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

BETWEEN:

THE GOVERNMENT OF SUDAN
and
THE SUDAN PEOPLE’S LIBERATION MOVEMENT/ARMY
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.

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

Day 3 Monday, 20th April 2009

09:33 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 took issue with my mention of their dealing with "legal niceties", an expression he used not less than five times, and he showed some irritation that I could refer in this manner to such important rules as presumptive finality or res judicata.
5 Mr President, nothing could be further from my mind than rejecting the fundamental importance of those rules; and certainly as a teacher I would never insist on their paramount importance in any society governed by law. But we are not in a classroom and, as very aptly recalled by Professor Kaikobad, whom I quoted in my speech on Saturday:
6 "Res judicata cannot be seen in vacuo; it has to be read and applied with respect to the facts applicable to a particular situation."
7 Important as the principles discussed again and again by the SPLM/A may be, they are not peremptory and cannot be deemed to prevail over an express agreement to the contrary.
8 If I may mention it in passing, Mr President, I'm afraid that my learned opponent makes a little confusion between mandatory, which I would think relates to the mandate and means nothing more than compulsory for the addressee of a rule, on the one hand, and peremptory, which is just another word for jus cogens in international jargon.
9 In the present case the fact is that the parties have agreed to partly set aside those principles by entrusting this Tribunal to change the decision, in principle final and binding, made by the experts if it determines that the ABC experts exceeded their mandate.
10 This agreement is binding upon the parties and must be given effect.
11 Therefore, our opponents may well use their, for me, unclimbable mountain of paper in order to prove the existence of principles that by no means we deny; the inescapable fact would remain: if the report is vitiated by an excess of mandate, its presumptive validity, its finality, its res judicata character can/will not stand any more in front of the finding of this Tribunal which, basing itself on the submissions of the parties, will have to substitute its own definition of the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905 to the definition given or omitted to be given by the experts.
12 If Mr Born does not like the expression "legal niceties", he might prefer "tout le reste est littérature"; everything else is just academic. Instead of discussing general principles in vacuo, let's apply the Arbitration Agreement, it is the law both of the parties and of the Tribunal, and that law establishes the mandate of this Tribunal in relation with that of the ABC.
13 Second general remark: mandate v excess of mandate.
14 I'm afraid, Mr President, that our adversaries have a problem with making the distinction between the notion of mandate on the one hand and of an excess of mandate on the other hand; even though I certainly agree that the latter, common in private law, is not usually received in international law or, more generally, in public law.
15 Now, we seem to agree at least on one point: the mandate of this Tribunal is defined by Article 2 of the 2008 Arbitration Agreement. It must first determine whether or not the experts exceeded their own mandate.
16 Then, if and only if -- we agree on that too -- you find that they did exceed their mandate, you will have in return to define not the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905, but its boundaries. And this second part of your mandate was also the ABC experts' mandate.

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As recalled again in Article 2 of the Arbitration Agreement, it was:

"... to define (i.e. delimit) and demarcate the area of the nine Ngok Dinka chieftdoms transferred to Kordofan in 1905."

Moreover, as Mr Born has insistently and rightly noted, Article 1 of the Abyei Protocol provided an agreed definition of the Abyei Area. This provision reads:

"The territory is defined as the area of

Ngok Dinka chieftdoms transferred to Kordofan in 1905."

But then the mandate of the ABC, or the experts acting in lieu of them, could not have been, as Mr Born has said repeatedly, to define the Abyei Area.

Mr President, I have been involved in international litigation for more than a quarter of a century and I have lost any hope that my, say, non-Latin colleagues be Cartesian; but I must say that I have some difficulty to understand how, at one and the same time, the Abyei Area could have been defined by the Protocol and its definition be the object of the mandate of the ABC, or secondarily of this Tribunal.

There is no need for a very long reasoning to see that the answer to the question asked to the experts could not have been given in advance in the Protocol.

The territory is defined as the area of the nine Ngok Dinka chieftdoms transferred to Kordofan in 1905."

Therefore the notion can only be defined on the basis of the Abyei Protocol and other related agreements, as well as precedents and/or common sense.

As for the precedents, they are rare, and I note that all the distinctions made yesterday morning by Mr Born between excess of mandate on the one hand and other grounds for annulment of arbitral awards on the other hand did not relate to excess of mandate properly said, but to excess of jurisdiction or excess of power.

Thus Mr Born referred to the ICSID Convention and explained that:

"There is a difference between an excess of substantive mandate in Article 52(1)(b) as compared to 52(1)(d)."

But it happens that Article 52(1)(b) is not about an excess of substantive mandate, as he put it, but an excess of power.

Similarly, neither the New York Convention nor the UNCITRAL Model Law, which he also mentioned, used the unusual expression "excess of mandate".

Mr President, the context and the circumstances in which both the mandate of the experts and that of this Tribunal were drafted and, as recorded by Mr Born himself, very carefully drafted and repeated in five different instruments, this confirms without any doubt that the intention was to have the ABC and its experts to comply very strictly with their mandate and this Tribunal to carefully check whether or not it has been the case.

We do not accept the general proposition that "tribunals possess very broad procedural discretion", but it is in the circumstances all the more acceptable that, first, the mandate of the experts had been meticulously negotiated and drafted, and second, the object of their mandate was so sensitive that they could only strictly and completely adhere to it without exercising any kind of so-called "discretion".

Third general remark: the number of excesses.

Mr President, leaving aside for a moment the mandate of this Tribunal, I now focus on the mandate of the ABC. Therefore the mandate was much more precise than what the SPLM/A alleges: it was only to find the limits of the territory thus defined, that of the Ngok Dinka territory transferred to Kordofan in 1905, in accordance with the wording of the formula.

By the way, it was certainly not open to the experts in defining the Abyei Area to define it in terms of both territorial boundaries and land usage in defined territories. In all the measure that the experts did not answer that only question, they acted infra petita.

All they did in surplus, including of course defining anew the Abyei Area or the respective land usages of the local tribes, was ultra petita, under which qualification can also be included the fact that they did not base themselves on any kind of scientific analysis, as required by Article 4 of the Abyei Annex and paragraph 3.4 of the Terms of Reference; a requirement on which counsel for the SPLM/A has been rather silent when he came to the question of motivation.

Fourth general remark: excess of mandate or difference of interpretation?

I will be brief, Mr President, with my fourth general remark, since I had already stressed in my Saturday's second speech that a careful distinction must...
be made between the erroneous interpretation of their mandate by the experts and a disagreement with them on the way they have implemented their mandate. The first aspect relates to the first part of your own mandate as announced in Article 2(a) of the Arbitration Agreement, the excess of mandate part of these proceedings; the second aspect is related to the delimitation phase, that is to Article 2(c) of the Arbitration Agreement. But once again a misinterpretation of their mandate by the experts necessarily results in an excess of mandate, whether ultra or intra petita. Fifth and last general remark: the Government's complaints. The SPLM/A gloats over my apparently imprudent admission according to which whether the excesses of mandate the Government complains of are 10, 11 or 12 does not really matter. But really, Mr President, it does not. Does it really matter whether we sustain that the fact that the experts were inspired by improper oil-oriented motivations is an autonomous excess of mandate or part of the discussion of the illegal ex aequo et bono decision? Does it really matter whether the illegal motivation of the report constitutes one or two or three excesses of mandate? It does not. Similarly, there is no ground for counsel's righteous indignation that the Government's case has changed between the memorial and Saturday's pleading. It is a virtue of the adversarial principle that each party is supposed to answer the other's argument. Moreover, as the SPLM/A had noted in its rejoinder, in most respects the changes we made are more -- I would not say cosmetic, but rather formal -- in the hope that our argument would be easier to follow. With respect, I must add that the SPLM/A for its part has not at all followed our good example. Not only has Mr Born in substance purely and simply repeated yesterday the argument already made by the SPLM/A's reply, but also -- and this is even more debatable -- far from answering the argument of our oral presentation or even our rejoinder, he has mainly limited himself to answering the Government's memorial. Mr President, members of the Tribunal, I will now briefly discuss the SPLM/A's challenge to our claims concerning the substantive excesses of mandate which tainted the experts' report. First, the issue of the failure to motivate. According to an authority on international arbitration, a certain Mr Gary Born:

"It is now a nearly universal principle that international arbitral awards must set forth the reasons for the Tribunal's decision." I know that being counsel imposes duties, but in the present case I strongly suggest that the learned author is more convincing than the devoted counsel. May I add, just to take another example, that another, indeed lesser authority, in French, Daillier and others, entirely concurs with the quote I just read. What is true for international arbitral awards in general is evidently even more true when boards are at stake. Territorial delimitation cannot be left unmotivated, and with due respect I do not need to refer to a mountain of paper to make this common-sense remark. Law is not necessarily inimical to common sense, but state sovereignty is certainly inimical to deciding borders by drawing lots. But there is another reason why climbing the mountain of paper where Mr Born wants to take us is in any case superfluous. The experts were mandatorily -- that is according to their express mandate -- instructed to base themselves on specific sources and to follow a specific method. Even accepting that they could have left their decision unexplained -- which is, I maintain, more than ever absurd -- they had to base their decision on scientific analysis and research. Had the report consisted in the final and binding decision alone, it might have been more difficult for the Government to show that this mandatory requirement had not been fulfilled, but the excess of mandate would nonetheless have been averted. Anyway, things being what they are, suffice it to read the report to ascertain that on crucial points it is not based on any kind of reasoning. I'm afraid it is difficult to globally share our opponents' enthusiasm for the experts' masterpiece, which it holds out as, and I quote among others, "a thoughtful, impressive, well-reasoned piece of work that deserves our respect". But, Mr President, as is well-known, the devil is in the detail, and so too the excess of mandate. When I speak of detail I do not mean minor defects, but a succession of serious losses of sight of the experts' mandate, which was -- I recall it again -- "to define (i.e. delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905", based on a scientific analysis of the available relevant archives. I will not repeat my Saturday's presentation; I will
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25 the putative Kordofan/Bahr el Ghazal boundary was irrelevant
22 However, the experts pushed it aside. Why? The sufficient answer to the question.
21 and this, erroneous as it was, was a necessary and
20 the Condominium officials’.
18 Condominium officials”.
16 Full stop, without “in practice by some of the
15 treated as the province boundary.”
14 “The Ragaba ez Zarga/Ngol rather than the
13 transferred from the province of Bahr el Ghazal to that
12 of the nine Dinka chiefdoms but that of the delimitation
11 transferred from the province of Bahr el Ghazal to that
10 the limit of the territory transferred from one province
9 to another in 1905, not to go into a maybe scholarly
8 Fair enough. Then the experts’ mandate was to determine
7 second, because they do not give the slightest beginning
6 recognise that the boundary was situated on the
5 reason, no motive for researching another limit; and
4 Ragaba ez Zarga, there was no need, not the slightest
3 recognised that the boundary was situated on the
2 as it stood in 1905, not the location of the putative
1 the experts referred to as what they were doing was the

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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
territory of the nine Dinka chiefdoms, but it was indeed
relevant to answer the question asked to the experts, or
to the ABC, which was not the question of the territory
of the nine Dinka chiefdoms but that of the delimitation
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
corresponding to the mandate of the experts, and to
which they acknowledged that they had the answer, to
another question to which they had to invent an entirely
new, artificial answer, is not a substantive error. It
is by all means an excess of mandate.
19 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

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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”? I accept, Mr President, that these questions might
25 be seen prima facie more as a disagreement with the

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

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example, a declaratory judgment by the ICJ -- is binding upon the parties. In other words, this part of the decision could perfectly have been the subject of an autonomous binding pronouncement if the experts had been asked to take a decision on this point. They were not, and this alone establishes that in deciding on this point they exceeded their mandate.

Moreover, the justification for this finding made by the experts in flagrant excess of their mandate is also another -- distinct or common, it doesn't matter -- excess of mandate, in that it confirms that the decision is based not on the territorial transfer operated in 1905, on which the ABC was called to decide, but on the arbitrary or equitable -- for the present discussion it does not matter -- division of tribal rights.

As apparently accepted by counsel for the other party, this decision was made as a follow-up to a global approach based on the dominant and secondary rights of the Ngok Dinka. For their part the Messiriya are only recognised secondary rights, and only in the measure that they are shared with those of the Ngok, even though elsewhere in the report the experts accept that the secondary rights of the Messiriya extended further to the south. These findings are doubly in excess of the experts' mandate. First, the experts were mandated to decide on an area, a territory, transferred from one province to another, not to allocate territories on the basis of tribal rights. And second, the limitation of the Messiriya's secondary rights, a limitation which is crystal-clear if you just cast an eye at the map annexed to the report, is in evident contradiction with Article 1.1.3 of the Abyei Protocol, which provides that:

"The Messiriya and other nomadic peoples retain their traditional rights to graze cattle and move across the territory of the Abyei."

According to the decision, and very clearly to the map decision, the rights of the Messiriya would be limited to the parallel 10°10' north.

Mr President, this brings me to the end of my presentation for this morning. I have not answered all the arguments made yesterday by the SPLM/A. Even full working nights are short. However, I hope that I have touched upon the main deficiencies in the experts' approach. They are:

1. That the report is not based on a scientific analysis, as demanded by their mandate, but on the entirely subjective and highly debatable judgment of the experts based on equity and/or irrelevant inter-tribal

The SPLM/A argued that the references to the Abyei Protocol, the Abyei Appendix, the Terms of Reference and the Rules of Procedure in Article 2(a) of the Arbitration Agreement, and that the Government's procedural complaints are inadmissible.

Arbitration Agreement, and that the Government's position is that a failure of the experts to respect the Rules of Procedure or to adhere to the work programme set out in the Terms of Reference does not represent an excess of mandate under Article 2(a) of the Arbitration Agreement, and that the Government's procedural complaints are inadmissible.

The SPLM/A's argument is founded on the irrelevant consideration of the extent of the traditional rights of the Ngok and the Messiriya and by limiting those of the latter.

... to define (i.e. delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.

In making these claims the Government of Sudan does not merely disagree with the substance of the decisions of the experts -- it does, but on other grounds; it submits that the experts have misinterpreted, and indeed entirely set aside, their mandate.

It belongs to you, members of the Tribunal, to declare this, and consequently to at last give the right answer to the only question included in the formula on the basis of the submissions of the parties.
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1. Article 3 of the Arbitration Agreement relating to the applicable law states that this Tribunal:

2. "...shall apply and resolve the disputes before it in accordance with the provisions of the CPA, particularly the Abyei Protocol and the Abyei Appendix, [the 2005 interim constitution], and general principles of law and practices."

3. In particular the applicable law clause contains an express reference to the Abyei Appendix which this Tribunal shall apply. The SPLM/A ignored this point yesterday, and did not spend much time on the Abyei Appendix.

4. Let me focus also on paragraph 5 of the appendix. It provides:

5. "The ABC shall present its final report to the presidency before the end of the pre-interim period.
6. The report of the experts, arrived at as prescribed in the ABC Rules of Procedure, shall be final and binding on the parties."

7. Three important points emerge from this provision. First, it was the ABC that was to present its final report to the presidency. Second, the report of the experts was to be arrived at as prescribed in the ABC Rules of Procedure. In other words, those rules are binding; they were deemed to be mandatory, and they were part of the experts’ mandate. The report had to be arrived at as prescribed in the rules.

8. Third, the appendix is the only one of the parties’ various agreements dealing with the ABC process where the words "final and binding" appear. "Final and binding" language with respect to the character of the experts’ report is not included in the Abyei Protocol, the Terms of Reference or the Rules of Procedure; only in the Abyei Appendix.

9. There it is clear that it is the report of the experts, arrived at as prescribed in the ABC Rules of Procedure, that shall be final and binding on the parties. In other words, to be final and binding the experts’ report had to be arrived at as prescribed in the rules, and this was a deliberate condition for its bindingness.

10. Fourthly and lastly, the fact that the substantive mandate of the experts is referred to in the Abyei Protocol, the Abyei Appendix, the Terms of Reference and the Rules of Procedure underscores that the other provisions in these instruments apply to the manner in which the experts carried out that mandate.

11. Yesterday the SPLM/A acknowledged that the provisions of the Abyei Protocol and related agreements were "vital to the parties' agreements to resolve their disputes" and that, "Procedurally the Abyei Protocol and the Abyei Annex established the framework for a remarkable dispute resolution mechanism".

12. Well, on this point at least the Government agrees. It is certainly true that the parties’ consent was linked to and circumscribed by the procedural framework set out in the Abyei Protocol, the Appendix, the ABC Terms of Reference and Rules of Procedure.

13. However, the Government fundamentally disagrees with the SPLM/A’s argument that the experts’ enjoyed unusually broad procedural discretion and that the parties’ agreements recognised the experts’ alleged broad power to undertake their own independent investigation and scientific research in the manner advocated by the SPLM/A.

14. Incidentally, in this context the SPLM/A admits that the experts "went beyond what had been contemplated by the Terms of Reference", and that the ABC "travelled to several sites not contemplated by the parties”.

15. The SPLM/A cited seven provisions of the relevant agreements in support of its allegations that the procedural rules contained no limitations to the experts’ fact-finding powers: Article 2 of the Abyei Annex, Article 3 of the Terms of Reference, procedural rules, 2, 7, 10, 11 and 13.

16. According to our opponents, nothing in the procedural rules forbade the ABC experts from acting as they did. A related argument is that the experts drafted the Rules of Procedure, and therefore they believed that they were acting in compliance with these rules. Mr President, as a Roman I cannot resist here but site a Latin maxim in response "patere legem quem ipse fecisti"; every authority must abide by its own rules.

17. In addition, the Rules of Procedure here might have been drafted by the experts but they had also been agreed by the parties. Let me now review the provisions that, according to our opponents, allegedly established the experts' broad fact-finding and procedural discretion.

18. Article 2 of the Abyei Annex deals with the composition of the ABC and only mentions the five experts when it describes their method of appointment and underscores their professional qualities and their impartiality. There's no mention of procedural discretion, broad or otherwise, explicit or implicit.

19. Article 3 of the Terms of Reference deals with the functioning of the ABC, and as such mainly refers to the work of the ABC as a whole. This is done by referring...
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<td>1 to three specific meetings of the Commission in Sudan</td>
<td>experts could be considered, given their knowledge of</td>
<td>of the Abyei Area, a highly sensitive matter; in these</td>
<td>&quot;the Commission members&quot; mean precisely what they say;</td>
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<td>2 with representatives of the people of the Abyei Area.</td>
<td>Sudan and, especially in the case of Professor Cunnison,</td>
<td>cases express reference is made to the full ABC, and not</td>
<td>members of the Commission, not experts.</td>
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<td>3 This provision is so detailed that it indicates the</td>
<td>their published writings, as sources on Sudan.</td>
<td>just the experts.</td>
<td>In actual fact there is no sign of the experts'</td>
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Trevor McGowan
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The same cold-shoulder treatment was reserved to our discussion of the so-called “specific discussions” that the parties are said to have had on the subject according to the SPLM/A. In fact, not only did the SPLM/A focus exclusively on its own witness statements, which are the only support for its assertions, and it ignored the Government’s written submissions and oral arguments in this respect, but it also incorrectly stated that the Government “puts no specific witness testimony in response”.

That is extraordinary considering that, as the Government recalled on Saturday, three of the Government’s witnesses, all of whom were representatives on the ABC for the Government, deal with this question in their testimonies, and refute the allegations of the witnesses put forward by the SPLM/A. They all state that the ABC was not informed of these meetings.

The SPLM/A felt the need to specify that the 8th May meeting was with the Twic Dinka. Indeed, that was the case. That was a meeting that apparently had been organised by the Sudanese politician Mr Bona Malwal. The meeting was probably solicited because the Twic Dinka wished to make sure that their interests were taken into account. We do not know the circumstances of that meeting.

However, the reason why the Government did not focus on these specific meetings in oral argument on Saturday is because much more troubling was the meeting that took place on 21st April, when the recording is limited to one witness, Mr Justin Deng, in spite of the fact that apparently eight Ngok Dinka individuals were present, and the meeting of 8th May 2005 with 15 Ngok Dinka individuals, when documents and maps were provided to the ABC experts and not to the parties or their representatives.

The SPLM/A also repeated once more that, even assuming that the experts had met with people in Khartoum instead of Abyei in error, this would not have constituted a “serious breach of a fundamental rule of procedure” because such a violation “would obviously have been unintentional”.

But, Mr President, quite aside from the fact that this is pure speculation, the point is not where the ABC experts met, but the fact that the experts had no justification for acting as they did, whether intentionally or unintentionally. What matters is that these meetings were conducted in the absence of the parties by the experts alone, and not the whole
and maybe also during your stay in Khartoum, we had
an opportunity to know in fact what people had said
about our efforts", he clearly made no reference to any
interviews with Ngok Dinka individuals, or for that
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In fact Ambassador Dirdeiry's choice of words,
"maybe also during your stay in Khartoum", makes it
clear that he did not really know what the experts had
done in Khartoum because he was not present. He was
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people in Khartoum regarding the efforts of the ABC,
hence the use of the words, "we [the ABC] had
an opportunity to know in fact what people had said
about our [ie, the ABC's] efforts".
Understandably the work of this body was a subject
of great interest in Khartoum, as elsewhere in Sudan,
and the ABC stay in the capital had provided
an opportunity to clarify that work to the people of
that city; no more, no less.
Finally, as to the fact that the experts issued
their decision without endeavouring to reach consensus
of the full ABC, Professor Crawford will say a few words
on the factual aspects of this point. I will just add
a few general comments to place the matter in its proper
procedural context.

It is evident from reading the Rules of Procedure
that the experts adopted a chronological approach to the
tasks that were to be undertaken, starting with
a reference in Rule 2 to the Commission's opening
meeting on 10th April 2005, and ending with Rule 16,
where the experts would, at the end, appoint technical
personnel to survey and demarcate the boundary on the
land.
In addressing the requirement that the Commission
endeavour to reach a decision by consensus, the SPLM/A
basically stops at Rules 12 and 13.
Rule 12, it will be remembered, states that the
Commission will reconvene in Nairobi at a date in May to
be determined, and that the parties will make their
final presentations at that time. At the time of the
parties' final presentations the proceedings were
essentially at the advocacy stage. Each party was
setting out or explaining its position.
Then Rule 13 provided that afterwards the experts
will examine and evaluate all the material they have
gathered and prepare the final report.
However, that was not the end of the process, for
Rule 14 then stipulated that the Commission -- and again
I emphasise the Commission as a whole -- would endeavour
to reach a decision by consensus. This necessarily
meant that the Commission would discuss the report
prepared by the experts, and after the parties' final
submissions it would endeavour to reach a decision by
consensus. It was only if an agreed position at the
time was not achieved that the experts would have the
final say.
This step, the effort to reach a consensus on the
report prepared by the experts, is the missing link in
the actual chain of events. The parties never saw the
report before it was presented to the presidency. They
were given no chance, as part of the Commission, to
try to reach a consensus on it.
This is not nitpicking, Mr President and members of
the Tribunal; this was disregard for a fundamental and
essential part of the process that was envisaged. And
yet, what is the evidence offered by the SPLM/A that
there had indeed been efforts at reaching consensus?
Nothing other than witness statements which have been
refuted by the Government's own witnesses.
Before I ask you to give the floor it
Professor Crawford, Mr President, I would like to note
that a number of points I made in my earlier
presentation remain unchallenged. In particular the
confusion between the experts and the ABC as a whole
continues to characterise our opponents' approach to the

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Day 3 Monday, 20th April 2009

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24 I emphasise the Commission as a whole -- would endeavour
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10:40 1 Millington email, the Khartoum meetings and the failure
to endeavour to reach consensus of the whole ABC.
2 Our opponents have also not uttered a single word
3 about Dr Johnson's embarrassing revelation that he
4 recently advised the Government of South Sudan on the
5 north/south boundary issue. This pregnant silence
6 arouses the suspicion that the SPLM/A also recognises
7 that Dr Johnson's conduct is indeed an embarrassing
8 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

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12 (Pages 37 to 40)

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never discussed the meaning of the substantive formula.
That being so, I had no occasion to speak in our reply on excess of mandate. I shouldn't be here. But it is, I regret, necessary to do so on another point.
There are, you will by now have observed, styles in advocacy. Apart from some light remarks on the SPLM/A's lexicon, we have so far chosen not to respond in kind to allegations of incompetence, frivolity and making untenable arguments. But there's now an allegation of bad faith against the agent, which seemed at times to extend to a claim of unprofessional conduct against counsel. The former at least requires me to say something.
The question is, not to mince words, whether Ambassador Dirdeiry has been dishonest in stating, as agent for the Government of Sudan, that the Government of Sudan had no notice as to the final presentation of the ABC experts' report. The SPLM/A's allegations on these issues have been repeated from an early stage of the proceedings. The SPLM/A has now requested that the Tribunal draw negative inferences from the fact that Ambassador Dirdeiry has not given evidence in these proceedings.
Now, the merits of the legal arguments on the ABC consensus claim are for you, and I do not propose to add anything to what Ms Malintoppi has said so lucidly on this point. But the suggestion that a decision was taken that the agent not give evidence so as to shield him from cross-examination on a point on which he is not telling the truth impugns my credit as well as his. The issue concerns me and not Ms Malintoppi, whose name counsel for the SPLM/A apparently cannot pronounce; he didn't mention it once yesterday.
Mr President, prudently it is not the practice for the agent of a state to give written or oral evidence.
This is for good reason, given the Nuclear Tests principle and the agent's authority to speak for the state in the matter of the dispute. Not having given a witness statement, it would have been entirely inappropriate for the agent to speak as a witness other than from the dossier on these issues.
As an alternative, the Government, acting on advice, submitted testimony from one of the three members of the presidency, the Vice President of Sudan, Mr Ali Osman Mohamed Taha. If anyone should have been aware of when the final presentation of the ABC report was to take place, it would have been one of the three individuals to whom that presentation was to be made.
I note that although we made the vice president available for cross-examination by video-link,
show that she told Ambassador Dirdeiry of the purposes of the meeting.
There are two points to make about this: first, Ambassador Dirdeiry was not a recipient of the email; secondly, Ms Keiru is not a witness.
Mr President, members of the Tribunal, all of the Government's witnesses are clear in this respect: the Government was never informed of the reason for the meeting. The Government rejects counsel for the SPLM/A's allegations of bad faith against its agent and those witnesses. As for counsel, we have broad backs.
Mr President, members of the Tribunal, this concludes the Government's response on excess of mandate.

Thank you very much, counsel. Thank you very much for the explanations, but nevertheless, my answer would be neither one nor the other.
It is now for the SPLM/A to make its presentation.

Thank you very much.

10:49
PROFESSOR CRAWFORD: Sir, there is a distinction which both parties accept between the ABC, the Commission, and the expert members. And the rules, speaking compendiously, attribute some functions to the ABC and some functions to the experts, and are very careful in doing so.
Obviously when persons who have multiple capacities act in a particular matter, there is a question of the capacity in which they act, and that may only be able to be assessed in relation to the factual situation. If the ABC was operating as such, one would expect the ABC to be convened by its chair, Ambassador Petterson, which I understand was not the case in relation to the particular meeting. So I think it's a question of assessment in relation to a particular point.
Having said that, obviously information which is shown to have been imparted to the person who was acting as the principal representative of the Government -- or indeed of the SPLM/A -- would be attributable to the Government in relation to that situation.
I was making an evidentiary point. A point that I didn't make, which I might have made, is that these cases are difficult enough without unproven allegations of bad faith in circumstances where relevant witnesses have not been examined or cross-examined or even called.

10:51
THE CHAIRMAN: I thank you very much. Professor Reisman has a question.
PROFESSOR REISMAN: Thank you, Mr President. This is a question for Professor Pellet, and I will pose the same question to counsel for SPLM/A after their rebuttal.
With respect to the standard that is to be applied to the question posed in the first paragraph of Article 2, is the standard with respect to substantive excess of mandate whether ABC rendered a plausible or reasonable interpretation, or whether it rendered a correct interpretation of its mandate?
PROFESSOR PELLET: Sir, I would think that prima facie my answer would be neither one nor the other.

If I understand your question, I understand it as meaning that you are asking me: under 2(a) is there any possibility for us to discuss the interpretation of the answer to the question? I would say that this is not the point, and that precisely under 2(a) the question is not whether the experts erred a little bit or much, but that they answered or did not answer the question.
So my answer would be that in any case this is not the question. For me the question under 2(a) is really: have they interpreted their mandate correctly or not?

10:53
If this is the question, I would think that the standard is very strict and that all the legal niceties, as I said, are irrelevant. They should have complied in all and every detail to the mandate.
The Government, and in particular Professor Pellet, spent some time discussing the general principles of finality and res judicata which we spent so much time going somehow set aside all the general principles of finality and res judicata the essential argument again was that by agreeing to arbitrate before you, before this Tribunal, the parties had waived or nullified or through yesterday and in our written submissions.
I would suggest to you that the Government's position on that is not only wrong as a matter of principle -- you've seen the authorities that we've cited, how important the principles of finality are, the important standards of proof that they give rise to and the important policies that underlie those rules, none of which is set aside by an agreement to arbitrate. In addition, though, and if you look on the current screen, you can see the Government's position on this is intellectually incoherent. The Government concedes repeatedly that particularly onerous and elevated standards of review, standard of proof, apply to it in its effort to demonstrate its various claims. We say many of those claims are inadmissible here, but irrespective of that, the Government acknowledges on multiple occasions that elevated standards of proof apply in these proceedings for its claims. The reason for that is obvious. The reason for that is that the principles of finality that we have discussed continue to apply notwithstanding the agreement to arbitrate. Where to these standards that the Government refers to come from? They don't come from the Government's good graces, they don't come from a voluntary concession that they need to make particular elevated showings; they rather come from the law. They come from generally recognised principles of law, general principles of law, which article 3 of the Arbitration Agreement refers to and which are extremely well settled, which in turn dictate, mandate, rules of elevated proof, standards of proof. The reason the Government refers to these particular standards, which it itself says it must meet, is because of these principles which remain fully applicable in these proceedings. The Government on the substance of these principles gets them wrong, they dilute them, they underestimate their true onerous character, but the conceptual point that the Government acknowledges in recognising these standards is that the standards of presumptive finality and res judicata, which are always applicable, apply in these proceedings as well, and that is the reason that it has made all these concessions. So the suggestion that by agreeing to arbitrate before you the parties have changed the legal regime applicable to finality and res judicata is not only completely wrong but contradicted by Government's own concessions. Second, and very briefly, the Government referred to

It is essential to understand -- and Professor Pellet conceded this in fact in his answer to Professor Reisman's question -- that an error in the interpretation of that substantive formula, the definition of Abyei Area in Article 1.1.2 as "the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905", is not the basis for an excess of mandate. Professor Pellet, in answer to Professor Reisman's question, said: neither of those two propositions is right, it's neither a little bit of a mistake or a big bit of a mistake; rather, if there is an error in the substantive interpretation of the definition of the Abyei Area, that is a matter of substance, that is a matter that is not a question of excess of mandate for this Tribunal to review. That's important because then when you look at Article 5.1 of the Abyei Protocol, which defines the experts' mandate, that mandate is to define and demarcate that substantively defined definition, the mandate is to define and demarcate that. Included in that mandate -- as Professor Pellet expressly conceded this morning when you follow through his logic, and as Professor Crawford in his reference to a substantive formula implicitly conceded -- is the inevitable and inescapable fact that the experts, like...
you, will need to interpret that substantive definition of the Abyei Area in Article 1.1.2.
That substantive interpretation of the definition of the Abyei Area in Article 1.1.2 is itself a non-reviewable substantive determination. How can we know that so clearly? We know it by thinking about what your mandate is.
I said repeatedly yesterday and in our written submissions that if the Government's logic were correct then your award in this case could be challenged on the grounds of an excess of mandate if you made a substantive mistake in interpreting the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.
The ABC report; it discusses rather in the first sentence, as you can see -- and this is contrary to what Professor Pellet recognised that legal principle.

... when he answered Professor Reisman's question and said that there is no substantive review of the substantive analysis of the definition of the Abyei Area in Article 2.1. That is game, set and match on their substantive mandate arguments.
Next we heard from Professor Pellet very briefly that the experts supposedly did not treat the Ngok and the Messiriya equally. He acknowledged that that was in a sense a quintessential disagreement with the substance or fairness, as he might put it, of the experts' determination, and for that reason one hardly needs to spend any time on it, though just for the sake of balance I'd note that it's emphatically wrong.
He neglects to exercise the fact that the Messiriya had extensive territories well to the north of the goz.
We will see in the coming days that the Messiriya had dominant rights, all sorts of other rights in the area of Muglad, Babanusa, the vast areas to the north of the goz, where they have, as we will see referred to, their headquarters, their home and so forth.

The general statement. You have seen how this is detailed in a number of the other agreements and Rules of Procedure that we talked about yesterday. It then, more specifically, says:
"... the report of the experts, arrived at as prescribed in the ABC Rules of Procedure ..."
It's obvious that this sentence is addressing how it is that the ABC functioning as a Commission will have its report presented to the presidency.
The important thing is that when that second sentence comes to address the issue it talks specifically about "the report of the experts", and we also saw how the Rules of Procedure said exactly the same thing; it talked about how the experts would prepare their final report, and we saw the same thing in the Programme of Work.
It was very clear, I would suggest, that this was the report of the experts; it was presented in the presence of the full ABC and it reflected the decision of the ABC, but it was a report of the experts, which was what was intended.
I would also like to address the language arrived at as prescribed in the ABC Rules of Procedure. It's been suggested that that in a sense takes away everything that is given in the final phrase of the sentence and
The report of the experts shall be final and binding on the parties. By referring to the report of the experts as being arrived at pursuant to the ABC Rules of Procedure, the parties in no sense meant to, if you will, undo the final and binding character of their report.

That is rather a descriptive phrase. It describes what report of the experts one is talking about. It's as if one refers to the agreement between parties A and B dated such-and-such a date. It is descriptive and it is not meant to put in as a condition on the final and binding status of the report some right to challenge the report. We also know that from the other provision that the report would be asked to agree to the initial procedural rules in a case. That's a way to put the case on an efficient basis on procedural grounds, actually does exactly the opposite, if one were to read it as some kind of condition on the report.

The only procedural reference that it makes is to the ABC Rules of Procedure, which it was for the experts to determine, and does not refer to the Abyei Annex or the other provisions.

So I would suggest that the notion that the parties, in inserting this phrase into the second sentence of Article 5, meant to provide for some sort of procedural review is as far from the view as could be.

We also know that from the other provision that the parties somehow constrained their otherwise extraordinarily broad discretion by having the parties agree to the rules which they had drafted. That in no way suggests -- and when you go through the slides that address these points. I'm not going to read them out for you. But, among others, Yves Derains and Eric Schwartz, former Secretary-Generals of the ICC, have described how it is good practice for the parties to be asked to agree to the initial procedural rules in a case.

There are authorities that are cited on the current slide that address these points. I'm not going to read them out for you. But, among others, Yves Derains and Eric Schwartz, former Secretary-Generals of the ICC, have described how it is good practice for the parties to be asked to agree to the initial procedural rules in a case. That's a way to put the case on an efficient and cooperative basis to go forward.

It in no way suggests -- and when you go through the authorities that I have cited here on the screen you will see that it in no way suggests -- that the Arbitral Tribunal or any other decision-maker loses its authority to make procedural decisions or further procedural rules by virtue of having the parties agree to procedural rules.

I would note that the Government has not cited any contrary authority that would support that suggestion, that the experts somehow constrained their otherwise extraordinarily broad discretion by having the parties agree to the rules which they had drafted. I'd like to turn to the question of the Khartoum meetings. We saw yesterday that Article 4 of the Abyei Annex granted the experts broad, independent investigatory power to consult both the British archives and other relevant sources on Sudan wherever they may be located.

We saw also how that provision very comfortably covered both the interviews of Professor Cunnison and Mr Tibbs, as well as the interviews that occurred in Khartoum, the consideration of the Millington email, and such other investigatory actions that the experts might have taken or wished to have taken. The Government suggested this morning for the first time that Professor Cunnison and Mr Tibbs are really books, and that you can treat the reference to the "British archives and other sources” as simply a reference to books, and by virtue of their publications that's what they are.
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 Tibbsses 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 telling 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

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11:54
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. Tibbsses 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.

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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,
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

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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

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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”,

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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 rightly
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 his 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
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<tr>
<td>12:03</td>
<td>69</td>
<td>It's interesting that Professor Crawford and the Government made much of how the experts erred in their interpretation of Article 1.1.2 of the Abyei Protocol, the definition of the Abyei Area.</td>
</tr>
<tr>
<td>12:06</td>
<td>69</td>
<td>Indeed the Government's interpretation -- and it's clearly, with the greatest of respect, confirmed by the testimony of those involved in drafting the Abyei Protocol as well as by the parties' purposes and recognised what sentences can be like. The English language has rules. It's simpler and -- at least to an English speaker who tries in German occasionally -- clearer, with the greatest of respect.</td>
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<tr>
<td>12:07</td>
<td>70</td>
<td>&quot;... a noun phrase consisting of a head noun (the area) which is then post-modified by a prepositional phrase (of the nine Ngok Dinka chiefdoms), and this is then followed by a non-finite clause (transferred to Kordofan in 1905).&quot;</td>
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<td>12:03</td>
<td>71</td>
<td>The Government's memorial treated this in its delimitation discussion, as it should have -- this is a part of the question of substance -- and the Government now, wanting to again recharacterise its case in various ways, has moved it to excess of mandate. I will therefore address it now, although it really belongs in the delimitation discussion.</td>
</tr>
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<td>12:06</td>
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phrase is as relating to the immediate preceding noun.  

This is referred to as the grammatical rule in the English language of proximity, which Professor Crystal explains, and he illustrates it with an English nursery rhyme. It is, and I'll read it:  

"This is the dog that worried the cat that killed the rat that ate the malt that lay in the house that Jack built."  

We were very happy to find this nursery rhyme, because it so clearly illustrates this simple rule of English grammar, which some other languages don't have, but which is really important to interpreting language. In principle any one of those "that's could refer all the way back to the dog. But in reality, applying the rule of proximity, that isn't what you do. You instead refer each phrase to the one immediately preceding it.  

This is not rocket science, in some sense. But since the Government takes the position that it repeatedly asserts and surrounds with emphatic rhetoric, it is necessary to go back to textbook grammar rules. Contrary to what Professor Crawford told you [on Saturday] that, “There's no rule that adjectival phrases such as 'transferred to Kordofan' have to follow immediately the noun they qualify", that misses the point. You can say anything in a particular way, but there are rules of grammar that explain how you are supposed to understand sentences. Those rules are to be applied here.  

As Professor Crystal explains, applying the rule of proximity to the language of Article 1.1.2, the natural and grammatically correct reading of the provision is to relate the post-modifying construction of "transferred to Kordofan" back to the immediately preceding noun of "chiefdoms". It would disregard the rule of proximity and disregard the syntax of the sentence to interpret it in any other way.  

Applying that analysis, Article 1.1.2 refers to the area of the nine Ngok Dinka chiefdoms which have been transferred to Kordofan in 1905. It does not refer to an area within the nine Ngok Dinka chiefdoms, which area was transferred to Kordofan in 1905. That conclusion is not just dictated by rules of English grammar, but it also makes sense when you look at the rest of the sentence. If you look at the sentence it refers to the area of the nine Ngok Dinka chiefdoms. That was done specifically. It was done to ensure that all nine chiefdoms -- not seven, not six, not three -- were included in the definition of the

That result, that desire was precisely consistent with the objectives of the parties at the time. It was a recognition of the collective identity of the Ngok people: all their chiefdoms were included and it was a recognition of the purpose of the Abyei referendum, which I'm going to come on to talk about, that all the nine chiefdoms were supposed to be part of the Abyei Area so that they could participate in the referendum. The Government claims that our interpretation ignores alternatively the preposition "to" in Article 1.1.2, or the phrase "transferred to Kordofan". You can see the cites where it says those things on the slide.  

That's wrong. The Abyei Area, as we've seen, is defined as the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905. Under our interpretation and the experts' interpretation, Article 1.1.2's language refers to the transfer of the nine Ngok Dinka chiefdoms from the administration of Bahr el Ghazal to the administration of Kordofan. That interpretation in no way ignores either the word "to" or the words "transferred to Kordofan"; it rather focuses on what it was that was transferred. What was transferred was "the nine Ngok Dinka chiefdoms", in the parties' language. What wasn't transferred was an area. That, as we have seen, is very clear from the grammatical rules that we've talked about and, as we're going to see, it's very clear from the purposes of the parties. The fundamental point is the SPLM/A definition gives full effect to the proposition "to" and "transferred to Kordofan". It simply says that "the nine Ngok Dinka chiefdoms" was the thing that was transferred to Kordofan. The Government also repeatedly says that "it was an area that was transferred from Bahr el Ghazal to Kordofan", and that "the area transferred cannot already have been in Kordofan prior to the transfer". For the reasons that I've just explained -- and I hope this isn't repetitive -- that interpretation contradicts the language in the English grammatical structure in Article 1.1.2. Article 1.1.2 does not refer to an area within the nine Ngok Dinka chiefdoms that was transferred; it refers to the entire area of the nine Ngok Dinka chiefdoms.  

As a consequence, the Government is simply wrong when it says that, "The area transferred cannot have already been in Kordofan prior to the transfer". What Article 1.1.2 requires is determining the area of the
| 12:14 | nine Ngok Dinka chiefdoms that were collectively transferred to Kordofan in 1905. The Government's reply memorial argues that: “On either interpretation of Article 1.1.2 it would still be necessary to determine what the area of those chiefdoms was that the Sudanese Government officials decided to transfer to Kordofan in 1905.” Again, this is in a sense a variation on the same theme: that is confused and wrong. Article 1.1.2 refers to the area of the nine Ngok Dinka chiefdoms as it stood in 1905. It was these nine chiefdoms, and not some specified area, that the Government and the SPLM/A agreed that “the Sudanese Government officials decided to transfer to Kordofan in 1905.” The area that must be defined and delimited under Article 1.1.2 is the total area of the nine Ngok Dinka chiefdoms as it stood in 1905. Conversely, the parties did not agree in Article 1.1.2 that the Abyei Area was a territory that had been delimited in 1905 as a sub-part of the historic Ngok Dinka territory. The parties’ intended meaning in Article 1.1.2 paralleled what the Condominium officials intended in 1905. As we’ll see shortly, the Condominium officials, in the particular document that the parties paid attention to, clearly intended to transfer the Ngok Dinka tribe in 1905, without knowing or caring or even being able to ascertain what specific territory that tribe occupied. That is precisely consistent with the fact that no such area was defined by the Condominium administrators -- or on Condominium maps, as we’ll see in the coming days -- for another decade. That is because, contrary to the Government’s claims, the Sudanese Government officials that it’s referred to did not decide to transfer any specific area, but instead decided to transfer a tribe, carrying with it whatever area it might turn out in the future that that tribe occupied. The Government argued on Saturday -- this was Professor Crawford -- that one does not “demarcate or delimit a tribe or a chief.” That argument is confused. The proper interpretation of Article 1.1.2 does not, of course, require delimiting a chief or a tribe. Instead, as the language of the provision provides, it calls for delimiting the area of a tribe, and more specifically the area of the nine Ngok Dinka chiefdoms that were transferred to Kordofan in 1905. Likewise, the Government's efforts on Saturday to contrast a territorial interpretation of Article 1.1.2 with a tribal interpretation is misguided in a nuanced way. Both parties in fact advance territorial interpretations of Article 1.1.2. Both parties seek to interpret what area, what territory is referred to by Article 1.1.2. The real difference, which Professor Crawford wanted to direct you away from, is that the Government's interpretation assumes that Article 1.1.2 refers to the transfer of a specific area; while the SPLM/A's interpretation relies on Article 1.1.2’s reference to a tribal transfer. Both interpretations are territorial; both look to an area. The real question is: what is the definition of that area? In the SPLM/A's case it's clear: it is the area of the nine Ngok Dinka chiefdoms. The Government's case is: there's some area that one can identify from what some colonial administrator did a century ago in circumstances where they had no idea where the Ngok Dinka were. It is essential to consider the purposes of the Government and the SPLM/A when they entered into the Abyei Protocol. Those purposes confirm, I would suggest very clearly, that the Abyei Area includes all of the territory of the nine Ngok Dinka chiefdoms as they stood in 1905. It would contradict the objectives of the Abyei Protocol and the Comprehensive Peace Agreement to limit the Abyei Area to only a truncated portion of the Ngok's historic territory, or to only some of the nine Ngok Dinka chiefdoms. According to the Government: "The task of the Tribunal does not require recourse to supplementary sources of interpretation, and only a simple reading of the mandate is necessary.” Professor Crystal has already told us what the simple reading of the mandate is. We can also see from just reading it ourselves what the simple reading is. But it is nonetheless I think important to have regard to what the parties intended. From the Government's perspective you simply treat this as some verbal puzzle that has fallen into your laps that you should give effect to without paying any attention to what the parties were seeking to accomplish here. Under Article 31(1) of the Vienna Convention, that's wrong. It has to make sense. You have to pay attention and you should pay attention to what the parties' objectives here were. As we saw yesterday, the fundamental purpose of the parties' agreements here on the definition of the Abyei Area was to specify that region whose residents would be entitled to participate in the Abyei referendum. We saw that that was provided for in Article 8 of the | 12:17 | limit the Abyei Area to only a truncated portion of the Ngok's historic territory, or to only some of the nine Ngok Dinka chiefdoms. According to the Government: "The task of the Tribunal does not require recourse to supplementary sources of interpretation, and only a simple reading of the mandate is necessary.” Professor Crystal has already told us what the simple reading of the mandate is. We can also see from just reading it ourselves what the simple reading is. But it is nonetheless I think important to have regard to what the parties intended. From the Government's perspective you simply treat this as some verbal puzzle that has fallen into your laps that you should give effect to without paying any attention to what the parties were seeking to accomplish here. Under Article 31(1) of the Vienna Convention, that's wrong. It has to make sense. You have to pay attention and you should pay attention to what the parties' objectives here were. 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Trevor McGowan info@TMGreporting.com
The reason that Professor Crawford doesn't want you to include Abyei Town. Abyei Town has been the capital of the Abyei Area for the last century. We will have a dispute in the coming days about when exactly Abyei Town was founded, where exactly it was, whether it was Burakol or Mathiang or some other place. The fundamental point that the Government tries to obscure is that the area immediately around what is today Abyei Town has for a century been the centre of Ngok Dinka political, commercial and cultural life, and the suggestion that by agreeing that the Abyei Area only meant the area south of the Kiir and therefore, in the Government's case, could not include the Abyei Town is, I would suggest, highly anomalous.

The Government suggests that there is nothing abnormal at all about that because Abyei Town didn't necessarily exist in 1905. Again, that misses the point. We are focusing on what the parties meant in 2005 when they picked this formulation. The question is: when the parties agreed upon this formulation in Article 1.1.2, would they reasonably have intended what they call the Abyei Area in the Abyei Protocol, which was going to provide for the Abyei referendum, to not include Abyei Town, to not include the centre of Ngok Dinka life, when they made that agreement in 2005? It is absurd to suggest that they did.

Moving on, the Government makes no serious effort to defend the inevitable consequence of its position. The inevitable consequence of its position would be that the Ngok Dinka would be limited to what is essentially a 14-mile narrow -- I wouldn't say wide -- strip of swamp along the southern bank of the Kiir/Bahr el Arab river. That, as we will see in the coming days, is peculiarly bizarre for two reasons. The first reason is that it necessarily includes, as Professor Crawford conceded with his map on Saturday, 88% of what the experts found was the territory of the Ngok Dinka people historically and ancestrally. So the Abyei Area would have been defined to exclude most, the bulk, of the area of the Ngok Dinka people.

Even more bizarrely, it would have put the Ngok Dinka into a place, as we will see tomorrow and the coming days, where there were very few Ngok Dinka at all. In fact, the Ngok Dinka weren't really south of the Kiir/Bahr el Arab, and the Government's interpretation would therefore not only take the Ngok out of where they were, but put them in a place that they weren't, which I would suggest is highly anomalous. A further result that is equally anomalous is -- and this goes back to the language that I referred to...
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,

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 ABCs 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

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."

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
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

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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

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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.

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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.
12:37 1 I think it is, if I may say so, an extremely apt example of the informal style of the experts' and the Commission's work. I think this is a reference to these Rules of Procedure themselves. I think Article 3 had in fact been drafted by the experts, if I can say this, in a forward-looking way. It was anticipating that this draft would then be shown to the parties, as happened and they agreed. The reference here to the Rules of Procedure for the Commission I think reflects -- and so there is not, in short answer to your question, another document that is the Rules of Procedure for the Commission. The reason of course is because the focus of the work was overwhelmingly on the experts. The two sets of party-appointed representatives were, as Professor Crawford I think rightly acknowledged this morning, not impartial members of the Commission; they were in fact active litigants. The head of the Government's delegation was also on the ABC; the same earth can we know about something that didn't in fact happen? We do know is the sequence in which the procedural rules spelt out what was going to happen. The idea that had they presented the report they resist the experts' conclusions, and that was not what was contemplated by any of the parties at the time. And so we saw from the transcripts of the final presentations, the parties believed that they had -- and said that they had -- made their final presentations to the experts. When I say "the parties", I mean in fact the very same individuals who were the party-nominated members of the full Commission. Ambassador Dirdeiry for the Government said, "We now await your judgment and your assessment"; we saw that language yesterday. It was not conceived, it was not intended that, having heard the parties make their presentations, the ABC experts would then go back and tell them in advance, "Here's what we've decided. Let's argue about it some more". That's not what the ABC.

12:38 1 with good practice they had the parties agree to them. Does that clarify?

PROFESSOR HAFNER: Thank you.

MR BORN: You're welcome.

THE CHAIRMAN: A question will be asked by Judge Schwebel.

JUDGE SCHWEBEL: Mr President, this is a question for counsel of both parties to comment on, if they wish. Counsel of the Government of Sudan have challenged the failure of the experts to submit the final report to the whole Commission before presenting the final report to the presidency. The Commission, as has been pointed out just now and earlier, was composed of the experts and party-appointed representatives, five of whom were partisans of the position of the Government of Sudan and five of the SPLM respectively. If the experts had submitted their final report to the Commission, it would in effect have given the parties advance notice of the content of the final report to be presented to the presidency. In those circumstances, would so doing have risked the possibility of a presentation to the president ever taking place?

THE CHAIRMAN: I give you the floor, Mr Born, but I give also a possibility to the other side to answer.

MR BORN: I also at some point should probably address

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12:40 1 Professor Reisman's question from previously.

I wasn't sure whose time that should come out of.

3 I think Judge Schwebel's observation is, as with Professor Hafner's, an extremely apt one. As a practical matter, it's completely obvious what would have happened had the experts presented their report to the parties. That's true whatever the contents of that report might have been. Had the experts presented their report to the ten party-nominated members of the Committee, each party would have sought to argue and resist the experts' conclusions, and that was not what was contemplated by any of the parties at the time.

As we saw from the transcripts of the final presentations, the parties believed that they had -- and said that they had -- made their final presentations to the experts. When I say "the parties", I mean in fact the very same individuals who were the party-nominated members of the full Commission.

Ambassador Dirdeiry for the Government said, "We now await your judgment and your assessment"; we saw that language yesterday. It was not conceived, it was not intended that, having heard the parties make their presentations, the ABC experts would then go back and tell them in advance, "Here's what we've decided. Let's argue about it some more". That's not what the ABC.

12:42 1 Rules of Procedure meant when they referred to "the experts will have the final say."

I would emphasise in this regard that this Article 14 that we're discussing was a rule that the ABC experts themselves drafted. They knew what was intended by that provision. They implemented that provision very faithfully. The idea that had they presented the report to the parties everything would have gone smoothly is inaccurate. One doesn't know what would have happened.

In fact, the impartial experts had had the final say, and they -- as the parties' provisions provided -- presented that to the president. That was what was intended, and that was what happened.

THE CHAIRMAN: Does the Government want to answer the question of Judge Schwebel?

MR BUNDY: Yes, thank you Mr President, Judge Schwebel.

I think all of this is complete speculation. How on earth can we know about something that didn't in fact happen? What we do know is the sequence in which the procedural rules spelt out what was going to happen. As Ms Malintoppi explained earlier this morning, there was a difference between the parties presenting their final submissions; the experts then evaluating all the material -- presumably including the submissions; then the attempt to reach consensus, failing which the
12:44
1. experts will 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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12:48
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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Page 100
Our presentation in this phase will be organised as follows. I will make some brief preliminary remarks, first on the character of your task under Article 2(c) and secondly on the characteristics of the SPLM/A’s claimed boundaries.

I will then ask you, Mr President, to call on our cartographic expert Mr Alastair MacDonald, who, as agreed, will make a presentation of the mapping issues in his capacity as expert before responding to questions from the Tribunal.

He will be followed by Mr Bundy, who will present argument on the limits of the transferred area as a geographical matter, focusing on the boundaries as they relate to the Abyei Area. Tomorrow morning, following Mr Bundy, who will probably still be going this evening, we will present our fact witnesses as follows: first for cross-examination, Mr Zakaria Atem Diyin Thibek Deng Kiir and Mr Mukhtar Babu Mamir. These are presented at the request of the SPLM/A for cross-examination.

As we’ve said, we do not intend to conduct any examination-in-chief of the witnesses we have tendered; we simply leave their witness statements on the record. They will give evidence, contrary to earlier indications, in Arabic, using the Arabic translator.

The three other witnesses, Mr Ayom Matit Ayom, Mr Majak Matet Ayom and Mr Majid Yak Kur, will be made available at the request of the Tribunal, but have not been selected for cross-examination by the SPLM/A.

Following these witnesses presentations I will conclude with a close examination of the documentary and map evidence for the location of the Ngok Dinka in and after 1905. In the course of this I will discuss various SPLM/A arguments seeking to sustain their claimed line based on the tribal interpretation of the formula.

I turn then to my first preliminary remark. Under Article 2(c) of the Arbitration Agreement it becomes your task on the assumption of an excess of mandate: ‘... to define (i.e. delimit) on map the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905, based on the submissions of the parties.’

I stress those words. This is not a strict appeal limited to the dossier before the ABC; it is a de novo rehearing leading to a new decision by you in the fulfilment of a mandate which is your own. Both parties recognising this, and both have put a great deal of new material before you: new maps, new documents, new
In that event it is, with the greatest respect, not your function simply to edit the experts' report; rather it is your function to do for yourselves what the ABC experts should have done but ex hypothesi did not in some respect.

At this point the distinction between appeal and review for excess of mandate which Professor Pellet took such care to make on Saturday disappears. Of course, at the excess of mandate stage you are not a Court of Appeal, but at the Article 2(c) stage you are a de novo decisional Tribunal.

Once you are acting under Article 2(c), the experts' report is not more than a mere opinion. At that stage you have to be satisfied of each issue that is a necessary component of your decision on the transferred area, whatever position the ABC experts may or may not have taken on that point.

Of course -- we accept this -- if on some points you agree with the ABC experts' report, you can incorporate what they said in your decision, but the necessary prerequisite for doing so is that you do agree. You have to form your own view on the matter based on the submissions of the parties before you.

I turn to my second preliminary remark, which concerns the SPLM/A's claimed boundaries of the Abyei Area. I will have more to say about this later this week.

Here there are two problems. The first problem is a perhaps minor technical problem, but it is indicative. It's to work out what their claimed boundaries actually are and why.

In their memorial the SPLM/A claimed a northern boundary extending to 32º15' east, which is 300 kilometres to the east of the ABC experts' turning point. This was a claim to a boundary more or less on the Nile. It was of course a typographical error, though it remains unacknowledged. Mr Born is not as good at acknowledging his own faults as he is at acknowledging those of others.

But then the SPLM/A reply memorial and rejoinder expressed the SPLM/A's claim as follows: "The current boundary of Kordofan and Bahr el Ghazal to the south extending to 10º35' north latitude to the north and the current boundary of Kordofan and Darfur to the west extending to 29º32’15” east."

The minutes and seconds were the wrong way round. It should have been 29º32’15” east.

Based on these consecutive typographical errors, it seems fair to describe the SPLM/A as "cartographically challenged". But the cartographic challenge doesn't end here. It's worthwhile tracing their claimed boundary on a map; something their pleadings neglect to do, but which we've done in the graphic on the screen.

You can see that the claimed area is incomplete. It does not include the section of the Kordofan/Upper Nile boundary between the Bahr el Ghazal/Kordofan/Upper Nile tripoint and 29º32’15” east. For a final submission in a case of this importance, that's pretty shoddy.

The second point is, however, of much greater significance. The SPLM/A's claimed boundaries are mostly not tribal boundaries at all. The only exception is the northern boundary, which has never even remotely corresponded to any arguable provincial boundary, and which purports to be a tribal boundary.

I will return to that northern boundary tomorrow. For the moment the point to note is that the remaining boundaries of the claimed area are not tribal boundaries at all; they are provincial boundaries, or in one case a constructed line extending a provincial boundary.

Take, for example, the western boundary between Kordofan and Darfur. It was defined -- perhaps it's more accurate to say "redefined" -- by Sir Rudolf Slatin, that redoubtable Austrian, in 1903, down to the tripoint with Bahr el Ghazal province on the Bahr el Arab. Slatin knew his way around. He'd been the Governor of Darfur and was now Inspector-General of the Sudan, second only to Wingate. He was not confused about the Bahr el Arab.

The Darfur boundary was modified on several subsequent occasions, most notably pursuant to the Monroe-Wheatley Agreement of 1924. At no stage in the history of the Darfur boundary, before or after 1905, was there the slightest indication that the Ngok Dinka had any interest or rights as far west as the Darfur boundary. I'll show you this in more detail tomorrow.

Indeed, in their first submission before the ABC, the SPLM/A did not even claim a connection with the Darfur boundary.

I'll return to the issue of tribal boundaries in more detail tomorrow. The present point is a simple one: the SPLM/A claimed area is a mishmash of provincial and alleged straight-line tribal boundaries. They adopt a tribal interpretation when it suits them, in the north and the top of the east; and a territorial interpretation when it suits them, in the south and in the west. Their Abyei Area is a complete hybrid, not based on any coherent interpretation of the formula at all.

Mr President, with that it would be convenient to call Mr Alastair MacDonald to give evidence.
THE GOVERNMENT OF SUDAN / THE SUDAN PEOPLE'S LIBERATION MOVEMENT/ARMY

Day 3  Monday, 20th April 2009

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

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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

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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 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

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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,
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<tr>
<th>15:18</th>
<th>Day 3</th>
<th>Monday, 20th April 2009</th>
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<tbody>
<tr>
<td>1</td>
<td>through the area with which this case is concerned,</td>
<td>15:22</td>
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<td>2</td>
<td>receives the Lol as a tributary, and finally enters the</td>
<td>necessary to know its every twist and turn.</td>
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<td>3</td>
<td>Bahr el Ghazal at a place known as Ghabat el Arab.</td>
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<td>4</td>
<td>This confluence is at this readily identifiable</td>
<td>every historical map by comparing it with a modern</td>
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<td>5</td>
<td>point on the Ghazal, namely where it changes direction</td>
<td>satellite image and consigning it to the scrapheap,</td>
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<td>from flowing due north to northeast. After this</td>
<td>often only on the basis of longitude error, but also</td>
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<td>7</td>
<td>northeast section, the river turns to the east and flows</td>
<td>through a clear inability to interpret its contents.</td>
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<td>8</td>
<td>on to Lake No.</td>
<td>7</td>
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<td>9</td>
<td>So, in summary, we should look for the following</td>
<td>serious problem that longitude presented before the</td>
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<td>10</td>
<td>features when assessing maps of the period for the</td>
<td>arrival of the telegraph, and I will deal with this</td>
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<td>11</td>
<td>depiction of the Bahr el Arab: a tributary passing close</td>
<td>topic in more detail later. Neither has there been any</td>
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<td>12</td>
<td>to Hofrat en Nahas; a loop to the north as far as</td>
<td>consideration of what might be expected of maps of that</td>
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<td>13</td>
<td>10°20'; from there, a southeast course, picking up the</td>
<td>era, and on top of that, some comments simply cannot be</td>
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<td>14</td>
<td>Lol at approximately 9°12'; a junction with the</td>
<td>related to the maps they apparently refer to.</td>
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<td>15</td>
<td>Bahr el Ghazal at the turning point in its channel from</td>
<td>14</td>
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<td>16</td>
<td>north to northeast.</td>
<td>to the development of the depiction of the Bahr el Arab.</td>
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<td>Mr President, before leaving this modern display</td>
<td>16</td>
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<td>18</td>
<td>I would like to point out to you two other features.</td>
<td>of which is now on screen.</td>
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<td>19</td>
<td>Firstly, Lake Ambady, some 40 kilometres south of the</td>
<td>18</td>
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<td>20</td>
<td>Ghabat el Arab, at the confluence with the Jur; and</td>
<td>we can see that, though going no further north than 10°,</td>
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<td>21</td>
<td>secondly, the double channel of the Bahr el Ghazal as it</td>
<td>this map does place the mouth of the Bahr el Arab at the</td>
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<td>22</td>
<td>approaches Ghabat el Arab, a feature that I think has</td>
<td>Ghazal's change of direction and does take the river</td>
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<td>23</td>
<td>been confused with Lake Ambady by the SPLM/A. I will</td>
<td>north of 10°. However, the Boro, as mentioned</td>
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<td>24</td>
<td>address this point later.</td>
<td>earlier -- the name is more usually applied to the head</td>
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<td>25</td>
<td>Using these tests it is possible to analyse the maps</td>
<td>water of the Lol -- joins the river too far upstream.</td>
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<td></td>
<td></td>
<td>But there is no trace of the Ragaba ez Zarga to the</td>
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<th>15:20</th>
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<td>1</td>
<td>of the period and track the development of</td>
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<td>2</td>
<td>an understanding of the course of the Bahr el Arab. But</td>
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<td>3</td>
<td>before I show you some examples, it is necessary to</td>
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<td>spend some time on the philosophy of my approach</td>
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<td>5</td>
<td>compared with that of the SPLM/A.</td>
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<td>6</td>
<td>I have considered the body of maps that are</td>
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<td>7</td>
<td>available to me as forming a continuum which displays</td>
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<td>a gradually increasing awareness of the detail of the</td>
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<td>course of the Bahr el Arab. To assess the level of</td>
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<td>increasing awareness I have looked at how well each</td>
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<td>11</td>
<td>depiction fits within the overarching framework</td>
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<td>12</td>
<td>I have just described. I have also taken into account</td>
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<td>13</td>
<td>the limitations of the era.</td>
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<tr>
<td>14</td>
<td>For example, I do not concern myself too much with</td>
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<td>15</td>
<td>longitude error, as it was simply not possible to</td>
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<td>16</td>
<td>determine longitude with any precision in the area at</td>
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<td>17</td>
<td>that time.</td>
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<td>18</td>
<td>Neither am I concerned by the lack of detail of the</td>
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<td>19</td>
<td>meandering of the river in its middle reaches. Until</td>
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<td>20</td>
<td>the arrival of aerial photography it would not have been</td>
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<td>21</td>
<td>feasible to depict such intricate detail. For the</td>
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<td>22</td>
<td>purposes of boundary making it would be sufficient to</td>
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<td>23</td>
<td>know that the river which formed the boundary between</td>
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<td>24</td>
<td>Darfur and Bahr el Ghazal and ran down to the</td>
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<tr>
<td>25</td>
<td>Ghabat el Arab was the Bahr el Arab. It was not</td>
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<table>
<thead>
<tr>
<th>15:24</th>
<th>Page 115</th>
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<tbody>
<tr>
<td>1</td>
<td>north of the Bahr el Arab.</td>
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<tr>
<td>2</td>
<td>An extract of Lupton's map of 1884 is now on the</td>
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<td>3</td>
<td>screen. It meets three of the four criteria which are</td>
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<td>4</td>
<td>now highlighted. The one that is lacking is the Lol</td>
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<td>5</td>
<td>coming in as a tributary in the lower reaches. The map</td>
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<td>6</td>
<td>shows this river flowing into the Jur and thus joining</td>
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<td>7</td>
<td>the Bahr el Ghazal too far south. Again, there is no</td>
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<td>8</td>
<td>trace of the Ragaba ez Zarga.</td>
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<td>9</td>
<td>An extract of the general map of the Nile Valley of</td>
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<td>10</td>
<td>1898 is now on screen. It introduces a more convoluted</td>
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<td>11</td>
<td>drainage around Ghabat el Arab, but the northermost</td>
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<td>12</td>
<td>connection of Bahr el Arab and Bahr el Ghazal is at the</td>
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<td>13</td>
<td>turning point of the latter.</td>
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<td>14</td>
<td>The Lol is named the Bahr el Horm, and whether it</td>
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<td>15</td>
<td>joins the Bahr el Arab or not depends on which channel</td>
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<td>16</td>
<td>might be followed by the river from the point now</td>
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<td>17</td>
<td>circled. The loop to the north above 10° and the</td>
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<td>18</td>
<td>connection with Hofrat en Nahas are both there. Once</td>
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<td>19</td>
<td>again, there is no trace of the Ragaba ez Zarga.</td>
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<tr>
<td>20</td>
<td>I now turn to the skeleton map of the Sudan of 1901.</td>
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<td>21</td>
<td>It has significant similarities with the 1898 map, as</td>
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<td>22</td>
<td>I would expect. The month, the loop and Hofrat en Nahas</td>
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<tr>
<td>23</td>
<td>are all there and are now highlighted. The Lol, again</td>
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<tr>
<td>24</td>
<td>named Bahr el Horm, connects with the Bahr el Ghazal in</td>
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<tr>
<td>25</td>
<td>much the same way as on the 1898 map.</td>
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</table>
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.

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 10º 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

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 stomped 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

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
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and my comparison using block shifts. If we look at
three of the earlier maps and then apply a block shift
to each of them, the pecked lines show that only a small
improvement is achieved in the lower reaches.
I have excluded the 1863 map from the SPLM/A set as
it seems to me to be so seriously in error. However, if
we look at the remaining three maps and then apply
individual block shifts in the same way, the agreement
for the pecked lines against the modern course of the
Bahr el Arab is really very good indeed. If scale is
taken into account, the agreement would look even
better, as we shall see.
One can also criticise the SPLM/A method because it
often does not compare like with like. Scale is
important in these comparisons. If the map under test
is significantly enlarged, the visual impact of the
to the idea of display is greatly enhanced. The
scale of the SPLM/A's map 61, as printed in its reply
atlas, is just under 1:1,100,000, several times larger
than the scale of most of the early maps under
comparison.
Mr President, if I could now invite the members of
the Tribunal to turn to tab 3 in their folders, you will
see an extract from the intelligence map of 1904 printed
at the correct scale of 1:4,000,000. This is the map.

You may well wonder why I have abandoned our
marvellous technology at this point. Well, I would like
the members of the Tribunal to appreciate the point
I wish to make about visual impact of the
map. When using a computer screen, one can never
be sure of the skill of the presentation. One only has
to look at the three different sizes of screens that we
have in the room today to understand this point.
Returning to the printed map, I have as an example
reduced the size of map 61 so that its scale is
1:4,000,000, and I have superimposed it on the 1904 map.
This is a reduction by a factor of just under four, and
I think the Tribunal will appreciate that the visual
impact of the discrepancies is considerably reduced. By
presenting its comparison at the larger scale of
1:1,100,000, the SPLM/A is in my view misleading the
reader.
Mr President, members of the Tribunal, the SPA has
shown in a number of instances in its written pleadings
a significant lack of experience in map analysis.
I would now like to show the Tribunal some examples.
I will start with a quotation from its reply
memorial appendix B set against the map to which it
refers. Both are now on your screens, and I will read
the text:

"Additional confusion is introduced in the 1898
Stanford map at the junction between the
Kiir/Bahr el Arab and Bahr el Ghazal, with a triangular
pattern that appears for the first time (and is repeated
in later maps). Judging by the 15 minute south
discrepancy in the location of the
Kiir/Bahr el Arab and Bahr el Ghazal, the more northern
dotted line in fact appears to be the Ngol/Ragaba ez
Zarga, where it has its junction with the Bahr el Arab.
If so, it is erroneously marked as rejoining the
Kiir/Bahr el Arab upstream. Moreover, the more southern
Lol appears (again erroneously) to reconnect with the
Bahr el Ghazal south of Lake Ambady, creating a further,
and mistaken depiction that is repeated in later maps."
This additional confusion suggested by the author
would seem to be self-induced. The 15 minute south
discrepancy is an exaggeration, although the SPLM/A do
tot us against what criterion the discrepancy is to
be measured.
On the map in question the latitude of the
confluence is 8º56'. This is only 9 minutes further
south than the latitude of the same point on the modern
satellite base map of the SPLM/A. Whatever the
discrepancy is, it does not justify in any way the claim
that the Ragaba ez Zarga is shown.

The confluence of the Ragaba with the Bahr el Ghazal
as we know it today is about halfway along the
northeastern section of the Ghazal. This point is now
being shown on your screen. There is no sign of
a waterway anywhere near this position. The more
northern dotted line to which the SPLM/A refers is
simply a continuation of the main course of the
Bahr el Arab to Ghabat el Arab.
The SPLM/A makes no acknowledgment that the southern
Lol appears to be named Bahr el Homr on this map. It is
very difficult to understand why the writer thinks that
it joins the Bahr el Ghazal south of Lake Ambady, when
the lake is not shown on the map. I have already
pointed out in the first part of my speech that whether
it joins the Bahr el Arab or not depends on which
channel is followed by the river from the point now
circled.
In summary, none of what is written about this map
makes any sense at all.
At paragraph 30 of the same appendix this comment
appears:
"The [Government] memorial relies on a 1901 Skeleton
map of Sudan from the Intelligence Division of the War
Office which depicts railways, telegraphs and routes.
As expected given that this is a skeleton map to
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 the Bahr el Arab. The
25 connection of the Lol/Bahr al Homr with Lake Ambady

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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 Biero appears
25 to be depicted, but is described later along its course

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15:43 1 as the 'Bahr el Arab'. It also appears that the
2 Kiir/Bahr el Arab is erroneously described as the 'Lo1'
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 10º, 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

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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
25     the Achwang ... Sheet 65-K series ... The approximate
24         "The 1918 Nyamell map is likely a misnamed map in
23     are now on the screen:
22     example of misunderstanding.  The relevant text and map
21         Paragraph 64 of the appendix provides yet another
20     or indeed whatever the longitude was really meant to be.
19     1916 maps -- the Achwang map is at a scale of 1:250,000
18         Although care must be taken in comparing the two
17     27º54'.
16     Bahr el Arab until approximately 24º30' longitude, then
15     to the west, reaching the tripoint with Darfur on the
14     the northwest, nor that his Bahr el Arab flowed into the
13     Bahr el Arab until approximately 24º30' longitude,
12     of the sheet, as can now be seen in the enlarged
11     while he did
10     "identical to that in the 1916 Achwang map".  All three
9     The boundary depicted on the 1918 map is not
8     making is thus introduced.
7     Mr President, I'm sure the Tribunal will be very
6     From all these misinterpretations and errors, one
5     supporting the view that Wilkinson simply thought he had
4     as the Bahr el Arab means that he and the
3     The cartographic evidence provided by the 1904 map
2     to the north of the Amadgora River.  So the 1916 Darfur map did
1     the Achwang ... Sheet 65-K series ... The approximate

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15:47 1 quoted by the SPLM/A.
2 24º30' 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 24º30' 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 24º30' 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 ...

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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 it 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 26º43' east.  On the 1916 edition of the
15 map, the boundary reaches the tripoint at around 27º54'.
16 The tripoint on the 1916 Darfur map is also close to
17 27º54':
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 1:3,000,000 --
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

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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

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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 10º', from
25 a point upstream of the modern-day location of Abyei, to
The depiction was very generalised, and commensurate that is to say 1 centimetre represents 40 kilometres. It should be remembered that these changes were proved later to have no foundation in fact. Some way to the south of Ghabat el Arab. Much of this past Sultan Rob's and emptying into the Bahr el Ghazal a source in the hills of Dar Fartit to the west, flowing the cartographers had to create a new river, with needed a significant head water to justify its size. So the depiction of the river which flowed past Sultan Rob's village, known locally as the Kiir. If it was not the Bahr el Arab, there had to be another confluence with the Bahr el Ghazal. It was a significant river and it needed a significant head water to justify its size. So this then had a consequential effect on the depiction of the river which flowed past Sultan Rob's village, known locally as the Kiir. If it was not the Bahr el Arab, there had to be another confluence with the Bahr el Ghazal. It was a significant river and it needed a significant head water to justify its size. So the cartographers had to create a new river, with a source in the hills of Dar Fartit to the west, flowing past Sultan Rob's and emptying into the Bahr el Ghazal some way to the south of Ghabat el Arab. Much of this proved later to have no foundation in fact. It should be remembered that these changes were carried out on a map at the small scale of 1:4,000,000; that is to say 1 centimetre represents 40 kilometres. The depiction was very generalised, and commensurate with the scale.

The direction of travel of the 1904 map's alignment of the Bahr el Arab after Mellum must have rung alarm bells with those who knew something of its lower course, for its general bearing was much too close to south instead of east. This depiction was soon attacked by Bayldon in 1905, and by Comyn in 1905/1906. Bayldon was convinced that the river coming into Ghabat el Arab in a general east-south-east direction was the one that flowed past Sultan Rob's village; whilst Comyn was adamant that no head water of the phantom Kiir existed in Dar Fartit: whilst Lyons, the director general of the Survey of Egypt in Cairo, misinterpreted what Bayldon was saying -- and he was, after all, a long way away. The Survey Department in Khartoum accepted the two arguments, and the 1907 1:1,000,000 map reflected that position. The phantom sections of the Kiir disappeared, and the Bahr el Arab reverted to flowing past Sultan Rob's village to Ghabat el Arab. To the north the first vestiges of the Ragaba ez Zarga finally appeared. Wilkinson's error caused a variation in the course of the Bahr el Arab to be shown only on the 1904 map. No other map was affected. His error did not give rise to the idea that the Bahr el Arab was a quite different river that did not rise in the vicinity of Hofrat en Nahas and did not loop up to the parallel of 10°20'. The mistake was corrected in the 1907 1:1,000,000 map, and from this point on the position of the Bahr el Arab remained essentially the same on all the subsequent mapping produced by the survey department. The amount of detail of the actual course of the river changed, and the latitude and longitude changed as more accurate measurements could be made. Not every piece of information proved reliable. For instance, the location of Abyei and the Bahr el Arab in its immediate vicinity moved significantly west on the 1922 edition of the 1:250,000 series, but was moved back again in 1925. But the general course of the river was well known, and there was no confusion with any other river.

Mr President, members of the Tribunal, the development of an understanding of the course of the Bahr el Arab up to 1905 followed a natural course, a course that could be expected for the era under consideration. The depiction lacked intricate detail and showed errors in position. Mistakes such as Wilkinson's, though none quite so significant, occurred from time to time.

But throughout the period leading up to 1905 there was a clear understanding that there was a substantial river rising in the vicinity of Hofrat en Nahas, and flowing some 750 kilometres southeastwards to join the Bahr el Ghazal at a well-determined location. I do not find the arguments advanced by the SPLM/A that the maps of the period were too inaccurate and confusing to be in any way convincing. By contrast, I have shown that there was a natural progression in the depiction of the river, with many common features occurring on one map after another. Now, returning to our opening screen, after having studied the maps that I have displayed, we can see with absolute clarity that the early cartographers got the classical signature of the Bahr el Arab right, within the limits set by the technology of the time and the scales of the maps produced. Its depiction was fit for the purpose of boundary delimitation at the time.

Mr President, that concludes my presentation, I hope that you've found it helpful, but before I close I would like to place on record the very great deal of assistance that I have received from Mr Martin Pratt of the International Boundaries Research Unit at Durham University in this presentation. His name doesn't go on...
16:00 1 the presentation, but really and truly it should have
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.

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

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records that might refer to the boundaries of Kordofan
and Bahr el Ghazal. These records were brought to me
and nothing particularly useful was found as far as
Kordofan and Bahr el Ghazal go. In fact, nothing was
found.

Q. Okay. In your second report you refer to a Cunningham
route sketch -- there's no need to go to it -- which you
reproduce at figures 1 and 2 of your second report.

A. Yes.

Q. Did you see any of the other route sketch maps that are
related on by the Government in its submissions in these
proceedings?

A. Not during my visit.

Q. Did you see the Wilkinson map in particular subsequent
to your visit?

A. Did I see -- which Wilkinson map?

Q. The 1902 Wilkinson sketch map.

A. The route map?

Q. Yes.

A. Did I see it subsequent to my visit?

Q. Yes?

A. Yes.

Q. Did you ever ask to see the complete Wilkinson route
sketch map?

A. I personally did not.

Q. Okay. Did you see the Percival sketch map
relating to his route from the Kiir to Wau?

A. Yes.

Q. Excuse me. Did you see his sketch map for the route
from Lake Keilak to Wau?

PROFESSOR CRAWFORD: Sorry, one point of clarification.

Are you saying did he subsequent to his visit or did
he during his visit?

MS MILES: He's already said he didn't see any sketch maps
during his visit, so subsequent. Thank you for
clarifying.

A. In writing my reports I only saw the Percival sketch
maps running south of the Bahr el Arab, or Kiir, as
Percival referred to it.

Q. Did you ever ask to see the complete Percival sketch
map?

A. I very much wanted to see that part of the route between
the Ragaba ez Zarga and what we now take to be the
Bahr el Arab.

Q. So did you ever ask to see the complete Percival sketch
map?

A. I asked members of our team in England, and I believe
that request was conveyed to Ambassador Dirdeiry.

Q. But you never did see the complete Percival sketch map?

A. I have -- since completing my reports I have seen the

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Q. Okay. Is it produced with the same pen, the same writing, the
same form? In what way does one know that
Percival referred to it.

Q. Did you see the Wilkinson map in particular subsequent
to your visit?

Q. Wilkinson?

A. I think I ought to make clear, Mr President, what I mean
by a "fair drawn copy".

I imagine that Percival on his day-to-day journey
drew a rough sketch and then, perhaps when he got to Wau
or perhaps when he stopped for a few days on the route,
he would draw up a neater version. That you could say
was fair drawn.

Q. Did you see what would be in your view a fair drawn copy
of a sketch map by Percival for the section of his trek
from Keilak to the Kiir?

A. I think I ought to make clear, Mr President, what I mean
by a "fair drawn copy".

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drew a rough sketch and then, perhaps when he got to Wau
or perhaps when he stopped for a few days on the route,
he would draw up a neater version. That you could say
was fair drawn.

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Q. Okay. Did you see the Percival route sketch map
relating to his route from the Kiir to Wau?

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Bahr el Arab.

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map?

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that request was conveyed to Ambassador Dirdeiry.

Q. But you never did see the complete Percival sketch map?

A. I have -- since completing my reports I have seen the
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|------------------|------------------|
| 16:14 | 1 | South of Burakol I believe I may have seen Percival's sketch, I believe I may have seen a rough sketch, and I have certainly seen a sketch I took to be fair drawn by a cartographer, in preparation presumably for transfer to the next edition of the 1:250,000 map. It's a very complicated set of sketches, and I apologise if I'm being a little bit confused, but it's requiring quite an effort of memory to sort it all out without any documents in front of me.
| 2 | Q. | I think you were very clear, thank you, Mr MacDonald.
| 3 | A. | And so, while I may have seen them, I have not the case. I had no reason to look at them with care and put them particularly registered them because I had nothing --
| 4 | Q. | I had no reason to look at them with care and put them together.
| 5 | A. | I'm sorry, Mr President, but I really can't answer that question, not because I'm trying to avoid it, but because quite honestly I was not involved with the sketches after writing my report because they were then being used for another purpose which was not my role in the case.
| 6 | Q. | At appendix 2 you refer to three sources. This is back in my memory.
| 7 | A. | I hope -- I'm not trying to avoid the question, but really it is quite difficult. There were a flood of reports coming in, and these really did not concern me in the later stages.
| 8 | Q. | We can move on, Mr MacDonald.
| 9 | A. | Yes.
| 10 | Q. | At appendix 2 you refer to three sources. This is back at your visit to the Survey Department archives. You refer to three sources: the Kasala boundary file, the Sinnar boundary file, and the Funj boundary file, and you speak in appendix 2 about having reviewed some correspondence -- would you like the other page of appendix 2?
| 11 | A. | No, I've got the other page.
| 12 | Q. | Oh, you've got it now -- about having reviewed some correspondence from those files.
| 13 | A. | My question is: you did not review any Kordofan boundary file at that time, did you?
| 14 | A. | No.

| Page 146 |
|------------------|------------------|
| 16:16 | 1 | in my memory.
| 2 | Q. | I hope -- I'm not trying to avoid the question, but really it is quite difficult. There were a flood of reports coming in, and these really did not concern me in the later stages.
| 3 | A. | Yes.
| 4 | Q. | At appendix 2 you refer to three sources. This is back at your visit to the Survey Department archives. You refer to three sources: the Kasala boundary file, the Sinnar boundary file, and the Funj boundary file, and you speak in appendix 2 about having reviewed some correspondence -- would you like the other page of appendix 2?
| 5 | A. | No, I've got the other page.
| 6 | Q. | Oh, you've got it now -- about having reviewed some correspondence from those files.
| 7 | A. | My question is: you did not review any Kordofan boundary file at that time, did you?
| 8 | A. | No.

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|------------------|------------------|
| 16:18 | 1 | Q. | And you did not review any Bahr el Ghazal boundary file at that time, did you?
| 2 | A. | No. No.
| 3 | Q. | Did you ask for a Kordofan boundary file to review?
| 4 | A. | Yes.
| 5 | Q. | Did you ask for a Bahr el Ghazal boundary file to review?
| 6 | A. | Yes.
| 7 | Q. | Okay. We can move on to the content of your reports now, if we may. Can I please have back my pages in case I need them?
| 8 | A. | Yes. (Handed)
| 9 | Q. | Thank you.
| 10 | Q. | If we start with your most recent, third, report, you accept there that the area we're concerned about in the era under consideration was a remote part of Africa.
| 11 | A. | Yes. I would have thought so.
| 12 | Q. | And that indeed there were -- and again you probably don't need to go to the quote to agree with me that this was a remote part of Africa?
| 13 | A. | Yes. I do.
| 14 | Q. | And also that many of the early administrative officers -- and you referred to this in your presentation -- carrying out exploration were not experienced surveyors? You put it this way: "At the time it would have been possible to determine astronomically [this is coordinates], but this would be beyond the expertise of most of the administrative officers concerned."
| 15 | A. | Yes. I have to say that of course this is all speculation. I'm attributing to these officers a level of ability, and of course that is on the best grounds of probability.
| 16 | Q. | That's true, isn't it?
| 17 | A. | Yes. I do. (Handed)
16:20  1  difficult.
      A.  Yes.
      Q.  Could we go to your Comyn map, which is reproduced at
          page 182 of your first report.
      A.  Yes.
      Q.  It's cut off at the side, which makes this a little bit
difficult, but I think you'll follow. At the locator
inset we see Lake Chad to the northwest; correct?
      A.  Yes.
      Q.  And the area enlarged is essentially to the area of the
east and southeast of that Lake Chad/Nile watershed
therefore?
      A.  Yes.
      Q.  So that's where you're discussing when you're
talking about where travel was difficult: essentially
the area on the Comyn map?
      A.  Well, I'll just make the comment that it's really part
of that area, because you can see with the lines, for
instance, from Meshra el Rek to Wau, Wau to Daim Zubeir,
these are all, if you look at the legend, country
traversing maps by British officers.
      Q.  And "the area to the north of the vignetted line", by
Q.  Yes, certainly: paragraph 5.1 of your first report.

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16:22  1  that you mean the area to the north --
      A.  Perhaps "shaded line" would be --
      Q.  -- of the shaded line, so that would encompass the area
above the Ngol and above the Bahr el Arab?
      A.  Again, that's a fairly general statement. I think
coming down to that place, Shakka, and moving into the
watershed area I think was a fairly general route
followed by traders and slavers.
      Q.  But the area north of the Bahr el Arab as depicted on
this map?
      A.  Immediately north of the Bahr el Arab, yes.
      Q.  Okay. So you accept that the fairly dense network of
routes that you describe are not in the area north of
the Bahr el Arab?
      A.  No, but of course Comyn was based in the south, and he
shows the ones he knows about. There are clearly other
routes coming down from the north that he doesn't show.
      Q.  Okay, and we'll come to those.
      A.  Okay.
      Q.  You say of this area, in your first report, that by
the end of the 19th century it had not been possible to
connect the rivers on the watershed with the known
mouths of tributaries on the Bahr el Ghazal with any
certainty.
      A.  No.
      Q.  Can you give me the reference?
      A.  Again, that's a fairly general statement. I think
there's a fairly dense little network of routes there,
and it's probably the area to the north of the vignetted
line that runs through the centre of Bahr el Ghazal.

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

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A.  Yes.  Is that correct?
      Q.  You agree, moreover, that it is unreasonable to expect
a detailed depiction of these river courses until the
arrival of aerial photography?
      A.  Yes.
      Q.  And this, in the Sudan at least, would not have been
until the Second World War?
      A.  Yes.
      Q.  In these proceedings we are fortunate enough to have the
benefit of modern satellite imagery of the area, and

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

40 (Pages 149 to 152)
16:27 | 1  A. Yes, that's correct.
2  Q. And you agree, and you've said in your presentation,
3  that this map reflects Wilkinson's assumption that the
4  river he reached just south of Falwal was what he called
5  the Bahr el Arab?
6  A. Yes.
7  Q. In your second report at paragraph 10 you say that:
8  "There was a short-lived period of confusion after
9  Wilkinson's journey in 1902 which resulted in one map
10  being issued with a distortion in the course of the
11  Bahr el Arab to the north of Sultan Rob's village."
12  A. Yes.
13  Q. That map you're referring to is the map on the screen
14  and the map that you just found in the back of the
15  handbook?
16  A. Yes.
17  Q. And you say that this confusion had been corrected, to
18  be fair, by 1907?
19  A. Yes.
20  Q. So Wilkinson's mistake was at least initially accepted
21  by the Condominium administration?
22  A. I only know that Wilkinson's mistake resulted in the
23  depiction on the 1904 map.
24  Q. Okay. If you go to paragraph 3.9 of your first report,
25  Page 153

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?

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, Mr MacDonald: the broader subject of what you describe
18  in your first report as "Intense Exploration, 1900 to
19  1910". You open that section of your report at page 168
20  with a quote from 1898, the first year of the
21  Condominium. The quote says -- these are not your
22  words:
23  "Almost a century has passed since Browne first
24  marked the Bahr el Arab on the map, and our knowledge of
25  Page 154

16:32 | 1  it is even now scarcely more definite. No European has
2  explored the whole course of the stream."
3  A. Yes.
4  Q. Now, in that section of your report entitled "Intense
5  Exploration, 1900 to 1910", the first pre-1905 explorer
6  that you refer to is Saunders; right?
7  A. Yes.
8  Q. However, you would accept that Saunders made little
9  contribution to the understanding of the course of the
10  Bahr el Arab, other than defining the location of its
11  mouth?
12  A. Yes.
13  Q. The next pre-1905 explorer that you refer to in your
14  "Intense Exploration" section is Wilkinson?
15  A. Yes.
16  Q. We've spoken about Wilkinson briefly. The third and final pre-1905 explorer to the region
17  that you discuss in your first report, albeit briefly,
18  is Percival. (Pause)
19  A. I'm just pausing because I'm not sure that it was the
20  final. I would have thought I mentioned Comyn and
21  Bayldon.
22  Q. Sorry, Mr MacDonald, pre-1905. I'm cutting your
23  "Intense Exploration" section down the middle.
24  Q. Sorry, Mr MacDonald, pre-1905. I'm cutting your
25  "Intense Exploration" section down the middle.
16:34 1 A. Sorry, I missed that. Yes, I think that's correct, provided you mean, by "1905", January 1905?  
2 Q. Yes. Other than Percival and Wilkinson, in your section in your first report on intense exploration you don't discuss any other pre-1905 sketch maps or trek reports from any other explorers in the region?  
3 A. No.  
4 Q. So the extent of intense exploration pre-1905 discussed in your first report is limited to Wilkinson and Percival?  
5 A. And Saunders.  
6 Q. But you've said that Saunders made little contribution to the understanding of the course of the Bahr el Arab, other than defining the location of its mouth.  
7 A. That was a contribution.  
8 Q. Alright, that's fine. Could we turn to another topic.  
9 THE CHAIRMAN: I'm sorry, how long do you think you have to go on?  
10 MS MILES: 10 minutes.  
11 THE CHAIRMAN: Okay, keep going.  
12 MS MILES: Ngok presence, Mr MacDonald. Let's turn to the historic and cartographic evidence dealing with the presence of Ngok in and around 1905.  
13 Now, apart from passing reference to Wilkinson and others having seen Sultan Rob's village, later his old village and Burakol, you did not discuss the presence of Ngok prior to the 1905 transfer in your first report?  
14 A. No.  
15 Q. Also in your third report you do not consider Ngok presence in any detail, and to be fair, that was a responsive report to the response to your first report.  
16 A. Yes.  
17 Q. So for the questions on your discussion of Ngok presence, could we turn to your second report, as this is the report in which you deal with any of the evidence on this subject.  
18 Now, first at paragraph 23 of your second report, you deal with paragraph 924 of the SPLM/A memorial. And that paragraph of the SPLM/A memorial says -- and I quote from the SPLM/A memorial: "Wilkinson next records that, at a point 28 miles from Ngol, he reached what he termed 'the Kiir River, or Bahr el Jange', and the 'settlements of Sultan Rob', which were located on both sides of the river." Now, your comment about that report is that the citation is not true to its source. You would agree with me though that the extracted quote, ie "settlements of Sultan Rob", comes from, verbatim, Wilkinson's report?  

16:37 1 A. Yes, I do.  
2 Q. And indeed, settlements of Sultan Rob were at that time located to the north of the River Kiir?  
3 A. That is what Wilkinson said.  
4 Q. If we could look at the Wilkinson sketch map, those marked settlements, the Mareig district is marked north of the Kiir. You accept that these are likely settlements of Sultan Rob that Wilkinson came to before he crossed the Kiir?  
5 A. I think I should make it clear, Mr President, that my job was to identify or to chronicle the development of the depiction of the Bahr el Arab. I was not particularly concerned with where the Dinka were living.  
6 Q. But you did deal with where the Dinka were living in your second report, albeit briefly, at least in relation to this area and in relation to where Sultan Rob was living?  
7 A. I did deal -- yes, I dealt with the issue of whether Sultan Rob lived on the north or south bank, because I did deal with the issue of whether Sultan Rob lived in Burakol at least by 1904?  
8 A. I did deal with the issue of whether Sultan Rob lived on the north or south bank, because I felt that Sultan Rob is a major feature on the maps of the era, and I wanted to be quite clear where he was.  
9 Q. On that subject, at paragraph 25 of your second report, you say that: "There is no evidence that Sultan Rob had moved from his original village in 1903,"  

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

16:44 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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16:45 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. Bahrl 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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16:46 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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Trevor McGowan
info@TMGreporting.com
16:48 1 Q. So the final map is the 1925 Ghabat el Arab map; do you see that?
       2   A. Yes, I do.
       3   Q. Do you see Abyei on that map?
       4   A. Yes, I do.
       5   Q. Is it again described as "Abyei", this time, "Chief Kwol"?
       6   A. Yes.
       7   Q. Mr MacDonald, I have one more topic and I will try to be very quick with it. It's on the subject of boundaries and I would like to take you to --
       8   THE CHAIRMAN: It is perhaps a good opportunity for breaking.
       9   MS MILES: Okay.

17:16 1 position that the red lines represent provincial boundaries in Sudan? Looking at the map as a whole?
       2   A. I think the red lines are primarily intended to show the chapters into which the compendium is divided, and I would need to look at the chapter list to see whether one could identify the boundaries in that way -- sorry, the provinces in that way.
       8   Q. Do you know how many provinces existed in Sudan in 1905?
       9   A. No, I don't.

17:18 1 provincial boundaries of Sudan?
       2   A. I would not suggest that as a whole these lines show the provincial boundaries.
       3   Q. What's the scale of this map, Mr MacDonald?
       4   A. I can't read it. Something inches to 192 miles. One in ...
       7   Q. It's 1:12,000,000; do you accept that? That's a small scale; correct?
       9   A. It is a small scale.
       10 Q. The small-scale diagram of chapters map was produced by the War Office; is that correct?
       12 A. Yes.
       13 Q. Okay. The other War Office map that we find in the handbook is the one that we looked at earlier, the folding-out map at the back of volume 1, and that's at 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 of chapters map?
       19 A. Yes.
       20 Q. Finally, the Mardon map is mentioned very briefly at paragraph 3.12 of your first report, and you say this is also from what you call the compendium, the Sudan handbook?
       23 A. Yes.
17:20 Q. You won't find it in volume 1, Mr MacDonald. Can I --
A. I was just checking it is indeed called a compendium.
Q. Can I pass you volume 2 of the handbook. The map is at
the back of volume 2 and it's also up on the screen.
This map was not produced by the War Office, was it?
A. No.
Q. It was produced by HW Mardon?
A. Yes.
Q. Is this in any way referred to as an official map, on
the face of the map?
A. No.
Q. The scale of that map is 1:8,000,000.
A. Yes.
Q. So that map is half the scale of the War Office map in
volume 1 of the handbook?
A. Yes.
Q. If you turn to the bibliography cartography -- back to
where we started -- at page 349 of the handbook --
A. Volume 2?
Q. Yes. Sorry, volume 1, page 349 at the back, the maps
cartography. Can you find any reference to the Mardon
map in that cartography?
A. You want me to read the --
Q. It's quite short.
A. No, I don't see a reference there. I'm not quite sure

17:22 Q. This is the very last question Mr MacDonald. If I could
pass you a copy -- have you seen this book before? Let
me pass it to you. (Handed)
This is -- sorry, I'll let you answer the question.
Have you seen this book before?
A. Not in this form.
Q. This is Mardon's book, A Geography of Egypt and the
Sudan of which you cited the preface in your
presentation.
A. Yes.
Q. And you have opened on the map of Sudan --
A. Yes.
Q. -- in that book. Does that map contain the provincial
boundaries?
A. No.
MS MILES: No further questions, Mr MacDonald.
(5.23 pm)
THE CHAIRMAN: Thank you. I give now the floor to
Mr Bundy.
(5.26 pm)
MR BUNDY: My task in the time that remains this
afternoon, and I think undoubtedly spilling over into
tomorrow morning, is to address one of the central
issues in the case, which is: what was the area of the
Ngok Dinka chiefdoms transferred to Kordofan in 1905?

17:23 to Dar el Jange, which is common bundle volume 2,
tab 20, [page 151], for future reference. I just want
to pass you the last entry, which is the description of
the Bahr el Arab and Sultan Rob's.
Could you just read the last sentence aloud?
A. "The district on the north bank is called Maceig, the
district on the south bank is called Mathiang, and
Sultan Rob lives in the latter. Much dura is
cultivated."
Q. Dura is a crop?
A. I believe it's a wheat, yes.
Q. That was in 1902. So the report stands for the
proposition that Sultan Rob lives south of the Kiir in
1902?
A. I believe that it what it is saying.
PROFESSOR CRAWFORD: Thank you. No further questions.
(5.24 pm)
THE CHAIRMAN: Thank you. I thank you very much, Mr MacDonald.
THE WITNESS: Thank you, Mr President.
PROFESSOR CRAWFORD: Just one question by way of
re-direct.
(5.24 pm)
THE CHAIRMAN: I thank you very much, Mr MacDonald.
THE WITNESS: Thank you, Mr President.
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re-direct.
(5.24 pm)
THE CHAIRMAN: I thank you very much, Mr MacDonald.
THE WITNESS: Thank you, Mr President.
17:27 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

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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

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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.
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7 specifically referring to the transfer -- the 1905
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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

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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
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17:35
1  senior-most Government official in Sudan at the time, Governor-General Wingate, provided the clearest indication of the northern limits of the transferred area.
2  He described the transferred area at page 24 in his memorandum, included in the 1905 reports on the finances, administration and condition of the Sudan, in the following way. It’s in your folders at tab 46, and it’s in the common bundle at tab 4.
3  This is how Governor-General Wingate described the transfer:
4    "The districts of Sultan Rob and Okwai, to the south of the Bahr el Arab, and formerly a portion of the Bahr el Ghazal province, have been incorporated into Kordofan."
5  Second, while prior to 1905 there had been confusion over the identity of the Bahr El Arab River in its central section, at the time the transfer occurred and was referred to by Governor-General Wingate in his memorandum, the Bahr El Arab River in the relevant area had been correctly identified as a result of specific explorations sent to explore it.
6  Wingate referred to these explorations in his own 1905 memorandum. Thus when Wingate identified the districts of Sultan Rob and Sultan Okwai to the south of the Bahr El Arab in his memorandum, and “formerly part of the Munroe-Wheatley accord.”

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17:39
1  The change in 1905 to the Kordofan/Bahr el Ghazal provincial boundary, which previously had been described as the Bahr el Arab, was noted in the annual reports for both Bahr el Ghazal and Kordofan in 1905, and in Wingate's description of the transfer.
2  After the transfer, therefore, maps of the relevant area began to show the Kordofan/Bahr El Ghazal provincial boundary, the post-transfer provincial boundary to the south of the Bahr El Arab River.
3  Now, while the southern limits of the transferred area, and hence the new post-transfer Kordofan/Bahr el Ghazal boundary, were not precisely established in 1905, post-1905 maps of the relevant area depict the boundary in the same general place, as I will show later on, and the parties agree that this boundary ultimately coalesced and became fixed as the Kordofan/Bahr el Ghazal provincial boundary in place as of 1956. On that, there’s no dispute.
4  Thus the transfer area represented the area between the old provincial boundary constituted by the Bahr El Arab and the new Kordofan/Bahr el Ghazal provincial boundary falling to the south. In other words, but for the 1905 transfer, areas south of the Bahr El Arab down to the 1956 boundary would have remained in Bahr El Ghazal.

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17:46
1  Now, I shall address each one of these points in this presentation, but before I do so, however, I’d like to draw the Tribunal’s attention to three general points that deserve mention here.
2    First, in its memorial the SPLM/A said, and I quote from paragraph 1114: "It is clear that the Government of Sudan and SPLM/A were familiar with the Sudan Government's records regarding the 1905 decision to transfer Sultan Rob and the Ngok Dinka. The parties referred to the Government's reports during their negotiation of the Abyei Protocol.”
3    Second, our opponents admonish the Government of Sudan not to rewrite or second-guess what the Anglo-Egyptian administrators said and what their decision was in 1905. Don't second-guess what the administrators did at the time, or said they did.
4    Third, the SPLM/A also in its written pleadings has argued that we shouldn’t draw speculative inferences about the transfer from what it terms the “putative” Kordofan/Bahr el Ghazal boundary. Instead, according to our distinguished opponents, this is what they say you should do:

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47 (Pages 177 to 180)

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| 1. "The more direct, less speculative and reliable approach is simply to look at what the Condominium administrators said they transferred to Kordofan in 1905, which was the Ngok Dinka and their territory."
| 2. Our colleagues on the other side of the bar agree that the first three documents on this list are relevant, and I believe that even Professor Daly calls these first three documents "foundation texts". But the SLM/A has gone out of its way in its memorial and its counter-memorial to ignore the fourth document, Wingate's memorandum, or when it became impossible to ignore it any longer, to try and explain it away in its rejoinder.
| 3. Now, this is the March 1905 Sudan Intelligence Report, which is in tab 9, reads as follows -- I will put it on the screen.
| 4. It's a passage which my learned friend Mr Born referred to this morning, albeit ostensibly in connection with the fact that all of them had been submitted to the experts by the Government of Sudan.
| 5. And, yes, the most reliable approach is to look at what the Condominium administrators actually did say -- what did they say they transferred to Kordofan in 1905, and particularly what the very seniormost Government official, the governor-general said about that transfer -- although we would submit that the question of excess of mandate. It reads: "It has been decided that Sultan Rob, whose country is on the Kiir River, and Sheikh Rihan of Toj, mentioned in the last Intelligence Report, are to belong to Kordofan province. These people have, on certain occasions, complained of raids made on them by southern Kordofan Arabs, and it has therefore been considered advisable to place them under the same governor as the Arabs of whose conduct they complain."
| 6. As I said, three of the four transfer documents contemporaneously proposed mention the transfer specifically in connection with the corresponding change to the provincial boundary.
| 7. The first reference to the transfer was in the Sudan Intelligence Report for the month of March 1905, and the relevant passage, which is at page 3 of the report under tab 9, reads as follows -- I will put it on the screen.
| 8. Now, the SPLM/A relies on this passage to argue that what was being transferred was a people in order to protect them, the Ngok Dinka under Sultan Rob and the Twic under Sheikh Rihan, not a specific area, and that the land occupied by these people and thus transferred extended all the way up to the 10°35’ north parallel of latitude. There's nothing in this passage, Mr President and members of the Tribunal, that remotely supports such an expansionist interpretation or theory.
| 9. Still important because it was inextricably linked to the transfer at the time.
| 10. My colleague this morning put emphasis on the reference to people: this was a transfer of people. He referred to the second sentence: "These people have on certain occasions complained of raids ..."
| 11. As I said, three of the four transfer documents contemporaneously proposed mention the transfer specifically in connection with the corresponding change to the provincial boundary.
| 12. The above mentioned reference to people? The only people mentioned before were two individuals, Sultan Rob and Sheikh Rihan. They transferred to Kordofan in 1905. Now, with that introduction let me turn to the first key issue on which the parties remain divided at this stage of the proceedings, and this concerns what the contemporaneous documents that refer to the transfer actually do say, and what their implications are for identifying the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.
| 13. Now, on these three points I'm pleased to say, Mr President and distinguished members of the Tribunal, we have a measure of agreement.
| 14. Yes, the negotiators of the Abyei Protocol were aware of the 1905 transfer documents. That's why the formula is drafted the way it is, referring to a recorded administrative transfer of an area in 1905 from one province to another, not to demographic or post-1905 events, criteria.
| 15. The ABC experts referred to none of these four documents in connection with the transfer in their report, despite the fact that all of them had been submitted to the experts by the Government of Sudan.
| 16. Yes, neither party -- and nor, with the greatest respect, we would suggest, the Tribunal -- should attempt to rewrite or second-guess what the Anglo-Egyptian administrators said about their decision in 1905.
| 17. The more direct, less speculative and reliable approach is simply to look at what the Condominium administrators said they transferred to Kordofan in 1905, which was the Ngok Dinka and their territory."
| 18. "The more direct, less speculative and reliable approach is simply to look at what the Condominium administrators said they transferred to Kordofan in 1905, which was the Ngok Dinka and their territory."
| 19. Yes, the negotiators of the Abyei Protocol were aware of the 1905 transfer documents. That's why the formula is drafted the way it is, referring to a recorded administrative transfer of an area in 1905 from one province to another, not to demographic or post-1905 events, criteria.
| 20. They're put on the screen now.
| 21. I noted a few minutes ago that there are four documents dating from the relevant period that specifically refer to the transfer, and they're the following. They're put on the screen now.
| 22. "The more direct, less speculative and reliable approach is simply to look at what the Condominium administrators said they transferred to Kordofan in 1905, which was the Ngok Dinka and their territory."
| 23. "The more direct, less speculative and reliable approach is simply to look at what the Condominium administrators said they transferred to Kordofan in 1905, which was the Ngok Dinka and their territory."
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are the people that had made the complaints previously of the raids. There's no reference there to all the people and all of the areas the Ngok Dinka allegedly occupied or used as of 1905. Moreover -- and this was passed over, I think, in silence this morning -- the first sentence makes it clear that, even if there were a people involved, they were under Sultan Rob. And where was Sultan Rob's country stated to be? It was described as on the Kiir River. There has never been any confusion as to the identity of the Kiir. There may have been confusion, that I'll discuss, in certain places, as to the location of the Bahr el Arab. But the Kiir was never confused. Moreover, in the very same March 1905 Sudan Intelligence Report in which the transfer is first recorded, Lieutenant Bayldon, who had been sent to the area with specific instructions to investigate the rivers in question, confirmed that the Kiir and the Bahr el Arab were the same river, based on the explorations he had been carrying out. By that time he had been on the rivers for three months. There was no suggestion that Sultan Rob's country extended further north up to the 10°35' north latitude, or the 10°22'30" north latitude decided by the experts, or even to the Ragaba ez Zarga, which Bayldon identified in the same intelligence reports as what he called the Bahr el Homr. Sultan Rob's country was said to be on the Kiir. And Sultan Rob himself, four months earlier, had told a Government official, Percival, in November 1904, that the Bahr el Homr -- which was actually the Ragaba ez Zarga -- was uninhabited except for wandered parties of Arabs. Not Dinka; Arabs. As for the country of Sheikh Rihan of Toj, or the Twic, also referred to in the intelligence report, that report notes that the Sheikh had been mentioned in the previous intelligence report, the report for February, another report which the experts ignored. But be that as it may, the February intelligence report had said very clearly that Sheikh Rihan himself had indicated that his country was situated between the Kiir and the Lol River further to the south, which is illustrated on the map. If you want to have reference to the February intelligence report, you'll find it under tab 37 of the common bundle and tab 10 of today's folders. These were the areas that Condominium officials reported were transferred from Bahr el Ghazal to Kordofan province. The implication of that is that prior to their transfer Kordofan extended down to the Kiir, or the Bahr el Arab, as correctly identified by Bayldon. What's also clear is that the description contained in the intelligence report is fundamentally incompatible with the SPLM/A's position that the areas transferred extended way up to 10°35'. But it is consistent with the Government's position that the transferred area lay along and to the south of the Bahr el Arab, as that river was correctly identified by Bayldon and reported in the same March 1905 intelligence report.

Now, the other three documents referring to the transfer appear all in one compendium: it's the 1905 Annual Reports on the Finances, Administration and Conditions of the Sudan. Before taking up these documents individually it may be useful if I say a few words about how this report was organised in the light of the SPLM/A's rather belated attempt to denigrate the significance of Governor-General Wingate's memorandum. The annual report for Sudan was organised into four parts. Part 1 was the report of Great Britain's agent and Counsel-General for Egypt and the Sudan, the Earl of Cromer. It was his report to his superiors in London. Part 2 comprised the memorandum by the Governor-General of Sudan, Major-General Sir Reginald Wingate, in which Wingate added his own comments and notes on the administration of Sudan for the relevant year. Part 3 contained individual reports from various departments within the Sudanese administration. Part 4 contained annual reports for each of the provinces, including for the provinces, for the relevant years that we're concerned with, of Kordofan and Bahr el Ghazal.

Now, I mention this because it's important to realise that Wingate's memorandum appeared in the same compendium of reports as did the Kordofan and Bahr el Ghazal annual reports for 1905. Both parties have filed extracts from Governor-General Wingate's memorandum, and from the individual annual reports for that year for the two provinces, Kordofan and Bahr el Ghazal. It's on these documents that I shall focus my remarks. If I first turn to the annual report for the province of Bahr el Ghazal, the relevant entry, which I'll place on the screen -- it's short -- reads as follows: "Province boundaries. In the north the territories of Sultan Rob and Sheikh Gorkwei have been taken from this province ..."
Remember this is the annual report for Bahr el Ghazal:
“... and added to Kordofan.”
There are a number of important points that emerge from this rather brief reference and description. First, it’s significant that the reference to the transfer appears under the heading “Province Boundaries”. I would suggest that makes it pretty clear, members of the Tribunal, that Government officials of the day considered that the transfer was directly related to the location of the provincial boundary, and the change in that boundary that the transfer gave rise to.
I’d also suggest that it follows that the SPLM/A’s contention that the Kordofan/Bahr el Ghazal boundary is irrelevant, and has no bearing on the area of the Ngok Dinka chiefdoms that was transferred, is misplaced.
That is simply not the way the local administrators viewed the situation.
Second, this extract from the annual report speaks of the territories of Sultan Rob and Sheikh Gorkwei that were taken from Bahr el Ghazal and added to Kordofan.
There’s no mention here of a transfer of people; it was a transfer of an area or areas, the territories of the two tribal leaders.

It’s true that the annual report does not say precisely where the limits of these territories lay, but we know from the February and March 1905 intelligence reports, as well as from sketch maps that I’ll display later on, produced by Wilkinson and Percival, that Sultan Rob’s country or territory was understood by Government officials as being on or to the south of the Kiir River, which Bayldon had correctly identified as the Bahr el Arab; and that Sheikh Gorkwei of the Twic had said that his territory or district lay between the Kiir/Bahr el Arab and the Lol River further south.
The third document referring to the transfer is the 1905 annual report for Kordofan, and in a sense it’s the counterpart to the annual report for Bahr el Ghazal, still appearing in this overall 1905 report for the entire Sudan. Once again, the relevant passage appears under the heading “Province Boundaries”. It reads as follows, as you can see:
“The Dinka Sheikhs, Sultan Rob and Sultan Rihan Gorkwei, are now included in Kordofan instead of Bahr el Ghazal.” The SPLM/A’s written pleadings have asserted that the transfer of the Ngok Dinka and the Twic Dinka to Kordofan was not accompanied at the time by any recorded change of the putative provincial boundaries of either Kordofan or Bahr el Ghazal. That’s a direct quote from their memorial at paragraph 355. The transfer was not accompanied at the time by any recorded change to the provincial boundary. That’s simply another attempt to do away with the relevance of the provincial boundary.
The plain fact is that the transfer was referred to, both in this annual report and in the Bahr el Ghazal annual report, under a section of those reports dealing with provincial boundaries.
Moreover, this formula that appears on the screen, taken from the 1905 annual report, did change the way in which the provincial boundary was described.
Just as was the case for the northern boundary of Bahr el Ghazal, previous editions of the annual report for Kordofan, for example the 1903 edition, had described the southern boundary of Kordofan as the Bahr el Arab.
That changed in 1905, and it changed for both Kordofan and Bahr el Ghazal. No longer did the annual reports for these two provinces refer to the Bahr el Arab as the province boundary; instead the transfers of Sultans Rob and Gorkwei and their territories were referred to as now being included in Kordofan instead of Bahr el Ghazal.

We submit that the necessary implication of this is that the transferred areas had to have been situated further south of the Bahr el Arab, in areas that before the transfer were part of Bahr el Ghazal province; otherwise there would have been no need for transfer. It could not have been the intention of Condominium officials in 1905 to transfer areas already situated in Kordofan to Kordofan. That makes no sense at all. While that inference is clear, we would suggest, based on the references appearing in the 1905 reports for the two provinces, the proposition is reinforced, and we would suggest demonstrated conclusively, by the fourth contemporary document that refers to the transfer, Governor-General Wingate’s memorandum also included in the 1905 Sudan annual report.
As I pointed out earlier and as I just mentioned, the memorandum of Wingate was in the same overall annual report for the whole Sudan. It was part 2; the Kordofan and Bahr el Ghazal province reports were in part 4. Now, it’s worth recalling that under the 1899 Anglo-Egyptian Condominium Agreement, the supreme military and civil command of the Sudan was vested in Wingate as governor-general. Wingate took up his position in December 1899 and, as the SPLM/A’s expert Professor Daly wrote in one of his reports:
The power of the governor-general was therefore absolute so long as he remained in the good graces of the British Government that nominated him. That is from Professor Daly's second report at page 16. The fact that Wingate occupied his position as governor-general for some 17 years, from December 1899 up until 1916, attests to the fact that he clearly was in the British Government's good graces in 1905. In fact Professor Daly even went so far as to describe Wingate as "a virtual dictator". Now, given his position, surely Wingate's views on the question of the transferred area are entitled to considerable weight. It's a matter one would have thought the SPLM/A would agree with, in view of the stress that they've placed in their written pleadings on looking at what Condominium administrators actually said that they transferred in 1905. Let's do that. Let's look at the seniormost administrator, Governor-General Wingate, and see what he said. His memorandum from 1905 covered events in the Sudan that had transpired during the year. It was a detailed account, divided into a number of subject-matters. What's noteworthy is that the relevant passages dealing with the transfer are recorded under a section of his memorandum -- it's at page 23 of his memorandum, again under tab 8 of your folders -- the transfer is referred to under a section of his memorandum entitled "Changes in Provincial Boundaries and Nomenclature". Now, once again, it's pretty evident that senior Government officials -- and Wingate was the most senior such official -- viewed the question of provincial boundaries as significant in connection with the transfer, not irrelevant, as our colleagues would have us believe. Wingate introduced the relevant passage of his memorandum by first stating at page 23: "It has been possible during the past year [ie during 1905] to make some important alterations in the provincial boundaries which have tended to a general improvement in administration, and a few changes will also take place from the beginning of the New Year." He then listed after saying this at page 24 what he termed "the principal alterations already effected", ie effected during the year 1905. Four changes were listed, with the fourth one being the transfer with which we are concerned. As to this, Wingate said the following -- it's a passage I know that I referred to earlier this evening, but because of its importance it merits being cited again. Recall what Wingate said was the fourth change that had been effected in provincial boundaries in 1905: "The districts of Sultans Rob and Okwai to the south of the Bahr el Arab and formerly a portion of the Bahr el Ghazal province have been incorporated into Kordofan." Mr Chairman members of the Tribunal, this statement of a senior Government official at the time we would suggest is clear, at least in so far as the northern limits of the transferred area are concerned. First, Wingate refers to the districts of the two Sultans, not to the Dinka people, not to areas allegedly occupied or used; the districts. It seems evident that the governor-general was thinking in terms of the transfer of fairly limited area or areas to Kordofan, the districts of the two Sultans, not huge swathes of territory or people extending up to the 10º35' north latitude. Second, the districts that were transferred or incorporated into Kordofan were to the south of the Bahr el Arab. Wingate doesn't say anything north of the Bahr el Arab was transferred. Had there been any areas north of the Bahr el Arab that Condominium officials intended to transfer in 1905 that had previously been part of Bahr el Ghazal but now were going to be incorporated into Kordofan, surely Wingate would have said so, and he did not. The transferred districts were south of that river. Third, those districts were noted by Wingate to have "formerly" constituted a portion of the Bahr el Ghazal province, and that is consistent with the fact that the pre-transfer provincial boundary between Bahr el Ghazal and Kordofan had been recorded as the Bahr el Arab. As a result of the transfer Wingate wrote that the districts of the two Sultans previously in Bahr el Ghazal, ie south of the Bahr el Arab, ie south of what had formerly been the provincial boundary, are now incorporated into Kordofan. Now it may assist to compare the positions of the parties if I place on the screen a schematic diagram illustrating what Wingate said. It's also under tab 13 of your folders, but the tab 13 doesn't move and this one does, so I'll refer to the screen. I think it's instructive to compare what Wingate said with how the SPLM/A views the situation. Here's the effect of Wingate's description. Prior to the transfer the Bahr el Arab was the provincial boundary between Bahr el Ghazal and Kordofan. Wingate
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.

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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

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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:

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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

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| 18:15 | 1. opponents finally addressed Wingate's memorandum, albeit very briefly. Three points are made in that pleading, none of which are accompanied by any serious reasoning. Those three points are the following. First, the SPLM/A says that the Government pretends to have discovered what it says is the crucial document only in its counter-memorial. Second, our colleagues say: Wingate's memorandum is ex post facto, it's a general summary of the earlier paragraph 360 and annexed the memorandum to its memorial and its counter-memorial. The third argument is that Wingate's reference to the Bahr el Arab was merely a geographic description, and not the delimitation or definition of a boundary. You'll find these in the rejoinder of the SPLM/A at paragraphs 860 and 861. As to the first assertion, that the Government pretends to have discovered this document only in its counter-memorial is obviously just simply wrong. Sudan's memorial discussed Wingate's description at paragraph 360 and annexed the memorandum to its memorial. The Government had produced the same memorandum to the ABC experts, and it was the SPLM/A's. |
| 18:19 | 1. disingenuous. Why rely on documents in the same overall report and not complain they're ex post facto, but then when it comes to Governor-General Wingate's memorandum, suddenly that becomes ex post facto and no longer pertinent? The argument is irrelevant, because even if Wingate's description was written shortly after the transfer was decided, it still reflected his contemporary understanding of what the transfer entailed. Wingate had no hidden agenda at the time, no ulterior motives for describing the transferred area in the manner he did. There was no dispute over the issue at the time. The memorandum wasn't self-serving in any way. The probative value of contemporary statements made by senior Government officials has, I would suggest, been recognised by the International Court in its recent decision in the Pedra Branca/Pulau Batu Puteh case. There, as I'm sure the members will recall, a question arose as to the weight to be given to a letter written by the acting state secretary of Johor, stating that the Johor Government does not claim ownership of the island of Pedra Branca, in response to a query from Singapore. |

| 18:17 | 1. that chose to ignore this key piece of evidence, in both its memorial and its counter-memorial. With respect to the argument that Wingate's memorandum was ex post facto, and a general summary of the transfer decision which was not intended to change that decision, that argument I would suggest is both disingenuous and irrelevant. It's disingenuous to complain that it's ex post facto because the SPLM/A has had absolutely no hesitation in referring to two other documents which appear in the same compendium as does Wingate's memorandum: the annual reports for Bahr el Ghazal and Kordofan for 1905. They're all in the same overall report for the Sudan. Why Wingate's memorandum is any more ex post facto than those two reports, which are termed "foundation texts" by the SPLM/A's experts, is left unexplained. The fact is that Wingate described the transfer in the very first annual report that was prepared following the transfer and, if anything, since Wingate was senior to the governors of both Kordofan and Bahr el Ghazal, his account is entitled to greater probative weight than any of the others; although the others are also entirely consistent with the Government's position. That's why this ex post facto argument is |

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| 18:20 | 1. The court, calling this document "of central importance for determining the developing understanding of the two parties about sovereignty over the island", concluded that the acting state secretary's letter had major significance and that it showed as of 1953, in that case, Johor's understanding of the situation, ie that it didn't have sovereignty or claim ownership over the island in question. The same can be said for Wingate's memorandum. It showed how the seniormost Government official in Sudan at the time understood the position regarding the areas that had been transferred. As he said, those areas lay to the south of the Bahr el Arab. I might also note that the court in its 1951 judgment in the Fisheries case also had no reservations about referring to ex post facto descriptions of a prior act by a government to shed light on the meaning of the original act. In that case it will be recalled that what was at issue was the interpretation of a Norwegian royal decree of 1812 concerning the extent of Norway's territorial sea. In interpreting that 1812 decree, the court relied on subsequent Norwegian decrees issued in 1869 and 1889, and on internal reports from 1912 and even 1929 prepared by the Norwegian Government, which provided further |

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| 18:20 | 1. disingenuous. Why rely on documents in the same overall report and not complain they're ex post facto, but then when it comes to Governor-General Wingate's memorandum, suddenly that becomes ex post facto and no longer pertinent? The argument is irrelevant, because even if Wingate's description was written shortly after the transfer was decided, it still reflected his contemporary understanding of what the transfer entailed. Wingate had no hidden agenda at the time, no ulterior motives for describing the transferred area in the manner he did. There was no dispute over the issue at the time. The memorandum wasn't self-serving in any way. The probative value of contemporary statements made by senior Government officials has, I would suggest, been recognised by the International Court in its recent decision in the Pedra Branca/Pulau Batu Puteh case. There, as I'm sure the members will recall, a question arose as to the weight to be given to a letter written by the acting state secretary of Johor, stating that the Johor Government does not claim ownership of the island of Pedra Branca, in response to a query from Singapore. |

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| 18:19 | 1. disingenuous. Why rely on documents in the same overall report and not complain they're ex post facto, but then when it comes to Governor-General Wingate's memorandum, suddenly that becomes ex post facto and no longer pertinent? The argument is irrelevant, because even if Wingate's description was written shortly after the transfer was decided, it still reflected his contemporary understanding of what the transfer entailed. Wingate had no hidden agenda at the time, no ulterior motives for describing the transferred area in the manner he did. There was no dispute over the issue at the time. The memorandum wasn't self-serving in any way. The probative value of contemporary statements made by senior Government officials has, I would suggest, been recognised by the International Court in its recent decision in the Pedra Branca/Pulau Batu Puteh case. There, as I'm sure the members will recall, a question arose as to the weight to be given to a letter written by the acting state secretary of Johor, stating that the Johor Government does not claim ownership of the island of Pedra Branca, in response to a query from Singapore. |

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explanations as to Norway's perception of what the original 1812 decree had provided for.
I'd suggest that, if anything, Wingate's description is even more relevant than what happened in that case in clarifying what Condominium officials considered had been transferred from Bahr el Ghazal to Kordofan in 1905. His memorandum was not prepared years later; it was written shortly after the transfer decision had been taken. It was not simply a general summary of the earlier transfer decision; it added clarifications about the geographical location of the transferred areas. In no way did Wingate purport to change the decision that had previously been taken; his memorandum explained that decision. Governor-General Wingate had no reason to change the decision, it wasn't controversial, although it was understandable that he would explain its territorial ramifications to his superiors by means of the annual report. Those superiors, whether in Cairo or in London, never thereafter questioned his description of what had happened. Thus when the SPLM/A argues that Wingate's description was merely geographic, not a delimitation of a boundary, this tells only half of the story. Yes, Wingate made a geographic description. But that description is highly relevant: it tells us that Government viewed the transferred areas as situated in a particular location, to the south of the Bahr el Arab. Given the earlier references to the Bahr el Arab as the pre-transfer administrative boundary, Wingate's description thus did place a northern limit on the transferred area, the Bahr el Arab. We agree that his memorandum and his description did not purport to delimit the southern boundary of the transferred areas, but the southern boundaries are not in dispute between the parties. The only genuine question that Wingate's memorandum could give rise to is: what river was he referring to when he wrote that, "The districts of Sultan Rob and Sultan Okwai, to the south of the Bahr el Arab, have been incorporated into Kordofan"? What river was he referring to when he mentioned the Bahr el Arab? Mr President, members of the Tribunal, that leads me to the next part of my presentation, in which I plan to address the question of the identity of the Bahr el Arab and in which I will show that Wingate knew which river he was referring to by the time he described the transfer area in his 1905 memorandum. But with your permission, Mr President, that story is maybe best held over until tomorrow morning.

118:22  1  explanations as to Norway's perception of what the original 1812 decree had provided for.
      2  I'd suggest that, if anything, Wingate's description is even more relevant than what happened in that case in clarifying what Condominium officials considered had been transferred from Bahr el Ghazal to Kordofan in 1905. His memorandum was not prepared years later; it was written shortly after the transfer decision had been taken. It was not simply a general summary of the earlier transfer decision; it added clarifications about the geographical location of the transferred areas. In no way did Wingate purport to change the decision that had previously been taken; his memorandum explained that decision. Governor-General Wingate had no reason to change the decision, it wasn't controversial, although it was understandable that he would explain its territorial ramifications to his superiors by means of the annual report. Those superiors, whether in Cairo or in London, never thereafter questioned his description of what had happened. Thus when the SPLM/A argues that Wingate's description was merely geographic, not a delimitation of a boundary, this tells only half of the story. Yes, Wingate made a geographic description. But that description is highly relevant: it tells us that

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

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

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