did not spend much time on the 12 Abyei Appendix. 13 Let me focus also on paragraph 5 of the appendix. 14 It provides: 15 "The ABC shall present its final report to the 16 presidency before the end of the pre-interim period. 17 The report of the experts, arrived at as prescribed in 18 the ABC Rules of Procedure, shall be final and binding 19 on the parties." 20 Three important points emerge from this provision. 21 First, it was the ABC that was to present its final 22 report to the presidency. 23 Second, the report of the experts was to be arrived 24 at as prescribed in the ABC Rules of Procedure. In 25 other words, those rules are binding; they were deemed</p> <p style="text-align: center;">Page 25</p>	<p>10:21 1 were "vital to the parties' agreements to resolve their 2 dispute" and that, "Procedurally the Abyei Protocol and 3 the Abyei Annex established the framework for 4 a remarkable dispute resolution mechanism". 5 Well, on this point at least the Government agrees. 6 It is certainly true that the parties' consent was 7 linked to and circumscribed by the procedural framework 8 set out in the Abyei Protocol, the Appendix, the ABC 9 Terms of Reference and Rules of Procedure. 10 However, the Government fundamentally disagrees with 11 the SPLM/A's argument that the experts' enjoyed 12 unusually broad procedural discretion and that the 13 parties' agreements recognised the experts' alleged 14 broad power to undertake their own independent 15 investigation and scientific research in the manner 16 advocated by the SPLM/A. 17 Incidentally, in this context the SPLM/A admits that 18 the experts "went beyond what had been contemplated by 19 the Terms of Reference", and that the ABC "travelled to 20 several sites not contemplated by the parties". 21 The SPLM/A cited seven provisions of the relevant 22 agreements in support of its allegations that the 23 procedural rules contained no limitations to the 24 experts' fact-finding powers: Article 2 of the Abyei 25 Annex, Article 3 of the Terms of Reference, procedural</p> <p style="text-align: center;">Page 27</p>
<p>10:19 1 to be mandatory, and they were part of the experts' 2 mandate. The report had to be arrived at as prescribed 3 in the rules. 4 Third, the appendix is the only one of the parties' 5 various agreements dealing with the ABC process where 6 the words "final and binding" appear. "Final and 7 binding" language with respect to the character of the 8 experts' report is not included in the Abyei Protocol, 9 the Terms of Reference or the Rules of Procedure; only 10 in the Abyei Appendix. 11 There it is clear that it is the report of the 12 experts, arrived at as prescribed in the ABC Rules of 13 Procedure, that shall be final and binding on the 14 parties. In other words, to be final and binding the 15 experts' report had to be arrived at as prescribed in 16 the rules, and this was a deliberate condition for its 17 bindingness. 18 Fourthly and lastly, the fact that the substantive 19 mandate of the experts is referred to in the 20 Abyei Protocol, the Abyei Appendix, the Terms of 21 Reference and the Rules of Procedure underscores that 22 the other provisions in these instruments apply to the 23 manner in which the experts carried out that mandate. 24 Yesterday the SPLM/A acknowledged that the 25 provisions of the Abyei Protocol and related agreements</p> <p style="text-align: center;">Page 26</p>	<p>10:22 1 rules, 2, 7, 10, 11 and 13. 2 According to our opponents, nothing in the 3 procedural rules forbade the ABC experts from acting as 4 they did. A related argument is that the experts 5 drafted the Rules of Procedure, and therefore they 6 believed that they were acting in compliance with these 7 rules. 8 Mr President, as a Roman I cannot resist here but 9 site a Latin maxim in response "patere legem quem ipse 10 fecisti"; every authority must abide by its own rules. 11 In addition, the Rules of Procedure here might have been 12 drafted by the experts but they had also been agreed by 13 the parties. 14 Let me now review the provisions that, according to 15 our opponents, allegedly established the experts' broad 16 fact-finding and procedural discretion. 17 Article 2 of the Abyei Annex deals with the 18 composition of the ABC and only mentions the five 19 experts when it describes their method of appointment 20 and underscores their professional qualities and their 21 impartiality. There's no mention of procedural 22 discretion, broad or otherwise, explicit or implicit. 23 Article 3 of the Terms of Reference deals with the 24 functioning of the ABC, and as such mainly refers to the 25 work of the ABC as a whole. This is done by referring</p> <p style="text-align: center;">Page 28</p>

<p>10:24 1 to three specific meetings of the Commission in Sudan 2 with representatives of the people of the Abyei Area. 3 This provision is so detailed that it indicates the 4 location at each meeting, the number of representatives 5 that were going to be seen and the tribes they were 6 from. So much for the experts' procedural discretion. 7 The only mention to the experts in this provision, 8 and not to the full Commission, is contained in 9 Article 3.4, where reference is made to consultation of 10 the British archives and other relevant sources on the 11 Sudan by the experts. 12 The SPLM/A characterises Article 3.4 as being broad 13 and unqualified. Such a reading of this provision is 14 highly distorted. Article 3.4 simply provides that the 15 experts can consult the British archives and other 16 relevant sources from the Sudan archives and/or 17 historical sources. 18 How can Ngok Dinka individuals, meetings with whom 19 were precisely set out elsewhere in the appendix and the 20 Terms of Reference, or third-party representatives 21 speaking as to the interpretation of the formula, such 22 as Mr Millington, fall under this definition? How can 23 they? 24 The meetings with Mr and Mrs Tibbs and 25 Professor Cunnison can be distinguished because these</p> <p style="text-align: center;">Page 29</p>	<p>10:27 1 of the Abyei Area, a highly sensitive matter; in these 2 cases express reference is made to the full ABC, and not 3 just the experts. 4 Mr Millington's advice also cannot possibly fall 5 within the plain reading of any of these procedural 6 provisions. The SPLM/A did not yet address the points 7 made in this respect in my first speech on Saturday. 8 Interpretation of a formula that was agreed by the 9 parties after long and difficult negotiations is 10 fundamentally different from consulting archival and 11 other sources to obtain information on the area 12 transferred. One will look in vain for a rule 13 justifying resort by the experts to a third party in 14 order to interpret the formula. 15 On the contrary, as I noted on Saturday, there 16 emerges from the procedural rules as a whole a clear 17 obligation of transparency and respect of the 18 adversarial principle which was systematically ignored 19 by the ABC experts. 20 As to procedural rules 2, 7, 10, 11 and 13, only one 21 of these provisions, Rule 13, specifically refers to 22 "the experts"; all the other refer to "the Commission" 23 or "Commission members". As I already noted on 24 Saturday, when the rules intended to refer to the 25 experts, they did. It is obvious that references to</p> <p style="text-align: center;">Page 31</p>
<p>10:25 1 experts could be considered, given their knowledge of 2 Sudan and, especially in the case of Professor Cunnison, 3 their published writings, as sources on Sudan. 4 SPLM/A dramatically asserts that fact that the 5 Government did not mention the meetings with the Tibbses 6 and Professor Cunnison as fatal to its case. But, 7 Mr President, there is a clear distinction in the 8 relevant agreements between the documentary material 9 that could be gathered in the archives or historical 10 information that could be obtained from sources 11 independent of the dispute, such as Mr and Mrs Tibbs and 12 Professor Cunnison, and oral testimonies to be collected 13 from interested parties; partisans, to use SPLM/A's 14 words. 15 This distinction is particularly evident in 16 Article 3 of the Terms of Reference, where only the 17 consultation of British archives and other relevant 18 sources on the Sudan is reserved to the experts alone. 19 By contrast, when it comes to listening to the 20 people of the Abyei Area and its neighbours or 21 travelling to the Sudan to listen to representatives of 22 the people of the Abyei Area and the neighbours -- these 23 are references to the appendix and the Terms of 24 Reference, Articles 3 and 3.2 -- so the latter, 25 travelling to the Sudan to listen to the representatives</p> <p style="text-align: center;">Page 30</p>	<p>10:28 1 "the Commission members" mean precisely what they say; 2 members of the Commission, not experts. 3 In actual fact there is no sign of the experts' 4 alleged "broad procedural discretion" in any of the 5 procedural rules, not even in Rule 2, where the 6 reference to an "informal yet businesslike tone" applies 7 to sessions of the Commission. 8 The focus of this provision is on the tone of the 9 meeting and the notion of "a full and easy exchange of 10 ideas, observations and suggestions" within the 11 Commission, rather than on some broad procedural 12 discretion which is nowhere to be found in the plain and 13 ordinary meaning of these words. 14 With respect to the meetings that took place at the 15 Khartoum Hilton on 21st April, 6th and 8th May 2005, the 16 SPLM/A argues that the information from the Khartoum 17 meetings was "unimportant and repetitive of what had 18 been learnt elsewhere". But, Mr President, the SPLM/A 19 acknowledged yesterday that the parties' representatives 20 did not attend the meetings, so how do they know that 21 the information exchanged on that occasion was 22 "unimportant and repetitive"? 23 It is not entirely true that, as the SPLM/A asserts, 24 the meetings are recorded in the report. The recordings 25 of 6th May only cover Mr Deng's interview, in spite of</p> <p style="text-align: center;">Page 32</p>

<p>10:30 1 the fact that the meeting was attended by eight 2 individuals. 3 Furthermore, the documents and maps that were handed 4 out at the meetings were never given to the other 5 members of the ABC. So how does the SPLM/A know that 6 the experts were given an "old map", as it stated during 7 its presentation yesterday? 8 Curiously, in its first-round presentation on excess 9 of mandate the SPLM/A repeated arguments raised in its 10 reply memorial, which were rebutted by the Government 11 not once but twice, in the rejoinder and its first-round 12 presentation on Saturday. 13 In particular we heard again yesterday that there 14 had been general discussions regarding the subject of 15 interviewing third parties at the initial presentations 16 of the parties to the ABC in April 2005. This point was 17 rebutted in our rejoinder at paragraph 116 and at some 18 length on Saturday during the Government's first round 19 presentation. Our opponents' arguments yesterday did 20 not add anything new, and therefore I refer the Tribunal 21 to Saturday's transcripts for the Government's response. 22 I shall simply reiterate here that the discussions 23 that took place in April 2005 do not justify a blank 24 authorisation for the experts to interview third parties 25 in camera. These discussions concerned oral testimony</p> <p style="text-align: center;">Page 33</p>	<p>10:33 1 taken into account. We do not know the circumstances of 2 that meeting. 3 However, the reason why the Government did not focus 4 on these specific meetings in oral argument on Saturday 5 is because much more troubling was the meeting that took 6 place on 21st April, when the recording is limited to 7 one witness, Mr Justin Deng, in spite of the fact that 8 apparently eight Ngok Dinka individuals were present, 9 and the meeting of 8th May 2005 with 15 Ngok Dinka 10 individuals, when documents and maps were provided to 11 the ABC experts and not to the parties or their 12 representatives. 13 The SPLM/A also repeated once more that, even 14 assuming that the experts had met with people in 15 Khartoum instead of Abyei in error, this would not have 16 constituted a "serious breach of a fundamental rule of 17 procedure" because such a violation "would obviously 18 have been unintentional". 19 But, Mr President, quite aside from the fact that 20 this is pure speculation, the point is not where the ABC 21 experts met, but the fact that the experts had no 22 justification for acting as they did, whether 23 intentionally or unintentionally. What matters is that 24 these meetings were conducted in the absence of the 25 parties by the experts alone, and not the whole</p> <p style="text-align: center;">Page 35</p>
<p>10:31 1 that was supposed to be collected during the field 2 visits which the ABC, including the parties, attended. 3 The same cold-shoulder treatment was reserved to our 4 discussion of the so-called "specific discussions" that 5 the parties are said to have had on the subject 6 according to the SPLM/A. In fact, not only did the 7 SPLM/A focus exclusively on its own witness statements, 8 which are the only support for its assertions, and it 9 ignored the Government's written submissions and oral 10 arguments in this respect, but it also incorrectly 11 stated that the Government "puts no specific witness 12 testimony in response". 13 That is extraordinary considering that, as the 14 Government recalled on Saturday, three of the 15 Government's witnesses, all of whom were representatives 16 on the ABC for the Government, deal with this question 17 in their testimonies, and refute the allegations of the 18 witnesses put forward by the SPLM/A. They all state 19 that the ABC was not informed of these meetings. 20 The SPLM/A felt the need to specify that the 8th May 21 meeting was with the Twic Dinka. Indeed, that was the 22 case. That was a meeting that apparently had been 23 organised by the Sudanese politician Mr Bona Malwal. 24 The meeting was probably solicited because the 25 Twic Dinka wished to make sure that their interests were</p> <p style="text-align: center;">Page 34</p>	<p>10:34 1 Commission, in violation of the adversarial principle 2 and basic notions of due process. 3 The parties' representatives were not present to 4 test the evidence, to make comments or to ask questions. 5 They were deprived of the right to participate in these 6 interviews with interested peoples, as they were 7 supposed to do throughout the process under the 8 applicable procedural rules. We have heard nothing from 9 our opponents in that respect. 10 With regard to the argument that the Government was 11 aware of the Khartoum meetings because 12 Ambassador Dirdeiry referred to the experts' stay in 13 Khartoum in submissions made to the ABC in June 2005, 14 this too was an argument made in the SPLM/A's reply 15 memorial and already rebutted in the Government's 16 rejoinder. As stated in that submission, this reference 17 was to the fact that the experts were supposed to 18 consult the archives in Khartoum. 19 We also know from the testimony of General Sumbeiywo 20 of IGAD that on 3rd May 2005 he wrote to the Swiss 21 ambassador in Nairobi noting that: 22 "The ABC [was] currently in Khartoum carrying out 23 research in the archives." 24 However, it is also evident that when 25 Ambassador Dirdeiry stated, "During our stay in Abyei,</p> <p style="text-align: center;">Page 36</p>

<p>10:36 1 and maybe also during your stay in Khartoum, we had 2 an opportunity to know in fact what people had said 3 about our efforts", he clearly made no reference to any 4 interviews with Ngok Dinka individuals, or for that 5 matter Twic Dinka, in Khartoum. 6 In fact Ambassador Dirdeiry's choice of words, 7 "maybe also during your stay in Khartoum", makes it 8 clear that he did not really know what the experts had 9 done in Khartoum because he was not present. He was 10 clearly referring to an exchange that the ABC had with 11 people in Khartoum regarding the efforts of the ABC, 12 hence the use of the words, "we [the ABC] had 13 an opportunity to know in fact what people had said 14 about our [ie, the ABC's] efforts". 15 Understandably the work of this body was a subject 16 of great interest in Khartoum, as elsewhere in Sudan, 17 and the ABC stay in the capital had provided 18 an opportunity to clarify that work to the people of 19 that city; no more, no less. 20 Finally, as to the fact that the experts issued 21 their decision without endeavouring to reach consensus 22 of the full ABC, Professor Crawford will say a few words 23 on the factual aspects of this point. I will just add 24 a few general comments to place the matter in its proper 25 procedural context.</p> <p style="text-align: center;">Page 37</p>	<p>10:39 1 meant that the Commission would discuss the report 2 prepared by the experts, and after the parties' final 3 submissions it would endeavour to reach a decision by 4 consensus. It was only if an agreed position at the 5 time was not achieved that the experts would have the 6 final say. 7 This step, the effort to reach a consensus on the 8 report prepared by the experts, is the missing link in 9 the actual chain of events. The parties never saw the 10 report before it was presented to the presidency. They 11 were given no chance, as part of the Commission, to 12 attempt to reach a consensus on it. 13 This is not nitpicking, Mr President and members of 14 the Tribunal; this was disregard for a fundamental and 15 essential part of the process that was envisaged. And 16 yet, what is the evidence offered by the SPLM/A that 17 there had indeed been efforts at reaching consensus? 18 Nothing other than witness statements which have been 19 refuted by the Government's own witnesses. 20 Before I ask you to give the floor it 21 Professor Crawford, Mr President, I would like to note 22 that a number of points I made in my earlier 23 presentation remain unrebutted. In particular the 24 confusion between the experts and the ABC as a whole 25 continues to characterise our opponents' approach to the</p> <p style="text-align: center;">Page 39</p>
<p>10:37 1 It is evident from reading the Rules of Procedure 2 that the experts adopted a chronological approach to the 3 tasks that were to be undertaken, starting with 4 a reference in Rule 2 to the Commission's opening 5 meeting on 10th April 2005, and ending with Rule 16, 6 where the experts would, at the end, appoint technical 7 personnel to survey and demarcate the boundary on the 8 land. 9 In addressing the requirement that the Commission 10 endeavour to reach a decision by consensus, the SPLM/A 11 basically stops at Rules 12 and 13. 12 Rule 12, it will be remembered, states that the 13 Commission will reconvene in Nairobi at a date in May to 14 be determined, and that the parties will make their 15 final presentations at that time. At the time of the 16 parties' final presentations the proceedings were 17 essentially at the advocacy stage. Each party was 18 setting out or explaining its position. 19 Then Rule 13 provided that afterwards the experts 20 will examine and evaluate all the material they have 21 gathered and prepare the final report. 22 However, that was not the end of the process, for 23 Rule 14 then stipulated that the Commission -- and again 24 I emphasise the Commission as a whole -- would endeavour 25 to reach a decision by consensus. This necessarily</p> <p style="text-align: center;">Page 38</p>	<p>10:40 1 Millington email, the Khartoum meetings and the failure 2 to endeavour to reach consensus of the whole ABC. 3 Our opponents have also not uttered a single word 4 about Dr Johnson's embarrassing revelation that he 5 recently advised the Government of South Sudan on the 6 north/south boundary issue. This pregnant silence 7 arouses the suspicion that the SPLM/A also recognises 8 that Dr Johnson's conduct is indeed an embarrassing 9 admission for one of those five experts who were, in the 10 SPLM/A's own words, "obviously impartial". 11 This concludes this brief presentation, 12 Mr President. If you could now ask Professor Crawford 13 to take the floor. Thank you very much. 14 THE CHAIRMAN: I thank you and I call Professor Crawford. 15 (10.41 am) 16 Submissions by MR CRAWFORD 17 PROFESSOR CRAWFORD: Mr President, members of the 18 Tribunal, on the issue of excess of mandate my own 19 task is the interpretation of the formula, the key 20 substantive element of the ABC's mandate. You will 21 notice Mr Born omitted to deal with that yesterday. 22 I gather he or perhaps one of his co-counsel will do 23 so this morning. 24 It's remarkable that he spent an hour on grazing 25 rights, the best part of an hour on finality, yet he</p> <p style="text-align: center;">Page 40</p>

<p>10:42 1 never discussed the meaning of the substantive formula. 2 That being so, I had no occasion to speak in our reply 3 on excess of mandate. I shouldn't be here. But it is, 4 I regret, necessary to do so on another point. 5 There are, you will by now have observed, styles in 6 advocacy. Apart from some light remarks on the SPLM/A's 7 lexicon, we have so far chosen not to respond in kind to 8 allegations of incompetence, frivolity and making 9 untenable arguments. But there's now an allegation of 10 bad faith against the agent, which seemed at times to 11 extend to a claim of unprofessional conduct against 12 counsel. The former at least requires me to say 13 something. 14 The question is, not to mince words, whether 15 Ambassador Dirdeiry has been dishonest in stating, as 16 agent for the Government of Sudan, that the Government 17 of Sudan had no notice as to the final presentation of 18 the ABC experts' report. The SPLM/A's allegations on 19 these issues have been repeated from an early stage of 20 the proceedings. The SPLM/A has now requested that the 21 Tribunal draw negative inferences from the fact that 22 Ambassador Dirdeiry has not given evidence in these 23 proceedings. 24 Now, the merits of the legal arguments on the ABC 25 consensus claim are for you, and I do not propose to add</p> <p style="text-align: center;">Page 41</p>	<p>10:45 1 a perfectly feasible and commonly used procedure, the 2 SPLM/A declined to ask him any questions about his 3 witness statement. Vice President Taha, whose English 4 is perfect, had and has responsibility within the 5 presidency for the conduct of the Abyei matter both 6 before the ABC and before this Tribunal on behalf of the 7 Government. 8 In paragraph 31 of his statement, Vice President 9 Taha makes direct reference to his lack of awareness of 10 the reason for the experts' meeting of 14th July: 11 "I personally felt the only reasonable request the 12 experts might make in that meeting was to seek 13 permission of the parties to utilise all the time as 14 stated in the Abyei Protocol with a view to arrive at 15 a consensus." 16 I would remind the Tribunal that the Abyei Protocol 17 provided for a time limit of as long as two years for 18 the ABC to fulfil its mandate. 19 Three additional witnesses, all members of the ABC, 20 have testified to the fact that they did not know why 21 the meeting was taking place. Mr Ahmed Assalih Sallouha 22 states that the experts had asked for an extension of 23 one month before the final presentation, yet they "never 24 said what they would be doing during this month". 25 Further, during that month the Government members of</p> <p style="text-align: center;">Page 43</p>
<p>10:43 1 anything to what Ms Malintoppi has said so lucidly on 2 this point. But the suggestion that a decision was 3 taken that the agent not give evidence so as to shield 4 him from cross-examination on a point on which he is not 5 telling the truth impugns my credit as well as his. The 6 issue concerns me and not Ms Malintoppi, whose name 7 counsel for the SPLM/A apparently cannot pronounce; he 8 didn't mention it once yesterday. 9 Mr President, prudently it is not the practice for 10 the agent of a state to give written or oral evidence. 11 This is for good reason, given the Nuclear Tests 12 principle and the agent's authority to speak for the 13 state in the matter of the dispute. Not having given 14 a witness statement, it would have been entirely 15 inappropriate for the agent to speak as a witness other 16 than from the dossier on these issues. 17 As an alternative, the Government, acting on advice, 18 submitted testimony from one of the three members of the 19 presidency, the Vice President of Sudan, 20 Mr Ali Osman Mohamed Taha. If anyone should have been 21 aware of when the final presentation of the ABC report 22 was to take place, it would have been one of the three 23 individuals to whom that presentation was to be made. 24 I note that although we made the vice president 25 available for cross-examination by video-link,</p> <p style="text-align: center;">Page 42</p>	<p>10:46 1 the ABC: 2 "... had never spoken about nor anticipated any 3 experts' decision on the boundary. They never told us 4 that this final report was ready the way they told 5 General Sumbeiywo three days later." 6 Mr Zakaria Atem reveals that none of the Government 7 of Sudan ABC members were "informed of the ABC experts' 8 conclusions, or of the fact that they were going to 9 present a final report to the presidency." 10 Mr Abdul Rasul El-Nour Ismail clearly states that: 11 "This meeting was not agreed to before by the ABC as 12 an ABC meeting. They never briefed nor consulted the 13 ABC members on what they wanted to say to the 14 presidency." 15 All these witnesses have been presented by the 16 Government in this arbitration. The [SPLM/A] has 17 indicated that they will question only Mr Zakaria, and 18 only in the delimitation phase. His witness statement 19 contains material relevant to delimitation. They called 20 no one for cross-examination on excess of mandate. 21 Finally I should note that from the private 22 correspondence between the ABC experts and IGAD 23 personnel, which is now in the record, correspondence to 24 which the SPLM/A has apparently had access, it is 25 Mrs Keiru's email of 7th May 2005 which is relied on to</p> <p style="text-align: center;">Page 44</p>

<p>10:48 1 show that she told Ambassador Dirdeiry of the purposes 2 of the meeting. 3 There are two points to make about this: first, 4 Ambassador Dirdeiry was not a recipient of the email; 5 secondly, Ms Keiru is not a witness. 6 Mr President, members of the Tribunal, all of the 7 Government's witnesses are clear in this respect: the 8 Government was never informed of the reason for the 9 meeting. The Government rejects counsel for the 10 SPLM/A's allegations of bad faith against its agent and 11 those witnesses. As for counsel, we have broad backs. 12 Mr President, members of the Tribunal, this 13 concludes the Government's response on excess of 14 mandate. 15 THE CHAIRMAN: Professor Crawford, I thank you. 16 I understand that there is a question on the part of 17 Professor Gerhard Hafner. 18 (10.49 am) 19 Questions from THE TRIBUNAL 20 PROFESSOR HAFNER: Thank you very much, counsel. Thank 21 you very much for the explanations, but nevertheless 22 one question remains for me. 23 In your view, what was the status of the members of 24 the ABC other than the experts? Were their acts 25 attributable to the parties, or were they independent?</p> <p style="text-align: center;">Page 45</p>	<p>10:51 1 have not been examined or cross-examined or even called. 2 THE CHAIRMAN: I thank you very much. Professor Reisman 3 has a question. 4 PROFESSOR REISMAN: Thank you, Mr President. This is 5 a question for Professor Pellet, and I will pose the 6 same question to counsel for SPLM/A after their 7 rebuttal. 8 With respect to the standard that is to be applied 9 to the question posed in the first paragraph of 10 Article 2, is the standard with respect to substantive 11 excess of mandate whether ABC rendered a plausible or 12 reasonable interpretation, or whether it rendered 13 a correct interpretation of its mandate? 14 PROFESSOR PELLET: Sir, I would think that prima facie my 15 answer would be neither one nor the other. 16 If I understand your question, I understand it as 17 meaning that you are asking me: under 2(a) is there any 18 possibility for us to discuss the interpretation of the 19 answer to the question? I would say that this is not 20 the point, and that precisely under 2(a) the question is 21 not whether the experts erred a little bit or much, but 22 that they answered or did not answer the question. 23 So my answer would be that in any case this is not 24 the question. For me the question under 2(a) is really: 25 have they interpreted their mandate correctly or not?</p> <p style="text-align: center;">Page 47</p>
<p>10:49 1 Thank you very much. 2 PROFESSOR CRAWFORD: Sir, there is a distinction which 3 both parties accept between the ABC, the Commission, 4 and the expert members. And the rules, speaking 5 compendiously, attribute some functions to the ABC and 6 some functions to the experts, and are very careful in 7 doing so. 8 Obviously when persons who have multiple capacities 9 act in a particular matter, there is a question of the 10 capacity in which they act, and that may only be able to 11 be assessed in relation to the factual situation. If 12 the ABC was operating as such, one would expect the ABC 13 to be convened by its chair, Ambassador Petterson, which 14 I understand was not the case in relation to the 15 particular meeting. So I think it's a question of 16 assessment in relation to a particular point. 17 Having said that, obviously information which is 18 shown to have been imparted to the person who was acting 19 as the principal representative of the Government -- or 20 indeed of the SPLM/A -- would be attributable to the 21 Government in relation to that situation. 22 I was making an evidentiary point. A point that 23 I didn't make, which I might have made, is that these 24 cases are difficult enough without unproven allegations 25 of bad faith in circumstances where relevant witnesses</p> <p style="text-align: center;">Page 46</p>	<p>10:53 1 If this is the question, I would think that the standard 2 is very strict and that all the legal niceties, as 3 I said, are irrelevant. They should have complied in 4 all and every detail to the mandate. 5 THE CHAIRMAN: Alright, I thank you. We will break until 6 11.30. 7 (10.54 am) 8 (A short break) 9 (11.34 am) 10 THE CHAIRMAN: It is now for the SPLM/A to make its 11 presentation. 12 MR BORN: Thank you very much, Mr President. 13 Submissions by MR BORN 14 MR BORN: This may be a little bit ragged, as they say; we 15 are responding on the fly to a number of arguments. 16 I'd like to start first with some of the things that 17 were said this morning. 18 The Government, and in particular Professor Pellet, 19 spent some time discussing the general principles of 20 finality and res judicata the essential argument again 21 was that by agreeing to arbitrate before you, before 22 this Tribunal, the parties had waived or nullified or 23 somehow set aside all the general principles of finality 24 and res judicata which we spent so much time going 25 through yesterday and in our written submissions.</p> <p style="text-align: center;">Page 48</p>

<p>11:34 1 I would suggest to you that the Government's 2 position on that is not only wrong as a matter of 3 principle -- you've seen the authorities that we've 4 cited, how important the principles of finality are, the 5 important standards of proof that they give rise to and 6 the important policies that underlie those rules, none 7 of which is set aside by an agreement to arbitrate. 8 In addition, though, and if you look on the current 9 screen, you can see the Government's position on this is 10 intellectually incoherent. 11 The Government concedes repeatedly that particularly 12 onerous and elevated standards of review, standard of 13 proof, apply to it in its effort to demonstrate its 14 various claims. We say many of those claims are 15 inadmissible here, but irrespective of that, the 16 Government acknowledges on multiple occasions that 17 elevated standards of proof apply in these proceedings 18 for its claims. 19 The reason for that is obvious. The reason for that 20 is that the principles of finality that we have 21 discussed continue to apply notwithstanding the 22 agreement to arbitrate. 23 Where to these standards that the Government refers 24 to come from? They don't come from the Government's 25 good graces, they don't come from a voluntary concession</p> <p style="text-align: center;">Page 49</p>	<p>11:37 1 an authority on international commercial arbitration 2 having to do with reasoned awards. If this were 3 a classroom I would tell my student to read the title of 4 the book; it is called International Commercial 5 Arbitration. I would also tell the student to read more 6 carefully the book, because the book more carefully sets 7 out the very limited circumstances in which annulment or 8 non-recognition of an award can be denied on grounds of 9 reasoning. 10 When you look carefully at the authorities which we 11 set out in detail yesterday, it is indeed almost 12 universally recognised, while there may be rules in some 13 regimes for there to be reasoned awards, the 14 consequences of a tribunal not providing a reasoned 15 international commercial arbitration award is not 16 annulment, is not setting aside, is not non-recognition. 17 That's I think very clear from all the authorities, as 18 any student would know if they read them. 19 Third, turning to the question of substantive 20 mandate, we made lengthy submissions yesterday as to how 21 the substantive definition in Article 1.1.2 of the 22 Abyei Protocol is a question of the merits of the 23 parties' dispute. Professor Crawford referred this 24 morning to the substantive formula, the substantive 25 formula in Article 1.1.2 which defines the Abyei Area.</p> <p style="text-align: center;">Page 51</p>
<p>11:36 1 that they need to make particular elevated showings; 2 they rather come from the law. They come from generally 3 recognised principles of law, general principles of law, 4 which article 3 of the Arbitration Agreement refers to 5 and which are extremely well settled, which in turn 6 dictate, mandate, rules of elevated proof, standards of 7 proof. 8 The reason the Government refers to these particular 9 standards, which it itself says it must meet, is because 10 of these principles which remain fully applicable in 11 these proceedings. 12 The Government on the substance of these principles 13 gets them wrong, they dilute them, they understate their 14 true onerous character, but the conceptual point that 15 the Government acknowledges in recognising these 16 standards is that the standards of presumptive finality 17 and res judicata, which are always applicable, apply in 18 these proceedings as well, and that is the reason that 19 it has made all these concessions. 20 So the suggestion that by agreeing to arbitrate 21 before you the parties have changed the legal regime 22 applicable to finality and res judicata is not only 23 completely wrong but contradicted by Government's own 24 concessions. 25 Second, and very briefly, the Government referred to</p> <p style="text-align: center;">Page 50</p>	<p>11:39 1 It is essential to understand -- and 2 Professor Pellet conceded this in fact in his answer to 3 Professor Reisman's question -- that an error in the 4 interpretation of that substantive formula, the 5 definition of Abyei Area in Article 1.1.2 as "the area 6 of the nine Ngok Dinka chiefdoms transferred to Kordofan 7 in 1905", is not the basis for an excess of mandate. 8 Professor Pellet, in answer to Professor Reisman's 9 question, said: neither of those two propositions is 10 right, it's neither a little bit of a mistake or a big 11 bit of a mistake; but rather, if there is an error in 12 the substantive interpretation of the definition of the 13 Abyei Area, that is a matter of substance, that is 14 a matter that is not a question of excess of mandate for 15 this Tribunal to review. 16 That's important because then when you look at 17 Article 5.1 of the Abyei Protocol, which defines the 18 experts' mandate, that mandate is to define and 19 demarcate that substantively defined definition, the 20 mandate is to define and demarcate that. 21 Included in that mandate -- as Professor Pellet 22 expressly conceded this morning when you follow through 23 his logic, and as Professor Crawford in his reference to 24 a substantive formula implicitly conceded -- is the 25 inevitable and inescapable fact that the experts, like</p> <p style="text-align: center;">Page 52</p>

<p>11:40 1 you, will need to interpret that substantive definition 2 of the Abyei Area in Article 1.1.2. 3 That substantive interpretation of the definition of 4 the Abyei Area in Article 1.1.2 is itself 5 a non-reviewable substantive determination. How can we 6 know that so clearly? We know it by thinking about what 7 your mandate is. 8 I said repeatedly yesterday and in our written 9 submissions that if the Government's logic were correct 10 then your award in this case could be challenged on the 11 grounds of an excess of mandate if you made 12 a substantive error, in the eyes of either party, in 13 interpreting the definition of the Abyei Area, in 14 interpreting the area of the nine Ngok Dinka chiefdoms 15 transferred to Kordofan in 1905. 16 The Government didn't rebut that when they spoke on 17 Saturday. The Government didn't come back to that this 18 morning. They didn't disagree with that. The reason is 19 that it cannot be the case that if the experts made 20 a substantive mistake in interpreting the area of the 21 nine Ngok Dinka chiefdoms transferred to Kordofan in 22 1905, a phrase that they inevitably and inescapably did 23 have to interpret in fulfilling their mandate under 24 Article 5.1 to define and demarcate that area, that 25 cannot be -- it cannot be -- an excess of mandate, and</p> <p style="text-align: center;">Page 53</p>	<p>11:44 1 headquarters, their home and so forth. 2 When it came to the areas where the Ngok and the 3 Messiriya did in fact share rights, what the experts 4 concluded was the goz, where there were equal shared 5 secondary rights, the experts in fact, insofar as it 6 would be relevant, which I don't think it is, treated 7 the parties equally. We saw yesterday how they divided 8 that shared rights area exactly between the parties. 9 We heard this morning some emphasis on Article 5 of 10 the Abyei Annex, which you can see on your screen right 11 now, and I'd like to come back to that. It has 12 particular relevance to our waiver and exclusion 13 arguments, which I did not have a chance to spend much 14 time on yesterday. 15 Those arguments we maintain fully, obviously, and 16 I note that the Government hasn't to any serious extent 17 contested those arguments. The one point that they make 18 is on Article 5, and I'd like to spend a little bit of 19 time on that. 20 First, it is not correct that Article 5 discusses 21 the ABC report; it discusses rather in the first 22 sentence, as you can see -- and this is contrary to what 23 Government's counsel Ms Malintoppi said this morning: 24 "The ABC shall present its final report to the 25 presidency before the end of the ... period."</p> <p style="text-align: center;">Page 55</p>
<p>11:42 1 we know it because if you made the same mistake then 2 either party if they didn't agree with you would be able 3 to challenge on exactly the same grounds, excess of 4 mandate, your award. 5 That is not what the law says. The law is clear, 6 and Professor Pellet recognised that legal principle 7 when he answered Professor Reisman's question and said 8 that there is no substantive review of the substantive 9 analysis of the definition of the Abyei Area in 10 Article 2.1. That is game, set and match on their 11 substantive mandate arguments. 12 Next we heard from Professor Pellet very briefly 13 that the experts supposedly did not treat the Ngok and 14 the Messiriya equally. He acknowledged that that was in 15 a sense a quintessential disagreement with the substance 16 or fairness, as he might put it, of the experts' 17 determination, and for that reason one hardly needs 18 spend any time on it, though just for the sake of 19 balance I'd note that it's emphatically wrong. 20 He neglects to exercise the fact that the Messiriya 21 had extensive territories well to the north of the goz. 22 We will see in the coming days that the Messiriya had 23 dominant rights, all sorts of other rights in the area 24 of Muglad, Babanusa, the vast areas to the north of the 25 goz, where they have, as we will see referred to, their</p> <p style="text-align: center;">Page 54</p>	<p>11:45 1 The general statement. You have seen how this is 2 detailed in a number of the other agreements and Rules 3 of Procedure that we talked about yesterday. It then, 4 more specifically, says: 5 "... the report of the experts, arrived at as 6 prescribed in the ABC Rules of Procedure ..." 7 It's obvious that this sentence is addressing how it 8 is that the ABC functioning as a Commission will have 9 its report presented to the presidency. 10 The important thing is that when that second 11 sentence comes to address the issue it talks 12 specifically about "the report of the experts", and we 13 also saw how the Rules of Procedure said exactly the 14 same thing; it talked about how the experts would 15 prepare their final report, and we saw the same thing in 16 the Programme of Work. 17 It was very clear, I would suggest, that this was 18 the report of the experts; it was presented in the 19 presence of the full ABC and it reflected the decision 20 of the ABC, but it was a report of the experts, which 21 was what was intended. 22 I would also like to address the language arrived at 23 as prescribed in the ABC Rules of Procedure. It's been 24 suggested that that in a sense takes away everything 25 that is given in the final phrase of the sentence and</p> <p style="text-align: center;">Page 56</p>



<p>11:46 1 indeed the whole sentence itself, namely: 2 "The report of the experts shall be final and 3 binding on the parties." 4 By referring to the report of the experts as being 5 arrived at pursuant to the ABC Rules of Procedure, the 6 parties in no sense meant to, if you will, undo the 7 final and binding character of their report. 8 That is rather a descriptive phrase. It describes 9 what report of the experts one is talking about. It's 10 as if one refers to the agreement between parties A and 11 B dated such-and-such a date. It is descriptive and it 12 is not meant to put in as a condition on the final and 13 binding status of the report some right to challenge 14 procedurally all the steps that the experts took in 15 rising at the report. 16 I would also emphasise that the clause refers only 17 to the ABC Rules of Procedure; it does not refer to the 18 procedural provisions of the Abyei Protocol or the Abyei 19 Annex or the Terms of Reference. Those Rules of 20 Procedure, as we saw yesterday and we will see again in 21 a moment, were to be determined by the experts 22 themselves. 23 Those rules -- and those are the only ones that are 24 referred to in this phrase -- were ones within the power 25 of the experts alone to determine, and therefore by</p> <p style="text-align: center;">Page 57</p>	<p>11:49 1 question of the experts' procedural discretion. I spent 2 a good deal of time on that yesterday; I don't want to 3 spend much more time on that today. But it was 4 suggested that, by the parties agreeing to the Rules of 5 Procedure, the experts had somehow constrained their 6 discretion to make procedural rulings, to take further 7 procedural steps and so forth. That is as far from the 8 truth as could be. 9 We have all presided in arbitrations, we have all 10 followed the very good and normal practice that, when 11 the Tribunal commences an arbitration, it will seek to 12 have the parties agree to an initial procedural order. 13 There are authorities that are cited on the current 14 slides that address these points. I'm not going to read 15 them out for you. But, among others, Yves Derains and 16 Eric Schwartz, former Secretary-Generals of the ICC, 17 have described how it is good practice for the parties 18 to be asked to agree to the initial procedural rules in 19 a case. That's a way to put the case on an efficient 20 and cooperative basis to go forward. 21 It in no way suggests -- and when you go through the 22 authorities that I have cited here on the screen you 23 will see that it in no way suggests -- that the Arbitral 24 Tribunal or any other decision-maker loses its authority 25 to make procedural decisions or further procedural rules</p> <p style="text-align: center;">Page 59</p>
<p>11:48 1 referring only to those rules and not to other rules 2 that had been agreed by the parties, this phrase, far 3 from suggesting some sort of procedural second-guessing 4 of what the experts did or some sort of opportunity to 5 appeal the report, to challenge its final and binding 6 basis on procedural grounds, actually does exactly the 7 opposite, if one were to read it as some kind of 8 condition on the report. 9 The only procedural reference that it makes is to 10 the ABC Rules of Procedure, which it was for the experts 11 to determine, and does not refer to the Abyei Annex or 12 the other provisions. 13 So I would suggest that the notion that the parties, 14 in inserting this phrase into the second sentence of 15 Article 5, meant to provide for some sort of procedural 16 review is as far from the view as could be the case. 17 We also know that from the other provision that the 18 parties entered into, which you can also see on the 19 slide, in Article 5.3, which said that the report would 20 be put into immediate effect. If there were to be some 21 sort of procedural review, as the Government now 22 suggests -- and which it never thought about at the 23 time -- you wouldn't be putting the report into 24 immediate effect. 25 I'd like to move on with that and turn to the</p> <p style="text-align: center;">Page 58</p>	<p>11:51 1 by virtue of having the parties agree to procedural 2 rules. 3 I would note that the Government has not cited any 4 contrary authority that would support that suggestion, 5 that the experts somehow constrained their otherwise 6 extraordinarily broad discretion by having the parties 7 agree to the rules which they had drafted. 8 I'd like to turn to the question of the Khartoum 9 meetings. We saw yesterday that Article 4 of the 10 Abyei Annex granted the experts broad, independent 11 investigatory power to consult both the British archives 12 and other relevant sources on Sudan wherever they may be 13 located. 14 We saw also how that provision very comfortably 15 covered both the interviews of Professor Cunnison and 16 Mr Tibbs, as well as the interviews that occurred in 17 Khartoum, the consideration of the Millington email, and 18 such other investigatory actions that the experts might 19 have taken or wished to have taken. 20 The Government suggested this morning for the first 21 time that Professor Cunnison and Mr Tibbs are really 22 books, and that you can treat the reference to the 23 "British archives and other sources" as simply 24 a reference to books, and by virtue of their 25 publications that's what they are.</p> <p style="text-align: center;">Page 60</p>

<p>11:52 1 That obviously makes no sense. They are people. 2 Some of them are sitting here. They were interviewed. 3 They were interviewed as fact witnesses by the ABC, who 4 attached their fact witness interviews to the ABC 5 report. They were put in as fact witnesses; not quite 6 independent in the sense that Ms Malintoppi would 7 suggest, because they were put in by the parties here on 8 their respective sides of the cases in support of their 9 case; Professor Cunnison on the Government's side -- 10 we'll see in fact in the coming days that his testimony 11 supports the SPLM/A decisively, and not the Government, 12 but nonetheless a fact witness for the Government -- and 13 the same for Mr Tibbs on the side of the SPLM/A. 14 The fact that the Tibbses and the Cunnisons could be 15 interviewed pursuant to Article 4 as part of the 16 experts' broad investigatory authority simply 17 demonstrates the breadth of that authority, to make it 18 completely clear, and there was tellingly no response at 19 all to this by the Government, by Ms Malintoppi, this 20 morning. 21 Ambassador Dirdeiry gave an explication of what 22 Article 4 of the Abyei Annex meant in his discussions 23 before the ABC experts. I went through that discussion 24 in detail yesterday, and saw how he talked about exactly 25 what Article 4 meant. That was a contemporaneous</p> <p style="text-align: center;">Page 61</p>	<p>11:55 1 The Government has also not responded in any 2 meaningful way to the very detailed witness evidence 3 that was given by the SPLM/A witnesses regarding the 4 discussions in Muglad and Abyei at dinner about the 5 experts' plans to interview additional witnesses in 6 Khartoum. That witness testimony is detailed, and 7 describes the circumstances and the people that were 8 involved in the discussions. 9 You can see on the current slide: what the 10 Government said in its oral closings [on Saturday] was: 11 "The [SPLM/A] witnesses in question testified as to 12 their personal belief." 13 No, not belief, knowledge: 14 "But, as stated in the Government's rejoinder, their 15 statements are framed in very general terms ..." 16 No, not general terms, identifying people, place and 17 what was said: 18 "... and provide no direct evidence that the experts 19 ever formally notified both parties or the other ABC 20 members." 21 Consider that formulation carefully. I would 22 suggest it is artful. It says there's "no direct 23 evidence that the experts ever formally notified both 24 parties." That is very similar, I would suggest, to the 25 Government's statement in its memorial that there was</p> <p style="text-align: center;">Page 63</p>
<p>11:53 1 interpretation by the experts in front of the parties. 2 There can be no doubt as to what the broad investigatory 3 authority of the experts was at the time. 4 We also saw how -- and I'd like to turn to the 5 witness testimony of a couple of the Government's 6 witnesses on this -- the Government's witnesses have 7 said that they were surprised -- this was 8 Ahmed Assalih Sallouha and Abdul Rasul El-Nour Ismail -- 9 by the Cunnison and Tibbs interviews. 10 One of the witnesses says -- and you should be able 11 to see this on the slide -- that the GoS members knew 12 that such meetings with Professor Cunnison and the 13 Tibbses had taken place only after the experts' report 14 was released. You can see that on the current slide, in 15 the highlighted sentence at the end. It's extremely 16 difficult to understand how that could be said. 17 If we could turn to the slide where Dr Johnson makes 18 his comments that we also saw yesterday. Dr Johnson 19 explained in detail in front of these two men that gave 20 that witness testimony that he had seen 21 Professor Cunnison and that he was going to go back with 22 the other experts and interview both Professor Cunnison 23 and Mr and Mrs Tibbs. The suggestion that there was 24 a surprise about this happening is as far from the truth 25 as could be.</p> <p style="text-align: center;">Page 62</p>	<p>11:56 1 "no official notice". 2 The fact of the matter is: this amounts to 3 a concession that, as the SPLM/A witnesses say, there 4 was a discussion conveying information to the relevant 5 people. The fact that it wasn't official or that it 6 wasn't formal is neither here nor there. 7 The ABC rules provided that these were supposed to 8 be informal meetings. The fact of the matter is -- and 9 contrary to the witness testimony that is put forward, 10 albeit in general terms, by the Government, which cannot 11 be relied on -- the ABC experts in terms described what 12 they were going to do in Khartoum. The current 13 complaints about "Oh my goodness, the experts went off 14 and interviewed people" is simply contrary to what 15 everybody was doing and expecting at the time. 16 There's been some reference to the so-called "note 17 on testimony". This is a 25th April 2005 note that the 18 experts prepared. It reported on what had been done in 19 the field visits between 14th and 20th April 2005. Much 20 has been made of the fact that: oh, the Khartoum witness 21 interviews weren't included in this. Well, neither were 22 the Cunnison and Tibbs interviews. 23 The reason that they weren't included is because 24 this is a note on field visits between 14th and 25 20th April; it's not a note about interviews in England,</p> <p style="text-align: center;">Page 64</p>

<p>11:57 1 and it is not a note about interviews in Khartoum. 2 Those interviews took place after 14th-20th April; they 3 took place on 8th May, they took place later in May, the 4 first of them took place the day after the report of 5 this, 21st April. 6 The suggestion that the experts somehow tried to 7 leave out what they were doing is absurd. They told 8 people what they were doing. There was no surprise 9 about it, as we saw. There was a telling silence about 10 this this morning: Mr Bona Malwal himself arranged one 11 of those at the behest of the Government. 12 There's also been some criticism of Dr Johnson's 13 formulation at one of those meetings, the May 6th 14 meeting, his formulation of the definition of the Abyei 15 Area. There's been some suggestion that he used 16 a different formulation at that meeting, and that 17 somehow caused the Government prejudice; had it heard 18 this formulation it would have protested; and that his 19 formulation was completely wrong: it didn't use the word 20 "transferred", they say, and it doesn't even refer to 21 1905. I think we need to catch the slides up. 22 You can see here, in the yellow highlighted area, 23 the reference to Dr Johnson's supposedly offending 24 remark. He said: 25 "The area to be transferred is described in the</p> <p style="text-align: center;">Page 65</p>	<p>12:00 1 because they looked at the Sudan Intelligence Report 2 No. 128 which referred to 1905. The suggestion that 3 there's some kind of mistake here is completely absurd. 4 Then, when we look, we can also see that Dr Johnson 5 and the other experts made exactly the same sorts of 6 formulations in all of their other descriptions. 7 I showed you some of these yesterday, I'm going to show 8 them to you again today. 9 The witness repeatedly used this same formulation. 10 The Government disagrees with it substantively, but the 11 idea that Dr Johnson say something different in secret 12 to the Ngok Dinka or somebody else is simply absurd. He 13 consistently, like the other experts, used the same 14 description of a transfer of the Ngok Dinka chiefdoms in 15 1905, and that the issue was what was the area of the 16 Ngok Dinka at that point. 17 I'd like to move on very quickly to the question of 18 the failure to act through, in the Government's eyes, 19 Article 14 of the Rules of Procedure. I'm not going to 20 spend much time on this. The question isn't bad faith 21 of the Government or the Government's counsel much less. 22 I certainly don't want to accuse Professor Crawford of 23 bad faith in the slightest, and I don't. 24 What I do, though, want to do is to emphasise what 25 the evidence says and what it doesn't say. The</p> <p style="text-align: center;">Page 67</p>
<p>11:59 1 Protocol as the area of the nine Ngok Dinka chiefdoms, 2 no one else. And we were supposed to discover what area 3 was being used and claimed by these nine chiefdoms when 4 the administrative decision was made to place them in 5 Kordofan." 6 It's instructive to look at this. The Government 7 says, "Oh my goodness, it didn't refer to 1905", and, 8 "Oh my goodness, it didn't refer to a transfer of 9 territory". This nicely illustrates the fundamental 10 point that the Government simply disagrees substantively 11 with the way that the experts defined the Abyei Area. 12 First of all, it does refer to a transfer. It talks 13 about the administrative decision made to place them in 14 Kordofan. The reference is to the transfer of the 15 Ngok Dinka tribes, the nine Ngok Dinka chiefdoms, and 16 the Government's disagreement is really with the fact 17 that the experts interpreted this as a transfer of the 18 tribes and not a transfer of a specific area. There is 19 a reference to a transfer. 20 The suggestion that there's no reference to the date 21 is also absurd. There is a reference specifically to 22 when the administrative decision was made to place them 23 in Kordofan. Dr Johnson didn't need to go on and say, 24 "And as we all know" -- because we are going to see 25 everybody did know -- "the decision was in 1905",</p> <p style="text-align: center;">Page 66</p>	<p>12:01 1 Government had a choice who to name as its agent, the 2 Government had a choice whom to call as witnesses, and 3 it made deliberate decisions there. There is evidence 4 in the record and there is evidence not in the record, 5 and one may very properly draw inferences, and I would 6 suggest very powerful negative inferences, from that. 7 I'd like to move on. Without spending a lot of time 8 on the additional testimony, I would simply urge you, as 9 you read the government's witness statements on these 10 particular points, to have particular mind to the 11 denials that anybody knew what was going to happen on 12 July 14th. That is the Government's case. That is the 13 testimony that Professor Crawford so righteously 14 defended as true and correct this morning. 15 The testimony is: everybody, all five Government 16 experts, went off to the presidential palace not knowing 17 what was going to happen. They all went off to the 18 presidential palace not knowing why they were going. 19 I would suggest to you: think about that. Does that 20 make sense? Are you going to go and sit down with 21 President Bashir and not know whether it's birthday 22 party or some meeting on other issues? No. 23 You are a member of the ABC Commission. You've been 24 working on it for three months. Ambassador Dirdeiry is 25 the head of the delegation. Aren't you going to call</p> <p style="text-align: center;">Page 68</p>

<p>12:03 1 him and say, "Why am I going to the presidential 2 palace?" Of course you are. But you don't need to 3 because he's told you and other people have told you why 4 you're going. 5 The suggestion that nobody knew why they were going 6 to the presidential palace is, I would suggest, 7 completely incredible. One doesn't need to talk about 8 good faith or bad faith; one simply needs to talk about 9 what makes sense. 10 I'd like to move on to the question of substantive 11 mandate, which I've already touched on briefly, and in 12 fact jump very quickly to the definition of the Abyei 13 Area. 14 The Government made much, Professor Crawford made 15 much of how the experts erred in their interpretation of 16 Article 1.1.2 of the Abyei Protocol, the definition of 17 the Abyei Area. 18 It's interesting that Professor Crawford and the 19 Government began their presentation on excess of mandate 20 with this point because you will recall that the 21 Government's memorial treated this in its delimitation 22 discussion, as it should have -- this is a part of the 23 question of substance -- and the Government now, wanting 24 to again recharacterise its case in various ways, has 25 moved it to excess of mandate. I will therefore address</p> <p style="text-align: center;">Page 69</p>	<p>12:06 1 chiefdoms transferred to Kordofan in 1905". As a plain 2 English language reading of that phrase makes clear, 3 Article 1.1.2 refers to the area of the nine Ngok Dinka 4 chiefdoms which were collectively transferred to 5 Kordofan in 1905; it does not refer to the transfer of 6 some sub-part of the area of the nine Ngok Dinka 7 chiefdoms. 8 The Government claims that Article 1.1.2 should be 9 interpreted as referring to, and this is a quote from 10 its submissions, "the area of the nine Ngok Dinka 11 chiefdoms which was transferred to Kordofan in 1905", 12 and in particular that: 13 "The area transferred cannot have already been part 14 of Kordofan prior to the transfer." 15 Put differently, if some portion of the Ngok Dinka 16 chiefdoms was located north of the Kordofan/Bahr 17 el Ghazal boundary in 1905, the Government claims that 18 Article 1.1.2 excludes that part of the Ngok Dinka 19 territory from the Abyei Area. 20 Indeed the Government's interpretation -- and it's 21 important to appreciate this -- is even if 66% or 88% or 22 98% of the historical ancestral Ngok Dinka territory was 23 located north of the Kordofan/Bahr el Ghazal boundary, 24 wherever that might have been in 1905, all of that 25 territory would be excluded from the definition of the</p> <p style="text-align: center;">Page 71</p>
<p>12:04 1 it now, although it really belongs in the delimitation 2 discussion. 3 When one comes to look at Article 1.1.2 it is, 4 I would suggest, completely clear why the ABC experts 5 consistently arrived at the conclusion that they did as 6 to the definition of the Abyei Area. The natural, 7 grammatically correct meaning of Article 1.1.2 in the 8 English language refers to the entire territory of the 9 nine Ngok Dinka chiefdoms that were collectively 10 transferred to Kordofan in 1905. 11 That meaning is clearly required by the language of 12 the Abyei Protocol as well as by the parties' purposes 13 in entering into those agreements. That meaning is also 14 confirmed by the testimony of those involved in drafting 15 the parties' agreements and, as we've just seen, the 16 interpretation that the ABC experts repeatedly expressed 17 without objection from the parties during the ABC 18 proceedings. 19 Preliminarily, as I've already mentioned, this is 20 a question of substance, not excess of mandate. In any 21 event, the experts correctly interpreted the 22 Abyei Protocol. 23 The definition in Article 1.1.2 has a clear and 24 straightforward meaning. Article 1.1.2, as we've heard 25 before, refers to "the area of the nine Ngok Dinka</p> <p style="text-align: center;">Page 70</p>	<p>12:07 1 Abyei Area. 2 Let's start with rules of the English language. The 3 English language is different from some other languages, 4 like German, where you can pile words on top of each 5 other. We've all tried to read Kant and other things 6 and recognised what sentences can be like. The English 7 language has rules. It's simpler and -- at least to 8 an English speaker who tries in German occasionally -- 9 clearer, with the greatest of respect. 10 This is made clear by the experts' report of 11 Dr David Crystal OBE. He received his OBE for his 12 contributions to the English language and he is a very 13 distinguished expert on the English language. His 14 report, which is worth reading, describes the text of 15 Article 1.1.2 as: 16 "... a noun phrase consisting of a head noun (the 17 area) which is then post-modified by a prepositional 18 phrase (of the nine Ngok Dinka chiefdoms), and this is 19 then followed by a non-finite clause (transferred to 20 Kordofan in 1905)." 21 Professor Crystal then goes on to say: 22 "The question is how the non-finite clause relates 23 to the two preceding constructions." 24 And he says the natural and grammatically correct 25 way to interpret a post-modifying construction in a noun</p> <p style="text-align: center;">Page 72</p>

<p>12:09 1 phrase is as relating to the immediate preceding noun. 2 This is referred to as the grammatical rule in the 3 English language of proximity, which Professor Crystal 4 explains, and he illustrates it with an English nursery 5 rhyme. It is, and I'll read it: 6 "This is the dog that worried the cat that killed 7 the rat that ate the malt that lay in the house that 8 Jack built." 9 We were very happy to find this nursery rhyme, 10 because it so clearly illustrates this simple rule of 11 English grammar, which some other languages don't have, 12 but which is really important to interpreting this 13 language. In principle any one of those "that"s could 14 refer all the way back to the dog. But in reality, 15 applying the rule of proximity, that isn't what you do. 16 You instead refer each phrase to the one immediately 17 preceding it. 18 This is not rocket science, in some sense. But 19 since the Government takes the position that it 20 repeatedly asserts and surrounds with emphatic rhetoric, 21 it is necessary to go back to textbook grammar rules. 22 Contrary to what Professor Crawford told you [on 23 Saturday] that, "There's no rule that adjectival phrases 24 such as 'transferred to Kordofan' have to follow 25 immediately the noun they qualify", that misses the</p> <p style="text-align: center;">Page 73</p>	<p>12:11 1 Abyei Area. 2 That result, that desire was precisely consistent 3 with the objectives of the parties at the time. It was 4 a recognition of the collective identity of the Ngok 5 people: all their chiefdoms were included and it was 6 a recognition of the purpose of the Abyei referendum, 7 which I'm going to come on to talk about, that all the 8 nine chiefdoms were supposed to be part of the Abyei 9 Area so that they could participate in the referendum. 10 The Government claims that our interpretation 11 ignores alternatively the preposition "to" in 12 Article 1.1.2, or the phrase "transferred to Kordofan". 13 You can see the cites where it says those things on the 14 slide. 15 That's wrong. The Abyei Area, as we've seen, is 16 defined as the area of the nine Ngok Dinka chiefdoms 17 transferred to Kordofan in 1905. Under our 18 interpretation and the experts' interpretation, 19 Article 1.1.2's language refers to the transfer of the 20 nine Ngok Dinka chiefdoms from the administration of 21 Bahr el Ghazal to the administration of Kordofan. That 22 interpretation in no way ignores either the word "to" or 23 the words "transferred to Kordofan"; it rather focuses 24 on what it was that was transferred. 25 What was transferred was "the nine Ngok Dinka</p> <p style="text-align: center;">Page 75</p>
<p>12:10 1 point. You can speak in confused ways, you don't have 2 to say anything in a particular way, but there are rules 3 of grammar that explain how you are supposed to 4 understand sentences. Those rules are to be applied 5 here. 6 As Professor Crystal explains, applying the rule of 7 proximity to the language of Article 1.1.2, the natural 8 and grammatically correct reading of the provision is to 9 relate the post-modifying construction of "transferred 10 to Kordofan" back to the immediately preceding noun of 11 "chiefdoms". It would disregard the rule of proximity 12 and disregard the syntax of the sentence to interpret it 13 in any other way. 14 Applying that analysis, Article 1.1.2 refers to the 15 area of the nine Ngok Dinka chiefdoms which have been 16 transferred to Kordofan in 1905. It does not refer to 17 an area within the nine Ngok Dinka chiefdoms, which area 18 was transferred to Kordofan in 1905. 19 That conclusion is not just dictated by rules of 20 English grammar, but it also makes sense when you look 21 at the rest of the sentence. If you look at the 22 sentence it refers to the area of the nine Ngok Dinka 23 chiefdoms. That was done specifically. It was done to 24 ensure that all nine chiefdoms -- not seven, not six, 25 not three -- were included in the definition of the</p> <p style="text-align: center;">Page 74</p>	<p>12:13 1 chiefdoms", in the parties' language. What wasn't 2 transferred was an area. That, as we have seen, is very 3 clear from the grammatical rules that we've talked about 4 and, as we're going to see, it's very clear from the 5 purposes of the parties. 6 The fundamental point is the SPLM/A definition gives 7 full effect to the proposition "to" and "transferred to 8 Kordofan". It simply says that "the nine Ngok Dinka 9 chiefdoms" was the thing that was transferred to 10 Kordofan. 11 The Government also repeatedly says that "it was 12 an area that was transferred from Bahr el Ghazal to 13 Kordofan", and that "the area transferred cannot already 14 have been in Kordofan prior to the transfer". 15 For the reasons that I've just explained -- and 16 I hope this isn't repetitive -- that interpretation 17 contradicts the language in the English grammatical 18 structure in Article 1.1.2. Article 1.1.2 does not 19 refer to an area within the nine Ngok Dinka chiefdoms 20 that was transferred; it refers to the entire area of 21 the nine Ngok Dinka chiefdoms. 22 As a consequence, the Government is simply wrong 23 when it says that, "The area transferred cannot have 24 already been in Kordofan prior to the transfer". What 25 Article 1.1.2 requires is determining the area of the</p> <p style="text-align: center;">Page 76</p>

<p>12:14 1 nine Ngok Dinka chiefdoms that were collectively 2 transferred to Kordofan in 1905. 3 The Government's reply memorial argues that: 4 "On either interpretation of Article 1.1.2 it would 5 still be necessary to determine what the area of those 6 chiefdoms was that the Sudanese Government officials 7 decided to transfer to Kordofan in 1905." 8 Again, this is in a sense a variation on the same 9 theme: that is confused and wrong. Article 1.1.2 refers 10 to the area of the nine Ngok Dinka chiefdoms as it stood 11 in 1905. It was these nine chiefdoms, and not some 12 specified area, that the Government and the SPLM/A 13 agreed that "the Sudanese Government officials decided 14 to transfer to Kordofan in 1905". The area that must be 15 defined and delimited under Article 1.1.2 is the total 16 area of the nine Ngok Dinka chiefdoms as it stood in 17 1905. 18 Conversely, the parties did not agree in 19 Article 1.1.2 that the Abyei Area was a territory that 20 had been delimited in 1905 as a sub-part of the historic 21 Ngok Dinka territory. The parties' intended meaning in 22 Article 1.1.2 paralleled what the Condominium officials 23 intended in 1905. 24 As we'll see shortly, the Condominium officials, in 25 the particular document that the parties paid attention</p> <p style="text-align: center;">Page 77</p>	<p>12:17 1 way. Both parties in fact advance territorial 2 interpretations of Article 1.1.2. Both parties seek to 3 interpret what area, what territory is referred to by 4 Article 1.1.2. 5 The real difference, which Professor Crawford wanted 6 to direct you away from, is that the Government's 7 interpretation assumes that Article 1.1.2 refers to the 8 transfer of a specific area; while the SPLM/A's 9 interpretation relies on Article 1.1.2's reference to 10 a tribal transfer. Both interpretations are 11 territorial; both look to an area. The real question 12 is: what is the definition of that area? 13 In the SPLM/A's case it's clear: it is the area of 14 the nine Ngok Dinka chiefdoms. The Government's case 15 is: there's some area that one can identify from what 16 some colonial administrator did a century ago in 17 circumstances where they had no idea where the 18 Ngok Dinka were. 19 It is essential to consider the purposes of the 20 Government and the SPLM/A when they entered into the 21 Abyei Protocol. Those purposes confirm, I would suggest 22 very clearly, that the Abyei Area includes all of the 23 territory of the nine Ngok Dinka chiefdoms as they stood 24 in 1905. It would contradict the objectives of the 25 Abyei Protocol and the Comprehensive Peace Agreement to</p> <p style="text-align: center;">Page 79</p>
<p>12:16 1 to, clearly intended to transfer the Ngok Dinka tribe in 2 1905, without knowing or caring or even being able to 3 ascertain what specific territory that tribe occupied. 4 That is precisely consistent with the fact that no 5 such area was defined by the Condominium 6 administrators -- or on Condominium maps, as we'll see 7 in the coming days -- for another decade. That is 8 because, contrary to the Government's claims, the 9 Sudanese Government officials that it's referred to did 10 not decide to transfer any specific area, but instead 11 decided to transfer a tribe, carrying with it whatever 12 area it might turn out in the future that that tribe 13 occupied. 14 The Government argued on Saturday -- this was 15 Professor Crawford -- that one does not "demarcate or 16 delimit a tribe or a chief". That argument is confused. 17 The proper interpretation of Article 1.1.2 does not, of 18 course, require delimiting a chief or a tribe. Instead, 19 as the language of the provision provides, it calls for 20 delimiting the area of a tribe, and more specifically 21 the area of the nine Ngok Dinka chiefdoms which were 22 transferred to Kordofan in 1905. 23 Likewise, the Government's efforts on Saturday to 24 contrast a territorial interpretation of Article 1.1.2 25 with a tribal interpretation is misguided in a nuanced</p> <p style="text-align: center;">Page 78</p>	<p>12:19 1 limit the Abyei Area to only a truncated portion of the 2 Ngok's historic territory, or to only some of the nine 3 Ngok Dinka chiefdoms. 4 According to the Government: 5 "The task of the Tribunal does not require recourse 6 to supplementary sources of interpretation, and only 7 a simple reading of the mandate is necessary." 8 Professor Crystal has already told us what the 9 simple reading of the mandate is. We can also see from 10 just reading it ourselves what the simple reading is. 11 But it is nonetheless I think important to have regard 12 to what the parties intended. 13 From the Government's perspective you simply treat 14 this as some verbal puzzle that has fallen into your 15 laps that you should give effect to without paying any 16 attention to what the parties were seeking to accomplish 17 here. Under Article 31(1) of the Vienna Convention, 18 that's wrong. It has to make sense. You have to pay 19 attention and you should pay attention to what the 20 parties' objectives here were. 21 As we saw yesterday, the fundamental purpose of the 22 parties' agreements here on the definition of the Abyei 23 Area was to specify that region whose residents would be 24 entitled to participate in the Abyei referendum. We saw 25 that that was provided for in Article 8 of the</p> <p style="text-align: center;">Page 80</p>

<p>12:20 1 Abyei Protocol: 2 "Only residents of the Abyei Area will be entitled 3 to participate in the Abyei referendum, which will be 4 conducted simultaneously with the main Sudanese 5 referendum in 2011." 6 It's undisputed that the entire reason for the Abyei 7 referendum was to permit the Ngok Dinka to vote on 8 whether or not they would be included in the south. 9 That is precisely why Article 1.1.2 defined the Abyei 10 Area by reference to the Ngok Dinka people and their 11 territory, by reference to the area of the nine Ngok 12 Dinka chiefdoms transferred to Kordofan in 1905. 13 In those circumstances, thinking about what the 14 purpose of that definition was, it makes no sense at all 15 to say that it was to include some but not all of the 16 Ngok Dinka. On the contrary, dividing the Ngok Dinka in 17 half, or only permitting 2% or 12% or 38% of the 18 Ngok Dinka to vote in that referendum, is completely 19 contrary to the basic purpose of the basic purpose of 20 the Abyei referendum. 21 Professor Crawford said on Saturday that it was 22 illegitimate to rely on one party's subjective purpose 23 in interpreting Article 1.1.2. Article 8 of the 24 Abyei Protocol does not express one party's subjective 25 purpose; it expresses both parties' objective and</p> <p style="text-align: center;">Page 81</p>	<p>12:23 1 of the Abyei Area for the last century. We will have 2 a dispute in the coming days about when exactly 3 Abyei Town was founded, where exactly it was, whether it 4 was Burakol or Mathiang or some other place. 5 The fundamental point that the Government tries to 6 obscure is that the area immediately around what is 7 today Abyei Town has for a century been the centre of 8 Ngok Dinka political, commercial and cultural life, and 9 the suggestion that by agreeing that the Abyei Area only 10 meant the area south of the Kiir and therefore, in the 11 Government's case, could not include the Abyei Town is, 12 I would suggest, highly anomalous. 13 The Government suggests that there is nothing 14 anomalous at all about that because Abyei Town didn't 15 necessarily exist in 1905. Again, that misses the 16 point. We are focusing on what the parties meant in 17 2005 when they picked this formulation. 18 The question is: when the parties agreed upon this 19 formulation in Article 1.1.2, would they reasonably have 20 intended what they call the Abyei Area in the 21 Abyei Protocol, which was going to provide for the Abyei 22 referendum, to not include Abyei Town, to not include 23 the centre of Ngok Dinka life, when they made that 24 agreement in 2005? It is absurd to suggest that they 25 did.</p> <p style="text-align: center;">Page 83</p>
<p>12:21 1 expressly agreed purpose, namely to permit the 2 Ngok Dinka and other residents of the Abyei Area to vote 3 in a free and democratic referendum. 4 That is not a subjective purpose; it's an objective, 5 mutually agreed and fundamentally important purpose. It 6 was one of the fundamental points of the Comprehensive 7 Peace Agreement to permit that free democratic 8 referendum to occur. It's not only legitimate but 9 necessary to have regard to that purpose. 10 The reason that Professor Crawford doesn't want you 11 to have regard to that purpose, the reason that the 12 Government wants to focus simply on word games and its 13 view of historic transfers, is because when you look at 14 what the parties meant to accomplish in 2005, it is 15 crystal-clear that the Government's case is absurd. 16 It makes no sense to say that the Abyei referendum 17 was not to include the nine Ngok Dinka chiefdoms and the 18 historic lands and the historic people of the Ngok Dinka 19 tribes. It was exactly to permit them to vote that the 20 parties agreed on Article 8 of the Abyei Protocol and 21 defined the Abyei Area in the way that they did. 22 Further, the Government's interpretation would 23 produce what I would suggest is the at least highly 24 anomalous result that the Abyei Area by definition could 25 not include Abyei Town. Abyei Town has been the capital</p> <p style="text-align: center;">Page 82</p>	<p>12:24 1 Moving on, the Government makes no serious effort to 2 defend the inevitable consequence of its position. The 3 inevitable consequence of its position would be that the 4 Ngok Dinka would be limited to what is essentially 5 a 14-mile narrow -- I wouldn't say wide -- strip of 6 swamp along the southern bank of the Kiir/Bahr el Arab 7 river. 8 That, as we will see in the coming days, is 9 peculiarly bizarre for two reasons. The first reason is 10 that it necessarily includes, as Professor Crawford 11 conceded with his map on Saturday, 88% of what the 12 experts found was the territory of the Ngok Dinka people 13 historically and ancestrally. So the Abyei Area would 14 have been defined to exclude most, the bulk, of the area 15 of the Ngok Dinka people. 16 Even more bizarrely, it would have put the 17 Ngok Dinka into a place, as we will see tomorrow and the 18 coming days, where there were very few Ngok Dinka 19 at all. In fact, the Ngok Dinka weren't really south of 20 the Kiir/Bahr el Arab, and the Government's 21 interpretation would therefore not only take the Ngok 22 out of where they were, but put them in a place that 23 they weren't, which I would suggest is highly anomalous. 24 A further result that is equally anomalous is -- and 25 this goes back to the language that I referred to</p> <p style="text-align: center;">Page 84</p>

<p>12:26 1 previously -- that the Government's interpretation would 2 necessarily exclude at least three of the Ngok Dinka 3 chiefdoms from the area of the Abyei Area. Those are 4 the chiefdoms of the Alei, the Agok and the Bongo, who 5 are located to the north historically, and we will see 6 that in the evidence. 7 The definition of the Abyei Area referred 8 specifically to the nine Ngok Dinka chiefdoms, all of 9 them, and it would contradict that language and the 10 purposes of the parties' agreements very clearly to 11 exclude some of the nine chiefdoms from the definition. 12 I'd also refer very briefly to the witness testimony 13 that was put in by Lieutenant-General Lazaro Sumbeiywo 14 from the IGAD. He discussed the drafting process and 15 rejected the Government's interpretation. 16 Jeffrey Millington, who actually took a different 17 view in his email, which I will refer to briefly at the 18 very end of my presentation, in his witness statement 19 also rejected the Government's interpretation of the 20 definition of the Abyei Area in Article 1.1.2. 21 Of course, in cases of ambiguity -- that is not this 22 case -- one can have regard to the drafting history of 23 the Abyei Protocol. That issue has not been addressed 24 at all by the Government, save for one point which I'm 25 going to come on to which is important. It has,</p> <p style="text-align: center;">Page 85</p>	<p>12:29 1 passage, in the Government's words. 2 As we will discuss tomorrow -- and it's worth 3 looking at this passage in some detail because I think 4 to be sheds some light on what the parties were 5 thinking -- there were complaints during 1902 and 1904 6 about cattle raids on the Ngok. That led to a decision 7 by the Condominium officials in March 1905. That 8 decision was reported in the Sudan Intelligence Report 9 No. 128, which is in front of you. 10 The decision was that -- and I will read it out -- 11 Sultan Rob, who was the paramount chief of the nine 12 Ngok Dinka chiefdoms, and his people would be placed 13 under the administration of the province of Kordofan, 14 the governor of Kordofan, in order to reduce the risk of 15 further raids. 16 The decision -- and it is precisely this passage, in 17 Professor Crawford's words, that the parties had in 18 mind -- was as follows: 19 "It has been decided that Sultan Rob, whose country 20 is on the Kiir River ... and Sheikh Rihan of Toj are to 21 belong to Kordofan province. These people have on 22 certain occasions complained of raids made on them by 23 southern Kordofan Arabs and it has therefore been 24 considered advisable to place them under the same 25 governor as the Arabs of whose conduct they complain."</p> <p style="text-align: center;">Page 87</p>
<p>12:27 1 however, been addressed in great detail in our 2 submissions, and I would refer the Tribunal in 3 particular to the drafting history discussion in our 4 memorial. 5 The one point about the drafting history that 6 I would like to discuss with you was referred to by 7 Professor Crawford on Saturday. He referred you to the 8 Sudan Intelligence Report No. 128, which you can see on 9 the current slide. He told you that during the parties' 10 negotiations of the Abyei Protocol: 11 "... reference was specifically made to the Sudan 12 Intelligence Report of March 1905, one of the transfer 13 documents." 14 That's Day 1, page 36, lines 15-17. 15 That's also what Government said in its memorial. 16 In its memorial the Government said: 17 "It was precisely this passage which led to the 18 formulation of the ABC's mandate." 19 By reference to this passage, and as 20 Professor Crawford described, the parties were referring 21 specifically to Sudan Intelligence Report No. 128 from 22 1905. They were not referring to some cover note by 23 Wingate, they were not referring to some subsequent map 24 by Whittingham or Hallam or whoever; they were referring 25 to Sudan Intelligence Report No. 128, precisely that</p> <p style="text-align: center;">Page 86</p>	<p>12:30 1 It is worth looking at both the purpose of this 2 transfer and the language of the transfer, and it is 3 worth keeping in mind, as the Government says, that it 4 was precisely this passage that the parties had in mind. 5 The Government does not dispute what the purpose of 6 the transfer was -- the purpose of the transfer was what 7 this report called "the necessity of closer supervision 8 of local tribes by Condominium officials" -- nor could 9 this be disputed. 10 The Condominium did not decide to straighten out 11 provincial boundaries in some housekeeping exercise or 12 to correct geographic anomalies. Instead the 13 Condominium decided to place the Ngok Dinka people under 14 the administration of the same provincial governor as 15 the Homr Arabs in order to ensure peace and security. 16 The purpose of the transfer was to ensure that the 17 Ngok and the Messiriya were both administered by the 18 same officials. It's equally clear when we look at the 19 language of it. So the purpose was focused on the 20 people. It was the people who were being transferred in 21 order to protect them. It was not a focus on an area at 22 all. 23 It's equally clear when you look at the language of 24 the transfer decision what the object of the transfer 25 was, the thing or the object that was transferred in</p> <p style="text-align: center;">Page 88</p>



<p>12:31 1 1905. The thing or the object that was transferred was 2 the Ngok Dinka, not a defined territorial area. 3 That's plain from the description -- if we can go 4 back and look at the slide, we can still see it here in 5 PowerPoint -- that's clear from the description: 6 "These people have on certain occasions complained 7 of raids made on them by southern Kordofan Arabs, and it 8 has therefore been considered advisable to place them 9 under the same governor as the Arabs of whose conduct 10 they complain." 11 Beyond any conceivable doubt it was Sultan Rob and 12 his people who were the object of the transfer. That is 13 what one sees when one reads the precise passage that 14 was referred to here. It was a transfer of the 15 Ngok Dinka, not a transfer of some piece of territory. 16 Indeed, when you go back before the Government began 17 to construct its most elaborate version of its 18 interpretation, the Government said exactly this. If we 19 can go to the next slide, I would like to show you 20 excerpts from the Government's own memorial, and I will 21 read them out for you because they are powerful and 22 because they are in some contrast to what 23 Professor Crawford would now try to rewrite history to 24 say: 25 "It was decided in early 1905 to transfer the latter</p> <p style="text-align: center;">Page 89</p>	<p>12:34 1 Sudan Intelligence Report No. 128. It is that report, 2 in Government's language, that was precisely the passage 3 that motivated the transfer, the reference in 4 Article 1.1.2. 5 As we have seen, that makes perfect sense, because 6 when you go and look at the language of Article 1.1.2, 7 it refers to exactly the same thing; it refers to 8 a transfer of the nine Ngok Dinka chiefdoms, and that at 9 the end of the day provides the clearest explanation of 10 what it is that Article 1.1.2 means. 11 I would suggest all the Government's subsequent 12 efforts to address this are simply an effort to rewrite 13 the plain language of the parties' agreement and ignore 14 the purposes of the parties in entering into that 15 agreement. 16 I think with that I have -- while not exhausting my 17 time -- exhausted my script and my slides. I would be 18 happy, since I went over yesterday, to stop at this 19 point and entertain questions from the Tribunal. 20 THE CHAIRMAN: Thank you very much, Mr Born. I understand 21 that there is a question on the part of 22 Professor Hafner. 23 (12.35 pm) 24 Questions from THE TRIBUNAL 25 PROFESSOR HAFNER: Thank you very much.</p> <p style="text-align: center;">Page 91</p>
<p>12:33 1 groups [that is the Ngok and the Twic] to Kordofan." 2 The Government was referring here to a transfer of 3 tribal groups, not people. Professor Crawford said 4 yesterday it would be odd to talk about delimiting 5 an area. Well, it would be odd to talk about a group 6 when you really meant a territory, and I think the 7 government here was interpreting the precise passage in 8 question very clearly. 9 Then, to make it even clearer, the Government said 10 in its memorial: 11 "A decision was promptly made to transfer both the 12 Ngok and the Twic to Kordofan." 13 Again, this was a transfer of the tribes, not of 14 a piece of territory. We are going to see in the coming 15 days how the Condominium officials in fact couldn't have 16 transferred a piece of territory because they had no 17 idea what the territorial boundaries of the thing that 18 they would have been transferring was. 19 What they did, and what this language says so 20 clearly, is they moved administration of the Ngok Dinka 21 and Twic Dinka people for a purpose, being to protect 22 those people. They put those people under the 23 administration of a different authority than they 24 previously had been thought to be under. 25 It is that tribal transfer that is described in</p> <p style="text-align: center;">Page 90</p>	<p>12:35 1 Counsel, the procedure which has to be complied with 2 by ABC has very often been referred to in the 3 argumentation. The ABC drew up the documents called the 4 Rules of Procedure that is attached to its report. One 5 part of these Rules of Procedure raised some difficulty 6 to me to understand, and I hope you can help me 7 understand it. I will read it out. 8 Point 3 of these Rules of Procedure for the 9 Abyei Boundaries Commission reads as follows: 10 "On the morning of Monday 11th April, the experts 11 will prepare the Rules of Procedure for the remainder of 12 the Commission's work." 13 I underscore "Commission's work": 14 "The experts will present the Rules of Procedure to 15 the two parties beginning at 3.00 pm for comments and 16 suggestions as appropriate", and so on. 17 I hope you have it before you. 18 MR BORN: I do indeed. 19 PROFESSOR HAFNER: Thank you. The problem is only that 20 I did not find any trace of a document containing 21 these additional Rules of Procedure. Could you 22 perhaps help me to clarify this? Thank you very much. 23 MR BORN: Thank you, Professor Hafner. I think that's 24 a good question and I hope I am able to address it and 25 clarify it.</p> <p style="text-align: center;">Page 92</p>

12:37 1 I think it is, if I may say so, an extremely apt  
2 example of the informal style of the experts' and the  
3 Commission's work. I think this is a reference to these  
4 Rules of Procedure themselves.  
5 I think Article 3 had in fact been drafted by the  
6 experts, if I can say this, in a forward-looking way.  
7 It was anticipating that this draft would then be shown  
8 to the parties, as happened and they agreed. The  
9 reference here to the Rules of Procedure for the  
10 Commission I think reflects -- and so there is not, in  
11 short answer to your question, another document that is  
12 the Rules of Procedure for the Commission.  
13 The reason of course is because the focus of the  
14 work was overwhelmingly on the experts. The two sets of  
15 party-appointed representatives were, as  
16 Professor Crawford I think rightly acknowledged this  
17 morning, not impartial members of the Commission; they  
18 were in fact active litigants. The head of the  
19 Government's delegation was also on the ABC; the same  
20 was true on the SPLM/A side.  
21 So there was in a sense no other set of procedural  
22 rules for the Commission itself. There was only this  
23 set of rules, which focused on, appropriately, the  
24 central role of the experts. It was, of course, for the  
25 experts, as they did, to draft these, and in accordance

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12:40 1 Professor Reisman's question from previously.  
2 I wasn't sure whose time that should come out of.  
3 I think Judge Schwebel's observation is, as with  
4 Professor Hafner's, an extremely apt one. As  
5 a practical matter, it's completely obvious what would  
6 have happened had the experts presented their report to  
7 the parties. That's true whatever the contents of that  
8 report might have been. Had the experts presented their  
9 report to the ten party-nominated members of the  
10 Committee, each party would have sought to argue and  
11 resist the experts' conclusions, and that was not what  
12 was contemplated by any of the parties at the time.  
13 As we saw from the transcripts of the final  
14 presentations, the parties believed that they had -- and  
15 said that they had -- made their final presentations to  
16 the experts. When I say "the parties", I mean in fact  
17 the very same individuals who were the party-nominated  
18 members of the full Commission.  
19 Ambassador Dirdeiry for the Government said, "We now  
20 await your judgment and your assessment"; we saw that  
21 language yesterday. It was not conceived, it was not  
22 intended that, having heard the parties make their  
23 presentations, the ABC experts would then go back and  
24 tell them in advance, "Here's what we've decided. Let's  
25 argue about it some more". That's not what the ABC

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12:38 1 with good practice they had the parties agree to them.  
2 Does that clarify?  
3 PROFESSOR HAFNER: Thank you.  
4 MR BORN: You're welcome.  
5 THE CHAIRMAN: A question will be asked by Judge Schwebel.  
6 JUDGE SCHWEBEL: Mr President, this is a question for  
7 counsel of both parties to comment on, if they wish.  
8 Counsel of the Government of Sudan have challenged  
9 the failure of the experts to submit the final report to  
10 the whole Commission before presenting the final report  
11 to the presidency. The Commission, as has been pointed  
12 out just now and earlier, was composed of the experts  
13 and party-appointed representatives, five of whom were  
14 partisans of the position of the Government of Sudan and  
15 five of the SPLM respectively.  
16 If the experts had submitted their final report to  
17 the Commission, it would in effect have given the  
18 parties advance notice of the content of the final  
19 report to be presented to the presidency. In those  
20 circumstances, would so doing have risked the  
21 possibility of a presentation to the president ever  
22 taking place?  
23 THE CHAIRMAN: I give you the floor, Mr Born, but I give  
24 also a possibility to the other side to answer.  
25 MR BORN: I also at some point should probably address

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12:42 1 Rules of Procedure meant when they referred to "the  
2 experts will have the final say."  
3 I would emphasise in this regard that this  
4 Article 14 that we're discussing was a rule that the ABC  
5 experts themselves drafted. They knew what was intended  
6 by that provision. They implemented that provision very  
7 faithfully. The idea that had they presented the report  
8 to the parties everything would have gone smoothly is  
9 inaccurate. One doesn't know what would have happened.  
10 In fact, the impartial experts had had the final  
11 say, and they -- as the parties' provisions provided --  
12 presented that to the president. That was what was  
13 intended, and that was what happened.  
14 THE CHAIRMAN: Does the Government want to answer the  
15 question of Judge Schwebel?  
16 MR BUNDY: Yes, thank you Mr President, Judge Schwebel.  
17 I think all of this is complete speculation. How on  
18 earth can we know about something that didn't in fact  
19 happen? What we do know is the sequence in which the  
20 procedural rules spelt out what was going to happen.  
21 As Ms Malintoppi explained earlier this morning,  
22 there was a difference between the parties presenting  
23 their final submissions; the experts then evaluating all  
24 the material -- presumably including the submissions;  
25 then the attempt to reach consensus, failing which the

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12:44 1 experts have the final say.  
 2 You will be aware of the Government's position that  
 3 that step after the final submissions, the consensus  
 4 step, in our submission was the missing gap. But to  
 5 speculate what would have happened if our position is  
 6 accepted, and there had been a discussion of the report,  
 7 no longer as parties acting as advocates or presenting  
 8 their submissions, but now acting on a draft report to  
 9 see whether there was any scope for consensus, to  
 10 speculate what would have happened when that didn't  
 11 happen, I think, in the Government's view, is  
 12 inappropriate.  
 13 Thank you.  
 14 THE CHAIRMAN: Thank you. I would like to limit the hurt  
 15 between the two parties and would like to give  
 16 a possibility to Professor Reisman to ask his  
 17 question.  
 18 PROFESSOR REISMAN: Thank you, Mr President.  
 19 Mr Born, you're aware of the question that I posed  
 20 to your opposing counsel in the previous presentation.  
 21 I would like you to have an opportunity to address it as  
 22 well.  
 23 I would also like to pose an additional question to  
 24 you, and it's a matter of clarification for me. I have  
 25 followed very carefully Ms Malintoppi's presentation of

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12:47 1 Article 2(a) of the Arbitration Agreement.  
 2 Is that responsive?  
 3 The second question -- if I can restate it so that  
 4 I'm being completely responsive -- this morning was:  
 5 what are the parties' respective positions with regard  
 6 to the standard of proof of an excess of substantive  
 7 mandate by the experts?  
 8 In particular Professor Reisman said: is it  
 9 evidenced that the experts made a slight  
 10 misinterpretation of their mandate, or did they make  
 11 a very grave misinterpretation of their mandate? To  
 12 that Professor Pellet this morning gave a two-part  
 13 answer.  
 14 The first part of his answer was: focusing on the  
 15 substantive definition of the Abyei Area in  
 16 Article 1.1.2 of the Abyei Protocol, neither of those  
 17 possibilities is correct because there is no review.  
 18 That was his answer, and we agree with that.  
 19 I emphasised it this morning.  
 20 There remains a possibility -- and we recognise this  
 21 with regard to the grazing rights -- for challenging  
 22 an excess of mandate on substantive grounds, for example  
 23 with regard to the grazing rights, where there would be  
 24 an argument that what the ABC experts did was not to  
 25 delimit or demarcate the Abyei Area but to do something

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12:45 1 the Government's allegations of procedural violations,  
 2 and the SPLM responses contending that they were not.  
 3 I had understood that there was, above the individual  
 4 responses, a principle objection, and that was that the  
 5 concept of excess of mandate did not include procedural  
 6 violations.  
 7 Did I misunderstand that?  
 8 MR BORN: Not at all. Let me answer the two questions, if  
 9 I can, in reverse order.  
 10 The SPLM/A's position is that all of the alleged  
 11 procedural violations, whether they're called  
 12 "procedural violations" -- and by that I mean the  
 13 Khartoum interviews, the Millington email, the  
 14 Article 14 procedure -- or whether they're called  
 15 "mandatory criteria" -- that means ex aequo et bono,  
 16 reasoned award, unspecified legal principles and  
 17 allocating oil resources -- all of those are subject to  
 18 a principle objection.  
 19 That principle objection is that they are  
 20 inadmissible because they do not, any of them,  
 21 constitute potential excesses of mandate. None of  
 22 those -- be they procedural violations or alleged  
 23 violations of mandatory criteria, or however they may be  
 24 referred to -- constitute an excess of mandate or  
 25 a potential excess of mandate within the definition of

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12:48 1 else.  
 2 On that issue we emphatically -- as said many times  
 3 yesterday -- take the position that the well-established  
 4 rules are that one must demonstrate a flagrant,  
 5 a glaring, a manifest excess of mandate. It's not  
 6 enough that the experts made a small mistake or  
 7 a medium-sized mistake, that they misinterpreted  
 8 ambiguous language, that they reached a conclusion about  
 9 which reasonable minds could differ; instead that they  
 10 glaringly and flagrantly overstepped their authority.  
 11 Only in that case would there be an excess of  
 12 mandate, and that is the answer to the second part of  
 13 the question as identified by Professor Pellet.  
 14 Thank you.  
 15 THE CHAIRMAN: I thank the members of the Tribunal for  
 16 their questions, and the parties for their answers.  
 17 If there are no other questions, I declare the hearing  
 18 suspended until this afternoon at 3 o'clock.  
 19 (12.50 pm)  
 20 (Adjourned until 3.00 pm)  
 21 (2.59 pm)  
 22 THE CHAIRMAN: Good afternoon, mesdames, gentlemen. Today  
 23 we commence the second round of these oral  
 24 proceedings, where the parties will present their  
 25 witnesses, experts and further arguments concerning

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<p>14:59 1 the delimitation of the Abyei Area. This round will 2 continue until 1.00 pm on Wednesday, April 22nd. 3 In keeping with paragraph 4.2(1) of Procedural Order 4 No. 1, each party has been allotted a maximum of 5 hours 5 and 45 minutes for this round. Cross-examination by 6 each party of the other party's witnesses shall be 7 deducted from the former's time. 30 minutes of time has 8 been allotted for questions from the Tribunal and other 9 contingencies. 10 To maintain the efficiency of this round of 11 pleading, may I request that each party be mindful of 12 the time limitations I have mentioned and manage their 13 presentation and cross-examination times judiciously. 14 Once more, Professor Crawford, the floor is yours. 15 <b>Submissions by MR CRAWFORD</b> 16 <b>PROFESSOR CRAWFORD:</b> Mr President, members of the 17 Tribunal, as you have said, the next two and a half 18 days are devoted to the second part of your task, as 19 defined in Article 2(c) of the Arbitration Agreement. 20 On the basis and assumption that the ABC experts 21 exceeded their mandate, it is for this Tribunal: 22 "... to define (i.e. delimit) on map the boundaries 23 of the area of the nine Ngok Dinka chiefdoms transferred 24 to Kordofan in 1905, based on the submissions of the 25 parties."</p> <p style="text-align: center;">Page 101</p>	<p>15:02 1 indications, in Arabic, using the Arabic translator. 2 The three other witnesses, Mr Ayom Matit Ayom, 3 Mr Majak Matet Ayom and Mr Majid Yak Kur, will be made 4 available at the request of the Tribunal, but have not 5 been selected for cross-examination by the SPLM/A. 6 Following these witnesses presentations I will 7 conclude with a close examination of the documentary and 8 map evidence for the location of the Ngok Dinka in and 9 after 1905. In the course of this I will discuss 10 various SPLM/A arguments seeking to sustain their 11 claimed line based on the tribal interpretation of the 12 formula. 13 I turn then to my first preliminary remark. Under 14 Article 2(c) of the Arbitration Agreement it becomes your 15 task on the assumption of an excess of mandate: 16 "... to define (i.e. delimit) on map the boundaries 17 of the area of the nine Ngok Dinka chiefdoms transferred 18 to Kordofan in 1905, based on the submissions of the 19 parties." 20 I stress those words. This is not a strict appeal 21 limited to the dossier before the ABC; it is a de novo 22 rehearing leading to a new decision by you in the 23 fulfilment of a mandate which is your own. Both parties 24 recognise this, and both have put a great deal of new 25 material before you: new maps, new documents, new</p> <p style="text-align: center;">Page 103</p>
<p>15:01 1 Our presentation in this phase will be organised as 2 follows. I will make some brief preliminary remarks, 3 first on the character of your task under Article 2(c) 4 and secondly on the characteristics of the SPLM/A's 5 claimed boundaries. 6 I will then ask you, Mr President, to call on our 7 cartographic expert Mr Alastair MacDonald, who, as 8 agreed, will make a presentation of the mapping issues 9 in his capacity as expert before responding to questions 10 from the opposite party and from the Tribunal. 11 He will be followed by Mr Bundy, who will present 12 argument on the limits of the transferred area as 13 a geographical matter, focusing on the transfer 14 documents and the recorded location of the provincial 15 boundaries at the relevant time. 16 Tomorrow morning, following Mr Bundy, who will 17 probably still be going this evening, we will present 18 our fact witnesses as follows: first for 19 cross-examination, Mr Zakaria Atem Diyin Thibek Deng 20 Kiir and Mr Mukhtar Babu Mamir. These are presented at 21 the request of the SPLM/A for cross-examination. 22 As we've said, we do not intend to conduct any 23 examination-in-chief of the witnesses we have tendered; 24 we simply leave their witness statements on the record. 25 They will give evidence, contrary to earlier</p> <p style="text-align: center;">Page 102</p>	<p>15:04 1 witnesses, new expert reports. 2 No doubt you are entitled to take into account what 3 the ABC experts wrote in their report, because the 4 report and the associated material are part of the 5 dossier before you, but once the report has been set 6 aside for excess of mandate, it has no authority or 7 status other than the intrinsic merits of the arguments 8 as you see them. 9 From this point on, you have to decide the case for 10 yourself, based on the much more extensive dossier 11 before you. Indeed -- I say this with some 12 hesitation -- I don't think this is in dispute. 13 Further, this is true whatever the ground or grounds 14 on which you find excess of mandate. Article 2(c) of the 15 Arbitration Agreement makes no distinction in this 16 regard. As soon as the experts' report is held to have 17 been vitiated in any respect as an excess of mandate, 18 then Article 2(c) of the Arbitration Agreement is 19 triggered and the excess of mandate phase is over and 20 done with. 21 This is true whether the excess was procedural or 22 substantive or involved matters infra or ultra petita; 23 that is to say, once you have decided on one ground of 24 excess of mandate then Article 2(c) is triggered, and the 25 whole case is re-opened.</p> <p style="text-align: center;">Page 104</p>

<p>15:06 1 In that event it is, with the greatest respect, not 2 your function simply to edit the experts' report; rather 3 it is your function to do for yourselves what the ABC 4 experts should have done but ex hypothesi did not in 5 some respect. 6 At this point the distinction between appeal and 7 review for excess of mandate which Professor Pellet took 8 such care to make on Saturday disappears. Of course, at 9 the excess of mandate stage you are not a Court of 10 Appeal, but at the Article 2(c) stage you are a de novo 11 decisional Tribunal. 12 Once you are acting under Article 2(c), the experts' 13 report is not more than a mere opinion. At that stage 14 you have to be satisfied of each issue that is 15 a necessary component of your decision on the 16 transferred area, whatever position the ABC experts may 17 or may not have taken on that point. 18 Of course -- we accept this -- if on some points you 19 agree with the ABC experts' report, you can incorporate 20 what they said in your decision, but the necessary 21 prerequisite for doing so is that you do agree. You 22 have to form your own view on the matter based on the 23 submissions of the parties before you. 24 I turn to my second preliminary remark, which 25 concerns the SPLM/A's claimed boundaries of the Abyei</p> <p style="text-align: center;">Page 105</p>	<p>15:09 1 here. It's worthwhile tracing their claimed boundary on 2 a map; something their pleadings neglect to do, but 3 which we've done in the graphic on the screen. 4 You can see that the claimed area is incomplete. It 5 does not include the section of the Kordofan/Upper Nile 6 boundary between the Bahr el Ghazal/Kordofan/Upper Nile 7 tripoint and 29°32'15" east. For a final submission in 8 a case of this importance, that's pretty shoddy. 9 The second point is, however, of much greater 10 significance. The SPLM/A's claimed boundaries are 11 mostly not tribal boundaries at all. The only exception 12 is the northern boundary, which has never even remotely 13 corresponded to any arguable provincial boundary, and 14 which purports to be a tribal boundary. 15 I will return to that northern boundary tomorrow. 16 For the moment the point to note is that the remaining 17 boundaries of the claimed area are not tribal boundaries 18 at all; they are provincial boundaries, or in one case 19 a constructed line extending a provincial boundary. 20 Take, for example, the western boundary between 21 Kordofan and Darfur. It was defined -- perhaps it's 22 more accurate to say "redefined" -- by 23 Sir Rudolf Slatin, that redoubtable Austrian, in 1903, 24 down to the tripoint with Bahr el Ghazal province on the 25 Bahr el Arab. Slatin knew his way around. He'd been</p> <p style="text-align: center;">Page 107</p>
<p>15:07 1 Area. I will have more to say about this later this 2 week. 3 Here there are two problems. The first problem is 4 a perhaps minor technical problem, but it is indicative. 5 It's to work out what their claimed boundaries actually 6 are and why. 7 In their memorial the SPLM/A claimed a northern 8 boundary extending to 32°15' east, which is 9 300 kilometres to the east of the ABC experts' turning 10 point. This was a claim to a boundary more or less on 11 the Nile. It was of course a typographical error, 12 though it remains unacknowledged. Mr Born is not as 13 good at acknowledging his own faults as he is at 14 acknowledging those of others. 15 But then the SPLM/A reply memorial and rejoinder 16 expressed the SPLM/A's claim as follows: 17 "The current boundary of Kordofan and Bahr el Ghazal 18 to the south extending to 10°35' north latitude to the 19 north and the current boundary of Kordofan and Darfur to 20 the west extending to 29°32'15" east." 21 The minutes and seconds were the wrong way round. 22 It should have been 29°32'15" east. 23 Based on these consecutive typographical errors, it 24 seems fair to describe the SPLM/A as "cartographically 25 challenged". But the cartographic challenge doesn't end</p> <p style="text-align: center;">Page 106</p>	<p>15:10 1 Governor of Darfur and was now Inspector-General of the 2 Sudan, second only to Wingate. He was not confused 3 about the Bahr el Arab. 4 The Darfur boundary was modified on several 5 subsequent occasions, most notably pursuant to the 6 Monroe-Wheatley Agreement of 1924. At no stage in the 7 history of the Darfur boundary, before or after 1905, 8 was there the slightest indication that the Ngok Dinka 9 had any interest or rights as far west as the Darfur 10 boundary. I'll show you this in more detail tomorrow. 11 Indeed, in their first submission before the ABC, 12 the SPLM/A did not even claim a connection with the 13 Darfur boundary. 14 I'll return to the issue of tribal boundaries in 15 more detail tomorrow. The present point is a simple 16 one: the SPLM/A claimed area is a mishmash of provincial 17 and alleged straight-line tribal boundaries. They adopt 18 a tribal interpretation when it suits them, in the north 19 and the top of the east; and a territorial 20 interpretation when it suits them, in the south and in 21 the west. Their Abyei Area is a complete hybrid, not 22 based on any coherent interpretation of the formula at 23 all. 24 Mr President, with that it would be convenient to 25 call Mr Alastair MacDonald to give evidence.</p> <p style="text-align: center;">Page 108</p>

<p>15:12 1 (3.13 pm) 2 MR ALASTAIR MACDONALD (called) 3 THE CHAIRMAN: Mr MacDonald, can I ask you to read out the 4 affirmation which is in front of you. 5 THE WITNESS: I solemnly declare upon my honour and 6 conscience that my statement will be in accordance 7 with my sincere belief. 8 Mr President, as I am not well known in this 9 Tribunal, may I just introduce myself before I start. 10 Mr President, maps have been a passion all my life, 11 and I decided to be a land surveyor at the age of nine. 12 I qualified 54 years ago, at the age of 22, and went to 13 work as a bush surveyor in Africa. Over the next 14 16 years I worked for significant periods in eight 15 African territories, and for short periods in six 16 others, one of which was Sudan. 17 I returned to the UK in 1971, and in 1983 I became 18 a director, and for a short time acting director-general 19 at Ordnance Survey, the national mapping agency. 20 I have sat on the governing council of the 21 Royal Geographical Society. I was president of 22 a working commission of the International Society for 23 Photogrammetry and Remote Sensing, and chairman of the 24 Association of Geographic Information in the UK. 25 I retired in 1992, and rather to my surprise became</p> <p style="text-align: center;">Page 109</p>	<p>15:15 1 quotations that I intend to refer to in the course of my 2 speech are contained in sequential order in tabs 2 to 4 3 in the arbitrators' folder. Tab 2 contains the first 12 4 items; tab 3 contains a printed map, which I will not 5 display on screen but which I will invite you to look at 6 in your folder at the appropriate time; tab 4 contains 7 the remaining 14 items. 8 Mr President, I hope that you will find that 9 acceptable. 10 I begin with a depiction of the Bahr el Arab. It is 11 one of three rivers which have featured prominently in 12 this case, the others being the Ragaba ez Zarga and the 13 Lol. It is worth pointing out here that the Lol is 14 sometimes named throughout on early maps as the Boro, 15 the name of one of its headwaters. 16 During the latter part of the 19th century and the 17 early years of the 20th century there was some 18 uncertainty over the exact courses of the Bahr el Arab 19 and Lol. The existence of the Ragaba ez Zarga remained 20 unknown to map-makers during the 19th century, and was 21 not acknowledged on the official mapping of Sudan until 22 1907, and then only in a crude and shortened form. 23 A more detailed and extensive outline of its course 24 appeared in 1909. 25 It has been claimed by the SPLM/A that there was so</p> <p style="text-align: center;">Page 111</p>
<p>15:14 1 involved in international boundaries. I acted as 2 advocate for Nigeria in the Cameroon-Nigeria case, as 3 an advisor to the Ethiopian legal team in 4 Eritrea v Ethiopia, and I've done some work for the 5 Palestinian Authority. 6 With your permission, Mr President, I will now turn 7 to my presentation. 8 Presentation by MR ALASTAIR MACDONALD 9 THE WITNESS: Mr President, members of the Tribunal, it is 10 a great honour for me, as a land surveyor of rather 11 advanced years, to appear before your distinguished 12 Tribunal in such august surroundings. 13 My task today is threefold. First, I would like to 14 explain to the Tribunal the development of the depiction 15 of the Bahr el Arab on contemporary maps of the period. 16 Secondly, I shall take the Tribunal through some 17 examples of serious misinterpretation of the mapping 18 evidence by the SPLM/A, to show that the confusion that 19 it claims to exist is largely self-generated. 20 Finally, I would like to show the Tribunal how the 21 error made by Wilkinson in 1902 resulted in a deviation 22 of the Bahr el Arab on the 1904 Intelligence Office map, 23 rather than a misnaming of the Ragaba ez Zarga as 24 a whole, as claimed by the SPLM/A. 25 Mr President, printed copies of all the maps and</p> <p style="text-align: center;">Page 110</p>	<p>15:17 1 much confusion over which river was which that it was 2 not possible to define a boundary using the 3 Bahr el Arab. I believe that in spite of some 4 uncertainty it was possible to identify this river. 5 In this context, it is useful to establish first of 6 all those features that are exhibited by the 7 Bahr el Arab which can be used to distinguish it from 8 other rivers. We can then test early maps against these 9 features to determine how well a particular map depicts 10 them. 11 On your screen now is a modern map of the area 12 prepared by the Government for this case. It is derived 13 from satellite imagery, and shows the courses of the 14 three rivers, and that of the Bahr el Ghazal into which 15 their waters flow. The upper tributaries which form the 16 river have their sources close to the watershed between 17 the Nile and Shari basins. 18 But the first point of reference that I want to 19 emphasise is the ancient copper mine of Hofrat en Nahas, 20 now circled, which lies close to one of those 21 tributaries. 22 After the tributaries combine, the main river flows 23 in a large loop to the north as far as 10°20', and 24 roughly follows that parallel for 80 kilometres. The 25 river then flows in a generally southeast direction,</p> <p style="text-align: center;">Page 112</p>

<p>15:18 1 through the area with which this case is concerned, 2 receives the Lol as a tributary, and finally enters the 3 Bahr el Ghazal at a place known as Ghabat el Arab. 4 This confluence is at this readily identifiable 5 point on the Ghazal, namely where it changes direction 6 from flowing due north to northeast. After this 7 northeast section, the river turns to the east and flows 8 on to Lake No. 9 So, in summary, we should look for the following 10 features when assessing maps of the period for the 11 depiction of the Bahr el Arab: a tributary passing close 12 to Hofrat en Nahas; a loop to the north as far as 13 10°20'; from there, a southeast course, picking up the 14 Lol at approximately 9°12'; a junction with the 15 Bahr el Ghazal at the turning point in its channel from 16 north to northeast. 17 Mr President, before leaving this modern display 18 I would like to point out to you two other features. 19 Firstly, Lake Ambady, some 40 kilometres south of the 20 Ghabat el Arab, at the confluence with the Jur; and 21 secondly, the double channel of the Bahr el Ghazal as it 22 approaches Ghabat el Arab, a feature that I think has 23 been confused with Lake Ambady by the SPLM/A. I will 24 address this point later. 25 Using these tests it is possible to analyse the maps</p> <p style="text-align: center;">Page 113</p>	<p>15:22 1 necessary to know its every twist and turn. 2 By contrast, the SPLM/A has sought to discredit 3 every historical map by comparing it with a modern 4 satellite image and consigning it to the scrapheap, 5 often only on the basis of longitude error, but also 6 through a clear inability to interpret its contents. 7 There has clearly been no understanding of the 8 serious problem that longitude presented before the 9 arrival of the telegraph, and I will deal with this 10 topic in more detail later. Neither has there been any 11 consideration of what might be expected of maps of that 12 era, and on top of that, some comments simply cannot be 13 related to the maps they apparently refer to. 14 Mr President, members of the Tribunal, I now return 15 to the development of the depiction of the Bahr el Arab. 16 I will start with Ravenstein's map of 1883, an extract 17 of which is now on screen. 18 Taking into account the constraints of the period, 19 we can see that, though going no further north than 10°, 20 this map does place the mouth of the Bahr el Arab at the 21 Ghazal's change of direction and does take the river 22 north of 10°. However, the Boro, as mentioned 23 earlier -- the name is more usually applied to the head 24 water of the Lol -- joins the river too far upstream. 25 But there is no trace of the Ragaba ez Zarga to the</p> <p style="text-align: center;">Page 115</p>
<p>15:20 1 of the period and track the development of 2 an understanding of the course of the Bahr el Arab. But 3 before I show you some examples, it is necessary to 4 spend some time on the philosophy of my approach 5 compared with that of the SPLM/A. 6 I have considered the body of maps that are 7 available to me as forming a continuum which displays 8 a gradually increasing awareness of the detail of the 9 course of the Bahr el Arab. To assess the level of 10 increasing awareness I have looked at how well each 11 depiction fits within the overarching framework that 12 I have just described. I have also taken into account 13 the limitations of the era. 14 For example, I do not concern myself too much with 15 longitude error, as it was simply not possible to 16 determine longitude with any precision in the area at 17 that time. 18 Neither am I concerned by the lack of detail of the 19 meandering of the river in its middle reaches. Until 20 the arrival of aerial photography it would not have been 21 feasible to depict such intricate detail. For the 22 purposes of boundary making it would be sufficient to 23 know that the river which formed the boundary between 24 Darfur and Bahr el Ghazal and ran down to the 25 Ghabat el Arab was the Bahr el Arab. It was not</p> <p style="text-align: center;">Page 114</p>	<p>15:24 1 north of the Bahr el Arab. 2 An extract of Lupton's map of 1884 is now on the 3 screen. It meets three of the four criteria which are 4 now highlighted. The one that is lacking is the Lol 5 coming in as a tributary in the lower reaches. The map 6 shows this river flowing into the Jur and thus joining 7 the Bahr el Ghazal too far south. Again, there is no 8 trace of the Ragaba ez Zarga. 9 An extract of the general map of the Nile Valley of 10 1898 is now on screen. It introduces a more convoluted 11 drainage around Ghabat el Arab, but the northernmost 12 connection of Bahr el Arab and Bahr el Ghazal is at the 13 turning point of the latter. 14 The Lol is named the Bahr el Homr, and whether it 15 joins the Bahr el Arab or not depends on which channel 16 might be followed by the river from the point now 17 circled. The loop to the north above 10° and the 18 connection with Hofrat en Nahas are both there. Once 19 again, there is no trace of the Ragaba ez Zarga. 20 I now turn to the skeleton map of the Sudan of 1901. 21 It has significant similarities with the 1898 map, as 22 I would expect. The mouth, the loop and Hofrat en Nahas 23 are all there and are now highlighted. The Lol, again 24 named Bahr el Homr, connects with the Bahr el Ghazal in 25 much the same way as on the 1898 map.</p> <p style="text-align: center;">Page 116</p>

<p>15:26 1 Next we have Mardon's map of 1903. It has been 2 mocked by the SPLM/A as the doodlings of a schoolmaster. 3 However, I would like to draw the attention of the 4 Tribunal to the prefatory note to his book A Geography 5 of Egypt and the Anglo-Egyptian Sudan, published in 6 1906, where Mardon writes: 7 "The writer is very greatly indebted for information 8 and invaluable help to ... Lieutenant-Colonel Count 9 Gleichen, late Director of Intelligence and Sudan Agent, 10 War Office; ...; to Captain RCR. Owen and Captain Amery, 11 Intelligence Department, War Office ...; to Colonel the 12 Honourable MG Talbot RE, late Director General of 13 Surveys in the Sudan ..." 14 This suggests that he had some rather more 15 knowledgeable assistance in his compilation than your 16 average schoolmaster might expect. 17 However that may be, it cannot be denied that the 18 map meets the criteria that have been set for the 19 Bahr el Arab. The river's connection with 20 Hofrat en Nahas, the loop to the north and the junction 21 at Ghabat el Arab are all there. A river named the 22 Bahr el Homr, which looks convincingly like the Lol, 23 avoids joining the Jur and is correctly shown as 24 a tributary of the Bahr el Arab. Once again, there is 25 no trace of the Ragaba ez Zarga.</p> <p style="text-align: center;">Page 117</p>	<p>15:29 1 correct additional adjustment when it compared a map 2 drawn on a longitude system based on the Paris 3 Observatory with the modern map, which is based on 4 Greenwich. 5 The result of the comparison, as it appears on 6 map 61, looks rather like a bowl of multicoloured 7 spaghetti. The SPLM/A suggests that this shows that 8 there was no coherent understanding of the position of 9 the Bahr el Arab. However, the issue of comparison is 10 more complicated than it appears to believe. 11 As Dava Sobel says in her bestselling book 12 Longitude: 13 "The zero-degree parallel of latitude ..." 14 By that, of course, she means the Equator: 15 "... is fixed by the laws of nature, while the 16 zero-degree meridian of longitude shifts like the sands 17 of time. This difference makes the determination of 18 latitude child's play, and turns the determination of 19 longitude, especially at sea ..." 20 And we might also adhere "and in the Bahr": 21 "... into an adult dilemma, one that stumped the 22 wisest minds of the world for the better part of human 23 history." 24 Now, the usual method of fixing position in remote 25 areas in 1905 was by observation to the sun and/or</p> <p style="text-align: center;">Page 119</p>
<p>15:27 1 Mr President, in summary, there is a continuous and 2 similar pattern of depiction of the Bahr el Arab through 3 all these maps up to Mardon's map of 1903. This 4 depiction shows that there was a continuous 5 understanding of the important features of the course of 6 the Bahr el Arab from the vicinity of Hofrat en Nahas 7 down to Ghabat el Arab. By contrast, there is no 8 depiction of the whole length of the Ragaba ez Zarga 9 south of 10° north -- that is, in our area of 10 interest -- until 1909. 11 In 1904 the Intelligence Office in Khartoum produced 12 a map at 1:4,000,000 which did depart to some extent 13 from this continuous pattern, and this will be dealt 14 with later in my talk. 15 Mr President, members of the Tribunal, I now want to 16 turn to the manner in which the SPLM/A has sought to 17 show that these early maps are unreliable. It compared 18 them with a map of the area taken from satellite 19 imagery, and its comparison is now on screen. 20 The course of the Bahr el Arab taken from each early 21 map has been overlain on the modern base map by using 22 the latitude and longitude grid as if both early and 23 modern maps were constructed on the same reference 24 system. 25 To be fair, the SPLM/A did make one perfectly</p> <p style="text-align: center;">Page 118</p>	<p>15:31 1 stars. The problem lay in the determination of the time 2 of the observations. Time can, of course, also be 3 determined by observation to the stars, but it would 4 need an experienced surveyor and advanced instruments to 5 get acceptable results. 6 A much simpler method is to observe the transit of 7 the sun at midday. Some of the officials on trek and 8 many of the early explorers who travelled up the Nile 9 would quite likely have had some means of measuring the 10 altitude of the sun at midday, primarily for latitude, 11 for which they would get quite good results. 12 Longitude was a different matter. The reliability 13 of their watches on their long treks would not be good. 14 Just 1 minutes of time error produces a distance error 15 of 27 kilometres in longitude. So until the advent of 16 the telegraph line, or of wireless time signals, 17 longitude was bound to be unreliable and a comparison of 18 mapping through latitude and longitude is meaningless. 19 A far better, and very normal, method of map 20 comparison is to identify reliable common points of 21 detail and then to apply a block shift to one map so 22 that the common points coincide. 23 In this case the confluence at Ghabat el Arab 24 provides a useful common point. 25 The next two slides will show the SPLM/A comparison</p> <p style="text-align: center;">Page 120</p>



<p>15:32 1 and my comparison using block shifts. If we look at 2 three of the earlier maps and then apply a block shift 3 to each of them, the pecked lines show that only a small 4 improvement is achieved in the lower reaches. 5 I have excluded the 1863 map from the SPLM/A set as 6 it seems to me to be so seriously in error. However, if 7 we look at the remaining three maps and then apply 8 individual block shifts in the same way, the agreement 9 for the pecked lines against the modern course of the 10 Bahr el Arab is really very good indeed. If scale is 11 taken into account, the agreement would look even 12 better, as we shall see. 13 One can also criticise the SPLM/A method because it 14 often does not compare like with like. Scale is 15 important in these comparisons. If the map under test 16 is significantly enlarged, the visual impact of the 17 error that it might display is greatly enhanced. The 18 scale of the SPLM/A's map 61, as printed in its reply 19 atlas, is just under 1:1,100,000, several times larger 20 than the scale of most of the early maps under 21 comparison. 22 Mr President, if I could now invite the members of 23 the Tribunal to turn to tab 3 in their folders, you will 24 see an extract from the intelligence map of 1904 printed 25 at the correct scale of 1:4,000,000. This is the map.</p> <p style="text-align: center;">Page 121</p>	<p>15:36 1 "Additional confusion is introduced in the 1898 2 Stanford map at the junction between the 3 Kiir/Bahr el Arab and Bahr el Ghazal, with a triangular 4 pattern that appears for the first time (and is repeated 5 in later maps). Judging by the 15 minute south 6 discrepancy in the location [of] the juncture of the 7 Kiir/Bahr el Arab and Bahr el Ghazal, the more northern 8 dotted line in fact appears to be the Ngol/Ragaba ez 9 Zarga, where it has its junction with the Bahr el Arab. 10 If so, it is erroneously marked as rejoining the 11 Kiir/Bahr el Arab upstream. Moreover, the more southern 12 Lol appears (again erroneously) to reconnect with the 13 Bahr el Ghazal south of Lake Ambady, creating a further, 14 and mistaken, depiction that is repeated in later maps." 15 This additional confusion suggested by the author 16 would seem to be self-induced. The 15 minute south 17 discrepancy is an exaggeration, although the SPLM/A do 18 not tell us against what criterion the discrepancy is to 19 be measured. 20 On the map in question the latitude of the 21 confluence is 8°56'. This is only 9 minutes further 22 south than the latitude of the same point on the modern 23 satellite base map of the SPLM/A. Whatever the 24 discrepancy is, it does not justify in any way the claim 25 that the Ragaba ez Zarga is shown.</p> <p style="text-align: center;">Page 123</p>
<p>15:34 1 You may well wonder why I have abandoned our 2 marvellous technology at this point. Well, I would like 3 the members of the Tribunal to appreciate the point 4 I wish to make about visual impact of the actual scale 5 of the map. When using a computer screen, one can never 6 be sure of the skill of the presentation. One only has 7 to look at the three different sizes of screens that we 8 have in the room today to understand this point. 9 Returning to the printed map, I have as an example 10 reduced the size of map 61 so that its scale is 11 1:4,000,000, and I have superimposed it on the 1904 map. 12 This is a reduction by a factor of just under four, and 13 I think the Tribunal will appreciate that the visual 14 impact of the discrepancies is considerably reduced. By 15 presenting its comparison at the larger scale of 16 1:1,100,000, the SPLM/A is in my view misleading the 17 reader. 18 Mr President, members of the Tribunal, the SPA has 19 shown in a number of instances in its written pleadings 20 a significant lack of experience in map analysis. 21 I would now like to show the Tribunal some examples. 22 I will start with a quotation from its reply 23 memorial appendix B set against the map to which it 24 refers. Both are now on your screens, and I will read 25 the text:</p> <p style="text-align: center;">Page 122</p>	<p>15:38 1 The confluence of the Ragaba with the Bahr el Ghazal 2 as we know it today is about halfway along the 3 northeastern section of the Ghazal. This point is now 4 being shown on your screen. There is no sign of 5 a waterway anywhere near this position. The more 6 northern dotted line to which the SPLM/A refers is 7 simply a continuation of the main course of the 8 Bahr el Arab to Ghabat el Arab. 9 The SPLM/A makes no acknowledgment that the southern 10 Lol appears to be named Bahr el Homr on this map. It is 11 very difficult to understand why the writer thinks that 12 it joins the Bahr el Ghazal south of Lake Ambady, when 13 the lake is not shown on the map. I have already 14 pointed out in the first part of my speech that whether 15 it joins the Bahr el Arab or not depends on which 16 channel is followed by the river from the point now 17 circled. 18 In summary, none of what is written about this map 19 makes any sense at all. 20 At paragraph 30 of the same appendix this comment 21 appears: 22 "The [Government] memorial relies on a 1901 Skeleton 23 map of Sudan from the Intelligence Division of the War 24 Office which depicts railways, telegraphs and routes. 25 As expected given that this is a skeleton map 'to</p> <p style="text-align: center;">Page 124</p>

<p>15:40 1 illustrate railways, telegraphs and routes', no 2 provincial boundaries are depicted on the map." 3 From the displayed title box of the map in question, 4 we can quite clearly see that this was not a map "to 5 illustrate railways, telegraphs and routes"; these 6 features appear in the title box simply as items in the 7 map legend. It was an all-purpose base map designed to 8 be overprinted with a title and the details of whatever 9 features a government department might want to display. 10 Mr President, to clarify this, I have supposed that 11 the government might wish, for instance, to issue a map 12 of the post office network, and this is how the legend 13 might then appear. 14 The SPLM/A comments that no provincial boundaries 15 are depicted, but the map was presented in the 16 Government memorial for its depiction of the 17 Bahr el Arab, and not as evidence for or against any 18 provincial boundaries. 19 Further on, in more critical comments on this map 20 which are now on your screen, the SPLM/A states: 21 "... the river's juncture with the Bahr el Ghazal is 22 much too close to Lake Ambady ... The Lol (labelled 23 Bahr el Homr) connects correctly with the Bahr el Arab 24 but incorrectly connects with Lake Ambady. The 25 connection of the Lol/Bahr al Homr with Lake Ambady</p> <p style="text-align: center;">Page 125</p>	<p>15:43 1 as the 'Bahr el Arab'. It also appears that the 2 Kiir/Bahr el Arab is erroneously described as the 'Lol' 3 for at least part of its middle course." 4 Turning to the map extract, it is quite a simple 5 depiction. The Ragaba ez Zarga is indeed labelled the 6 Bahr el Homr. The map also shows the Bahr el Arab 7 coming down from 10°, flowing past Sultan Rob's and 8 joining the Bahr el Ghazal at Ghabat el Arab. The Lol 9 joins it below Sultan Rob's, but perhaps too far north. 10 The Lol in turn has a tributary which an experienced 11 observer might easily identify as the Amadgora. No 12 other rivers are shown. 13 It is obvious that the Ragaba Umm Biero, which is 14 a tributary of the Bahr el Arab coming in on its left 15 bank above Sultan Rob's, is simply not depicted, nor is 16 the Bahr el Arab erroneously described as the Lol. 17 In its memorial atlas the SPLM/A presented this map 18 to show that the 1913 map was inaccurate when compared 19 to modern satellite imagery. This is, of course, true 20 if one is looking for 2009 accuracy in a 1913 map. 21 But the Tribunal should be aware that the 1913 map 22 is drawn at a scale of 1:2,000,000 and prepared 95 years 23 ago, without the benefit of accurate longitude 24 determination. Its depiction of the Bahr el Arab is not 25 going to match the modern map, produced at a larger</p> <p style="text-align: center;">Page 127</p>
<p>15:41 1 appears to be a consistent error in these maps, often 2 resulting in a circular pattern of rivers at the 3 juncture of the Bahr el Arab, Lol and Bahr el Ghazal 4 near Lake Ambady." 5 There has been a complete misinterpretation of the 6 map in respect of Lake Ambady. If we look at an extract 7 of the actual map in more detail, we can see that 8 Lake No carries traces of a coloured infill which is 9 more obvious on Lake Rudolf much further to the south. 10 On the second, larger-scale extract, the infill for 11 Lake No is more easily seen. 12 By contrast, the double channels south of the 13 Bahr el Arab confluence can be seen to have no such 14 infill. They are merely the double channels close to 15 Ghabat el Arab referred to in my opening remarks. One 16 can only assume that the SPLM/A has taken these channels 17 to be the outline of Lake Ambady, a careless and 18 inexperienced interpretation. 19 At paragraph 58 of the appendix there is another 20 example of confused analysis. The relevant text is now 21 on your screens: 22 "The 1913 Kordofan map contains multiple 23 inaccuracies. It labels the Ngol/Ragaba ez Zarga as the 24 'Bahr el Homr'. The Nyamora/Ragaba Umm Biairo appears 25 to be depicted, but is described later along its course</p> <p style="text-align: center;">Page 126</p>	<p>15:45 1 scale and based on satellite imagery. 2 Its purpose was to show the whole province of 3 Kordofan, a province the size of France, on a single 4 convenient sheet of paper. While this map may have some 5 inaccuracy in position, it does not contain the sins of 6 omission and misnaming that the SPLM/A claim to see in 7 it. 8 So here again confusion is being introduced not so 9 much by the mapping as by the poor analysis of that 10 mapping by the SPLM/A. 11 In paragraph 63 of the appendix there is yet further 12 evidence of an unfamiliarity with the subject. The text 13 is now on screen: 14 "The [Government] relies on a 1916 map of Darfur 15 prepared by the Geographical Section of the War Office. 16 The Government fails to mention, however, that this map 17 also shows the boundary between Kordofan and 18 Bahr el Ghazal as running north of the Kiir/Bahr el Arab 19 until approximately 24°30' east longitude, then swinging 20 south to run beneath the Bahr el Arab and then arch 21 northwest to the Darfur frontier." 22 An extract from the map is now also on screen, and 23 here we have a similar error to the type that 24 Professor Crawford referred to earlier this afternoon. 25 This first error is a gross error in the longitude</p> <p style="text-align: center;">Page 128</p>

<p>15:47 1 quoted by the SPLM/A. 2 24°30' is in the vicinity of Hofrat en Nahas, well 3 outside our area of immediate interest. But even 4 allowing for this, it's very difficult to follow the 5 description of the boundary as running north of the 6 Bahr el Arab until approximately 24°30' longitude, then 7 swinging south to run beneath the Bahr el Arab. 8 Sections of four boundaries are shown on the map 9 with conventional symbols: Nuba Mountains/White Nile; 10 Nuba Mountains/Kordofan; Kordofan/Bahr el Ghazal; and 11 Kordofan/Darfur. What the writer appears to be 12 completely unaware of is the common cartographic 13 convention that the symbols for those boundaries which 14 sit on a topographic feature are often omitted for the 15 sake of clarity. 16 The river boundaries now complete the picture. 17 Nowhere can a boundary be described as running north of 18 the Bahr el Arab until approximately 24°30' longitude, 19 or indeed whatever the longitude was really meant to be. 20 So here we have a further case of weak map analysis. 21 Paragraph 64 of the appendix provides yet another 22 example of misunderstanding. The relevant text and map 23 are now on the screen: 24 "The 1918 Nyamell map is likely a misnamed map in 25 the Achwang ... Sheet 65-K series ... The approximate</p> <p style="text-align: center;">Page 129</p>	<p>15:50 1 comparing maps accurately. Further confusion of its own 2 making is thus introduced. 3 Mr President, I'm sure the Tribunal will be very 4 pleased we have come to the end of those map examples, 5 because I know that lawyers in general are not quite so 6 interested in maps as I am. But there is an important 7 point that comes out of all this. 8 From all these misinterpretations and errors, one 9 can only assume that the SPLM/A lacked expert 10 cartographic advice. This might not be important if it 11 was not part of its strategy to suggest that the maps 12 used by the Government in this case are unreliable and 13 confusing, and thus significantly add to the uncertainty 14 and confusion that the SPLM/A claims to surround the 15 definition of the Bahr el Arab and the boundary between 16 Kordofan and Bahr el Ghazal. In fact that confusion and 17 uncertainty is entirely of its own making. 18 Mr President, members of the Tribunal, perhaps the 19 most prominent example of SPLM/A confusion is the case 20 of the 1904 Intelligence Office map. This was a general 21 map at a small scale covering the whole country. 22 The SPLM/A has consistently claimed that Wilkinson's 23 mistaken naming of a section of waterway in the vicinity 24 of Mellum as the Bahr el Arab means that he and the 25 other administrators gave that name to the whole of the</p> <p style="text-align: center;">Page 131</p>
<p>15:48 1 provincial boundary depicted in the 1918 Nyamell Map is 2 identical to that in the 1916 Achwang map, apparently 3 undoing the variation introduced by the 1916 Darfur 4 map." 5 On a minor point, this sheet is not misnamed; it 6 takes its name from a settlement in the southwest corner 7 of the sheet, as can now be seen in the enlarged 8 extract. 9 The boundary depicted on the 1918 map is not 10 "identical to that in the 1916 Achwang map". All three 11 maps are displayed on screen now. 12 On the 1918 map the boundary has been moved further 13 to the west, reaching the tripoint with Darfur on the 14 Bahr el Arab at 26°43' east. On the 1916 edition of the 15 map, the boundary reaches the tripoint at around 27°54'. 16 The tripoint on the 1916 Darfur map is also close to 17 27°54'. 18 Although care must be taken in comparing the two 19 1916 maps -- the Achwang map is at a scale of 1:250,000 20 and the Darfur map is a scale of 1:3,00,000 million -- 21 the two maps do show roughly the same boundary alignment 22 north of the Amadgora River. So the 1916 Darfur map did 23 not introduce a variation from the 1916 Achwang map. It 24 was the 1918 Nyamell map which introduced change. 25 Here again, the SPLM/A seems to be incapable of</p> <p style="text-align: center;">Page 130</p>	<p>15:52 1 Ragaba ez Zarga as we know it today. I believe this to 2 be quite mistaken. The best evidence available to us 3 today on the impact of Wilkinson's mistake is the effect 4 that it had on the mapping of the Bahr el Arab on the 5 1904 map. 6 First, however, I want to establish the extent of 7 Wilkinson's mistake. As the map on your screen now 8 shows, he only followed the Ragaba for two very short 9 sections, about 3% of its whole length. While he did 10 name this part of the river the Bahr el Arab, and the 11 river that flowed past Sultan Rob's village the Kiir, 12 there is no evidence that he believed that he had found 13 a river entirely separate from that which formed the 14 boundary between Darfur and Bahr el Ghazal provinces to 15 the northwest, nor that his Bahr el Arab flowed into the 16 Bahr el Ghazal at some point other than Ghabat el Arab. 17 The cartographic evidence provided by the 1904 map 18 supports the view that Wilkinson simply thought he had 19 come across a part of the course of the Bahr el Arab on 20 its way from Hofrat en Nahas to Ghabat el Arab. 21 The cartographers at the Intelligence Office 22 interpreted his report in two ways. The first was to 23 divert the Bahr el Arab, which came down from 24 Hofrat en Nahas, around the loop north of 10°, from 25 a point upstream of the modern-day location of Abyei, to</p> <p style="text-align: center;">Page 132</p>

<p>15:54 1 flow north to Mellum. From here it followed the course 2 of the Ragaba ez Zarga for about 12 kilometres, before 3 turning south-southeast to reach the Ghazal at its known 4 mouth at Ghabat el Arab. 5 It was not a case of misnaming the Ragaba ez Zarga 6 as the Bahr el Arab, because they simply did not know 7 anything about the course of such a river, or even its 8 existence. It was simply a case of routing the 9 Bahr el Arab to the north, and then back to its known 10 mouth at Ghabat el Arab. 11 This then had a consequential effect on the 12 depiction of the river which flowed past Sultan Rob's 13 village, known locally as the Kiir. If it was not the 14 Bahr el Arab, there had to be another confluence with 15 the Bahr el Ghazal. It was a significant river and it 16 needed a significant head water to justify its size. So 17 the cartographers had to create a new river, with 18 a source in the hills of Dar Fartit to the west, flowing 19 past Sultan Rob's and emptying into the Bahr el Ghazal 20 some way to the south of Ghabat el Arab. Much of this 21 proved later to have no foundation in fact. 22 It should be remembered that these changes were 23 carried out on a map at the small scale of 1:4,000,000; 24 that is to say 1 centimetre represents 40 kilometres. 25 The depiction was very generalised, and commensurate</p> <p style="text-align: center;">Page 133</p>	<p>15:57 1 to the idea that the Bahr el Arab was a quite different 2 river that did not rise in the vicinity of 3 Hofrat en Nahas and did not loop up to the parallel of 4 10°20'. 5 The mistake was corrected in the 1907 1:1,000,000 6 map, and from this point on the position of the 7 Bahr el Arab remained essentially the same on all the 8 subsequent mapping produced by the survey department. 9 The amount of detail of the actual course of the river 10 changed, and the latitude and longitude changed as more 11 accurate measurements could be made. 12 Not every piece of information proved reliable. For 13 instance, the location of Abyei and the Bahr el Arab in 14 its immediate vicinity moved significantly west on the 15 1922 edition of the 1:250,000 series, but was moved back 16 again in 1925. But the general course of the river was 17 well known, and there was no confusion with any other 18 river. 19 Mr President, members of the Tribunal, the 20 development of an understanding of the course of the 21 Bahr el Arab up to 1905 followed a natural course, 22 a course that could be expected for the era under 23 consideration. The depiction lacked intricate detail 24 and showed errors in position. Mistakes such as 25 Wilkinson's, though none quite so significant, occurred</p> <p style="text-align: center;">Page 135</p>
<p>15:55 1 with the scale. 2 The direction of travel of the 1904 map's alignment 3 of the Bahr el Arab after Mellum must have rung alarm 4 bells with those who knew something of its lower course, 5 for its general bearing was much too close to south 6 instead of east. This depiction was soon attacked by 7 Bayldon in 1905, and by Comyn in 1905/1906. 8 Bayldon was convinced that the river coming into 9 Ghabat el Arab in a general east-south-east direction 10 was the one that flowed past Sultan Rob's village; 11 whilst Comyn was adamant that no head water of the 12 phantom Kiir existed in Dar Fartit; whilst Lyons, the 13 director general of the Survey of Egypt in Cairo, 14 misinterpreted what Bayldon was saying -- and he was, 15 after all, a long way away. 16 The Survey Department in Khartoum accepted the two 17 arguments, and the 1907 1:1,000,000 map reflected that 18 position. The phantom sections of the Kiir disappeared, 19 and the Bahr el Arab reverted to flowing past 20 Sultan Rob's village to Ghabat el Arab. To the north 21 the first vestiges of the Ragaba ez Zarga finally 22 appeared. 23 Wilkinson's error caused a variation in the course 24 of the Bahr el Arab to be shown only on the 1904 map. 25 No other map was affected. His error did not give rise</p> <p style="text-align: center;">Page 134</p>	<p>15:59 1 from time to time. 2 But throughout the period leading up to 1905 there 3 was a clear understanding that there was a substantial 4 river rising in the vicinity of Hofrat en Nahas, and 5 flowing some 750 kilometres southeastwards to join the 6 Bahr el Ghazal at a well-determined location. 7 I do not find the arguments advanced by the SPLM/A 8 that the maps of the period were too inaccurate and 9 confusing to be in any way convincing. By contrast, 10 I have shown that there was a natural progression in the 11 depiction of the river, with many common features 12 occurring on one map after another. 13 Now, returning to our opening screen, after having 14 studied the maps that I have displayed, we can see with 15 absolute clarity that the early cartographers got the 16 classical signature of the Bahr el Arab right, within 17 the limits set by the technology of the time and the 18 scales of the maps produced. Its depiction was fit for 19 the purpose of boundary delimitation at the time. 20 Mr President, that concludes my presentation, I hope 21 that you've found it helpful, but before I close I would 22 like to place on record the very great deal of 23 assistance that I have received from Mr Martin Pratt of 24 the International Boundaries Research Unit at Durham 25 University in this presentation. His name doesn't go on</p> <p style="text-align: center;">Page 136</p>

<p>16:00 1 the presentation, but really and truly it should have 2 done. Thank you. 3 Mr President, I am grateful for your advice as to 4 where I go now, what happens next. 5 THE CHAIRMAN: Well, thank you very much, you can go back 6 to your chair. 7 We will now proceed to the cross-examination. 8 (4.01 pm) 9 Examination-in-chief by MS MILES 10 Q. Good afternoon, Mr MacDonald. My name is Wendy Miles 11 and I'm going to ask you a few questions about your 12 evidence. Can we start, please, just a question about 13 your presentation. Going back, do you have your bundle 14 of maps in front of you? 15 A. I don't, but I'm sure Mr Pratt can put it on screen and 16 I can see it here. 17 Q. Alright. Could you please put on screen the map 18 entitled "The Bahr el Arab as depicted on maps 19 pre-1905". It's the last map before tab 4, divider 4. 20 No, the last map before divider 4. It has the 21 adjustment, the longitude adjustment. 22 A. I'm sorry. 23 Q. Sorry, I wasn't saying "no" to you, I was saying "no" to 24 the screen. 25 A. I've got it.</p> <p style="text-align: center;">Page 137</p>	<p>16:04 1 a longitudinal adjustment? 2 A. That's correct. 3 Q. Okay. 4 Mr MacDonald, I'd like to ask you some questions now 5 about your report, if I may. We know you submitted 6 three -- 7 A. Yes. 8 Q. -- separate reports, one in early December and two in 9 February of this year. 10 A. Yes. 11 Q. Do you have your reports in front of you? Could you 12 please turn to appendix 2 of your second report, it's 13 the penultimate page in that report. 14 A. Yes. 15 Q. At appendix 2, if I may read out, you have said: 16 "Further research in the archives of the Survey 17 Department in Khartoum has shed light on the process by 18 which provincial boundaries were determined", et cetera. 19 A. Yes. 20 Q. In your third report -- and you don't need to go to it 21 if you trust me to read the quote correctly -- you say: 22 "It is clear from the archives of the Survey 23 Department that the department must have had rapid 24 access to certain information." 25 It was in response to the Bayldon point. I can take</p> <p style="text-align: center;">Page 139</p>
<p>16:02 1 Q. That is correct. 2 You spoke in your presentation about adjusting the 3 rivers to take into account longitudinal error; correct? 4 A. Yes. 5 Q. You mentioned also latitude. Describing it using the 6 quotation from the book Longitude, you described 7 latitude as "child's play"? 8 A. Yes. 9 Q. You said that -- and I think I've written it down 10 correctly from the transcript: 11 "... early explorers who travelled up the Nile would 12 quite likely have had some means of measuring the 13 [position] of the sun at midday, ie for latitude, 14 primarily for latitude, for which they would get quite 15 good results." 16 Is that correct? 17 A. Yes. 18 Q. So as I understand longitude, to make a longitudinal 19 adjustment on this map you would need to move the rivers 20 in a west-east adjustment? 21 A. Yes. 22 Q. But it is correct, isn't it, that you have also moved 23 these rivers in a north-south adjustment? 24 A. That's correct. 25 Q. So you have made a latitudinal adjustment as well as</p> <p style="text-align: center;">Page 138</p>	<p>16:06 1 you to it. It's in your third report at page 5, 2 paragraph 19. It's the penultimate sentence in that 3 paragraph. 4 A. Sorry, the paragraph number? 5 Q. Paragraph 19 on page 5. 6 My question is a simple one, Mr MacDonald: did you 7 personally visit the Sudan Survey Department archive to 8 carry out the research for your reports? 9 A. I visited the Sudan Survey Department. 10 Q. For the purpose of carrying out research for your 11 reports? 12 A. Yes. 13 Q. How many times did you visit the Survey Department for 14 that purpose? 15 A. Once. 16 Q. Can you remember when that was? 17 A. That was on the -- if I've got my dates -- it was 18 a Monday to Friday, and I suspect it was 19 15th-20th January. 20 Q. So it was after your first report but before your second 21 and third reports? 22 A. Yes. 23 Q. At the Survey Department archive, did you consider that 24 you enjoyed free access to the archives? 25 A. The procedure -- I sat in a room. I'd asked for any</p> <p style="text-align: center;">Page 140</p>

16:07 1 records that might refer to the boundaries of Kordofan  
2 and Bahr el Ghazal. These records were brought to me  
3 and nothing particularly useful was found as far as  
4 Kordofan and Bahr el Ghazal go. In fact, nothing was  
5 found.  
6 Q. Okay. In your second report you refer to a Cunningham  
7 route sketch -- there's no need to go to it -- which you  
8 reproduce at figures 1 and 2 of your second report.  
9 A. Yes.  
10 Q. Did you see any of the other route sketch maps that are  
11 relied on by the Government in its submissions in these  
12 proceedings?  
13 A. Not during my visit.  
14 Q. Did you see the Wilkinson map in particular subsequent  
15 to your visit?  
16 A. Did I see -- which Wilkinson map?  
17 Q. The 1902 Wilkinson sketch map.  
18 A. The route map?  
19 Q. Yes.  
20 A. Did I see it subsequent to my visit?  
21 Q. Yes?  
22 A. Yes.  
23 Q. Did you ever ask to see the complete Wilkinson route  
24 sketch map?  
25 A. I personally did not.

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16:10 1 Percival -- I believe I have seen the Percival complete  
2 sketch map, but I've not used it in my report.  
3 Q. The complete Percival sketch map that you believe you  
4 have seen, is that in the same form as the first  
5 Percival sketch map that you saw that related to the  
6 segment of his trek from Wau to Kiir?  
7 A. Kiir to Wau.  
8 Q. Kiir to Wau, you are quite right.  
9 A. Is it in the same form? In what -- how --  
10 Q. Is it produced with the same pen, the same writing, the  
11 same format, or is it a rough sketch?  
12 A. I have to say that there are a lot of Percival sketches.  
13 I can recall a version of Percival's sketch south of the  
14 Kiir which in my view was a fair drawn copy, though by  
15 whom I don't know.  
16 Q. Did you see what would be in your view a fair drawn copy  
17 of a sketch map by Percival for the section of his trek  
18 from Keilak to the Kiir?  
19 A. I think I ought to make clear, Mr President, what I mean  
20 by a "fair drawn copy".  
21 I imagine that Percival on his day-to-day journey  
22 drew a rough sketch and then, perhaps when he got to Wau  
23 or perhaps when he stopped for a few days on the route,  
24 he would draw up a neater version. That you could say  
25 was fair drawn.

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16:09 1 Q. Okay. Did you see the Percival route sketch map  
2 relating to his route from the Kiir to Wau?  
3 A. Yes.  
4 Q. Excuse me. Did you see his sketch map for the route  
5 from Lake Keilak to Wau?  
6 PROFESSOR CRAWFORD: Sorry, one point of clarification.  
7 Are you saying did he subsequent to his visit or did  
8 he during his visit?  
9 MS MILES: He's already said he didn't see any sketch maps  
10 during his visit, so subsequent. Thank you for  
11 clarifying.  
12 A. In writing my reports I only saw the Percival sketch  
13 maps running south of the Bahr el Arab, or Kiir, as  
14 Percival referred to it.  
15 Q. Did you ever ask to see the complete Percival sketch  
16 map?  
17 A. I very much wanted to see that part of the route between  
18 the Ragaba ez Zarga and what we now take to be the  
19 Bahr el Arab.  
20 Q. So did you ever ask to see the complete Percival sketch  
21 map?  
22 A. I asked members of our team in England, and I believe  
23 that request was conveyed to Ambassador Dirdeiry.  
24 Q. But you never did see the complete Percival sketch map?  
25 A. I have -- since completing my reports I have seen the

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16:12 1 But when I say that I've seen a fair drawn map  
2 running south from the Kiir, I'm thinking more -- it  
3 looked to me to be a more professionally drawn map, and  
4 I had the feeling that maybe a cartographer had done  
5 that, though I can't in any way prove that.  
6 To turn now to the Keilak maps, I believe that  
7 I have seen rough maps of the Keilak to Ragaba ez Zarga  
8 and also a fair drawn map probably by Percival.  
9 Q. So just to be clear, you believe you have seen from the  
10 Government a fair drawn map for the segment from Kiir to  
11 Lake Keilak, probably drawn by Percival?  
12 A. No, I'm not saying that.  
13 Q. You have not seen?  
14 A. You are confusing me by changing direction --  
15 Q. I'm sorry.  
16 A. -- and also changing segments. I don't want you to get  
17 the impression that I've seen anything other than  
18 a route from Keilak to the vicinity of the  
19 Ragaba ez Zarga. I believe -- I cannot be absolutely  
20 sure, but I believe I have seen a rough sketch of that  
21 route, and a fair drawn section of that route by  
22 Percival.  
23 I have not seen, to my knowledge -- certainly not  
24 before I wrote my reports -- any sketch between the  
25 Ragaba ez Zarga and Burakol close to the Bahr el Arab.

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16:14 1 South of Burakol I believe I may have seen Percival's  
2 sketch, I believe I may have seen a rough sketch, and  
3 I have certainly seen a sketch I took to be fair drawn  
4 by a cartographer, in preparation presumably for  
5 transfer to the next edition of the 1:250,000 map.  
6 It's a very complicated set of sketches, and  
7 I apologise if I'm being a little bit confused, but it's  
8 requiring quite an effort of memory to sort it all out  
9 without any documents in front of me.  
10 Q. I think you were very clear, thank you, Mr MacDonald.  
11 Just one question about your answer. You said:  
12 "I have not seen to my knowledge, certainly not  
13 before I wrote the report, the sketch between the  
14 Ragaba ez Zarga and Burakol."  
15 Now, have you seen one since you wrote your report,  
16 or indeed your reports?  
17 A. I'm sorry, Mr President, but I really can't answer that  
18 question, not because I'm trying to avoid it, but  
19 because quite honestly I was not involved with the  
20 sketches after writing my report because they were then  
21 being used for another purpose which was not my role in  
22 the case.  
23 And so, while I may have seen them, I have not  
24 particularly registered them because I had nothing --  
25 I had no reason to look at them with care and put them

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16:18 1 Q. And you did not review any Bahr el Ghazal boundary file  
2 at that time, did you?  
3 A. No. No.  
4 Q. Did you ask for a Kordofan boundary file to review?  
5 A. Yes.  
6 Q. Did you ask for a Bahr el Ghazal boundary file to  
7 review?  
8 A. Yes.  
9 Q. Okay. We can move on to the content of your reports  
10 now, if we may. Can I please have back my pages in case  
11 I need them?  
12 A. Yes. (Handed)  
13 Q. Thank you.  
14 If we start with your most recent, third, report,  
15 you accept there that the area we're concerned about in  
16 the era under consideration was a remote part of Africa.  
17 You describe it that way at paragraph 61 of your third  
18 report, but you probably don't need to go to it to agree  
19 with me that this was a remote part of Africa?  
20 A. I would have thought so.  
21 Q. And that indeed there were -- and again you probably  
22 don't need to go to the quote to agree with me -- but  
23 there were difficulties facing any mapping of that area  
24 in Africa?  
25 A. I do agree with that.

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16:16 1 in my memory.  
2 I hope -- I'm not trying to avoid the question, but  
3 really it is quite difficult. There were a flood of  
4 reports coming in, and these really did not concern me  
5 in the later stages.  
6 Q. We can move on, Mr MacDonald.  
7 Also at your second report, appendix 2, on the very  
8 last page of your second report.  
9 A. I need another copy because --  
10 Q. That's okay, I can pass you my copy. Here you are.  
11 (Handed)  
12 A. Yes.  
13 Q. At appendix 2 you refer to three sources. This is back  
14 at your visit to the Survey Department archives. You  
15 refer to three sources: the Kasala boundary file, the  
16 Sinnar boundary file, and the Funj boundary file, and  
17 you speak in appendix 2 about having reviewed some  
18 correspondence -- would you like the other page of  
19 appendix 2?  
20 A. No, I've got the other page.  
21 Q. Oh, you've got it now -- about having reviewed some  
22 correspondence from those files.  
23 My question is: you did not review any Kordofan  
24 boundary file at that time, did you?  
25 A. No.

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16:19 1 Q. And also that many of the early administrative  
2 officers -- and you referred to this in your  
3 presentation -- carrying out exploration were not  
4 experienced surveyors? You put it this way:  
5 "At the time it would have been possible to  
6 determine astronomically [this is coordinates], but this  
7 would be beyond the expertise of most of the  
8 administrative officers concerned."  
9 That's true, isn't it?  
10 A. Yes. I have to say that of course this is all  
11 speculation. I'm attributing to these officers a level  
12 of ability, and of course that is on the best grounds of  
13 probability.  
14 Q. That's fine. You say that:  
15 "Any travel in the country between the  
16 Bahr el Ghazal and the watershed was difficult."  
17 By "the Bahr el Ghazal", you mean the Bahr el Ghazal  
18 River, don't you?  
19 A. Yes, I do.  
20 Q. And by "the watershed" you're referring to the  
21 Lake Chad/Nile watershed?  
22 A. Yes, I do. Yes, I am.  
23 Q. So the whole area that you talk about when you refer to  
24 the country between the Bahr el Ghazal and the watershed  
25 is in fact that whole area to the -- without a map, it's

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16:20 1 difficult.  
 2 A. Yes.  
 3 Q. Could we go to your Comyn map, which is reproduced at  
 4 page 182 of your first report.  
 5 A. Yes.  
 6 Q. It's cut off at the side, which makes this a little bit  
 7 difficult, but I think you'll follow. At the locator  
 8 inset we see Lake Chad to the northwest; correct?  
 9 A. Yes.  
 10 Q. And the area enlarged is essentially to the area of the  
 11 east and southeast of that Lake Chad/Nile watershed  
 12 therefore?  
 13 A. Yes.  
 14 Q. So that's the area that you're discussing when you're  
 15 talking about where travel was difficult: essentially  
 16 the area on the Comyn map?  
 17 A. Well, I'll just make the comment that it's really part  
 18 of that area, because you can see with the lines, for  
 19 instance, from Meshra el Rek to Wau, Wau to Daim Zubeir,  
 20 these are all, if you look at the legend, country  
 21 traversing maps by British officers.  
 22 It's a fairly dense little network of routes there,  
 23 and it's probably the area to the north of the vignettted  
 24 line that runs through the centre of Bahr el Ghazal.  
 25 Q. And "the area to the north of the vignettted line", by

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16:24 1 A. Yes. Well, I wrote it, so obviously I believe it to be  
 2 true.  
 3 Q. I'm sure. You recognise that the task of sorting out  
 4 the course of the waterways in the area proved very  
 5 challenging in what you describe as "very difficult flat  
 6 country"; that's 5.2 of your first report, if you want  
 7 to check that.  
 8 A. Yes.  
 9 Q. In your third report you elaborate on the relevance of  
 10 the problem that you describe as the "flatlands of the  
 11 Bahr", and you elaborate by saying:  
 12 "The traveller was unable to get any view of the  
 13 ground to trace the twists and turns of the rivers and  
 14 the way they were interwoven."  
 15 Is that correct?  
 16 A. Yes.  
 17 Q. You agree, moreover, that it is unreasonable to expect  
 18 a detailed depiction of these river courses until the  
 19 arrival of aerial photography?  
 20 A. Yes, I said that this morning.  
 21 Q. And this, in the Sudan at least, would not have been  
 22 until the Second World War?  
 23 A. Yes.  
 24 Q. In these proceedings we are fortunate enough to have the  
 25 benefit of modern satellite imagery of the area, and

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16:22 1 that you mean the area to the north --  
 2 A. Perhaps "shaded line" would be --  
 3 Q. -- of the shaded line, so that would encompass the area  
 4 above the Ngol and above the Bahr el Arab?  
 5 A. Again, that's a fairly general statement. I think  
 6 coming down to that place, Shakka, and moving into the  
 7 watershed area I think was a fairly general route  
 8 followed by traders and slavers.  
 9 Q. But the area north of the Bahr el Arab as depicted on  
 10 this map?  
 11 A. Immediately north of the Bahr el Arab, yes.  
 12 Q. Okay. So you accept that the fairly dense network of  
 13 routes that you describe are not in the area north of  
 14 the Bahr el Arab?  
 15 A. No, but of course Comyn was based in the south, and he  
 16 shows the ones he knows about. There are clearly other  
 17 routes coming down from the north that he doesn't show.  
 18 Q. Okay, and we'll come to those.  
 19 You say of this area, in your first report, that by  
 20 the end of the 19th century it had not been possible to  
 21 connect the rivers on the watershed with the known  
 22 mouths of tributaries on the Bahr el Ghazal with any  
 23 certainty.  
 24 A. Can you give me the reference?  
 25 Q. Yes, certainly: paragraph 5.1 of your first report.

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16:25 1 I think you agree that the actual satellite imagery  
 2 shows that this is an area where there is a multitude of  
 3 channels, old and new?  
 4 A. Yes.  
 5 Q. Now, if we could look at the 1904 War Office map,  
 6 please, Mr MacDonald.  
 7 If it doesn't raise any objection, could I ask  
 8 Mr MacDonald to turn to that map in the Gleichen  
 9 handbook?  
 10 Mr MacDonald, do you recognise the book I just  
 11 handed to you? (Pause). I can assist you: it's the  
 12 Gleichen handbook --  
 13 A. Yes. I hadn't seen it in its original edition.  
 14 Q. If you turn to the back please, Mr MacDonald, I'd like  
 15 you, just if you can, by looking at the reference  
 16 number, confirm that that is the map that's on the  
 17 screen?  
 18 A. Yes, yes, it is.  
 19 Q. You refer to this map in your first report, describing  
 20 it as having been produced by the Intelligence Office in  
 21 Khartoum in May 1904.  
 22 A. I certainly accept the 1904. I'd have to take your word  
 23 for May without looking up the reference.  
 24 Q. It's the first report at paragraph 3.9. You can check  
 25 it, I'm happy for you to go to it. You'll find that at

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16:27 1 page 172.  
 2 A. Yes, that's correct.  
 3 Q. And you agree, and you've said in your presentation,  
 4 that this map reflects Wilkinson's assumption that the  
 5 river he reached just south of Falwal was what he called  
 6 the Bahr el Arab?  
 7 A. Yes.  
 8 Q. In your second report at paragraph 10 you say that:  
 9 "There was a short-lived period of confusion after  
 10 Wilkinson's journey in 1902 which resulted in one map  
 11 being issued with a distortion in the course of the  
 12 Bahr el Arab to the north of Sultan Rob's village."  
 13 A. Yes.  
 14 Q. That map you're referring to is the map on the screen  
 15 and the map that you just found in the back of the  
 16 handbook?  
 17 A. Yes.  
 18 Q. And you say that this confusion had been corrected, to  
 19 be fair, by 1907?  
 20 A. Yes.  
 21 Q. So Wilkinson's mistake was at least initially accepted  
 22 by the Condominium administration?  
 23 A. I only know that Wilkinson's mistake resulted in the  
 24 depiction on the 1904 map.  
 25 Q. Okay. If you go to paragraph 3.9 of your first report,

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16:31 1 What you're looking at here is the last page of the  
 2 bibliography and cartography for the 1905 Sudan  
 3 handbook; right?  
 4 A. Yes.  
 5 Q. If we look at part C of the cartography, that's entitled  
 6 "Maps", obviously. Can you see under the words "For  
 7 general maps the following are recommended", the first  
 8 map listed there, would you agree with me that that is  
 9 the map that you've just refolded in the back of the  
 10 handbook?  
 11 A. Yes, I would.  
 12 Q. Could you read out for me, please, the words after the  
 13 name of that map, the words in parentheses?  
 14 A. It says "latest and most up-to-date general map", which  
 15 of course refers to the Anglo-Egyptian Sudan.  
 16 Q. Thank you.  
 17 If we could move to a different topic now please,  
 18 Mr MacDonald: the broader subject of what you describe  
 19 in your first report as "Intense Exploration, 1900 to  
 20 1910". You open that section of your report at page 168  
 21 with a quote from 1898, the first year of the  
 22 Condominium. The quote says -- these are not your  
 23 words:  
 24 "Almost a century has passed since Browne first  
 25 marked the Bahr el Arab on the map, and our knowledge of

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16:29 1 Mr MacDonald, the third sentence of that report, you  
 2 say:  
 3 "Initially it was accepted by the Condominium  
 4 administration that he [he' being Wilkinson] was right  
 5 in calling this stream the Bahr el Arab."  
 6 A. Yes, I have written that, and perhaps I should more --  
 7 I should have written what I've just said.  
 8 Q. Looking at the map, Mr MacDonald, and you can look at  
 9 it, it has a close-up on the screen, can you see  
 10 Sultan Rob's marked on that map?  
 11 A. I can.  
 12 Q. Can you tell me on this map the name of the river that  
 13 Sultan Rob's is located on?  
 14 A. It says River Kiir or el Gurf.  
 15 Q. Can you describe for me whether on this map Sultan Rob's  
 16 is depicted on the north or the south of that river?  
 17 A. I'd need a greater enlargement for my old eyes, I'm  
 18 afraid.  
 19 Q. It may help to look at the map in the back of the book.  
 20 We do have a magnifying glass. I'm not being cheeky;  
 21 I can't see it either.  
 22 A. Yes, it appears here to be on the northern side.  
 23 Q. Could you fold up that map but keep open Gleichen, the  
 24 handbook, for a moment. Turn from the back to page 349,  
 25 please, of that handbook. Do you have it?

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16:32 1 it is even now scarcely more definite. No European has  
 2 explored the whole course of the stream."  
 3 You've reproduced that quote in your report.  
 4 A. Yes.  
 5 Q. Now, in that section of your report entitled "Intense  
 6 Exploration, 1900 to 1910", the first pre-1905 explorer  
 7 that you refer to is Saunders; right?  
 8 A. Yes.  
 9 Q. However, you would accept that Saunders made little  
 10 contribution to the understanding of the course of the  
 11 Bahr el Arab, other than defining the location of its  
 12 mouth?  
 13 A. Yes.  
 14 Q. The next pre-1905 explorer that you refer to in your  
 15 "Intense Exploration" section is Wilkinson?  
 16 A. Yes.  
 17 Q. We've spoken about Wilkinson briefly.  
 18 The third and final pre-1905 explorer to the region  
 19 that you discuss in your first report, albeit briefly,  
 20 is Percival. (Pause)  
 21 A. I'm just pausing because I'm not sure that it was the  
 22 final. I would have thought I mentioned Comyn and  
 23 Bayldon.  
 24 Q. Sorry, Mr MacDonald, pre-1905. I'm cutting your  
 25 "Intense Exploration" section down the middle.

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16:34 1 A. Sorry, I missed that. Yes, I think that's correct,  
2 provided you mean, by "1905", January 1905?  
3 Q. Yes. Other than Percival and Wilkinson, in your section  
4 in your first report on intense exploration you don't  
5 discuss any other pre-1905 sketch maps or trek reports  
6 from any other explorers in the region?  
7 A. No.  
8 Q. So the extent of intense exploration pre-1905 discussed  
9 in your first report is limited to Wilkinson and  
10 Percival?  
11 A. And Saunders.  
12 Q. But you've said that Saunders made little contribution  
13 to the understanding of the course of the Bahr el Arab,  
14 other than defining the location of its mouth.  
15 A. That was a contribution.  
16 Q. Alright, that's fine. Could we turn to another topic.  
17 THE CHAIRMAN: I'm sorry, how long do you think you have  
18 to go on?  
19 MS MILES: 10 minutes.  
20 THE CHAIRMAN: Okay, keep going.  
21 MS MILES: Ngok presence, Mr MacDonald. Let's turn to the  
22 historic and cartographic evidence dealing with the  
23 presence of Ngok in and around 1905.  
24 Now, apart from passing reference to Wilkinson and  
25 others having seen Sultan Rob's village, later his old

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16:37 1 A. Yes, I do.  
2 Q. And indeed, settlements of Sultan Rob were at that time  
3 located to the north of the River Kiir?  
4 A. That is what Wilkinson said.  
5 Q. If we could look at the Wilkinson sketch map, those  
6 marked settlements, the Mareig district is marked north  
7 of the Kiir. You accept that these are likely  
8 settlements of Sultan Rob that Wilkinson came to before  
9 he crossed the Kiir?  
10 A. I think I should make it clear, Mr President, that my  
11 job was to identify or to chronicle the development of  
12 the depiction of the Bahr el Arab. I was not  
13 particularly concerned with where the Dinka were living.  
14 Q. But you did deal with where the Dinka were living in  
15 your second report, albeit briefly, at least in relation  
16 to this area and in relation to where Sultan Rob was  
17 living?  
18 A. I did deal -- yes, I dealt with the issue of whether  
19 Sultan Rob lived on the north or south bank, because  
20 I felt that Sultan Rob is a major feature on the maps of  
21 the era, and I wanted to be quite clear where he was.  
22 Q. On that subject, at paragraph 25 of your second report,  
23 you say that:  
24 "There is no evidence that Sultan Rob had moved from  
25 his original village in 1903."

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16:35 1 village and Burakol, you did not discuss the presence of  
2 Ngok prior to the 1905 transfer in your first report?  
3 A. No.  
4 Q. Also in your third report you do not consider Ngok  
5 presence in any detail, and to be fair, that was  
6 a responsive report to the response to your first  
7 report.  
8 A. Yes.  
9 Q. So for the questions on your discussion of Ngok  
10 presence, could we turn to your second report, as this  
11 is the report in which you deal with any of the evidence  
12 on this subject.  
13 Now, first at paragraph 23 of your second report,  
14 you deal with paragraph 924 of the SPLM/A memorial. And  
15 that paragraph of the SPLM/A memorial says -- and  
16 I quote from the SPLM/A memorial:  
17 "Wilkinson next records that, at a point 28 miles  
18 from Ngok, he reached what he termed 'the Kiir River, or  
19 Bahr el Jange', and the 'settlements of Sultan Rob',  
20 which were located on both sides of the river."  
21 Now, your comment about that report is that the  
22 citation is not true to its source. You would agree  
23 with me though that the extracted quote, ie "settlements  
24 of Sultan Rob", comes from, verbatim, Wilkinson's  
25 report?

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16:39 1 By "his original village" you mean Mathiang, the  
2 site where he met Wilkinson?  
3 A. Yes.  
4 Q. You do accept, though, that there is evidence that  
5 Sultan Rob in fact lived in Burakol at least by 1904?  
6 A. I'm not sure, Mr President, if I'm allowed to say this,  
7 but my own personal opinion is that he might well have  
8 been operating two villages, and moved back and forwards  
9 between them. That's how I interpret the various  
10 reports on his location during this period.  
11 Q. You qualified that as your own personal opinion. Is  
12 there any evidence in the record that that was indeed  
13 the case?  
14 A. The evidence in the record is the difficulty in  
15 reconciling all of these reports without making that  
16 assumption.  
17 Q. You say in your report that Sultan Rob lived in Mathiang  
18 up to his death in 1906, but you would accept that the  
19 evidence in the record does not support that conclusion?  
20 A. Can you give me a reference?  
21 Q. Sorry, paragraph [19] of your second report, I believe.  
22 A. In paragraph 19, Mr President, I explain that -- and  
23 again perhaps this is supposition -- but that  
24 Huntley-Walsh reported seeing him on 8th March, and  
25 I believe that was in his old village. He was, of

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16:41 1 course, also buried very near to the site of his old  
2 village.  
3 Q. In your [second] report at paragraph 31 you say that:  
4 "The paramount chief's settlement in 1905 was at the  
5 site of his old village near present-day Mathiang, and  
6 that is about 30 kilometres southeast of the present  
7 location of Abyei."  
8 That's correct, isn't it?  
9 A. Which paragraph are you asking me to look at?  
10 Q. Sorry, I was asking you to look at paragraph 31.  
11 A. Yes. I've lost the question, I'm sorry. I clearly said  
12 that Sultan Rob lived in Mathiang up to his death in  
13 1906.  
14 Q. Okay. That was the question, so you've confirmed --  
15 A. I base that on the Huntley-Walsh --  
16 Q. You've confirmed the point, that's fine.  
17 Could we please just -- and I'll try to do this very  
18 quickly -- look at the cartographic record for the  
19 location of the paramount chief of the Ngok Dinka for  
20 the period from 1904 at least to 1925.  
21 Now, in your second report you describe Burakol --  
22 let me ask a first question. Do you accept that Burakol  
23 was described by Percival as the place where Sultan Rob  
24 was living when he met with him?  
25 A. Yes, I do.

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16:45 1 A. Yes.  
2 Q. The next map I'd like you to look at -- you referred to  
3 it in your presentation -- is the 1907 northern  
4 Bahr el Ghazal map. If we zoom in on this map, do you  
5 see Burakol again marked in the fork between the  
6 Nyamora, or the Yamoi it's called again, and the Kiir?  
7 A. Yes, I do.  
8 Q. Do you see written below that, "Sultan Rob's new  
9 village"?  
10 A. Yes.  
11 Q. I'd like to take you now to the Whittingham sketch map  
12 of 1910. Have you seen this before. We'll zoom in on  
13 the area, it might be more helpful.  
14 A. Yes, I have seen it.  
15 Q. Do you see Abyia at the bottom of the map?  
16 A. I do.  
17 Q. And do you see the "ferry" marked at Abyia, or do you  
18 see the word "ferry" written below Abyia?  
19 A. I do.  
20 Q. Would that map suggest to you that the ferry is located  
21 as having its crossing over the Nyamora or the  
22 Umm Biero?  
23 A. That map would suggest that there is a ferry three and  
24 a half miles upriver from the Kiir junction across the  
25 Umm Biero.

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16:44 1 Q. And in your second report you describe Burakol as "on  
2 the west side of the Ragaba Umm Biero"?  
3 A. Yes, I do.  
4 Q. And you say "whereas Abyei Town is on the east side of  
5 the Ragaba"?  
6 A. That's correct.  
7 Q. I'd like to look at the cartographic record on that. If  
8 we start with Percival's sketch map itself, can you see  
9 on the enlargement Burakol?  
10 A. I can.  
11 Q. Is it located in the fork between the Nyamora or  
12 Umm Biero and the River Kiir?  
13 A. Yes. In the enlargement on screen, of course, it does  
14 say Yamoi, but I accept what you say.  
15 Q. You accept that the Yamoi is in fact the Umm Biero or  
16 the Nyamora, the Ngok name for it?  
17 A. Yes, I do.  
18 Q. Do you see a number of markings suggesting scattered  
19 settlements or houses in that area?  
20 A. I see a number of markings; I don't think I can say that  
21 they would necessarily mark scattered settlements.  
22 There's no legend to check that.  
23 Q. It is a sketch map, to be fair. Do you see Bongo?  
24 A. I do, yes.  
25 Q. And that's marked close to the river?

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16:46 1 Q. Thank you. The 1914 Ghabat el Arab map, if we zoom in  
2 here, do you see again the fork between the Nyamora and  
3 the Kiir?  
4 A. I do.  
5 Q. Do you see "Abyia" written as an area label across the  
6 Nyamora?  
7 A. Abyia? Yes.  
8 Q. Yes. And do you see the ferry a little bit above the  
9 word "Abyia"?  
10 A. I see a ferry".  
11 Q. And that ferry would suggest to you again that it  
12 crosses the Nyamora?  
13 A. It would suggest it crosses the Umm Biero, yes.  
14 Q. If we look at the 1918 Nyamell map which was part of  
15 your presentation [earlier], can you see the Abyia again  
16 in the zoom-in on that map?  
17 A. Yes, I can.  
18 Q. It says in full, "Abyei (Sultan Kwol)"; correct?  
19 A. Yes.  
20 Q. Do you see an "RH" just above Abyei on that map?  
21 A. Yes.  
22 Q. Would you agree with me that that likely represents --  
23 I can take you to the key, but can we agree that that  
24 represents "rest house"?  
25 A. It does indeed.

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16:48 1 Q. So the final map is the 1925 Ghabat el Arab map; do you  
2 see that?  
3 A. Yes, I do.  
4 Q. Do you see Abyei on that map?  
5 A. Yes, I do.  
6 Q. Is it again described as "Abyei", this time,  
7 "Chief Kwol"?  
8 A. Yes.  
9 Q. Mr MacDonald, I have one more topic and I will try to be  
10 very quick with it. It's on the subject of boundaries  
11 and I would like to take you to --  
12 THE CHAIRMAN: It is perhaps a good opportunity for  
13 breaking.  
14 MS MILES: Okay.  
15 THE CHAIRMAN: Should I recall, Mr MacDonald, that you are  
16 not allowed to have contact with counsels of the  
17 Government during the break?  
18 THE WITNESS: I understand. I'd be quite happy to stay  
19 here if someone would bring me a drink.  
20 (4.49 pm)  
21 (A short break)  
22 (5.14 pm)  
23 MS MILES: Mr MacDonald, just a couple more questions  
24 concerning boundaries.  
25 In your conclusion at paragraph 76 of your final

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17:16 1 position that the red lines represent provincial  
2 boundaries in Sudan? Looking at the map as a whole?  
3 A. I think the red lines are primarily intended to show the  
4 chapters into which the compendium is divided, and  
5 I would need to look at the chapter list to see whether  
6 one could identify the boundaries in that way -- sorry,  
7 the provinces in that way.  
8 Q. Do you know how many provinces existed in Sudan in 1905?  
9 A. No, I don't.  
10 Q. Would you accept from me that there were eight  
11 first-class and four second-class provinces, so twelve  
12 in total?  
13 A. I'm not sure if you're including Darfur, which of course  
14 was a tributary state, but given that possibility,  
15 I will accept your list.  
16 Q. Okay. And one of those first-class provinces was  
17 Kasala?  
18 A. If you say so.  
19 Q. Can you see Kasala on the --  
20 A. Yes, I can. I've actually been there.  
21 Q. Right. And Kasala is in fact crossing two chapters in  
22 the diagram of chapters?  
23 A. Yes, it is.  
24 Q. So I put it to you again: is it your position that the  
25 red lines on this map as a whole represent the

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17:14 1 report you say that:  
2 "MENAS's claim [the claim being that no provincial  
3 boundary existed in 1905] has not been proved on  
4 cartographic grounds."  
5 A. Yes.  
6 Q. Now, do you accept that there's not a single Sudan  
7 Government map in the record in these proceedings that  
8 marks any provincial boundary between Kordofan and  
9 Bahr el Ghazal prior to 1905?  
10 A. I accept that there's no map, yes.  
11 Q. Okay. You refer at paragraph 3.11 of your first report  
12 to the compendium index map at figure 7.  
13 A. Yes.  
14 Q. You say of this map:  
15 "... [this map] clearly showed a pre-1905 border."  
16 It's at paragraph 3.11 of your first report. It's  
17 highlighted on the screen if that helps.  
18 A. Yes.  
19 Q. And you have produced an extract of that map in your  
20 report in order to illustrate that point?  
21 A. Yes.  
22 Q. If you turn to this map in the Sudan handbook, which is  
23 still in front of you -- it's in the front, or  
24 alternatively we can put it up on the screen, or as  
25 well -- looking at this map as a whole, is it your

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17:18 1 provincial boundaries of Sudan?  
2 A. I would not suggest that as a whole these lines show the  
3 provincial boundaries.  
4 Q. What's the scale of this map, Mr MacDonald?  
5 A. I can't read it. Something inches to 192 miles. One  
6 in ...  
7 Q. It's 1:12,000,000; do you accept that? That's a small  
8 scale; correct?  
9 A. It is a small scale.  
10 Q. The small-scale diagram of chapters map was produced by  
11 the War Office; is that correct?  
12 A. Yes.  
13 Q. Okay. The other War Office map that we find in the  
14 handbook is the one that we looked at earlier, the  
15 folding-out map at the back of volume 1, and that's at  
16 a scale of 1:4,000,000; correct?  
17 A. Yes.  
18 Q. So that means it's three times the scale of the diagram  
19 of chapters map?  
20 A. Yes.  
21 Q. Finally, the Mardon map is mentioned very briefly at  
22 paragraph 3.12 of your first report, and you say this is  
23 also from what you call the compendium, the Sudan  
24 handbook?  
25 A. Yes.

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17:20 1 Q. You won't find it in volume 1, Mr MacDonald. Can I --  
 2 A. I was just checking it is indeed called a compendium.  
 3 Q. Can I pass you volume 2 of the handbook. The map is at  
 4 the back of volume 2 and it's also up on the screen.  
 5 This map was not produced by the War Office, was it?  
 6 A. No.  
 7 Q. It was produced by HW Mardon?  
 8 A. Yes.  
 9 Q. Is this in any way referred to as an official map, on  
 10 the face of the map?  
 11 A. No.  
 12 Q. The scale of that map is 1:8,000,000.  
 13 A. Yes.  
 14 Q. So that map is half the scale of the War Office map in  
 15 volume 1 of the handbook?  
 16 A. Yes.  
 17 Q. If you turn to the bibliography cartography -- back to  
 18 where we started -- at page 349 of the handbook --  
 19 A. Volume 2?  
 20 Q. Yes. Sorry, volume 1, page 349 at the back, the maps  
 21 cartography. Can you find any reference to the Mardon  
 22 map in that cartography?  
 23 A. You want me to read the --  
 24 Q. It's quite short.  
 25 A. No, I don't see a reference there. I'm not quite sure

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17:23 1 to Dar el Jange, which is common bundle volume 2,  
 2 tab 20, [page 151], for future reference. I just want  
 3 to pass you the last entry, which is the description of  
 4 the Bahr el Arab and Sultan Rob's.  
 5 Could you just read the last sentence aloud?  
 6 A. "The district on the north bank is called Mareig, the  
 7 district on the south bank is called Mathiang, and  
 8 Sultan Rob lives in the latter. Much dura is  
 9 cultivated."  
 10 Q. Dura is a crop?  
 11 A. I believe it's a wheat, yes.  
 12 Q. That was in 1902. So the report stands for the  
 13 proposition that Sultan Rob lives south of the Kiir in  
 14 1902?  
 15 A. I believe that it what it is saying.  
 16 PROFESSOR CRAWFORD: Thank you. No further questions.  
 17 (5.24 pm)  
 18 THE CHAIRMAN: Thank you. I give now the floor to  
 19 Mr Bundy.  
 20 (5.26 pm)  
 21 Submissions by MR BUNDY  
 22 MR BUNDY: My task in the time that remains this  
 23 afternoon, and I think undoubtedly spilling over into  
 24 tomorrow morning, is to address one of the central  
 25 issues in the case, which is: what was the area of the

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17:22 1 what section C is purporting to represent.  
 2 Q. This is the very last question Mr MacDonald. If I could  
 3 pass you a copy -- have you seen this book before? Let  
 4 me pass it to you. (Handed)  
 5 This is -- sorry, I'll let you answer the question.  
 6 Have you seen this book before?  
 7 A. Not in this form.  
 8 Q. This is Mardon's book, A Geography of Egypt and the  
 9 Sudan of which you cited the preface in your  
 10 presentation.  
 11 A. Yes.  
 12 Q. And you have opened on the map of Sudan --  
 13 A. Yes.  
 14 Q. -- in that book. Does that map contain the provincial  
 15 boundaries?  
 16 A. No.  
 17 MS MILES: No further questions, Mr MacDonald.  
 18 (5.23 pm)  
 19 THE CHAIRMAN: I thank you very much, Mr MacDonald.  
 20 THE WITNESS: Thank you, Mr President.  
 21 PROFESSOR CRAWFORD: Just one question by way of  
 22 re-direct.  
 23 (5.24 pm)  
 24 Re-examination by MR CRAWFORD  
 25 Q. You were taken to Wilkinson's route description El Obeid

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17:26 1 Ngok Dinka chiefdoms transferred to Kordofan in 1905?  
 2 The issue is obviously clearly set out in  
 3 Article 2(c) of the Arbitration Agreement, in the event  
 4 that the Tribunal finds that there has been an excess of  
 5 mandate. It's been referred to many times; I won't read  
 6 it again.  
 7 Now, there's no dispute between the parties that as  
 8 a matter of fact there was an administrative transfer in  
 9 1905 of Ngok Dinka territories and Twic territories that  
 10 had previously been situated in the province of  
 11 Bahr el Ghazal to the province of Kordofan, and the  
 12 parties also agree on what the broad purpose of that  
 13 transfer was. I'll quote from the SPLM/A memorial,  
 14 where it's stated at paragraph 346:  
 15 "The purpose of the transfer was to reduce the risk  
 16 to the Ngok Dinka of slave and cattle raids, conducted  
 17 by Baggara Arabs located in Kordofan, by placing the  
 18 Ngok and the Baggara under the same provincial  
 19 administration."  
 20 In contrast to these two general points of  
 21 agreement, there's obviously a very clear difference  
 22 between the parties over the area that was transferred  
 23 in 1905, particularly the northern limits of that area.  
 24 This issue is really at the heart of the dispute, and  
 25 it's illustrated by the map that I'll now have placed on

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<p>17:27 1 the screen. For reference, all of my graphics are under 2 tab 7 of the daily folders. 3 Now, the SPLM/A contends that the area transferred 4 from Bahr el Ghazal to Kordofan in 1905 included all the 5 areas allegedly occupied and used by the Ngok Dinka at 6 that time; and that, based primarily on oral tradition 7 and post-1905 materials, these areas extended from what 8 later became the 1956 Kordofan/Bahr el Ghazal boundary 9 in the south, which was the provincial boundary at 10 Sudan's independence, all the way up to the 10°35' north 11 latitude in the north. 12 Of course, the words "occupied and used by the 13 Ngok Dinka in 1905" do not appear in the agreed formula 14 of the mandate, either of the experts or of this 15 Tribunal. That's a matter that Professor Crawford has 16 already addressed. As I shall show, they also -- these 17 words "occupied and used", to qualify what was 18 transferred -- had nothing to do with the way that the 19 Condominium officials and administrators viewed the 20 situation and viewed the transfer in 1905. 21 Now, notwithstanding this, the SPLM/A argues that it 22 was not a specific area that was transferred in 1905 23 from Bahr el Ghazal to Kordofan; but rather it was 24 a people that was transferred, namely the Ngok Dinka 25 tribe under Sultan Rob.</p> <p style="text-align: center;">Page 173</p>	<p>17:31 1 the area of the Ngok Dinka chiefdoms transferred to 2 Kordofan in 1905. 3 Now, the Government of Sudan disagrees. All four of 4 the relevant transfer documents refer to the key event 5 in terms of a transfer from one province to another. 6 Three of the four so-called "transfer documents" 7 specifically referring to the transfer -- the 1905 8 annual report for Bahr el Ghazal, the 1905 annual report 9 for the province of Kordofan, and the 1905 memorandum 10 offered by the governor-general, Major Wingate, that was 11 also in the annual reports -- those three documents, 12 three of the four documents, specifically mention the 13 transfer under the heading of "provincial boundaries", 14 and in connection with those boundaries. The formula 15 itself, as explained by my colleagues on Saturday, 16 refers also to such a transfer. 17 Now, in the Government of Sudan's submission it's 18 clear that in 1905 Government administrators viewed the 19 transfer as involving a change to the provincial 20 boundary. Areas belonging to the Ngok Dinka and the 21 Twic that had previously been located in Bahr el Ghazal 22 province were transferred to Kordofan in that year. But 23 to ignore the relevance of the provincial boundary and 24 the effect that the transfer had on that boundary is to 25 disregard the manner in which Government officials of</p> <p style="text-align: center;">Page 175</p>
<p>17:29 1 Now, while the SPLM/A concedes that the transfer of 2 the Ngok Dinka tribe from one province to another 3 "necessarily entailed the transfer of Ngok Dinka 4 territory", it goes on to assert that it was: 5 "... the transfer of the tribe that defined the 6 territory that was transferred, not the transfer of the 7 territory that defined the tribes that were 8 transferred." 9 Now, as part of this argument the SPLM/A accuses the 10 Government of being preoccupied with the relationship 11 between the transfer effectuated by Condominium 12 officials and the location of the Kordofan/Bahr 13 el Ghazal provincial boundary, both before and after the 14 transfer. 15 The SPLM/A's position is that the provincial 16 boundary prior to the transfer -- a provincial boundary 17 which, in the contemporaneous documents, is continuously 18 referred to as the Bahr el Arab -- that that boundary 19 was only a so-called "putative" boundary that was 20 provisional, uncertain, indeterminate, because of the 21 confusion that's said to have existed over the identity 22 of the Bahr El Arab River. 23 Accordingly, the SPLM/A argues that the location of 24 the provincial boundary between Kordofan and 25 Bahr el Ghazal is irrelevant to the identification of</p> <p style="text-align: center;">Page 174</p>	<p>17:33 1 the day treated the transfer. 2 Moreover, the logical consequence of the SPLM/A's 3 position is that areas south of the 10°35' north 4 latitude must have been considered to have been part of 5 Bahr el Ghazal province before the transfer, otherwise 6 there would have been no need for a transfer of such 7 areas to Kordofan. 8 As I shall show, that cannot possibly be correct. 9 None of the evidence on the record -- none of it -- even 10 remotely suggests that prior to the transfer 11 Bahr el Ghazal province was considered by Condominium 12 officials to extend up to the 10°35' north latitude, or 13 even to the 10°22'30" latitude decided by the experts, 14 or that the transfer concerned areas situated so far to 15 the north. 16 I turn briefly to the Government of Sudan's 17 position. We maintain that the area transferred from 18 Bahr el Ghazal to Kordofan in 1905 lay along and to the 19 south of the Bahr El Arab River. This position is based 20 on four key elements, all of which are documented in the 21 contemporaneous records, and all of which are mutually 22 consistent and reinforcing. 23 First, the documents referring to the transfer 24 attest to the fact that the transferred areas fell along 25 and to the south of the Bahr El Arab River. The</p> <p style="text-align: center;">Page 176</p>

<p>17:35 1 senior-most Government official in Sudan at the time, 2 Governor-General Wingate, provided the clearest 3 indication of the northern limits of the transferred 4 area. 5 He described the transferred area at page 24 in his 6 memorandum, included in the 1905 reports on the 7 finances, administration and condition of the Sudan, in 8 the following way. It's in your folders at tab 8, and 9 it's in the common bundle at tab 46. This is how 10 Governor-General Wingate described the transfer: 11 "The districts of Sultan Rob and Okwai, to the south 12 of the Bahr el Arab, and formerly a portion of the 13 Bahr el Ghazal province, have been incorporated into 14 Kordofan." 15 Second, while prior to 1905 there had been confusion 16 over the identity of the Bahr El Arab River in its 17 central section, at the time the transfer occurred and 18 was referred to by Governor-General Wingate in his 19 memorandum, the Bahr El Arab River in the relevant area 20 had been correctly identified as a result of specific 21 explorations sent to explore it. 22 Wingate referred to these explorations in his own 23 1905 memorandum. Thus when Wingate identified the 24 districts of Sultan Rob and Sultan Okwai to the south of 25 the Bahr El Arab in his memorandum, and "formerly part</p> <p style="text-align: center;">Page 177</p>	<p>17:38 1 The change in 1905 to the Kordofan/Bahr el Ghazal 2 provincial boundary, which previously had been described 3 as the Bahr el Arab, was noted in the annual reports for 4 both Bahr el Ghazal and Kordofan in 1905, and in 5 Wingate's description of the transfer. 6 After the transfer, therefore, maps of the relevant 7 area began to show the Kordofan/Bahr el Ghazal 8 provincial boundary, the new provincial boundary, the 9 post-transfer provincial boundary to the south of the 10 Bahr El Arab River. 11 Now, while the southern limits of the transferred 12 area, and hence the new post-transfer Kordofan/Bahr 13 el Ghazal boundary, were not precisely established in 14 1905, post-1905 maps of the relevant area depict the 15 boundary in the same general place, as I will show later 16 on, and the parties agree that this boundary ultimately 17 coalesced and became fixed as the Kordofan/Bahr 18 el Ghazal provincial boundary in place as of 1956. On 19 that, there's no dispute. 20 Thus the transfer area represented the area between 21 the old provincial boundary constituted by the 22 Bahr el Arab and the new Kordofan/Bahr el Ghazal 23 provincial boundary falling to the south. In other 24 words, but for the 1905 transfer, areas south of the 25 Bahr el Arab down to the 1956 boundary would have</p> <p style="text-align: center;">Page 179</p>
<p>17:36 1 of the Bahr el Ghazal province", as having been 2 incorporated into Kordofan, he was referring to the real 3 Bahr el Arab, not to the Ragaba ez Zarga or any other 4 river. 5 Third, the information available to Government 6 officials at the time of the transfer regarding the 7 location of the Ngok Dinka under Sultan Rob and the Twic 8 under Sultan Okwai -- who's also sometimes called 9 Sheikh Gorkwei -- the information available to 10 Government officials placed Sultan Rob's district along 11 and to the south of the Bahr el Arab, or the Kiir River; 12 and Sultan Okwai's district between the Bahr el Arab or 13 Kiir and the Lol River further to the south. That is 14 entirely consistent with Wingate's description of the 15 transferred area. 16 Fourth, the location of the provincial boundary 17 between Kordofan and Bahr el Ghazal prior to the 18 transfer, as well as between Darfur and Bahr el Ghazal, 19 was recorded in the annual reports for Kordofan and 20 Bahr el Ghazal as being the Bahr el Arab. 21 The Kordofan/Bahr el Ghazal boundary changed as 22 a result of the 1905 transfer. The Darfur/Bahr 23 el Ghazal boundary changed, as Professor Crawford has 24 already mentioned, much later, in 1924, as a consequence 25 of the Munroe-Wheatley accord.</p> <p style="text-align: center;">Page 178</p>	<p>17:40 1 remained in Bahr el Ghazal. 2 Now, I shall address each one of these points in 3 this presentation, but before I do so, however, I'd like 4 to draw the Tribunal's attention to three general points 5 that the SPLM/A has emphasised in its written pleadings 6 that deserve mention here. 7 First, in its memorial the SPLM/A said, and I quote 8 from paragraph 1114: 9 "It is clear that the Government of Sudan and SPLM/A 10 were familiar with the Sudan Government's records 11 regarding the 1905 decision to transfer Sultan Rob and 12 the Ngok Dinka. The parties referred to the 13 Government's reports during their negotiation of the 14 Abyei Protocol." 15 Second, our opponents admonish the Government of 16 Sudan not to rewrite or second-guess what the 17 Anglo-Egyptian administrators said and what their 18 decision was in 1905. Don't second-guess what the 19 administrators did at the time, or said they did. 20 Third, the SPLM/A also in its written pleadings has 21 argued that we shouldn't draw speculative inferences 22 about the transfer from what it terms the "putative" 23 Kordofan/Bahr el Ghazal boundary. Instead, according to 24 our distinguished opponents, this is what they say you 25 should do:</p> <p style="text-align: center;">Page 180</p>

<p>17:42 1 "The more direct, less speculative and reliable 2 approach is simply to look at what the Condominium 3 administrators said they transferred to Kordofan in 4 1905, which was the Ngok Dinka and their territory." 5 Now, on these three points I'm pleased to say, 6 Mr President and distinguished members of the Tribunal, 7 we have a measure of agreement. 8 Yes, the negotiators of the Abyei Protocol were 9 aware of the 1905 transfer documents. That's why the 10 formula is drafted the way it is, referring to 11 a recorded administrative transfer of an area in 1905 12 from one province to another, not to demographic or 13 post-1905 events, criteria. 14 Yes, neither party -- and nor, with the greatest 15 respect, we would suggest, the Tribunal -- should 16 attempt to rewrite or second-guess what the 17 Anglo-Egyptian administrators said about their decision 18 in 1905. 19 And, yes, the most reliable approach is to look at 20 what the Condominium administrators actually did say -- 21 what did they say they transferred to Kordofan in 1905, 22 and particularly what the very seniormost Government 23 official, the governor-general said about that 24 transfer -- although we would submit that the question 25 of the Kordofan/Bahr el Ghazal provincial boundary is</p> <p style="text-align: center;">Page 181</p>	<p>17:45 1 folders and tab 46 of the common bundle. 2 Our colleagues on the other side of the bar agree 3 that the first three documents on this list are 4 relevant, and I believe that even Professor Daly calls 5 these first three documents "foundation texts". But the 6 SPLM/A has gone out of its way in its memorial and its 7 counter-memorial to ignore the fourth document, 8 Wingate's memorandum, or when it became it impossible to 9 ignore it any longer, to try and explain it away in its 10 rejoinder. 11 I shall discuss each of these documents in turn, but 12 before doing so I might just note in passing that it is 13 absolutely extraordinary in the Government's view that 14 the ABC experts referred to none of these four documents 15 in connection with the transfer in their report, despite 16 the fact that all of them had been submitted to the 17 experts by the Government of Sudan. 18 The first reference to the transfer was in the Sudan 19 Intelligence Report for the month of March 1905, and the 20 relevant passage, which is at page 3 of the report under 21 tab 9, reads as follows -- I will put it on the screen. 22 It's a passage which my learned friend Mr Born referred 23 to this morning, albeit ostensibly in connection with 24 the question of excess of mandate. It reads: 25 "It has been decided that Sultan Rob, whose country</p> <p style="text-align: center;">Page 183</p>
<p>17:44 1 still important because it was inextricably linked to 2 the transfer at the time. 3 As I said, three of the four transfer documents 4 contemporaneously proposed mention the transfer 5 specifically in connection with the corresponding change 6 to the provincial boundary. 7 Now, with that introduction let me turn to the first 8 key issue on which the parties remain divided at this 9 stage of the proceedings, and this concerns what the 10 contemporaneous documents that refer to the transfer 11 actually do say, and what their implications are for 12 identifying the area of the nine Ngok Dinka chiefdoms 13 transferred to Kordofan in 1905. 14 I noted a few minutes ago that there are four 15 documents dating from the relevant period that 16 specifically refer to the transfer, and they're the 17 following. They're put on the screen now. 18 There's the March 1905 Sudan Intelligence Report, 19 which is in tab 9 of your folders and in tab 38 of the 20 common bundle; the 1905 annual report for 21 Bahr el Ghazal, which is in tab 11 of your folders and 22 tab 46 of the common bundle; the 1905 annual report for 23 Kordofan, which is in tab 12 of your daily folders and 24 at tab 46 of the common bundle; and Governor-General 25 Wingate's 1905 memorandum, which is at tab 8 of your</p> <p style="text-align: center;">Page 182</p>	<p>17:47 1 is on the Kiir River, and Sheikh Rihan of Toj, mentioned 2 in the last Intelligence Report, are to belong to 3 Kordofan province. These people have, on certain 4 occasions, complained of raids made on them by southern 5 Kordofan Arabs, and it has therefore been considered 6 advisable to place them under the same governor as the 7 Arabs of whose conduct they complain." 8 Now, the SPLM/A relies on this passage to argue that 9 what was being transferred was a people in order to 10 protect them, the Ngok Dinka under Sultan Rob and the 11 Twic under Sheikh Rihan, not a specific area, and that 12 the land occupied by these people and thus transferred 13 extended all the way up to the 10°35' north parallel of 14 latitude. There's nothing in this passage, Mr President 15 and members of the Tribunal, that remotely supports such 16 an expansionist interpretation or theory. 17 My colleague this morning put emphasis on the 18 reference to people: this was a transfer of people. He 19 referred to the second sentence: 20 "These people have on certain occasions complained 21 of raids ..." 22 Well, since we were discussing grammar this morning, 23 let's discuss grammar this afternoon. What is the 24 reference to people? The only people mentioned before 25 are two individuals, Sultan Rob and Sheikh Rihan. They</p> <p style="text-align: center;">Page 184</p>



<p>17:49 1 are the people that had made the complaints previously 2 of the raids. There's no reference there to all the 3 people and all of the areas the Ngok Dinka allegedly 4 occupied or used as of 1905. 5 Moreover -- and this was passed over, I think, in 6 silence this morning -- the first sentence makes it 7 clear that, even if there were a people involved, they 8 were under Sultan Rob. And where was Sultan Rob's 9 country stated to be? It was described as on the 10 Kiir River. 11 There has never been any confusion as to the 12 identity of the Kiir. There may have been confusion, 13 that I'll discuss, in certain places, as to the location 14 of the Bahr el Arab. But the Kiir was never confused. 15 Moreover, in the very same March 1905 Sudan 16 Intelligence Report in which the transfer is first 17 recorded, Lieutenant Bayldon, who had been sent to the 18 area with specific instructions to investigate the 19 rivers in question, confirmed that the Kiir and the 20 Bahr el Arab were the same river, based on the 21 explorations he had been carrying out. By that time he 22 had been on the rivers for three months. 23 There was no suggestion that Sultan Rob's country 24 extended further north up to the 10°35' north latitude, 25 or the 10°22'30" north latitude decided by the experts,</p> <p style="text-align: center;">Page 185</p>	<p>17:52 1 prior to their transfer Kordofan extended down to the 2 Kiir, or the Bahr el Arab, as correctly identified by 3 Bayldon. 4 What's also clear is that the description contained 5 in the intelligence report is fundamentally incompatible 6 with the SPLM/A's position that the areas transferred 7 extended way up to 10°35'. But it is consistent with 8 the Government's position that the transferred area lay 9 along and to the south of the Bahr el Arab, as that 10 river was correctly identified by Bayldon and reported 11 in the same March 1905 intelligence report. 12 Now, the other three documents referring to the 13 transfer appear all in one compendium: it's the 1905 14 Annual Reports on the Finances, Administration and 15 Conditions of the Sudan. Before taking up these 16 documents individually it may be useful if I say a few 17 words about how this report was organised in the light 18 of the SPLM/A's rather belated attempt to denigrate the 19 significance of Governor-General Wingate's memorandum. 20 The annual report for Sudan was organised into four 21 parts. Part 1 was the report of Great Britain's agent 22 and Counsel-General for Egypt and the Sudan, the Earl of 23 Cromer. It was his report to his superiors in London. 24 Part 2 comprised the memorandum by the 25 Governor-General of Sudan, Major-General Sir Reginald</p> <p style="text-align: center;">Page 187</p>
<p>17:51 1 or even to the Ragaba ez Zarga, which Bayldon identified 2 in the same intelligence reports as what he called the 3 Bahr el Homr. 4 Sultan Rob's country was said to be on the Kiir. 5 And Sultan Rob himself, four months earlier, had told 6 a Government official, Percival, in November 1904, that 7 the Bahr el Homr -- which was actually the 8 Ragaba ez Zarga -- was uninhabited except for wandered 9 parties of Arabs. Not Dinka; Arabs. 10 As for the country of Sheikh Rihan of Toj, or the 11 Twic, also referred to in the intelligence report, that 12 report notes that the Sheikh had been mentioned in the 13 previous intelligence report, the report for February, 14 another report which the experts ignored. But be that 15 as it may, the February intelligence report had said 16 very clearly that Sheikh Rihan himself had indicated 17 that his country was situated between the Kiir and the 18 Lol River further to the south, which is illustrated on 19 the map. 20 If you want to have reference to the February 21 intelligence report, you'll find it under tab 37 of the 22 common bundle and tab 10 of today's folders. 23 These were the areas that Condominium officials 24 reported were transferred from Bahr el Ghazal to 25 Kordofan province. The implication of that is that</p> <p style="text-align: center;">Page 186</p>	<p>17:54 1 Wingate, in which Wingate added his own comments and 2 notes on the administration of Sudan for the relevant 3 year. 4 Part 3 contained individual reports from various 5 departments within the Sudanese administration. 6 Part 4 contained annual reports for each of the 7 provinces, including for the provinces, for the relevant 8 years that we're concerned with, of Kordofan and 9 Bahr el Ghazal. 10 Now, I mention this because it's important to 11 realise that Wingate's memorandum appeared in the same 12 compendium of reports as did the Kordofan and 13 Bahr el Ghazal annual reports for 1905. Both parties 14 have filed extracts from Governor-General Wingate's 15 memorandum, and from the individual annual reports for 16 that year for the two provinces, Kordofan and 17 Bahr el Ghazal. It's on these documents that I shall 18 focus my remarks. 19 If I first turn to the annual report for the 20 province of Bahr el Ghazal, the relevant entry, which 21 I'll place on the screen -- it's short -- reads as 22 follows: 23 "Province boundaries. In the north the territories 24 of Sultan Rob and Sheikh Gorkwei have been taken from 25 this province ..."</p> <p style="text-align: center;">Page 188</p>

<p>17:56 1 Remember this is the annual report for 2 Bahr el Ghazal: 3 "... and added to Kordofan." 4 There are a number of important points that emerge 5 from this rather brief reference and description. 6 First, it's significant that the reference to the 7 transfer appears under the heading "Province 8 Boundaries". I would suggest that makes it pretty 9 clear, members of the Tribunal, that Government 10 officials of the day considered that the transfer was 11 directly related to the location of the provincial 12 boundary, and the change in that boundary that the 13 transfer gave rise to. 14 I'd also suggest that it follows that the SPLM/A's 15 contention that the Kordofan/Bahr el Ghazal boundary is 16 irrelevant, and has no bearing on the area of the nine 17 Ngok Dinka chiefdoms that was transferred, is misplaced. 18 That is simply not the way the local administrators 19 viewed the situation. 20 Second, this extract from the annual report speaks 21 of the territories of Sultan Rob and Sheikh Gorkwei that 22 were taken from Bahr el Ghazal and added to Kordofan. 23 There's no mention here of a transfer of people; it was 24 a transfer of an area or areas, the territories of the 25 two tribal leaders.</p> <p style="text-align: center;">Page 189</p>	<p>17:59 1 change of the putative provincial boundaries of either 2 Kordofan or Bahr el Ghazal. That's a direct quote from 3 their memorial at paragraph 355. The transfer was not 4 accompanied at the time by any recorded change to the 5 provincial boundary. That's simply another attempt to 6 do away with the relevance of the provincial boundary. 7 The plain fact is that the transfer was referred to, 8 both in this annual report and in the Bahr el Ghazal 9 annual report, under a section of those reports dealing 10 with provincial boundaries. 11 Moreover, this formula that appears on the screen, 12 taken from the 1905 annual report, did change the way in 13 which the provincial boundary was described. 14 Just as was the case for the northern boundary of 15 Bahr el Ghazal, previous editions of the annual report 16 for Kordofan, for example the 1903 edition, had 17 described the southern boundary of Kordofan as the 18 Bahr el Arab. 19 That changed in 1905, and it changed for both 20 Kordofan and Bahr el Ghazal. No longer did the annual 21 reports for these two provinces refer to the 22 Bahr el Arab as the province boundary; instead the 23 transfers of Sultans Rob and Gorkwei and their 24 territories were referred to as now being included in 25 Kordofan instead of Bahr el Ghazal.</p> <p style="text-align: center;">Page 191</p>
<p>17:57 1 It's true that the annual report does not say 2 precisely where the limits of these territories lay. 3 But we know from the February and March 1905 4 intelligence reports, as well as from sketch maps that 5 I'll display later on, produced by Wilkinson and 6 Percival, that Sultan Rob's country or territory was 7 understood by Government officials as being on or to the 8 south of the Kiir River, which Bayldon had correctly 9 identified as the Bahr el Arab; and that Sheikh Gorkwei 10 of the Twic had said that his territory or district lay 11 between the Kiir/Bahr el Arab and the Lol River further 12 south. 13 The third document referring to the transfer is the 14 1905 annual report for Kordofan, and in a sense it's the 15 counterpart to the annual report for Bahr el Ghazal, 16 still appearing in this overall 1905 report for the 17 entire Sudan. Once again, the relevant passage appears 18 under the heading "Province Boundaries". It reads as 19 follows, as you can see: 20 "The Dinka Sheikhs, Sultan Rob and 21 Sultan Rihan Gorkwei, are now included in Kordofan 22 instead of the Bahr el Ghazal." 23 The SPLM/A's written pleadings have asserted that 24 the transfer of the Ngok Dinka and the Twic Dinka to 25 Kordofan was not accompanied at the time by any recorded</p> <p style="text-align: center;">Page 190</p>	<p>18:01 1 We submit that the necessary implication of this is 2 that the transferred areas had to have been situated 3 further south of the Bahr el Arab, in areas that before 4 the transfer were part of Bahr el Ghazal province; 5 otherwise there would have been no need for transfer. 6 It could not have been the intention of Condominium 7 officials in 1905 to transfer areas already situated in 8 Kordofan to Kordofan. That makes no sense at all. 9 While that inference is clear, we would suggest, 10 based on the references appearing in the 1905 reports 11 for the two provinces, the proposition is reinforced, 12 and we would suggest demonstrated conclusively, by the 13 fourth contemporary document that refers to the 14 transfer, Governor-General Wingate's memorandum also 15 included in the 1905 Sudan annual report. 16 As I pointed out earlier and as I just mentioned, 17 the memorandum of Wingate was in the same overall annual 18 report for the whole Sudan. It was part 2; the Kordofan 19 and Bahr el Ghazal province reports were in part 4. 20 Now, it's worth recalling that under the 1899 21 Anglo-Egyptian Condominium Agreement, the supreme 22 military and civil command of the Sudan was vested in 23 Wingate as governor-general. Wingate took up his 24 position in December 1899 and, as the SPLM/A's expert 25 Professor Daly wrote in one of his reports:</p> <p style="text-align: center;">Page 192</p>

<p>18:03 1 "The power of the governor-general was therefore 2 absolute so long as he remained in the good graces of 3 the British Government that nominated him." 4 That is from Professor Daly's second report at 5 page 16. 6 The fact that Wingate occupied his position as 7 governor-general for some 17 years, from December 1899 8 up until 1916, attests to the fact that he clearly was 9 in the British Government's good graces in 1905. In 10 fact Professor Daly even went so far as to describe 11 Wingate as "a virtual dictator". 12 Now, given his position, surely Wingate's views on 13 the question of the transferred area are entitled to 14 considerable weight. It's a matter one would have 15 thought the SPLM/A would agree with, in view of the 16 stress that they've placed in their written pleadings on 17 looking at what Condominium administrators actually said 18 that they transferred in 1905. 19 Let's do that. Let's look at the seniormost 20 administrator, Governor-General Wingate, and see what he 21 said. 22 His memorandum from 1905 covered events in the Sudan 23 that had transpired during the year. It was a detailed 24 account, divided into a number of subject-matters. 25 What's noteworthy is that the relevant passages dealing</p> <p style="text-align: center;">Page 193</p>	<p>18:06 1 evening, but because of its importance it merits being 2 cited again. Recall what Wingate said was the fourth 3 change that had been effected in provincial boundaries 4 in 1905: 5 "The districts of Sultans Rob and Okwai to the south 6 of the Bahr el Arab and formerly a portion of the 7 Bahr el Ghazal province have been incorporated into 8 Kordofan." 9 Mr Chairman members of the Tribunal, this statement 10 of a senior Government official at the time we would 11 suggest is clear, at least in so far as the northern 12 limits of the transferred area are concerned. 13 First, Wingate refers to the districts of the two 14 Sultans, not to the Dinka people, not to areas allegedly 15 occupied or used; the districts. It seems evident that 16 the governor-general was thinking in terms of the 17 transfer of fairly limited area or areas to Kordofan, 18 the districts of the two Sultans, not huge swathes of 19 territory or people extending up to the 10°35' north 20 latitude. 21 Second, the districts that were transferred or 22 incorporated into Kordofan were to the south of the 23 Bahr el Arab. Wingate doesn't say anything north of the 24 Bahr el Arab was transferred. Had there been any areas 25 north of the Bahr el Arab that Condominium officials</p> <p style="text-align: center;">Page 195</p>
<p>18:04 1 with the transfer are recorded under a section of his 2 memorandum -- it's at page 23 of his memorandum, again 3 under tab 8 of your folders -- the transfer is referred 4 to under a section of his memorandum entitled "Changes 5 in Provincial Boundaries and Nomenclature". 6 Now, once again, it's pretty evident that senior 7 Government officials -- and Wingate was the most senior 8 such official -- viewed the question of provincial 9 boundaries as significant in connection with the 10 transfer, not irrelevant, as our colleagues would have 11 us believe. 12 Wingate introduced the relevant passage of his 13 memorandum by first stating at page 23: 14 "It has been possible during the past year 15 [ie during 1905] to make some important alterations in 16 the provincial boundaries which have tended to a general 17 improvement in administration, and a few changes will 18 also take place from the beginning of the New Year." 19 He then listed after saying this at page 24 what he 20 termed "the principal alterations already effected", 21 ie effected during the year 1905. Four changes were 22 listed, with the fourth one being the transfer with 23 which we are concerned. 24 As to this, Wingate said the following -- it's 25 a passage I know that I referred to earlier this</p> <p style="text-align: center;">Page 194</p>	<p>18:08 1 that intended to transfer in 1905 that had previously 2 been part of Bahr el Ghazal but now were going to be 3 incorporated into Kordofan, surely Wingate would have 4 said so, and he did not. The transferred districts were 5 south of that river. 6 Third, those districts were noted by Wingate to have 7 "formerly" constituted a portion of the Bahr el Ghazal 8 province, and that is consistent with the fact that the 9 pre-transfer provincial boundary between Bahr el Ghazal 10 and Kordofan had been recorded as the Bahr el Arab. 11 As a result of the transfer Wingate wrote that the 12 districts of the two Sultans previously in 13 Bahr el Ghazal, ie south of the Bahr el Arab, ie south 14 of what had formerly been the provincial boundary, are 15 now incorporated into Kordofan. 16 Now it may assist to compare the positions of the 17 parties if I place on the screen a schematic diagram 18 illustrating what Wingate said. It's also under tab 13 19 of your folders, but the tab 13 doesn't move and this 20 one does, so I'll refer to the screen. I think it's 21 instructive to compare what Wingate said with how the 22 SPLM/A views the situation. 23 Here's the effect of Wingate's description. Prior 24 to the transfer the Bahr el Arab was the provincial 25 boundary between Bahr el Ghazal and Kordofan. Wingate</p> <p style="text-align: center;">Page 196</p>

<p>18:09 1 says that: 2 "The districts of Sultans Rob and Okwai to the south 3 of Bahr el Arab, and formerly a portion of the 4 Bahr el Ghazal province, have been incorporated into 5 Kordofan." 6 Thus post-transfer the Bahr el Arab was no longer 7 the provincial boundary, and that's clear from the 8 annual reports for Kordofan and Bahr el Ghazal for 1905 9 that I referred to a minute ago. 10 Now, it's quite true that Wingate does not specify 11 the southern limits of the districts that were 12 transferred -- I will come back to that point later -- 13 but in any event it's important to note that there's no 14 dispute between the parties in this case as to what 15 those southern limits are. They are identical in each 16 of our submissions. 17 But with respect to the northern limit of the 18 transferred area, we submit that Governor-General 19 Wingate's memorandum is clear: it was the Bahr el Arab. 20 Now let's consider the position if we were to accept 21 the SPLM/A thesis that the area transferred in 1905 22 actually extended up to 10°35' north latitude. 23 Once again, we have the districts of the two sultans 24 to the south of the Bahr el Arab that Wingate says are 25 incorporated into Kordofan. That becomes Kordofan now.</p> <p style="text-align: center;">Page 197</p>	<p>18:12 1 memorandum in its memorial or its counter-memorial; nor 2 did Professor Daly acknowledge its existence in his 3 first report; nor did my good friends from MENAS mention 4 it in their report either. None of them referred to it. 5 Equally striking, of course, is the fact that the ABC 6 experts ignored it as well. 7 I think we can understand why the SPLM/A does not 8 particularly like the document. It does completely 9 undermine their theory of the case. But simply ignoring 10 what is the most detailed description of the transferred 11 area that we have on the record, authored by the most 12 senior Government official in Sudan at the time, and 13 prepared contemporaneously, does not make the document 14 go away or somehow diminish its relevance. 15 The SPLM/A's silence on this issue is also 16 surprising [given] the fact that the document was 17 actually annexed to their memorial under tab 213 -- 18 although they didn't wish to discuss it -- and in fact 19 the SPLM/A had referred to it in their final submission 20 to the ABC experts. 21 It's perhaps worthwhile to recall what the SPLM/A 22 had to say about Wingate's memorandum in their 23 submissions to the ABC. The relevant extract now 24 appears on the screen, and it's in the common bundle at 25 tab 114. First they quoted Wingate:</p> <p style="text-align: center;">Page 199</p>
<p>18:11 1 But if the SPLM/A's position that the transferred area 2 actually extended way up to 10°35' were to be accepted, 3 the obvious question would be: what was the status of 4 the area between the Bahr el Arab and that latitude? 5 Under the SPLM/A's thesis, prior to the transfer 6 this area must have been deemed to be part of 7 Bahr el Ghazal province; had it not been, it couldn't 8 have been transferred from that province to Kordofan in 9 1905. 10 But given that Wingate did not say that anything 11 north of the Bahr el Arab had been transferred -- quite 12 the contrary, he said it was to the south -- the 13 SPLM/A's theory would leave us in the anomalous and 14 indeed very peculiar situation that there was somehow 15 still a strip of the Bahr el Ghazal province between the 16 transferred districts south of the Bahr el Arab, which 17 were now Kordofan, and the rest of Kordofan above 18 10°35'. 19 That makes no sense at all, and it's obviously not 20 what the governor-general had in mind at the time, and 21 not what Condominium officials intended at the time. 22 Otherwise there is simply no way of explaining the area 23 between the Bahr el Arab and 10°35'. 24 The Tribunal will be aware from the parties' written 25 pleadings that the SPLM/A made no mention of Wingate's</p> <p style="text-align: center;">Page 198</p>	<p>18:14 1 "The districts of Sultans Rob and Okwai, to the 2 south of the Bahr el Arab, and formerly a portion of the 3 Bahr el Ghazal province, have been incorporated into 4 Kordofan." 5 Then they focused on the language "to the south of 6 the Bahr el Arab". What's the explanation? 7 "It's about the limit of the two districts, and not 8 the actual areas. However, if the preposition 'from' 9 were to be used, the passage would definitely suit the 10 Government's position." 11 I confess -- maybe this will be explained by our 12 colleagues -- I've never understood that second 13 sentence, but then grammar is not my strong suit. It's 14 about the limits of the two districts, if not the actual 15 area. 16 So here we have the SPLM/A acknowledging -- at least 17 before the experts, if not in front of this Tribunal -- 18 that Wingate's description is about the limit of the two 19 districts transferred. 20 It's correct it's not about actual areas. Wingate 21 did not specify the entire boundary of the area 22 transferred. But he did clearly indicate what the 23 northern limits were when he said that the transferred 24 districts lay to the south of the Bahr el Arab. 25 It was only in the SPLM/A's rejoinder that our</p> <p style="text-align: center;">Page 200</p>

<p>18:15 1 opponents finally addressed Wingate's memorandum, albeit 2 very briefly. Three points are made in that pleading, 3 none of which are accompanied by any serious reasoning. 4 Those three points are the following. 5 First, the SPLM/A says that the Government pretends 6 to have discovered what it says is the crucial document 7 only in its counter-memorial. 8 Second, our colleagues say: Wingate's memorandum is 9 ex post facto, it's a general summary of the earlier 10 1905 transfer decision, which was not intended to change 11 the decisions that had been taken in Sudan. It's 12 ex post facto and a general summary, not intended to 13 change what had happened. 14 The third argument is that Wingate's reference to 15 the Bahr el Arab was merely a geographic description, 16 and not the delimitation or definition of a boundary. 17 You'll find these in the rejoinder of the SPLM/A at 18 paragraphs 860 and 861. 19 As to the first assertion, that the Government 20 pretends to have discovered this document only in its 21 counter-memorial is obviously just simply wrong. 22 Sudan's memorial discussed Wingate's description at 23 paragraph 360 and annexed the memorandum to its 24 memorial. The Government had produced the same 25 memorandum to the ABC experts, and it was the SPLM/A</p> <p style="text-align: center;">Page 201</p>	<p>18:19 1 disingenuous. Why rely on documents in the same overall 2 report and not complain they're ex post facto, but then 3 when it comes to Governor-General Wingate's memorandum, 4 suddenly that becomes ex post facto and no longer 5 pertinent? 6 The argument is irrelevant, because even if 7 Wingate's description was written shortly after the 8 transfer was decided, it still reflected his 9 contemporary understanding of what the transfer 10 entailed. 11 Wingate had no hidden agenda at the time, no 12 ulterior motives for describing the transferred area in 13 the manner he did. There was no dispute over the issue 14 at the time. The memorandum wasn't self-serving in any 15 way. 16 The probative value of contemporary statements made 17 by senior Government officials has, I would suggest, 18 been recognised by the International Court in its recent 19 decision in the Pedra Branca/Pulau Batu Puteh case. 20 There, as I'm sure the members will recall, 21 a question arose as to the weight to be given to 22 a letter written by the acting state secretary of Johor, 23 stating that the Johor Government does not claim 24 ownership of the island of Pedra Branca, in response to 25 a query from Singapore.</p> <p style="text-align: center;">Page 203</p>
<p>18:17 1 that chose to ignore this key piece of evidence, in both 2 its memorial and its counter-memorial. 3 With respect to the argument that Wingate's 4 memorandum was ex post facto, and a general summary of 5 the transfer decision which was not intended to change 6 that decision, that argument I would suggest is both 7 disingenuous and irrelevant. 8 It's disingenuous to complain that it's 9 ex post facto because the SPLM/A has had absolutely no 10 hesitation in referring to two other documents which 11 appear in the same compendium as does Wingate's 12 memorandum: the annual reports for Bahr el Ghazal and 13 Kordofan for 1905. They're all in the same overall 14 report for the Sudan. Why Wingate's memorandum is any 15 more ex post facto than those two reports, which are 16 termed "foundation texts" by the SPLM/A's experts, is 17 left unexplained. 18 The fact is that Wingate described the transfer in 19 the very first annual report that was prepared following 20 the transfer and, if anything, since Wingate was senior 21 to the governors of both Kordofan and Bahr el Ghazal, 22 his account is entitled to greater probative weight than 23 any of the others; although the others are also entirely 24 consistent with the Government's position. 25 That's why this ex post facto argument is</p> <p style="text-align: center;">Page 202</p>	<p>18:20 1 The court, calling this document "of central 2 importance for determining the developing understanding 3 of the two parties about sovereignty over the island", 4 concluded that the acting state secretary's letter had 5 major significance and that it showed as of 1953, in 6 that case, Johor's understanding of the situation, 7 ie that it didn't have sovereignty or claim ownership 8 over the island in question. 9 The same can be said for Wingate's memorandum. It 10 showed how the seniormost Government official in Sudan 11 at the time understood the position regarding the areas 12 that had been transferred. As he said, those areas lay 13 to the south of the Bahr el Arab. 14 I might also note that the court in its 1951 15 judgment in the Fisheries case also had no reservations 16 about referring to ex post facto descriptions of a prior 17 act by a government to shed light on the meaning of the 18 original act. 19 In that case it will be recalled that what was at 20 issue was the interpretation of a Norwegian royal decree 21 of 1812 concerning the extent of Norway's territorial 22 sea. In interpreting that 1812 decree, the court relied 23 on subsequent Norwegian decrees issued in 1869 and 1889, 24 and on internal reports from 1912 and even 1929 prepared 25 by the Norwegian Government, which provided further</p> <p style="text-align: center;">Page 204</p>

<p>18:22 1 explanations as to Norway's perception of what the 2 original 1812 decree had provided for. 3 I'd suggest that, if anything, Wingate's description 4 is even more relevant than what happened in that case in 5 clarifying what Condominium officials considered had 6 been transferred from Bahr el Ghazal to Kordofan in 7 1905. His memorandum was not prepared years later; it 8 was written shortly after the transfer decision had been 9 taken. It was not simply a general summary of the 10 earlier transfer decision; it added clarifications about 11 the geographical location of the transferred areas. 12 In no way did Wingate purport to change the decision 13 that had previously been taken; his memorandum explained 14 that decision. Governor-General Wingate had no reason 15 to change the decision, it wasn't controversial, 16 although it was understandable that he would explain its 17 territorial ramifications to his superiors by means of 18 the annual report. Those superiors, whether in Cairo or 19 in London, never thereafter questioned his description 20 of what had happened. 21 Thus when the SPLM/A argues that Wingate's 22 description was merely geographic, not a delimitation of 23 a boundary, this tells only half of the story. Yes, 24 Wingate made a geographic description. But that 25 description is highly relevant: it tells us that the</p> <p style="text-align: center;">Page 205</p>	<p>18:25 1 hearing will resume tomorrow morning at 9.30. 2 (6.25 pm) 3 (The hearing adjourned until 9.30 am the following day) 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p style="text-align: center;">Page 207</p>
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<p>18:23 1 Government viewed the transferred areas as situated in 2 a particular location, to the south of the Bahr el Arab. 3 Given the earlier references to the Bahr el Arab as 4 the pre-transfer administrative boundary, Wingate's 5 description thus did place a northern limit on the 6 transferred area, the Bahr el Arab. We agree that his 7 memorandum and his description did not purport to 8 delimit the southern boundary of the transferred areas, 9 but the southern boundaries are not in dispute between 10 the parties. 11 The only genuine question that Wingate's memorandum 12 could give rise to is: what river was he referring to 13 when he wrote that, "The districts of Sultan Rob and 14 Sultan Okwai, to the south of the Bahr el Arab, have 15 been incorporated into Kordofan"? What river was he 16 referring to when he mentioned the Bahr el Arab? 17 Mr President, members of the Tribunal, that leads me 18 to the next part of my presentation, in which I plan to 19 address the question of the identity of the Bahr el Arab 20 and in which I will show that Wingate knew which river 21 he was referring to by the time he described the 22 transfer area in his 1905 memorandum. 23 But with your permission, Mr President, that story 24 is maybe best held over until tomorrow morning. 25 THE CHAIRMAN: I thank you very much, Mr Bundy. The</p> <p style="text-align: center;">Page 206</p>	<p style="text-align: center;">INDEX</p> <p style="text-align: center;">PAGE</p> <p>Submissions by PROFESSOR PELLET .....1 Submissions by MS MALINTOPPI .....24 Submissions by MR CRAWFORD .....40     Questions from THE TRIBUNAL .....45 Submissions by MR BORN .....48     Questions from THE TRIBUNAL .....91 Submissions by MR CRAWFORD .....101 MR ALASTAIR MACDONALD (called) .....109 Presentation by .....110     MR ALASTAIR MACDONALD</p> <p>    Examination-in-chief by MS MILES .....137</p> <p>    Re-examination by MR CRAWFORD .....170</p> <p>Submissions by MR BUNDY .....171</p>
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